

REGULATION OF DIGITAL CURRENCIES IN GERMANY

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Annotation. The article is devoted to the problems of digital currencies in Germany. Types of digital currencies and their status in Germany are considered. The author analyzes the approaches of the legislator, regulator and doctrine to the content of the concepts of “blockchain”, “digital assets”, “tokens”, “cryptocurrency” and others. The Federal Electronic Securities Act of 2021 (ESS Act) and other changes in the legislation of the Federal Republic of Germany are analyzed. The advantages and disadvantages of the German approach to digital assets are identified. The EDS Act defines the rules for registration and exchange of digital assets in Germany. Rights to them are traded through electronic registries. One of the central innovations is the license for blockchain trading systems. Adapting German law to new technologies increases transparency, market integrity and investor protection.

Keywords: Germany, German law, German Electronic Securities Act, blockchain, digital assets, tokens, cryptocurrency, distributed ledger technology.

Translated from DeepL.com (free version) In practice, it is often necessary to secure corporate financing through securities that are issued electronically using blockchain technology. However, for a long time, securities laws did not allow electronic securities (hereinafter referred to as “ECS”). At the same time, other countries allowed the issuance of electronic securities and also provided for the use of blockchain, and Germany's attractiveness as a financial center was declining. Against this backdrop, the federal government set out to modernize its securities laws (hereinafter referred to as “CS”), thereby increasing investor protection. The Germans believed that “the integrity, transparency and functionality of financial markets should be protected and improved by creating a legally defensible regulatory framework and supervisory structures”.

Translated from DeepL.com (free version) On June 10, 2021, the Electronic Securities Act came into force in Germany . It authorizes the issuance of bearer securities using innovative technologies, in particular Distributed-Ledger-Technologies.

The Act establishes a legal framework for rights trading through registries of electronic securities and adds a new type of license for maintaining an electronic securities registry. The Act implements the main components of the German Government Strategy as well as the Joint Document of the German



Ministry of Finance and the Ministry of Justice on the Regulation of Electronic Securities and Crypto-Tokens .

The EDS Act modernizes the German Civil Code (hereinafter referred to as the German Civil Code) and related supervisory legislation. With the creation of the EDS, one of the central building blocks of the German government's blockchain strategy is being realized. The Act amended a large number of regulations: the Federal Ministry of Justice's regulation on admission to the stock exchange , the Securities Prospectus Act , the Deposit Act .

The Bond Act , the Banking Act , the Pledge Act and the Capital Investment Code . The Act (§ 2) classifies ECBs as “movable property” within the meaning of section 90 of the German Civil Code . In this case, ECBs are equivalent to traditional securities issued with an endorsed “paper” certificate. Thus, German securities are now divided: a) into securities included in a centralized register and b) cryptocurrency securities.

The electronic registry operator is obliged to ensure the confidentiality, integrity and reliability of the data contained (§ 7 of the EDS Act). A bona fide purchaser of such securities may rely on the contents of the register. Obstacles to disposal must be entered in the register or known to the purchaser as valid (§ 26).

The Law on CSE refers to the EU Regulation on Central Securities Depositories , which defines them as legal entities managing the infrastructure that ensures the operation of securities settlement systems. Centralized registers (§ 13 of the Act) must contain information on the content of the right issued, the volume of the issue, the nominal amount, the issuer, an indication of whether the record is individual or collective, bearer, and information on joint ownership. Individual records should also contain information on obstacles to disposal and rights of third parties.

The MOJ and the German MoF are authorized to jointly issue regulations concerning the establishment, maintenance and technical requirements for cryptocurrency registries as well as requirements for confidentiality, integrity, availability and authenticity of data (§ 15).

The term “cryptocurrency securities register” is technologically neutral. However, according to the explanatory memorandum to the law, “the focus is on systems of record based on distributed registry technology”. The register must be maintained in a “tamper-proof system of record in which data is recorded chronologically and stored in a manner protected against unauthorized deletion and subsequent modification” (§ 16, para. of the Act)



The EDS register contains the same information as the centralized register (§ 17). The registration of the issuance of EDSs must be published in the German Federal Gazette . In addition, the Federal Financial Supervisory Authority (BaFin), which publishes the relevant information, must be notified (§ 20 of the EDS Act). The maintenance of the register of ECBs has been added to the list of financial services requiring registration with the BaFin under the Banking Act (§ 1, para. 1a, § 32, para. 1). The definition of cryptocurrency deposit business (§ 1, item 1a, no. 6) has been amended accordingly. Transactions of ECBs shall be recorded by means of entries on securities accounts.

Thus, transactions with EDSs are comparable to traditional securities . In other words, the possession and transfer of EDS to other persons is still based on the provisions of the German Civil Code. However, it should be taken into account that centralized registers may be maintained by the issuer of EDS or by a depositary authorized by it (§ 12 of the EDS Act). This provision complies with the requirements of § 3 of EU Regulation No 909/2014. Securities not included in the register are not allowed to be traded on “trading venues” within the meaning of the EU Financial Markets Directive . Consequently, regulated markets, multilateral trading facilities - MTF (Multilateral trading facility is the EU law term for “self-regulated financial trading facility”) and organized trading facilities - OTF (Organized trading facility is the EU law term for a multilateral system that is not a “regulated market”) cannot be used for blockchain. The Federal Financial Supervisory Authority controls the provision of issuance and decentralized registers as new financial services.

Under the provisions of the ESM Act, bearer bonds, mortgage bonds and certain special fund shares may now also be issued electronically. However, the law does not apply to registered and direct securities as well as warrant bonds. On the other hand, in principle all promises of performance made to bearer can be subject to ECBs. This applies, for example, to “classic bonds”, convertible bonds and “bonds with warrants”, participation certificates, warrants, investment certificates and structured bonds.

Under the ESM Law, issuers have the right to choose whether they want to issue securities in the traditional way (by issuing a certificate) or in electronic format. Under certain conditions “old” issues may also be digitized. Reversion of EDS to paper form is also possible, but only with the consent of the beneficiaries or, if this is also possible, without such consent under the terms of the issue.

The law on EDS enhances the security of technological innovation by creating legally secure solutions and improves the environment for innovation



in the financial sector. The maintenance of the register of ECBs is under the supervision of the financial market. The novelties are also compatible with European law, as the legislative changes do not affect the scope defined by European law.

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