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STANZ IM MÜRZTAL

Stanz Token

Examining opportunities to combine a digital local currency with a renewable energy community in Stanz im Mürztal.

Final Version

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The current document contains extracts from the report entitled

‘Stanz Token’: Examining opportunities to combine a digital local currency with a renewable energy community in Stanz im Mürztal

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Appendix A: Legal Considerations

Disclaimer

New types of legal questions arise in connection with blockchain applications. These legal questions have not yet been sufficiently researched from a scientific point of view and are not available for a final evaluation due to the lack of case law. Therefore, we do not assume any liability for the correctness of the legal statements.

The following statements do not constitute legal advice and/or legal clarification and do not replace legal advice. Instead, they are to be understood as an analysis of the given legal situation as well as possible legal consequences with regard to individual legal research questions. This document is intended for internal use only and may not, in particular, be used for submission to administrative authorities and/or courts. Any - even partial - disclosure to third parties is expressly prohibited.

Regional Currencies

a. Legal qualification of the regional currency

Regional currencies generally have the same functions as money. They serve as a medium of exchange, unit of account and store of value. However, regional currencies **do not qualify as legal tender**, but are based on an **individual contractual basis**.[1]

This results in the following limitations:

- **Regional limitation:** The validity as well as their usability as a payment instrument are typically geographically limited.[2]
- **Voluntary participation:** Another restriction is the (merely) voluntary participation of the issuing persons (e.g. entrepreneurs) and the redeeming persons (e.g. customers) in the regional currency system. Therefore, there is no general (acceptance) obligation, especially for entrepreneurs within the region concerned.). Therefore, there is no general acceptance obligation, especially for entrepreneurs within the region concerned.[3]
- **Period of validity and counterfeit-proofing:** Regional currencies also have an expiry date. They must be regularly renewed during their period of validity in order not to lose their validity and function as a means of payment prematurely. The notes must also be protected against counterfeiting.[4]

Due to the limitations outlined above, regional currencies **are not money** in the legal sense.[5]

From a civil law perspective, regional currencies are typically to be **qualified as vouchers**.[6] Their characteristic features are that, firstly, they are issued by a certain entrepreneur and, secondly, they entitle the customer to choose goods from the range of products of this entrepreneur up to the maximum amount of the voucher's nominal value. A special aspect is that the validity of such a voucher goes beyond the two-person

relationship between the entrepreneur and the customer. The regional currency in the form of a voucher is issued **by a central body** in the region (e.g. municipality), but can be **redeemed at several entrepreneurs**. However, the entrepreneurs must **explicitly agree** to this process in advance. This multi-personal relationship does not change the legal qualification as a voucher.[7] Since the characteristics described above are also present in a virtual regional currency, the comparison to (digital) vouchers can also be made here.

b. Civil law aspects

An independent **legal framework for vouchers does not exist in Austria**.[8] The contractual basis must be derived from the law of obligations, whereby the specific arrangement in the individual case must be taken into account.[9] In the following, the aspects of civil law shall be outlined.

- **Main contract of the voucher**: The legal practice unanimously assumes that the actual main contract is already concluded with the purchase of the voucher.[10] The redemption of the voucher therefore only concerns the execution of the legal transaction.[11] The legal nature of the main contract (e.g. contract of sale or contract for work and services) is the only decisive factor, therefore there are no delimitation problems.[12] Unless a limitation is imposed on the purchase of the voucher, the voucher holder can choose from the entire range of products of the entrepreneur.[13]

- **No restriction of consumer rights**: The redemption of a voucher does not limit the rights of a consumer in any way. For example, the consumer is entitled to the statutory warranty claims.[14]

- **Refund claim**: A refund of the amount stated in the voucher is generally not considered. However, a full exclusion of the right of withdrawal and exchange in the General Terms and Conditions is not permitted when vouchers are sold via an online platform.[15] Accordingly, a clause that excludes a revocation[16] of the consumer after redemption of the voucher in a general way violates the 14-day right of withdrawal in distance selling.[17]

- **Claim to redemption**: In general, there is no claim to redemption of the voucher in cash or to cash refund of the voucher. This would only be permissible with an explicit agreement with the entrepreneur concerned. If the sales price of the products is lower than the nominal value of the voucher, the entrepreneur will usually issue a new voucher for the remaining amount.[18]

- **Statute of limitations**: The period of limitations is 30 years according to § 1478 Austrian Civil Code (*ABGB*), unless otherwise agreed between the entrepreneur and the customer. In contrast, the Austrian Supreme Court (*OGH*) ruled that a validity period of only one or two years was grossly disadvantageous in the sense of § 879 para 3 Austrian Civil Code and ultimately inadmissible.[19]

In addition to the civil law aspects, data protection law (especially regarding the storage of customer data), tax law (see below under c) and regulatory aspects (see below under III) should also be taken into account.

c. Tax law aspects

With the adoption of the Voucher Directive[20] in 2019, the VAT treatment of vouchers was standardised in the EU. This directive introduced a definition of the term "voucher" for the first time (Art 30a no 1 Directive on the VAT system[21]) and subsequently made a distinction between single-purpose and multi-purpose vouchers (Art 30a no 2 and 3 Directive on the VAT system). The allocation of a voucher to one or the other category ultimately results in a different assessment of when the tax liability arises and becomes chargeable. In the case of a single-purpose voucher, the performance of the service is already fictitious at the time of issuance and thus immediately triggers VAT. In the case of a multi-purpose voucher, however, the VAT liability only arises when the service is actually performed at a later date.

Regional currency can also be treated like a voucher from a tax perspective.[22] In the present case, a multi-purpose voucher can be assumed, since at the time the voucher is issued, the place of the supply or other service and the tax liability have not yet been determined. The VAT liability does not arise when the voucher is handed over, but only when the service is actually rendered. Any onward transfers are not subject to VAT. If the service is provided by a third party, VAT is due for all identifiable services, whereby the Voucher Directive explicitly mentions distribution and promotion services (Art 30b para 2 Directive on the VAT system).[23]

d. Authorisation to implement a regional currency

§ 4 para 2 National Bank Act (*Nationalbankgesetz – NBG*) stipulates that the Austrian National Bank (*Österreichische Nationalbank – OeNB*) has the **exclusive right to issue banknotes**. In the case of regional currencies, there is no infringement of the monetary monopoly, as they are not legal tender and usually are used **in addition to the Euro**. However, if the concept of the regional currency is to replace rather than complement the Euro in the region concerned, there may be an infringement under certain circumstances. This is particularly the case if it is not possible to exchange the regional currency back into Euro. The implementation of the regional currency in a comparatively large area, where it is to be used predominantly instead of the Euro, could also appear problematic with regard to § 4 para 2 National Bank Act.[24]

These arguments, however, do not apply to the case at hand, as the regional currency is only to be introduced in a limited area and is in no way intended to replace the Euro as legal tender. The implementation of the regional currency therefore does not seem to be problematic. However, whether there can be restrictions from a supervisory law perspective due to potential concession obligations (E-Money Act 2010) is to be clarified under III.

[1] See *Frießnegger*, Einführung einer Regionalwährung, RFG 2012, 136 (138 et seq).

[2] See *Frießnegger*, RFG 2012, 138; regulatory exemptions may be relevant due of this.

[3] See *Frießnegger*, RFG 2012, 138.

[4] See *Frießnegger*, RFG 2012, 140.

[5] See *Frießnegger*, RFG 2012, 138; FMA Letter 01/2020: „*Begrenzte Netze - Anzeigepflicht gem § 3 Abs 4 ZaDiG 2018*“, 18, available under <https://www.fma.gv.at/fma/fma-rundschreiben/> (last requested on May 25, 2022).

[6] See *Frießnegger*, RFG 2012, 138.

[7] See *Frießnegger*, RFG 2012, 138; FMA Letter 01/2020, 18.

[8] Cf § 4 Discount Act (*Rabattgesetz*, but already repealed by Federal Law Gazette 1992/147).

[9] *Rastegar/Jenny*, Der Gutscheinvertrag I, VbR 2021, 123 (123).

[10] Vgl *Eccher*, Zur Rechtsnatur der Gutscheine, ÖJZ 1974, 337; *Spitzer/Told* in Schwimann/Kodek, ABGB VI[5] (2021) § 1053 ABGB Ref 27; *Verschraegen* in Kletečka/Schauer, ABGB-ON[1.08] (2020) § 1053 Ref 33; OGH 4 Ob 310/80; 6 Ob 191/04p = ecolex 2005/274 (*Wilhelm*); RIS-Justiz RS0072106.

[11] *Eccher*, ÖJZ 1974, 340; *Aichberger-Beig* in Klang[3] § 906 Ref 16; OGH 4 Ob 310/80; 4 Ob 416/81 = JBl 1982, 488 (*Eccher*).

[12] *Schwartze* in Klang[3] § 1053 Ref 67; see also *Dienst/Scheibenpflug*, JurPC Web-Dok 147/2012 Abs 24.

[13] See *Kolmasch* in Schwimann/Kodek, ABGB Va[5] § 906 ABGB Ref 5; see also OGH 6 Ob 126/74.

[14] *Frießnegger*, RFG 2012, 138.

[15] OGH 6 Ob 169/15v = VbR 2016/22.

[16] That is a return of the voucher to the issuer against reimbursement of the purchase price.

[17] § 11 para 1 Distance Selling Act (*Fern- und Auswärtsgeschäfte-Gesetz – FAGG*). The provision does not contain an exception for cases where a voucher is sold. Although a waiver of the right of withdrawal for services pursuant to § 18 para 1 no 1 FAGG is possible under certain conditions, according to the Austrian Surpreme Court the sale of a voucher is not always to be qualified as such a service. Rather, it should be classified according to whether the transaction to which the voucher refers is a purchase or service contract.

[18] *Frießnegger*, RFG 2012, 138.

[19] See both in relation to vouchers for tourist services in OGH 6 Ob 210/17a and OGH 7 Ob 22/12d; *Stadler/Pfeil*, Ungültige Befristung der Gültigkeitsdauer von entgeltlichen Gutscheinen, ecolex 2019, 852 (852 et seq).

[20] 2016/1065/EU.

[21] 2006/112/EC.

[22] *Frießnegger*, RFG 2012, 140.

[23] See *Geringer*, Neuerungen in der umsatzsteuerlichen Behandlung von Gutscheinen, taxlex 2019, 215.

[24] *Frießnegger*, RFG 2012, 138 et seq.

Decentralized energy supply through energy communities

a. „Decentralized Energy“

Due to the high degree of regulation in the energy industry and the dependence of the economic success of corresponding decentralized business models on regulatory framework conditions, the European legislator has created specific regulatory instruments to facilitate the emergence of decentralized supply structures. These instruments were incorporated into the Austrian legal system by the national legislator and elevated to the rank of legally recognised energy industry actors.

b. Different forms of energy communities

With the Renewable Energy Expansion Act Package[1], which came into force in 2021, the legislator added two further forms of energy community to the previously exclusive "energy community" (= the community generating plant). The following models of an energy community are now provided for by law:

- Community generating installations (*Gemeinschaftliche Erzeugungsanlagen – GEA*) pursuant to § 16a of the Electricity Industry and Organisation Act 2010[2] (hereinafter: *ElWOG*);
- Citizen Energy Communities (*Bürgerenergiegemeinschaften – BEG*) pursuant to § 16b ElWOG; and
- Renewable Energy Communities (*Erneuerbare-Energie-Gemeinschaften – EEG*) pursuant to § 16c ElWOG and §§ 79 et seq of the Renewable Energy Expansion Act (hereinafter: *EAG*).

Since the Renewable Energy Expansion Act Package is still very new and there is no case law on the new energy communities, the questions on delimitation, differentiation as well as commonalities cannot yet be fully answered. In individual cases, a separate examination of the permissibility of the concretely planned model is therefore indispensable.[3] In the following, however, the focus will be specifically on the renewable energy community (hereinafter: *REC*).

c. Renewable Energy Communities

i. Legal basis

The legal basis for the REC at European level is Art 22 of the Renewable Energy Directive ("RED II")[4] of 11. December. 2018. This provision was implemented at national level in § 16c ElWOG as well as in §§ 79 et seq EAG.

ii. General and purpose

Pursuant to § 79 para 1 EAG, an REC[5] may produce energy from renewable sources, consume its own energy, store it or sell it (especially to members). Furthermore, it may be active in the field of aggregation and provide other energy services. The rights and obligations of the participating grid users, in particular the free choice of suppliers, remain unaffected. Grid operation is permitted (§ 16c para 2 ElWOG).

The institute of the REC serves the purpose of advancing the production of renewable energy and self-sufficiency by creating the possibility for private individuals and other actors to join together to form a RECs across property boundaries. The energy produced in the own plants by the RECs is to be used thereby again together. In contrast to Citizen Energy Communities, RECs are allowed to operate not only in the electricity sector but also other energy related sectors such as heating and cooling. However, they are limited to the renewable energy sector.[6] The REC is thus a regulatory instrument not only to facilitate decentralized local, but also sustainable energy supply.[7]

However, the main purpose of the REC **may not be financial gain** pursuant to § 79 para 2 EAG. This must be stated in the articles of association if it is not already apparent from the form of the company. The REC shall primarily bring **ecological, economic or social community benefits** to its members or to the areas in which it is active.[8]

iii. Requirements under organizational law

Pursuant to § 79 para 2 EAG, a REC shall consist of two or more members or partners and shall be organized as an association, cooperative, partnership or corporation or similar association with legal personality.

Members or shareholders of a REC may be natural persons, municipalities, legal entities of public authorities in relation to local services and other legal entities under public law or small and medium-sized enterprises (SMEs). It is unclear whether only the direct participant must be an SME, or whether its shareholder or the group must be included.[9]

Participation in a REC is voluntary and open, but in the case of private companies, participation must not be their main commercial or professional activity. The involvement of a company founded purely for the purpose of participation is thus probably inadmissible. Pursuant to § 16c para 1 ElWOG, however, it must be noted that generators that supply energy to a grid in the local or regional area pursuant to para 2 leg cit may only participate in a REC if they are not controlled by a utility, supplier or electricity trader within the meaning of ElWOG. Whether and when subsidiaries and associated companies of other generators, suppliers or electricity traders may participate in the REC is not clearly regulated. The preconditions for participation must be examined in detail in the case in question.[10]

iv. Local delimitation

Within a REC, pursuant to § 16c para 2 ElWOG, the consumption installations of the members or shareholders must be connected to the generation installations via a low-voltage distribution grid and the low-voltage part of the transformer station (local area) or via the medium-voltage grid and the medium-voltage busbar in the transformer station (regional area) in the concession area of a grid operator. This represents a close connection ("*Nähekriterium*")[11] to the consumers and is at the same time the starting point for the privileged treatment of REC in terms of grid usage charges (see below). Accordingly, a distinction is made between local and regional REC.

v. Advantages

The "local tariff"[12] for grid fees pursuant to § 52 para 2 ElWOG is charged for purchases from the REC operator by the REC participants. This results from the mentioned "*Nähekriterium*" of the REC. The consumption installations are connected to the generation installations either in the local area or in the regional area in the concession area of a grid operator. Depending on this, the local or regional tariff is applied.[13] REC-participants do not have to pay either the Renewable Energy Contribution[14] or the Green Gas Contribution[15] for the energy they purchase (cf § 75 para 5, § 76 para 5 EAG). Electricity deliveries to REC participants from PV systems are generally exempt from the electricity levy.[16] Electricity that is generated but not consumed within a REC can be subsidized by market premiums up to a maximum of 50 % of the total amount of electricity generated within a REC pursuant to § 80 para 2 EAG.[17] However, in accordance with § 16b para 5 ElWOG, no market premium is granted for the electricity consumed by the members or the community.

vi. Ownership and power of disposition

Owners of generation facilities may be the community itself, its members or third parties. The power to operate and dispose of these generation plants must in principle (i.e. with the exception of self-consumption by members, so-called "prosumers") accrue to the community itself. The operation and maintenance of the generation plants can, in turn, be taken over by third parties (e.g. energy supply companies). Contracting and leasing models are also permissible.[18]

vii. Miscellaneous provisions

§§ 16d and 16e ElWOG contain further provisions that apply to energy communities in general.

- § 16d para 1 ElWOG: Grid users have a **legal claim against grid operators to participate in an energy community**.
- In addition, para 2 *leg cit* regulates **information obligations** of the grid operator, which he has to communicate to the regulatory authority (e.g. information on the description of the functioning of the generating installations; consumption installations of the grid users; the non-material share of the grid users in the generating installation as well as the distribution of the generated energy; allocation of the non-consumed energy feed-in per quarter hour; admission and withdrawal of participating grid users; termination or cancellation of the renewable energy community as well as the dismantling of the generating installations). Furthermore, he shall establish agreements on data processing, liability, bearing of costs and insurances.
- § 16e ElWOG: The grid operator shall **measure the supply of the consumption installations** of the grid users as well as the feed-in and the supply of the generation

installations with suitable measuring devices. The measured values of the generation plants and the consumption installations of the grid users shall be made available to the suppliers and the Energy Community as soon as possible. These values shall also be made available free of charge via a web portal.

d. Challenges and approaches to solutions for municipal actors

Besides issues of private law (e.g. property, contract and company law structures in the internal relations of a REC)[19] and questions of equality law (e.g. admissibility of privileges for communities founded as independent legal entities)[20], two main problem areas become apparent from the perspective of energy industry law. These concern the restrictive **requirements under organizational law** and the **prohibition of profit-making**.[21]

· **Organizational structure**: Pursuant to § 79 para 2 EAG, only small and medium-sized enterprises (SMEs) may participate in a REC in addition to natural persons, municipalities, legal entities of public authorities in relation to local services and other legal entities under public law. This would largely exclude the participation of municipal companies (e.g. so called *Stadtwerke-GmbH*), as these are no longer to be considered SMEs if the public sector holds more than 25 % of the company shares or voting rights.[22] In addition, (municipal) companies that exceed a certain number of employees and/or financial thresholds should also be excluded.[23] The (shareholding) status of municipal enterprises would thus be subject to a high degree of uncertainty.[24] As already described, a municipal enterprise classified as a supplier would not be allowed to participate at all due to §§ 79 para 2 EAG icw 16c para 1 ElWOG.

As an approach to a solution, the literature calls for a restrictive interpretation of the limiting requirements for municipal economic actors under the guiding idea of a specific member and/or local reference of the community activity.[25] Municipal (i.e. public) enterprises are obliged by constitutional law to serve the **local common good**.[26] In principle, they must pursue public service objectives in the local community. The fact that they may also operate for profit does not essentially change their public interest orientation. Accordingly, it would be advisable to allow the (controlling) participation of a municipal enterprise in a REC under a teleologically restrictive interpretation of the SME definition in the relevant Commission Recommendation or the provisions mentioned in §§ 79 para 2 EAG icw 16c para 1 ElWOG by way of exception. This also applies irrespective of the degree of participation of the state and the number of employees and financial thresholds of Art 2 annex (COM) 2003/361/EC. The fact that a municipal enterprise acts primarily in the service interest of the local community and thus complies with the regulatory purpose of the EC is constitutionally guaranteed.[27]

· **Prohibition of profit-making**: If a municipality or a municipal enterprise participates in a REC that not only generates electricity for its members' own consumption, but mainly sells it to **third parties** and thus markets it, such a REC

would in itself be classified as a **profit-oriented community**. However, if the sale is made exclusively in that municipality, it would (arguably) comply with the legal model of a decentralized energy supply worthy of support, which is committed to local electricity supply, due to its **specific local reference**. A profit orientation would therefore be denied.[28]

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[1] *Erneuerbaren-Ausbau-Gesetz – EAG*, Federal Law Gazette I 2021/150.

[2] *Elektrizitätswirtschafts- und -organisationsgesetz 2010 – ElWOG*, Federal Law Gazette I 2010/110 as amended by Federal Law Gazette I 2022/7.

[3] See for differences and similarities *Katalan/Reitinger*/Lejsek, How To - Energiegemeinschaften: Ein Überblick, RFG 2021, 184 (184 et seq).

[4] 2018/2001(EU.

[5] See also the definition in Art 2 No 16 of RED II.

[6] Rec 65 et seq Renewable Energies Directive.

[7] *Krönke/Tschachler*, RdU 2021, 254.

[8] See also Art 2 no 16 of the Renewable Energies Directive; more details on the advantages of a REC at <https://energiegemeinschaften.gv.at/vorteile-von-energiegemeinschaften/> (last requested on March 9, 2022).

[9] See *Katalan/Reitinger*/Lejsek, RFG 2021, 185.

[10] *Katalan/Reitinger*/Lejsek, RFG 2021, 185.

[11] See *Katalan/Reitinger*/Lejsek, RFG 2021, 185.

[12] This is a proportionally reduced network tariff for shared use of the public network within REC.

[13] The corresponding amendments to the System Charges Ordinance 2018 ("*Systemnutzungsentgelte-Verordnung 2018" - SNE-V 2018 - Novelle 2022*) regulating local tariffs entered into force on January 1, 2022, Federal Law Gazette II 2021/558.

[14] Pursuant to § 5 no 15 EAG, the contribution to be paid by all final consumers connected to the public electricity grid and which serves to raise a share of the subsidies.

[15] Pursuant to § 5 no 26 EAG, the contribution to be paid by all end consumers connected to the public gas grid, which serves to raise a share of the subsidies and to cover the expenses of the Service Agency for Renewable Gases.

[16] See § 2 no 4 ElAbgG; see also the Austrian Coordination Office for Energy Communities (*Österreichische Koordinationsstelle für Energiegemeinschaften – ÖKEG*), see <https://energiegemeinschaften.gv.at/vorteile-von-energiegemeinschaften/> (last requested on March 9, 2022).

[17] Regulations on funding are generally found in § 80 EAG.

[18] See *Katalan/Reitinger*/Lejsek, RFG 2021, 186.

[19] Cf *Cejka*, Privatrechtliche Aspekte der österreichischen Umsetzung von Energiegemeinschaften im EAG-Paket, ecolex 2021, 11 (13 et seq); *Hartlieb/Kitzmüller*, Erneuerbare-Energie-Gemeinschaften: Zivilrechtliche Stolpersteine und regulatorische Rahmenbedingungen, RdU-U&T 2021, 56 (56 et seq).

[20] Cf on this question *Rajal/Orator-Saghy*, Die Rolle der Energiegemeinschaften im österreichischen Energierecht, NR 2021, 34 (35 f). Nach *Krönke/Tschachler*, RdU 2021, footn 51 The linking of the

privileges to an establishment as a separate legal entity is likely to be permissible because the regulatory authority has an accessible object of supervision at its disposal.

[21] See *Krönke/Tschachler*, RdU 2021, 256.

[22] See Art 3 para 4 annex (COM) 2003/361/EC.

[23] See Art 2 annex (COM) 2003/361/EC.

[24] *Krönke/Tschachler*, RdU 2021, 254 et seq.

[25] Cf *Krönke/Tschachler*, RdU 2021, 257.

[26] See Art 118 para 4 Federal Constitutional Act (*Bundesverfassungsgesetz – B-VG*).

[27] See *Krönke/Tschachler*, RdU 2021, 257.

[28] See *Krönke/Tschachler*, RdU 2021, 257.

Token-based systems from a supervisory law perspective

a. Classification of tokens and regulatory framework

Due to the numerous design possibilities of tokens, several legal regulations may be relevant when issuing new tokens. In addition to the consumer protection regime, there are stricter regulatory measures in capital market and supervisory law.[1] However, the applicability of these regulations does not depend on the technological design, but on the **purpose and function** of the tokens.

There are different approaches to the classification of tokens in the literature and there are also certain discrepancies in the international context,[2] but the classification made by the Austrian Financial Markets Authority (**FMA**) appears reasonable from an initial point of view:[3]

- Security Token
- Payment Token
- Utility Token

Each token type fulfils certain criteria in terms of content (see below). In addition, mixed forms (so-called hybrid tokens) can also arise, which have individual characteristics from several token categories.

However, the FMA points out that there is currently no legally recognised classification of tokens either in Austria or at European or international level.[4] Therefore, the above classification does not provide any final conclusions on their assessment under supervisory law. It simply facilitates the overview of the types of tokens found on the market.

b. Security Token

Security tokens represent **claims to payments of a certain amount of money** ("future cash flow") against the issuer. The characteristics are therefore similar to those of traditional securities, especially bonds or shares.[5] In principle, it is not mandatory that these claims exist in legal currency. In addition to **pecuniary rights** (e.g. dividends, interest or repayment claims), **administrative rights** (e.g. participation and voting rights at a general meeting) may also be covered by security tokens.[6]

Security tokens are often considered as transferable securities within the definition of MiFID II[7] or WAG 2018[8], as they fulfil the criteria contained therein:

I. Representation of a **property right**
II. **Tradability** on the capital market
III. **Comparability** with types of securities tradable on the capital market
IV. **No exception** to the definition of a security

If a token is thus to be classified as a security, this results in a large number of requirements under financial market law, depending on the specific structure. These include, for example, the obligation to publish a prospectus[9], concession obligations and other legal regulations.[10]

c. Payment Token

A payment token is a token whose primary purpose is a **payment function**. Payment tokens represent a certain value that can be used to purchase goods or services from persons other than the issuer. Payment tokens are not intended for any other use.[11]

According to the FMA, the concrete circumstances of the individual case are always of essential importance for the regulatory treatment of payment tokens. Depending on the specific structure of the token, a number of different elements may be **subject to a concession**. The most important concessions are the **issuance and administration** as defined in § 1 para 1 no 6 Banking Act[12] and the **issuance of e-money** as defined in the E-Money Act 2010[13]. It depends on whether the token can be used for payment at third party acceptors and whether it can be purchased or exchanged for money. However, in the case of the **issuance of payment instruments** according to § 1 para 2 no 5 Payment Services Act, personalisation is the relevant factor.[14]

In the case of issuing regional currencies (in the form of tokens), the E-Money Act 2010 could be applicable. The FMA considers payment tokens as e-money on principle, since payment transactions are to be carried out with them and they are accepted by third parties in lieu of payment.[15] Due to the application of the E-Money Act, the issuing body (e.g. a municipality) would have to be licensed by the Financial Market Authority (FMA) as an e-money institution. However, the exemption of a **limited network** pursuant to § 2 para 3 no 1 E-Money Act could be relevant. In this case, the concession obligation would not apply.[16] Small and specific systems should not fall under the strict supervisory laws. However, as soon as the system allows for broad applicability, regulatory provisions may be relevant. In principle, open networks therefore do not fall under the exemption rule, as they are usually intended for a constantly growing network of service providers. Broadly accepted tokens will thus in any case not fall under a limited network.[17]

According to the FMA, whether a limited network exists is to be determined by the following criteria:

- geographical range of the system
- the number of acceptors
- the diversity of products and services
- validity limits and any amount limits may also play a role.

In general, the FMA uses the different questions as criteria for the supervisory assessment of whether a concession obligation may exist. [18]

d. Utility Token

Utility tokens are primarily used to provide the holder with a benefit in relation to a specific product or service.[19] Often they grant access to a digital platform of the issuer, which can be used by the holder of the utility token in a certain way. However, utility tokens appear in many different forms and often also fulfil the function of payment tokens or security tokens (so-called hybrid token), with the result that the definition is complex and the regulatory

categorisation is difficult. Utility tokens can be linked to the right to participate in the development of a product or service, to use a product or service or to redeem the token for a product or service. [20] Utility tokens are often combined with an immanent payment function towards the issuer or other users of the issuer's platform.[21]

If the token can only be used for the development of a product or service and is not otherwise linked to other claims, or if the token only grants access to a product or service without also serving as payment, there is usually no connecting factor under supervisory law according to the **current legal situation[22]**. Depending on the design of the business model, a concession obligation may nevertheless exist in individual cases. If the token can be redeemed with the issuer or with other users of the platform for the use of a product or service, it fulfils a payment function and is therefore comparable to a payment token. In this case, the same criteria and exceptions are relevant for the regulatory classification as for payment tokens (see above).

Due to the large number of different ways of structuring utility tokens, it is always necessary to analyse on a case-by-case basis whether regulations under financial market law could be applicable. Furthermore, European regulations are also planned for utility tokens in the future.

e. Outlook at European level

In September 2020, the EU Commission (COM) published the so-called Digital Finance Package.[23] Part of the Digital Finance Package was the drafting of a new supervisory regime for so-called crypto assets, the **Markets in Crypto-Assets Regulation** (MiCA).

The MiCA regime is generally intended to create a consistent regulatory framework for issuers and service providers of crypto assets. A crypto asset is "*a digital representation of value or rights that can be electronically transferred and stored using distributed ledger technology or similar technology*".[24] In general, the MiCA-V provides for a threefold classification of crypto assets: I) Asset referenced tokens (ART), II) E-money tokens (EMT) and III) all other crypto tokens that are not tokens mentioned above (especially utility tokens).[25] Thus, MiCA creates a catch-all approach and **framework for all types of crypto assets** that are intended to be traded.[26] However, MiCA does not apply to security tokens, as these already fall under a different and stricter supervisory regime (including MiFID II, Prospectus Regulation).[27]

The MiCA is planned as a **regulation** that is directly applicable in the member states. Therefore, implementation by the member states is not necessary. However, individual national regulations (e.g. on the responsibility for the supervision of issuers and crypto service providers) must be enacted.

Currently, the MiCA is still at the **draft stage**. As of 6 June 2022, several drafts exist which reflect the different positions of the COM[28], the European Parliament[29] and the Council of the EU[30] and provide the basis for the trilogue negotiations. All currently planned provisions can therefore still change fundamentally. In this respect, there is currently no

officially date on which the MiCA will enter into force. If the trilogue negotiations progress quickly, the entry into force can be expected in 2023.

f. Preliminary recommendation when introducing new business models

According to the FMA, tokens can only be qualified under supervisory law in individual cases. Before implementing a planned business model, it is therefore **recommended to contact the FinTech contact point[31] to clarify any supervisory laws that may have to be complied with**.

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[1] *Marek*, Emission digitaler Assets, in Piska/Völkel, Blockchain rules (2019) Ref 9.7.

[2] Cf *Marek* in Piska/Völkel Ref 9.8 et seq.

[3] FMA FinTech-Navigator, „*ICO: Aufsichtsrechtliche Einordnung von Coins und Tokens*“, <https://www.fma.gv.at/kontaktstelle-fintech-sandbox/fintechnavigator/initial-coin-offering/> (last requested on March 9, 2022)

[4] See, however, the European regulatory proposals, in particular the MiCA Regulation, which classifies tokens.

[5] See *Steiner*, Krypto-Assets und das Aufsichtsrecht (2019) 21 et seq.

[6] FMA FinTech-Navigator.

[7] Directive on Markets in Financial Instruments 2014/65/EU; see Art 4 para 1 no 44 MiFID II.

[8] Securities Supervision Act 2018 (*Wertpapieraufsichtsgesetz 2018 – WAG 2018*), Federal Law Gazette I 2017/107 as amended by Federal Law Gazette I 2022/36; see § 1 no 5 WAG 2018.

[9] See Prospectus Regulation 2017/1129/EU.

[10] FMA FinTech-Navigator.

[11] See among others *Zickgraf*, Initial Coin Offerings – Ein Fall für das Kapitalmarktrecht? AG 9/2018, 293 (296); *Hacker/Thomale*, Crypto-Securities Regulation: ICOs, Token Sales und Cryptocurrencies under EU Financial Law Hacker, 15 European Company and Financial Law Review 645-696 (2018), 12; *Klöhn/Parhofer/Resas*, Initial Coin Offerings (ICOs), ZBB 2/2017 93, FMA FinTech-Navigator, ESMA Advice on Crypto Assets ESMA50-157-1391, 23.
FMA FinTech-Navigator.

[12] *Bankwesengesetz – BWG*, Federal Law Gazette 1993/532 as amended by Federal Law Gazette I 2022/36.

[13] Federal Law Gazette I 2010/107 as amended by Federal Law Gazette I 2018/37.

[14] FMA FinTech-Navigator.

[15] FMA FinTech-Navigator, „*ICO: Diese Konzessionstatbestände müssen Sie als Akteur beachten*“.

[16] See FMA Letter 01/2020, „*Begrenzte Netze - Anzeigepflicht gem. § 3 Abs. 4 ZaDiG 2018*“, see <https://www.fma.gv.at/fma/fma-rundschreiben/> (last requested on March 30, 2022).

[17] FMA FinTech-Navigator.

[18] See FMA Letter 01/2020.

[19] Cf FMA FinTech-Navigator.

[20] See Blockchain Bundesverband, Statement on Token Regulation (2018), 3; FMA FinTech-Navigator.

[21] See EBA, Report with advice for the European Commission on crypto-assets, 9.1.2019, 7; ESMA Advice, 23.

[22] Cf the European developments below III.e.

[23] *European Commission*, Press release of the Digital Finance Package from 24 September 2020, see <ec.Europa.eu/commission/presscorner/api/files/document/print/en/ip_20_1684/IP_20_1684_EN.pdf > (last requested on May 25, 2022).

[24] Art 3 para 1 no 2 MiCA.

[25] Rec 9 MiCA.

[26] See Rec 8 MiCA.

[27] See Art 2 para 2 MiCA.

[28] COM (2020) 593 final.

[29] A9-0052/2022.

[30] 14067/21 LIMITE.

[31] Online contact form for legal questions on FinTech models available at <https://www.fma.gv.at/kontaktstelle-fintech-sandbox/fintechnavigator/kontaktstelle-fintech/> (last requested on June 8, 2022)