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Legal Framework of digital assets under European Union law

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Abstract

This paper assesses the legal regulation of cryptocurrencies in the European Union and Germany in terms of their classification as securities. The first part discusses the MiCA's provisions regarding the classification of crypto-assets and the approach to regulating stablecoins and utility tokens. We separately highlighted points of intersection of the MiCA as the law regulating the circulation of tokens being digital assets and the Prospectus Regulation together with MiFID II as legislative acts regulating financial instruments, their circulation, and the procedure for their sale on the capital markets. The paper notes the importance of adopting the MiCA at the level of the European Union as a single set of rules applicable throughout the EU without the need for national implementation laws. For the purposes of this article, only certain aspects of the MiCA will be considered: the range of subjects targeted by the regulation, the concept and classification of digital assets, the approach to determining the legal nature of assets representing tokens being financial instruments and utility tokens. The second part of the paper briefly describes the regulatory approaches to cryptocurrencies in Germany, as well as the positions of the regulatory authorities on recognizing digital assets as securities. Finally, the main conclusions of the study are summarized.

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Keywords

EU, MiCA, tokens, transferable securities, BaFin, digital assets.

Introduction

Cryptocurrencies, such as bitcoin, are a new form of digital assets that require special attention from governments and regulators. The development of rules and regulations to regulate cryptocurrency transactions and ensure the security of blockchain networks is becoming an increasingly crucial task.

Digital assets represent a new reality that requires the development and implementation of appropriate legal regulation. States and business must cooperate to ensure that the rights and interests of all parties are protected and to promote innovation and the digital economy.

The legal regulation of cryptocurrencies in the European Union is important for the development of the digital asset market and differs from the approach adopted in the United States.

The aim of this study is to identify the main approaches to the legal regulation of crypto-assets in the EU and Germany.

Methods and materials of the study

When reviewing and analyzing legal scientific literature, legislative acts and legal documents, private special juridical methods were used: comparative legal method, legal modeling, legal forecasting.

Discussion

A. MiCA Regulation in the EU

The Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and amending Directive (EU) 2019/1937 ("MiCA") has passed recently through all the stages of the EU's legislative process.

The MiCA will apply in 2024 as follows: in accordance with Art. 126 of the MiCA, upon adoption it enters into force on the 20th day following its publication in the Official Journal of the EU. However, its provisions will apply 18 months after the date of entry into force, except for the provisions regulating asset-referenced tokens or e-money tokens, which will apply 12 months from the date of entry into force.

The objective of the MiCA is to regulate the distribution, issuance and trading of crypto-assets, which are defined as "a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology." This term was deliberately defined broadly in order to cover as many types of tokens as possible in a technology-neutral and forward-looking manner.

The MiCA regulates the primary market (i.e. issuance and public offerings) and access to the secondary market (i.e. listings) activities as well as the provision of certain crypto-related services addressing three major groups.

The issuers of crypto-assets: This group offers to the public any type of crypto-assets or seeks the admission of such crypto-assets to a trading platform for cryptoassets.

Crypto-asset service providers (CASPs): This group includes any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis.

All others trading in crypto-assets that are admitted to trading on a trading platform for crypto-assets operated by an authorized crypto-asset service provider.

The MiCA also expands the scope of cryptoassets to include new asset classes while keeping others

out of scope. The MiCA recognizes e-money tokens (EMTs), asset-referenced tokens (ARTs), and other crypto-assets. EMTs stabilize the value by referencing only one single official currency, for example, USDC or USDT, while ARTs stabilize their value by referencing any other value or right (for example, PAX Gold,). And other tokens are known as utility tokens, which do not fall in the two above mentioned categories (in-game currency, BNB, ETH, BTC). Furthermore, both ARTs and EMTs are variants of what is currently referred to as "stablecoins."

That said, the MiCA excludes certain crypto-assets from its scope. According to Art. 2, the MiCA will not apply to crypto-assets that qualify as financial instruments as defined in Art. 4(1) (15) of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments ("MiFID II"). The definition of the financial instruments includes transferable securities as defined in Art. 4(1) (44) of MiFID II.

Thus, according to the recent draft of the MiCA, if a token qualifies as a financial instrument, including as a transferable security, the MiCA will not apply.

B. EU Securities Law and MiCA

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market ("Prospectus Regulation") sets out requirements for the drafting, approval, and distribution of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State. The regime is designed to reinforce investor protection by ensuring that all prospectuses, wherever drawn up in the EU, provide clear and comprehensive information.

The financial instrument is the central concept of EU capital markets regulation. A financial instrument could be generally described as an abstract instrument embodying certain property rights and providing for a flow of funds between the selling party and the buying party on the financial market.

"Securities" are defined in the Prospectus Regulation by reference to the definition of "transferable securities" in MiFID II:

"'Transferable securities' means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as: (a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares; (b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities; (c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures." (Art. 4(1) (44) of MiFID II).

It is evident that the definition is based on the necessary assumption of the transferability and negotiability of such instrument. The defining characteristic of negotiability is met if the instrument is eligible to be traded on the market. Such instrument does not have to be actually traded on the capital market at a certain moment in order to qualify as a transferable security.

If a token is qualified as a transferable security under MiFID II, the requirements of the Prospectus Regulation as well as other financial rules will apply to its issuer, unless certain exemptions are applicable or the token falls outside of the scope of the Prospectus Regulation for another reason. If a token is a transferable security and is subject to exemptions or the token falls outside of the scope of the Prospectus Regulation for another reason, the obligation to publish a prospectus and requirements for its approval and distribution under the Prospectus Regulation do not apply to its issuer.

Nevertheless, there may be certain peculiarities depending on national laws of a Member State,

e.g., according to Art. 1(3) of the Prospectus Regulation, offers below €1 million are exempt from the Prospectus Regulation. However, it is stated that Member States may require other disclosure requirements at the national level.

If a token is not qualified as a financial instrument, including as a transferable security, it is likely to be subject to the MiCA and its transparency and disclosure requirements when the MiCA enters into force.

To conclude, currently, the classification of crypto-assets as financial instruments depends largely on the special characteristics of the crypto-asset and the way it is used. Some crypto-assets may be considered transferrable securities if they meet the criteria set out in the MiFID definition. Other crypto-assets, such as stablecoins, may be classified as electronic money (e-money) should they meet the criteria set out in the EU's Electronic Money Directive (EMD) or as ARTs and EMTs under the MiCA.

D. Token Qualification as a Security under MiFID II

It is important to note that there are different types of EU legal acts. Regulations such as the Prospectus Regulation or the MiCA are legal acts that apply automatically and uniformly to all Member States, without any need to be transposed into national law; they are binding in their entirety on all Member States. While directives such as MiFID II set out a goal that all Member States must achieve, it is, however, up to the Member States to devise their national laws on how to reach these goals. Member States must adopt measures to incorporate them into national law (transpose) in order to achieve the objectives set by the directive.

The initial regulatory framework, i.e. MiFID II, was not designed with tokens in mind. The notion of "transferable securities" under MiFID II is agreed upon in a broad manner. The list of classes of securities in the definition of "transferable securities" is non-exhaustive, leaving room for discretion and interpretation. Therefore, the definitions used and the scope of the national laws differ.

In November 2017, the European Securities and Markets Authority ("ESMA"), an independent EU authority whose purpose is to improve investor protection and promote stable, orderly financial markets, published a statement (Ref.: ESMA50-157-828) regarding tokens sales, clarifying that some tokens may qualify as transferable securities under MiFID II: "...where the coins or tokens qualify as financial instruments it is likely that the firms involved in ICOs conduct regulated investment activities... Moreover, they may be involved in offering transferable securities to the public."

Nevertheless, in 2019 ESMA found that "while a majority of NCAs (16) have no specific criteria in their national legislation to identify transferable securities in addition to those set out under MiFID II, other NCAs (12) do have such criteria. This results in different interpretations of what constitutes a 'transferable security'." (Advice on Initial Coin Offerings and Crypto-Assets, January 2019). National competent authorities of the Member States (NCAs) diverge in their approach to interpreting and applying MiFID II with regards to tokens. Thus, it is possible that the same token could be considered as a "transferable security" in one jurisdiction and non-transferable in another.

In 2022, Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology (DLT Pilot Regime) was adopted, which clarifies that financial instruments under MiFID II, including transferable securities, may be issued by means of distributed ledger technology (such as blockchain). The definition of "financial instrument" in the MiFID II will be amended as follows: "'financial instrument' means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology."

In connection with adoption of the MiCA, it is expected that unified approach will be eventually developed. The MiCA contains an obligation of the ESMA to issue guidelines on the conditions and

criteria for the qualification of crypto-assets as financial instruments 18 months after the MiCA's entry into force. And, in order to promote a unified approach, the European Supervisory Authorities (ESAs) should promote discussions on the classification of crypto-assets. Competent authorities should be able to request opinions from ESAs on the classification of crypto-assets.

In the meantime, now there is no unified approach among Member States as to the criteria for qualification of tokens as securities. It is clarified by the DLT Pilot Regime that transferable securities may be issued by means of distributed ledger technology (such as blockchain). However, the actual qualification of a token as a transferable security under MiFID II varies depending on how the notion of "transferable security" has been implemented by Member States and requires a case-by-case analysis per jurisdiction.

Hence, in order to qualify the Token in the context of the EU securities legislation, the analysis of national laws of every Member State need to be conducted.

E. Public Offering in Germany

A public offering of securities is defined in Art. 2(d) of the Prospectus Regulation (including in conjunction with section 2(2) of the German Securities Prospectus Act (Wertpapierprospektgesetz — "WpPG")). If the public offering takes place in Germany, it falls under competency of the Federal Financial Supervisory Authority ("BaFin"). A public offering takes place in Germany if it is designed to address investors resident in Germany.

There is a general presumption that this is the case if the offering is accessible in Germany. In the case of an online public offering that can be accessed without restriction, this means that the worldwide public is being addressed, with the result that it is subject to a prospectus requirement in Germany. It should be noted that BaFin recommends that issuers, who intend to conduct a public offering of securities, clarify the qualification of the token as a security with BaFin in advance.

F. Definition of Securities and its Qualification Criteria

BaFin determines on a case-by-case basis whether a token constitutes a security and whether it is subject to a requirement to issue a prospectus under the Prospectus Regulation, WpPG and the German Securities Trading Act (Wertpapierhandelsgesetz — "WpHG").

Both the WpHG and the WpPG use the term "securities" as defined by MiFID II ("transferable security" under Art. 4(1) (44) of the MiFID II), thus transposing this legal definition into national law: "securities within the meaning of this Act, whether or not represented by a certificate, mean all categories of transferable securities with the exception of instruments of payment that are by their nature negotiable on the capital markets, in particular 1. shares. 2. other investments equivalent to shares in German or foreign legal persons, partnerships and other entities, as well as depositary receipts in respect of shares, 3. debt securities, a) in particular profit participation certificates, bearer bonds and order bonds as well as depositary receipts in respect of debt securities; b) any other securities giving the right to acquire or sell securities."

BaFin lays out its position on the regulatory qualification of tokens in the field of securities supervision in its advisory letters (Advisory letter (WA) Ref..: WA 11-QB 4100-2017/0010; Guidance Notice: Second advisory letter on prospectus and authorization requirements in connection with the issuance of crypto tokens, Ref.: WA 51-Wp 7100-2019/0011; IF 1-AZB 1505-2019/0003).

The BaFin advisory letters based on the definition of securities under MiFID II and German national laws identify the following criteria that must be met for a token to be qualified as a security: transferability, negotiability on the capital markets and the embodiment of rights similar to securities in the token.

Transferability can be assumed if the token can be transferred to other users (without any changes

in its legal and/or technical substance). According to the BaFin advisory letters, this is the case for the vast majority of the token standards existing on the market (e.g., ERC-20).

Negotiability in respect of a token takes place if it is considered to be eligible for trading on the capital markets. In theory, a unit is negotiable if its format allows its sale or purchase in a structured market setting (i.e., in the capital markets). The term "capital markets" is not defined under EU law. However, the European Commission applies a broad interpretation, which includes "all contexts where buying and selling interests in securities meet." (European Commission, Your Questions on MiFID; Oct. 31, 2008). According to the BaFin advisory letters, online crypto trading platforms/crypto exchanges may meet the definition of a capital market.

The type of transfer is not relevant to the "negotiability" criterion. The definition of the security in the WpHG additionally specifies that a securitization in the form of a certificate, which ensures the marketability of financial instruments in the case of traditional securities, is not required for a token to be qualified as a security. Rather, BaFin clarifies that it is sufficient if the holder of the token and the rights embodied in the token can be documented, including by means of a distributed ledger technology (including blockchain).

Negotiability assumes the respective units to be standardized. This flows from the concept of capital markets transactions, which are executed anonymously and require the respective units to be identifiable and enumerable. Transactions need to be possible without further negotiations between the parties. In theory, it is reasoned that the standardization criterion seeks to exclude securities that have been customized for particular customers, as this would create uncertainties in the market environment.

G. Tokenized Investment Product

BaFin's administrative practice relating to the "tokenization" of assets should also be noted. Generally, investment products under the Capital Investment Act (Vermögensanlagengesetz — "VermAnlG") are not classified as securities under the Prospectus Regulation, the WpPG and the WpHG, considering that they do not meet criteria of comparability with securities where transferability, negotiability are concerned.

However, according to BaFin advisory letters, if a token is configured in substance like an investment product within the meaning of the VermAnlG and is digitalized (including by means of blockchain) in the form of a freely transferable token that is negotiable on the capital markets, it is ultimately not a capital investment under the VermAnlG, but a security under the Prospectus Regulation and the WpPG and as defined in the WpHG. Such tokens constitute a separate type of security (*sui generis*) according to BaFin.

It is important to note that the foregoing applies if such token conveys rights similar to equities or membership rights or obligation-based claims on assets that are comparable with those of a shareholder or bondholder. Thus, for a tokenized investment product to qualify as a security, it must meet the same criteria as described in the paragraph above: transferability, negotiability on the capital markets and the embodiment of rights similar to securities in the token.

Conclusion

To date, the MiCA is probably the most comprehensive regulatory framework for crypto-assets that we have seen on a global scale. Prior to the MiCA, each EU country regulated cryptocurrencies independently. The MiCA establishes the range of subjects targeted by its action and makes it clear to all players in the market that tokens that were previously in the gray zone have their legal status. We are talking primarily about stablecoins (ARTs and EMTs).

The MiCA gets extraterritorial status as well. This means that issuers or operators of cryptocurrency exchanges or brokers who have obtained the relevant authorization in one-member state of the union are not required to obtain the relevant status in another jurisdiction.

However, it is also necessary to note the questions that either went unanswered or provoked additional questions.

For instance, the MiCA brings together three distinct forms of crypto-assets under one regulation, but it does not clarify when the second group (i.e. asset-referenced tokens) falls within or outside the framework of the Prospectus Regulation and the MiFID. In practice, the MiCA will apply to a specific asset, unless it falls within the scope of the MiFID.

The same duality exists for crypto trading platforms, where the question will emerge whether MiFID-licensed trading platforms can trade crypto, or whether they should be authorized under the MiCA.

In addition, the MiCA regime also does not directly regulate many types of tokens. For example, the MiCA will only apply to NFTs (non-fungible tokens), if the NFT has characteristics that make it similar to one of the assets whose use is covered by the MiCA. Also, the MiCA will not apply to the so-called CBDC (Central Bank Digital Currency) – the official government digital currencies.

While it remains difficult to bring stablecoins under the MiFID or MiCA regulation, the author is convinced that the MiCA's provisions are of great importance for the purposes of distinguishing between the market for those digital assets that are not securities and those that are financial instruments. The EU was the first to regulate the crypto market and tokens, unlike, for example, the US, where the SEC simply recognizes most digital assets as securities.

In our opinion, this decision will have a positive impact not only on the European digital asset market, but also on the entire global crypto industry.

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Правовой режим цифровых активов по законодательству Европейского Союза

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Аннотация

В данной работе оценивается правовое регулирование криптовалют в Европейском союзе и Германии с точки зрения их отнесения к ценным бумагам. В первой части рассматриваются положения MiCA относительно классификации криптоактивов и подхода к регулированию стейбл и ютилити токенов. Отдельно выделены точки пересечения MiCA, как закона, регулирующего обращение токенов – цифровых актив и Prospectus Regulation вместе с MiFID II, как законодательных актов, регулирующих финансовые инструменты их оборот, порядок реализации на Capital Markets. В работе отмечается значимость принятия MiCA на уровне европейского союза, как единого свода правила применимого по всей территории ЕС без необходимости принятия национальных законов об имплементации. Для целей настоящей статьи будут рассмотрены лишь отдельные аспекты MiCA: круг субъектов, на которых направлено действие регламента, понятие и классификация цифровых активов, подход к определению правовой природы активов, представляющих собой токены – финансовые инструменты и ютилити токены. Во второй части работы кратко описываются подходы к регулированию криптовалют в Германии, а также позиции регуляторных органов по признанию цифровых активов ценными бумагами. В завершении подведены основные выводы исследования.

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Ключевые слова

ЕС, MiCA, токены, переводные ценные бумаги, BAFIN, цифровые активы.

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