

# Payments & FinTech

News | June 2022



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# Hot Topic

## Guidelines on the Application Process for the Crypto Securities Registration published

In June 2021, the Electronic Securities Act (*Gesetz über elektronische Wertpapiere – eWpG*) introduced electronic securities into German law. The eWpG does not only provide for the issuance of electronic securities that are kept in a central register maintained by a custodial bank or a central securities depository, but also for the issuance of so-called crypto securities where the register is maintained using a decentralised recording system such as DLT. At the same time, a licence requirement was introduced for such crypto securities registration (*Kryptowertpapierregisterführung*) as a new financial service pursuant to Sec. 1(1a) sent. 2 no. 8 of the German Banking Act (*Kreditwesengesetz – KWG*). Furthermore, a transitional period was granted in Sec. 65 KWG under which companies intending to apply for a licence that had started their activities by 10 December 2021 at the latest, and had announced their intention to do so two months before starting their activities, are deemed to have been granted the licence until a decision on their licence application has been taken. Such companies were required to submit a complete licence application within six months after starting their activities. In order to provide guidance as to its expectations for such licence application, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) has now published Guidelines on the application process for the crypto securities registration ([Merkblatt 02/2022 \(BA\)](#) – the **Notice**).

In the following, we want to briefly introduce the key points of the Notice and look at the next steps for companies intending to keep registers of electronic securities.

### 1. Scope of the Notice

The Notice contains general information on the authorisation procedure for crypto securities registration, guidance on the transitional period under Sec. 65 KWG as well as on the required content of the licence application, inter alia in relation to requirements for IT, the suitability assessment of the managing directors, AML requirements and the fee for granting the license.

Overall, the Notice follows very closely the Guidelines on applications for authorisation for crypto custody business of March 2020. It puts a particular emphasis on IT requirements and reiterates that the IT systems need to ensure the integrity and authenticity of the data recorded in the crypto securities register. Therefore an IT security strategy, procedures for

the handling of security incidents as well as an IT risk assessment need to be submitted. Furthermore, a detailed explanation on how the recording system is implemented will need to be provided. This documentation will be assessed against the general requirements for IT systems under MaRisk and BAIT, but also the Ordinance on requirements for electronic securities registers (*Verordnung über Anforderungen an elektronische Wertpapierregister – eWpRV*), which is still only available in draft form, and where there are still some open questions (see our ‘Hot Topic’ in the February 2022 issue).

At the same time, and similarly to its guidance in relation to applications for authorisation for crypto custody business, BaFin refers to its interpretation of the suitability assessment in

relation to the IT expertise of managing directors. Given the fact that the crypto securities registration is based on the keeping of a database, where validity and integrity are of particular importance, BaFin intends to follow these criteria in relation to the technical expertise of a managing director and will

therefore consider a managing director's technical expertise as evidenced through a relevant course of study and extensive practical experience of IT security issues as sufficient in terms of the managing director's qualifications "in the relevant areas of business" (Sec. 25c (1) sent. 2 KWG).

## 2. Next steps

As mentioned, there was the possibility to make use of a transitional period under Sec. 65 KWG for companies intending to apply for a licence which, under certain conditions, are now deemed to have been granted the licence until a decision on their licence application has been taken. In relation to these companies, BaFin clarifies that these are already financial institutions within the meaning of the KWG and are therefore, as a general rule, expected to comply with all applicable legal requirements from the commencement of their activities.

As this transitional period was only available to companies taking up the crypto securities registration within the first six months from the entry into force of the eWpG on 10 June 2021, companies that are now considering to set up a crypto securities register will no longer be able to make use of this transitional period but will instead have to apply for a respective licence directly, and will only be able to commence their

activities once the licence has been granted. From experience with the first licence applications in relation to crypto custody business, it will take BaFin some time to issue the first licences in relation to such a new type of activity. In relation to crypto custody business, the first licence was issued more than 17 months after the entry into force of the licence requirement. Companies that do not benefit from the transitional period may therefore not be able to keep crypto securities register for a considerable amount of time. They may however, provided they hold a licence for safe custody business or as a central securities depository, make use of DLT to issue electronic securities under a central register, provided that the set-up is indeed to be qualified as such central register (as opposed to a crypto securities register).

# Regulatory Updates

## Payments



EU

### **EPC: Public consultation on the SEPA Payment Account Access Scheme Rulebook**

The European Payments Council (EPC) has launched a public consultation on the draft rulebook of its new SEPA Payment Account Access (SPAA) Scheme. The SPAA scheme covers the set of rules, practices and standards that will allow the exchange of payment accounts related data and facilitates the initiation of payment transactions in the context of 'value-added' ('premium') services provided by asset holders (i.e. account-servicing payment service providers to asset brokers (e.g. third party providers)). The SPAA scheme covers messaging functionalities. It is not about a payment means or a payment instrument, but it offers a way to transport information in relation to payment accounts and transactions. The EPC is also consulting on a related document concerning a possible additional 'premium' functionality that would allow asset brokers to request a payment with transaction fees not borne by the payer.

Date of publication: 13/06/2022



EU

### **EPC: Clarification paper on the SEPA Request-to-Pay (RTP) scheme rulebook**

The EPC has published a clarification paper on the Single Euro Payments Area (SEPA) Request-to-Pay (SRTP) scheme rulebook. The purpose of the clarification paper is to provide guidance and, where feasible, recommendations to the SRTP scheme participants on matters that are not as such described in version 2.0 of the SRTP scheme rulebook, which was published on 30 November 2021. It should be noted that the clarification paper is a living document which will be updated from time to time once new questions and/or issues arise that need further clarification.

Date of publication: 30/05/2022

## FinTech/Digital finance



### Germany

#### Regulation on the audit structure for crowdfunding service providers (*Schwarmfinanzierungsdienstleister-Prüfungsverordnung*)

The Regulation on the audit structure pursuant to Section 32f of the German Securities Trading Act (*Wertpapierhandelsgesetz – WpHG*) for crowdfunding service providers in accordance with the EU Crowdfunding Regulation (*Schwarmfinanzierungsdienstleister-Prüfungsverordnung – SchwarmfDPV*) has been published in the Federal Gazette. With this Regulation, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*) and the German Ministry of Finance (*Bundesfinanzministerium*) intend to define key aspects of the yearly auditing procedures provided for by Section 32f WpHG for crowdfunding service providers in more detail.

Date of publication: 17/06/2022



### Germany

#### Regulation on crypto fund units (*Verordnung über Kryptofondsanteile*)

The Regulation on crypto fund units (*Verordnung über Kryptofondsanteile – KryptoFAV*) has been published in the Federal Gazette. It aims to promote Germany as a fund location by opening up the possibility for providers of investment funds to also issue crypto fund units. The regulation relies on the law on the introduction of electronic securities, including the Electronic Securities Act (*Gesetz über elektronische Wertpapiere – eWpG*), which entered into force on 4 June 2021, as this law created the possibility of issuing electronic securities by way of entry into an electronic securities register.

Accordingly, the new regulation enables the providers of investment funds to issue electronic securities by entering them in an electronic

securities register as so-called crypto fund units. The regulation governs the general possibility of issuing crypto fund units and, to this end, extends the provisions of the eWpG to electronic fund units. It is ensured that the register-keeping entity of an electronic securities register in which crypto fund units are registered is always the depositary of the investment fund itself. This ensures that the depositary can fulfil its duties in relation to the investor.

Date of publication: 17/06/2022



### Germany

#### BaFin: Guidance Notice 02/2022 (BA) – Guidelines on the application process for the crypto securities registration (*Merkblatt 02/2022 (BA) – Hinweise zum Erlaubnisverfahren für die Kryptowertpapierregisterführung*)

BaFin has published the Guidance Notice 02/2022 (BA) on the application process for the crypto securities registration. It contains initial information for companies as to which aspects of the licensing procedure BaFin considers to be of particular importance. The Guidance Notice is addressed to companies that want to apply for a licence for crypto securities registration pursuant to Section 1(1a)(2)(8) of the German Banking Act (*Kreditwesengesetz – KWG*).

By way of background, the eWpG established the crypto securities registration as a new financial service in the KWG. Since the law came into force on 10 June 2021, companies that want to provide this service need a licence from BaFin. If the transitional provision pursuant to Section 65 of the KWG is used, the licence is deemed to have been granted provisionally if companies had started their activities by 10 December 2021 at the latest and had announced their intention to do so two months before starting their activities. Companies must submit a complete licence application no later than six months after starting their activity.

For details on the guidelines, see our 'Hot Topic' section above.

Date of publication: 01/06/2022



EU

**ECB: Opinion on the establishment and functioning of the European Single Access Point (ESAP)**

The ECB has published an Opinion on the establishment and functioning of the European Single Access Point (ESAP) which has been proposed on 25 November 2021. This proposal aims to provide centralised Union-wide access to publicly available financial and non-financial information on Union entities and securities of relevance to financial services, capital markets and sustainability, as envisaged in the Capital Markets Union (CMU) Action Plan adopted by the Commission in September 2020. The ECB welcomes this objective and views the establishment of ESAP as an important milestone in the completion of the CMU. According to the ECB, the establishment of the ESAP is also important as

it would help to overcome some of the main obstacles that arise from the need for deeper statistical and economic analysis of information and datasets stemming from different Union directives and regulations.

Date of publication: 07/06/2022



EU

**Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on DLT**

The Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology (DLT) has been published in the OJ. The Regulation also amends the MiFID II Directive, MiFIR and the CSDR. While the general date of application is 23 March 2023, exceptions are set out for Articles 8(5), 9(5), 10(6) and 17, which will apply from 22 June, and for Article 16, which will apply from 4 July 2021.

Date of publication: 02/06/2022

# News from the Courts

## Payments



### Germany

#### **Administrative Court of Frankfurt am Main, ruling of 04/11/2021 – 7 K 1262/20.F (unauthorised e-money business – cryptocurrency)**

The background to the case is a dispute between BaFin and the plaintiff regarding the classification of the plaintiff's business model as an unauthorized e-money business under German payments law.

The plaintiff marketed so-called "I-Coins" to investors. These I-Coins were set up on the Ethereum blockchain using smart contracts and could, at any time, be exchanged for the corresponding amount of so-called CashGold (i.e. banknote-like notes into which thin threads of 0.1 to 0.6 grams of gold are woven) (the **I-Coins**). BaFin ordered the cessation and liquidation of the plaintiff's business with respect to the marketing of the I-Coins, claiming that the plaintiff provided an 'unauthorised e-money business' within the meaning of Section 7(1) of the German Payment Services Supervisory Act (*Zahlungsdiensteaufsichtsgesetz – ZAG*), against which the plaintiff took legal action before the Administrative Court of Frankfurt am Main (*Verwaltungsgericht Frankfurt am Main*).

In essence, the court ruled in favour of BaFin and decided that the I-Coins constitute e-money, and hence the marketing of the I-Coins by the plaintiff constitutes a licensable e-money business pursuant to Section 11(1) sentence 1 of the ZAG.

According to Section 1(2) sentence 2 of the ZAG, e-money business features the issuance of e-money. More specifically, Section 1(2) sentence 3 of the ZAG defines e-money as all electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt

of money for the purpose of making payment transactions within the meaning of Section 675f(4) sentence 1 of the German Civil Code (*Bürgerliches Gesetzbuch – BGB*) and which is also accepted by natural or legal persons other than the issuer. A monetary value exists when the units of account are intended to function as a means of payment and exchange. The court decided that, according to the plaintiff's whitepaper (namely, the "I. Whitepaper"), which described its business model, the I-Coins could be used to pay for goods and services anywhere and anytime, and thus they had a monetary value. In this regard, the court also stressed that a cryptocurrency neither needs a store of value function, nor does it necessarily have to have a stable value, in order to be classified as e-money.

Furthermore, customers buying the I-Coins have a claim against the plaintiff, as they request the plaintiff to have their I-Coins exchanged into CashGold at any given time. Unlike other decentralised block chain payment systems, the I-Coins can be clearly assigned to the plaintiff, who limited the number of available tokens to 12 billion, while also making it impossible for third parties to create new I-Coins using computing power (i.e. so-called "mining").

Additionally, the plaintiff stated in its whitepaper that the I-Coins could be purchased using legal tender (e.g. via a credit card transaction or via transaction through the plaintiff's website), meaning that they were also issued on the receipt of money.

As regards the issuance of the I-Coins for the purpose of making payment transactions within the meaning of Section 675f(4) sentence 1 of the BGB (i.e. any provision, transmission or withdrawal of money), the court highlighted that the decisive factor is the issuer's intention for the e-money to be

used for such payment transactions, regardless of how they are actually used in practice. As set out in the plaintiff's whitepaper, the plaintiff intended for the I-Coins to be used for payment transactions when marketing them.

Finally, in its decision the court highlighted that e-money does not have to be used and accepted in the real world to fulfil the criterion of the acceptance by persons other than the issuer. Requiring actual

use cases would delay the supervision of e-money systems significantly, threatening its purpose, to ensure the functionality of payment transactions, their price stability and the protection of consumer deposits. Therefore, it was in the court's view sufficient that the plaintiff advertised a broad network of cooperating partners who would accept the I-Coins as a means of payment.

# Contacts

## Payments and FinTech Regulatory

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# ECB in focus

ECB in focus is our blog dedicated to the banking supervisory activities of the European Central Bank (ECB). We report on key developments in European banking regulation led by the ECB as part of the Single Supervisory Mechanism (SSM).

The blog features views and commentary from members of Allen & Overy's market-leading German financial services regulation practice.

For enquiries regarding Allen & Overy's ECB in focus blog, please contact us.

## Some of our recent posts

### **EU GENERAL COURT HOLDS THAT INDICTMENT OF A CONTROLLING SHAREHOLDER MAY JUSTIFY WITHDRAWAL OF BANK LICENCE**

*18 May 2022*

In *Case T-27/19 Pilatus Bank* the Court dismissed an action brought by Malta's Pilatus Bank, confirming the legality of the ECB's 2018 decision to withdraw the bank's licence after an indictment of its sole shareholder. The court held that the qualifying shareholder ceasing to fulfil the suitability criteria was a valid ground for withdrawing a bank's licence and that on the present facts, the negative public perception of the shareholder's reputation meant that it was justified.

[Read more →](#)

### **ECB REPORTS THAT BANKS' CLIMATE RISK DISCLOSURE FALLS FAR SHORT OF EXPECTATIONS**

*28 April 2022*

In March 2022 the ECB published its second report on the state of significant banks' climate-related and environmental risk disclosures. While the ECB sees improvements since last year's assessment, no bank currently fully meets the supervisory expectations. Banks received individual feedback letters identifying key gaps and calling them to further action and C&E risk disclosure will continue to be a key part of the ECB's supervisory priorities in the years to come.

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