



On 20 May 2019, the German Federal Ministry of Finance (BMF) presented its draft bill on the implementation of the 5th Anti-Money Laundering Directive. The legislator has taken the new anti-money laundering requirements from the 5th Anti-Money Laundering Directive regarding trading platforms for virtual currencies and wallet providers as an opportunity to further regulate crypto tokens beyond anti-money laundering laws. Crypto values have been added to the list of financial instruments in the German Banking Act (KWG) and crypto custody business has now been included as a financial service.

What changes does the law entail regarding



crypto tokens?

Crypto value: extension of the definition of financial instrument in the KWG

In accordance with the BaFin's administrative practice, crypto tokens (depending on their concrete form) are subject to the existing financial market regulation if they are to be regarded as financial instruments. The following rough summary can be provided:

BaFin qualifies payment tokens as financial instruments in the form of units of account pursuant to Section 1 para. 11 sentence 1 no. 7 KWG. As a result, companies who trade payment tokens commercially are subject to supervision by BaFin.

Security tokens can be classified as financial instruments in the form of shares, debt securities or investment assets. In that case, in addition to the KWG and the German Anti-Money Laundering Act (GwG), further laws such as the German WpHG, WpPG, VermAnlG, KAGB or the EU Market Abuse Regulation may be applicable. Pure utility tokens, on the other hand, are not classified as financial instruments and are therefore not subject to financial market regulation.

The draft bill now expands the concept of financial instruments. According to Section 1 para. 11 sentence 1 no. 10 KWG (amended version), crypto values are in future also regarded as financial instruments within the meaning of the KWG, unless the crypto tokens are already considered to constitute financial instruments for another reason. The financial instrument of the crypto value is therefore drafted as a catch-all provision and the definition of crypto value is correspondingly broad. In accordance with this definition, crypto values are:

“*digital representations of a value which was not issued or guaranteed by any central bank or public authority and which does not have the legal status of a currency or money but which is accepted by natural or legal persons as a means of exchange or payment or for investment purposes by virtue of an agreement or actual practice and which can be transferred, stored and traded electronically.*”

It remains to be seen whether in the crypto environment an independent area of application for the financial instrument of the crypto value will emerge. The significance in practice is likely to be that the amendment to the law safeguards the BaFin's administrative practice to date. As a result, for example, the discussion around the unit of account, which was triggered by the so-called “[Bitcoin decision](#)” of the Higher Regional Court of Berlin, has been rendered unnecessary. This is due to the fact that if a competent court came to the conclusion that [Bitcoin](#) do not constitute units of account, the new law would in any case regard them as crypto values and therefore also as financial instruments.



Addition of crypto custody business to the definition of financial services

The draft bill also adds crypto custody business to the list of financial services, see Section 1 para. 1a sentence 2 no. 6 KWG (amended version). This refers to

“ *the safekeeping, administration and backup of crypto values or private cryptographic keys used to hold, store and transfer crypto values for others.* ”

This means that in future, those who conduct crypto custody business in Germany commercially or to an extent that requires business operations to be set up in a commercial manner will require a licence from BaFin, Section 32 para. 1 KWG.

Consequences for the individual market participants

So far, so good. All in all this means that things are not getting any easier from a regulatory perspective. But what does this new legal situation mean for the individual market participants?

Significance for issuers of crypto tokens?

For the issuers of crypto tokens, this legal amendment changes almost nothing. The issuance of crypto tokens will continue to be possible in most cases without a licence in future. This applies both to Initial Coin Offerings (ICOs) and to Security Token Offerings (STOs). However, as was the case in the past, security tokens may be subject to sales requirements, in particular a prospectus requirement.

Significance for exchanges

Exchanges on which payment tokens can be purchased, sold or exchanged already require a licence from BaFin today. Depending on the structure of the exchange, this may in particular be as a result of proprietary trading, financial commission business, the operation of a multilateral trading system, investment brokerage and deposit business. Additionally, as they are credit or financial services institutions, they are subject to the GWG, so that they need to fulfil applicable anti-money laundering obligations. It should be noted that this applies not only to exchanges domiciled in Germany, but also to companies domiciled abroad that are targeting the German market.

However, to the extent the exchanges also operate crypto custody business, in future they will also require a licence for this financial service.



Significance for wallet providers?

One mustn't lose sight of the fact that one wallet is not the same as another. There are many different types of wallets such as online wallets, desktop wallets, mobile wallets, etc. Irrespective of the name of the wallet, it needs to be checked whether the relevant wallet falls under the category of the crypto custody business.

If this is the case, the relevant wallet providers will in future be subject to the regulated area. They will require a licence from BaFin and are then subject to ongoing supervision by the BaFin. This is intended to ensure the protection of customers, which in the view of the BMF is necessary in view of the not inconsiderable risks involved in the crypto custody business. As a financial services institution, they will in future also be subject to the GwG, so that they will also have to comply with applicable anti-money laundering obligations, in particular the KYC identification obligations.

As was the case for exchanges, this all applies not only to companies domiciled in Germany, but also to companies domiciled abroad that are targeting the German market.

What are the next steps?

The draft bill was submitted on 20 May 2019. Comments on the draft bill were accepted by the BMF as part of the 'hearing of the associations' process within an extremely tight time frame, namely until 31 May 2019. The cabinet decision is expected on 19 June 2019. Within the framework of the legislative procedure, there is a distinct possibility that further changes will be made. The law is scheduled to enter into force on 1 January 2020. As the draft bill does not contain any transitional provisions, there is not much time for companies engaged in the crypto custody business to adjust to the amended legal situation.

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