



YPOG Briefing:

Draft on the Financing for the Future Act (*Zukunftsfiananzierungsgesetz*) with regard to the advancing digitalization of the capital market

Hamburg/Berlin, 13.04.2023 | Dr. Carola Rathke, Dr. Anika Patz, Thomas Tüllmann, Dr. Carsten Lösing, Dr. David John, Lennart Franke

On 13.04.2023, the German Federal Ministry of Justice (BMJ) published the draft of the "Financing for the Future Act" (*Gesetz zur Finanzierung von zukunftssichernden Investitionen – ZuFinG*). The draft aims at accelerating the digitization of the German capital market and includes amendments to capital market law as well as to company and tax law. This briefing focuses on the most practically relevant changes in financial supervisory law.

Introduction of electronic shares and crypto shares

The draft amends the Electronic Securities Act and introduces the possibility of issuing electronic shares, which are issued entirely electronically without being securitised in a deed. Electronic shares can either be issued as electronic registered shares or as electronic bearer shares. Registered shares are to be registered either in a central securities register (Sec. 12 German Electronic Securities Act – eWpG) or as so-called crypto shares in a crypto securities register (Sec. 16 eWpG). Bearer shares can only be entered into a central securities register. It will, therefore, not be possible to issue bearer shares by using crypto technology.

The introduction of crypto shares is also relevant in light of the DLT Pilot Regime (Regulation (EU) 2022/858) as they would qualify as DLT financial instruments under the DLT Pilot Regime and could be traded and settled via DLT market infrastructures.

New requirements for the protection of customer crypto assets in custody and in case of insolvency of crypto custodians

The protection of customer crypto assets held by crypto custodians will be improved. In the future, crypto custodians have to keep the crypto assets and private keys of their customers separate from the crypto assets and private keys of the crypto custodian. In the case of joint custody of customers' crypto assets in omnibus wallets, it must be ensured that the units of the individual customers can be identified at any time. These regulations anticipate already the requirements under the upcoming Markets in Crypto-assets Regulation (MiCA).

In addition, the draft stipulates that the crypto custodian shall ensure that the crypto assets and private cryptographic keys held in safe custody cannot be disposed of for the crypto custodian's own account or for the account of another person without the customer's



express consent. Therefore, staking activities of the crypto custodian, regardless whether the customer participates in any reward sharing or not, should be possible with the customer's express consent.

Furthermore, the draft provides clarity on the handling of customer crypto assets in case of insolvency of the crypto custodian. The draft states that customer crypto assets in custody of the crypto custodian belong to the customer and can therefore be segregated (*aussondern*) in case of insolvency of the crypto custodian (Sec. 47 German Insolvency Code – InsO).

Harmonization of liability for crowdfunding key investment information sheets

The current liability provision for key investment information sheets pursuant to the Securities Trading Act (WpHG) for project owners of crowdfunding projects and for crowdfunding service providers is quite strict and will be slightly reduced to be aligned with the liability provisions in the Securities Prospectus Act (WpPG) for securities information sheets (WIB) and in the Capital Investment Act (VermAnlG) for capital investment information sheets. The amendments include, among others, a change in the burden of proof in favor of the investor, as well as a limitation of liability for incorrect or missing information in the key investment information sheets. In addition, the reference to members of the management and supervisory bodies in terms of liability was removed in this context.

No additional KWG/WpIG licence required for DLT market infrastructures

It is clarified that operators of DLT market infrastructures within the meaning of Art. 2 No. 5 of the DLT Pilot Regime which have been granted a specific permission pursuant to Art. 8, 9 or 10 of the DLT Pilot Regime to operate a DLT MTF, DLT SS or DLT TSS, shall not require an additional licence pursuant to Sec. 32 KWG or Sec. 15 WpIG to the extent that the financial service provided or the banking business conducted is covered by the specific permission.

Communication in English with the German regulator BaFin

The draft also provides that communication with the German Federal Financial Supervisory Authority (BaFin), including the submission of licence applications, will be possible in English language. Although BaFin was already in recent years more and more open to communication in English language, this is finally official. This amendment will make it easier for international players to consider Germany as their home state within the EU.

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