

BaFin's Qualification of Non-Fungible Tokens (NFTs)

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What's new?

On 8 March 2023, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht - BaFin*) has, **for the first time**, published a comprehensive **Article** (available in German) on the **regulatory qualification of so-called Non-Fungible Tokens (NFTs)**. It should be noted as a positive signal that BaFin seems to follow a rather restrictive approach: Many typical NFTs are not likely to be subject to regulation. However, a case-by-case analysis is required.

What are NFTs?

NFTs are cryptographic tokens based on blockchain/distributed ledger-technology (DLT). From a technical perspective, each NFT is unique and, therefore, not exchangeable, albeit potentially tradable. The technical basis is a smart contract that identifies each token individually (based on, for example, ERC-721 or ERC-1155 token standard).

Under which circumstances are NFTs regulated as „financial instruments“?

Not the technical basis but the respective underlying contractual arrangements and the rights associated with an NFT in each individual case are decisive for the regulatory classification of NFTs. BaFin emphasizes that the designation of a DLT-based value as "NFT" says nothing about specific rights attached.

In Germany, NFTs may qualify as "financial instruments" under the German Banking Act (*Kreditwesengesetz - KWG*) or the German Investment Firm Act (*Wertpapierinstitutsgesetz - WpIG*). There are several conceivable sub-categories of financial instruments (in particular securities, investment products and crypto assets) which might be relevant.

An NFT may qualify as financial instrument in the form of an **investment product (Vermögensanlage)** if it embodies an obligation on the part of the issuer to sell a respective asset at a profit and grants the NFT-holder a right to repayment and interest.

An NFT may qualify as **crypto asset (Kryptowert)** if such NFT serves **investment purposes (Anlagezwecke)**. However, according to BaFin, an objective approach applies. The **mere circumstance that parties may speculate with an NFT**, i.e. can realize a profit via the purchase and subsequent sale, is **not sufficient** to objectively assume an investment purpose.

It is also relevant whether advertising statements are made by or on behalf of the issuer, regarding, for example, the particular suitability of the NFTs for investment purposes. NFTs that become (short-term) speculative objects rather by chance are, in contrast, unlikely to be regulated. However, a careful analysis is necessary in each individual case.

Which restrictions apply if NFTs are qualified as financial instruments?

If an NFT qualifies as a financial instrument, the mere sale or issuance by the issuer is generally not subject to authorization. However, trading activities going beyond this may require a license

pursuant to KWG or WpIG. Additional prospectus requirements may also apply to the issuance/sale of NFTs.

Insofar as NFTs are the subject of regulated financial or investment services, this also triggers the German Money Laundering Act (*Geldwäschegesetz - GwG*) and, potentially, also the Crypto Securities Transfer Regulation (*Kryptowertrtransferverordnung*).

Looking ahead

Issuers/sellers of NFT should look ahead: In the future, offering crypto assets will be regulated much more strictly throughout the EU. Pursuant to the Markets in Crypto-Assets Regulation (MiCAR), the offer of numerous tokens will also be subject to white paper publication obligations. This may also apply to NFTs in individual cases. In this regard, see our [Briefing of 28 November 2022](#).

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