Blockchain Year-in-Review 2020

April 26, 2021

In a year dominated by the Covid-19 pandemic, quarantines and social distance, interest in cryptocurrencies and certain types of blockchain projects (such as decentralized finance) ultimately showed resilience.

While uncertainties caused by the Covid-19 pandemic initially dampened Bitcoin and other cryptocurrency prices, Bitcoin recovered quickly. With significant price appreciation in November and December, Bitcoin (which started the year with a price below $8,000) ended the year with a price close to $29,000. Year-on-year trading volume of cryptocurrencies showed an increase of about 700%. There is also substantial evidence that Bitcoin (and perhaps some other major cryptocurrencies) are increasingly attracting the attention of institutional investors and larger financial service providers.

In this update, we have chosen a handful of jurisdictions and discussed selected regulatory and other developments in 2020. While some jurisdictions have taken steps toward implementing centralized regulatory frameworks in the blockchain space (*e.g.*, MiCA in the European Union and the Digital Financial Assets Law in Russia), the United States continues to be characterized by a patchwork of federal and state regulations.

European Union

Licensing Regime for Digital Asset Custodians in Germany

On January 1, 2020, amendments to the German Banking Act and German Payment Services Supervision Act became effective that require digital asset custodians to register with the Financial Supervisory Authority (BaFin) and obtain a license.[1] Prospective licensees who are already performing custody services were required to inform BaFin of

[1] See BaFin Guidelines on applications for authorisation for crypto custody business, available at https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Merkblatt/BA/mb_Hinweise_zum_Erlaubnisantrag_fuer_das_Kryptoverwahrgeschaeft_en.html;jsessionid=D3CB26541B188A36184160D12C87AE2A.1_cid502?nn=13732444.

their intention to apply for a license before April 1, 2020 and submit their application by November 30, 2020.

European Parliament Committee Policy Recommendations for Crypto-Assets

On April 7, 2020, the European Parliament Committee on Economic and Monetary Affairs ("ECON") published a study[2] entitled "Crypto-assets – Key developments, regulatory concerns and responses," that discusses recent developments related to digital assets, notes challenges to regulating digital assets, and proposes solutions to overcome these challenges. The report proposes modernizing the EU's 5th Anti-Money Laundering Directive ("AMLD5"), amending its financial services laws to keep pace with digital assets and increase investor protection, and introducing cybersecurity standards for intermediaries who provide custodial services. The list of policy recommendations includes:

- Working with other regulatory bodies for central bank-issued digital currency ("CBDC") research and coordinating actions regarding global stablecoins.
- Broadening the definition of virtual currency in AMLD5 to include utility and investment tokens.
- Expanding the ambit of the EU's money laundering framework to include regulating additional "crypto-gatekeepers," such as token trading platforms that exchange virtual currency for virtual currency, financial services providers, and issuers of cryptoassets.
- Establishing an EU AML watchdog.

EU Regulation on Markets in Crypto-Assets

As part of its digital finance package,[3] on September 24, 2020 the European Commission published a draft Regulation[4] on Markets in Crypto-assets ("MiCA"). MiCA is intended

---

2 European Parliament: "Crypto-assets – Key developments, regulatory concerns and responses", *available at* https://www.europarl.europa.eu/RegData/etudes/STUD/2020/648779/IPOL_STU(2020)648779_EN.pdf.

3 The digital finance package was adopted by the European Commission in September 2020 and includes (i) a communication of the European Commission on a digital finance strategy for the European Union, (ii) MiCA, (iii) a legislative proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology and (iv) a legislative proposal for an EU regulatory framework on digital operational resilience. The digital finance package aims at building a competitive EU financial sector that gives consumers access to innovative financial products, while ensuring consumer protection and financial stability.

4 Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, *available at* https://eur-lex.europa.eu/resource.html?uri=cellar:f69f89bb-fe54-11ea-b44f-01aa75ed71a1.0001.02/DOC_1&format=PDF.

to provide a comprehensive and harmonized regulatory framework for crypto-assets that do not constitute financial instruments. Crypto-assets to be covered by MiCA include, in particular, stablecoins, e-money tokens and utility tokens. MiCA aims at regulating (i) the public offering of crypto-assets, (ii) the admission of crypto-assets to trading on a trading platform, (iii) the licensing of crypto-asset service providers and (iv) the implementation of market abuse rules for crypto-assets businesses. As an EU regulation, MiCA will apply directly in all EU Member States and will not require implementation under national law.

MiCA will apply to the following three types of tokens:

- **Asset-Referenced Tokens**: crypto-assets that purport to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets. Stablecoins, however, will not constitute asset-referenced tokens, but they will fall within the catch-all category of other crypto-assets.

- **E-Money Tokens**: crypto-assets the main purpose of which is to be used as a means of exchange and that purport to maintain a stable value by referring to the value of a fiat currency that is legal tender.

- **Other Crypto-Assets (Catch-All Category)**: This catch-all category covers all crypto-assets other than asset-referenced tokens and e-money tokens. MiCA defines "crypto-assets" as digital representations of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology. This category of tokens would in particular cover stablecoins, utility tokens but also Bitcoin and other similar tokens.

MiCA will not apply if a crypto-asset constitutes:

- a financial instrument, such as a security token;

- e-money (other than an e-money token);

- deposits;

- structured deposits; or

- securitization.

If a crypto-asset constitutes one of the above instruments, it will remain subject to the EU financial markets regulations already applicable to such instruments.

Issuer Licensing and Operating Conditions

Depending on the type of token, MiCA provides for different requirements for the licensing and operation of issuers of such tokens.

In the case of issuers of asset-referenced tokens:

- the issuer must be a legal entity established in the EU;
- it must have own funds of EUR 350,000, or 2% of the average of reserve assets, if greater, or such other amount as is required by the relevant regulator; and
- it must comply with additional governance and business conduct requirements.

Credit institutions authorized under the Capital Requirements Directive ("CRD") may issue asset-referenced tokens under their existing credit institution license and do not need to obtain a MiCA license in addition. Issuers of asset-referenced tokens also need to comply with certain ongoing obligations relating to the maintenance and custody of reserve assets. The reserve must be maintained at all times, and the number of tokens and the reserves must match, *i.e.*, each creation or destruction of tokens must be reflected by a corresponding increase or decrease of reserves. The reserve assets must be segregated from the issuer's own assets and must be kept in custody with a crypto-asset service provider, if crypto-assets, or with a credit institution, if other assets.

An issuer of e-money tokens must be a legal entity established in the EU and licensed as a credit institution under the CRD or as an electronic money institution under the E-Money Directive. Issuers of e-money tokens must also comply with the operational requirements of the E-Money Directive. In addition, MiCA requires the submission and publication of a whitepaper and sets out the requirements on content and approval of such whitepapers.

No license under the CRD or the E-Money Directive will be required for issuers of small-scale offerings (up to EUR 5 million within 12 months) or offerings to qualified investors.

MiCA does not impose any licensing obligations on issuers of other crypto-assets, such as utility tokens. An issuer of such a token must be a legal entity but may be established outside the EU. But such issuers must comply with certain governance and business conduct requirements.

"Significant" Asset-Referenced Token and E-Money Token

MiCA introduces a category of "significant" asset-referenced tokens and "significant" e-money tokens. The European Commission realized that such significant tokens could

raise certain challenges in terms of financial stability, monetary policy or monetary sovereignty and therefore should be subject to more stringent requirements and enhanced supervision.

Regulation of Crypto-Asset Service Providers

MiCA will also regulate the licensing and operating requirements for providers of crypto-asset services. The requirements resemble the requirements for investment firms under MiFID II. The crypto-asset services regulated by MiCA are similar to the financial services that are subject to the EU financial services regulations and will include:

- custody and administration of crypto-assets on behalf of third parties;
- operation of a trading platform for crypto-assets;
- exchange of crypto-assets for fiat currency that is legal tender;
- exchange of crypto-assets for other crypto-assets;
- execution of orders for crypto-assets on behalf of third parties;
- placing of crypto-assets;
- reception and transmission of orders for crypto-assets on behalf of third parties; and
- providing advice on crypto-assets.

Cross-Border Implications

A license granted to an issuer of crypto-assets or a crypto-asset service provider in one EU Member State will be recognized in all EU Member States. An issuer licensed in one Member State will therefore be able to make offerings of crypto-assets or apply for admission of crypto-assets to trading in all Member States without any additional licensing requirements. Similarly, a crypto-asset service provider licensed in one EU Member State will be able to provide its services in all EU Member States.

Application to Non-EU Issuers and Service Providers

Issuers and service providers that are not established in the EU will need to comply with the licensing and operational requirements under MiCA if they actively solicit clients or potential clients or promote or advertise crypto-asset services or activities in the EU. However, MiCA, does not provide for a third-country access regime similar to that available under MiFID/MiFIR. As in the case of financial instruments, the principle of reverse solicitation with respect to crypto-assets will also apply under MiCA.

European Commission Introduces Sandbox for DLT

Also as part of its digital financial package, on September 24, 2020, the European Commission published a draft Regulation on a pilot regime for market infrastructures based on distributed ledger technology ("DLT Pilot Regime").[5] The DLT Pilot Regime is designed as a sandbox that will enable eligible market participants to operate DLT based multilateral trading facilities and securities settlement systems while being exempted from the requirements under the regulatory framework that have hindered the application of DLT in the financial instruments markets. The DLT Pilot Regime will be supplemented by the proposed directive amending a number of existing financial instruments regulations and providing for additional exemptions from such regulations for DLT based multilateral trading facilities and securities settlement systems ("DLT Amending Directive").[6]

Electronic Records to replace paper certificates for German securities transactions

On December 16, 2020, the German Federal Government proposed legislation to allow paper securities certificates to be replaced with electronic records, including through blockchain technology.[7] The new legislation, once adopted by the German Parliament, is intended to introduce all-electronic securities as part of Germany's wider blockchain strategy.

Russia

Russia, like the rest of the world, spent 2020 focused on its management of the COVID-19 pandemic. At the same time, in 2020 Russia proceeded further with formation of legislation governing issuance and circulation of digital assets—the process that started in 2019 and received acceleration due to online transfer.

Following amendments to the Russian Civil Code that introduced the definition of digital tokens ("digital rights") to the Russian law and the Crowdfunding Law that

---

5 Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructure based on distributed ledger technology, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0594.

6 Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 (COM(2020)596).

7 December 16, 2020 press release Federal Ministry of Justice and Consumer Protection German Bundesregierung treibt Digitalisierung des Finanzplatzes voran - Gesetz zur Einführung von elektronischen Wertpapieren vom Bundeskabinett beschlossen, available at https://www.bmjv.de/SharedDocs/Pressemitteilungen/DE/2020/121620_elektronischeWertpapiere.html.

stipulated their first type—utility digital rights,[8] on July 31, 2020, Federal Law No. 259-FZ on Digital Financial Assets, Digital Currency and Amendments to Certain Legislative Acts of the Russian Federation (the "DFA Law") was adopted.[9] The DFA Law completes the system of digital rights under Russian law by defining and regulating digital financial assets ("DFA") and allowing creation of hybrid digital rights combining both DFA and utility digital rights. The supervisory authority in the sphere of issue and circulation of DFAs is the Bank of Russia.

- **DFAs**. DFAs are digital rights that may include monetary claims, ability to exercise rights attaching to issuable securities, interest in the capital of a non-public joint stock company ("non-public JSC") or right to require transfer of issuable securities. Issue and recording of DFAs are carried out by means of making or amending entries in an information system, including a distributed ledger.

- **Offering and Issue of DFAs**. Only legal entities and sole proprietorships have the right to issue DFAs. DFAs are issued on the basis of a decision upon issuance that specifies the type and scope of rights represented by the issued DFAs and includes certain other information. The decision upon issuance is required to be published on the website of the entity or person issuing DFAs and on the website of the information system operator on which they are issued.

- **DFAs Circulation**. Sale and purchase of DFAs, as well as the exchange of DFAs for other DFAs or for other digital rights, including DFAs issued pursuant to foreign law or hybrid digital rights are permitted. There are no restrictions in the DFA Law in respect of persons who can purchase DFAs. However, the DFA Law specifically provides for the right of the Bank of Russia to determine that DFAs meeting certain criteria may be acquired only by qualified investors and/or may be acquired by purchasers other than qualified investors only up to an amount set forth by the Bank of Russia and/or up to an aggregate value of other DFAs transferred as consideration.[10]

---

[8] For more details on these developments please *see* Debevoise InDepth "Blockchain Year-in-Review 2019" *available at* https://www.debevoise.com/-/media/files/insights/publications/2020/04/20200427-in-depth--blockchain-yearinreview-2019.pdf.

[9] For more details on the DFA Law please *see* Debevoise Update "Russia Adopts Law on Digital Financial Assets" *available at* https://www.debevoise.com/-/media/files/insights/publications/2020/08/20200806-russia-adopts-law-on-digital-eng.pdf.

[10] Respective criteria are set forth by the Bank of Russia Directive No. 5635-U dated November 25, 2020. By way of example, only qualified investors may purchase DFAs issued pursuant to foreign law or DFAs certifying ability to exercise rights attaching to issuable securities that can be acquired only by qualified investors. The amount of annual investments into DFAs made by individuals not being qualified investors is limited to

- **Recording of DFAs**. All users of the information system in which DFAs are issued will be registered in the respective register of users maintained by the operator of such information system. A user will be considered an owner of DFAs if a user is included in such register of users of the information system, and has a unique code giving such user access to the information about the DFAs owned by such person and permitting transfer of such DFAs by means of the information system.

- **Information System Operators**. The information systems in which DFAs are issued are maintained by information system operators. Only Russian legal entities (including credit institutions, depositaries and stock exchanges) included by the Bank of Russia in the respective register may act as such operators and only after their inclusion in such register. To become registered, an entity intending to become an information system operator must adopt the rules of the information system, which must be filed together with the application for inclusion in the register.

The DFA Law contains a number of requirements both for the persons holding office with the corporate bodies of the information system operator (*e.g.*, education and work experience in the respective area, reputational requirements such as no convictions or administrative disqualifications, *etc.*), persons entitled, directly or indirectly, to dispose of 10% or more of the shares of the information system operator (*e.g.*, reputational requirements) and for the activities of the operator (*e.g.*, the operator must ensure smooth and continuous operation of the information system).

- **DFA Exchange Operator.** Any transactions with DFAs shall be made through a DFA exchange operator, which can act both as an intermediary between the parties to the transaction and as a party to the transaction for the benefit of a third party. A credit institution or a stock exchange can act as such exchange operator, as well as any Russian legal entity that meets the criteria set forth in the DFA Law, including if it has (among other qualifications) share capital of at least RUB 50 million (approx. USD 660,000) and net assets of at least RUB 50 million (approx. USD 660,000). DFA exchange operators are included into the register maintained by the Bank of Russia. To become registered, the DFA exchange operator shall adopt the DFA exchange's rules which must be filed together with the application for inclusion in the register.

  Similar to information system operators, corporate bodies and persons entitled to dispose 10% or more of shares of the DFA exchange operators will be subject to qualification and reputational requirements.

---

600 000 rubles (approx. USD 8,000). This limit does not apply to investments into certain types of DFAs, for example, DFAs certifying monetary claims with amount equal to the value of a certain precious metal.

- **Digital Shares**. Only shares in non-public JSCs can be issued in the form of DFAs, and the issue of shares in the form of DFAs can be made only upon the incorporation of a non-public JSC. Such non-public JSC will subsequently be unable to issue any issuable securities (including shares) in any form other than DFAs, convert the shares issued in the form of DFAs into ordinary shares in any form other than DFAs or become a public joint stock company. The shares of such non-public JSC will be recorded by the operator of the respective information system.

The DFA Law also provided for the basics of regulation of digital currency in Russia. Digital currency is defined as a series of digital data (digital code or reference) contained in the information system that is offered and/or can be accepted as a means of payment not constituting a monetary unit of Russia, a foreign country or an international monetary unit or a payment unit and/or as an investment. In the case of digital currency, there is no obligor liable to its holder. The absence of an obligor distinguishes digital currency from DFAs. Digital currency is not a legal means of payment in Russia, and the Russian ruble remains the only official monetary unit.

It is expected that the status of digital currency and the relations arising out of its circulation will be regulated by a separate federal law. Respective bill is under development by the Ministry of Finance, but its current drafts are heavily criticized by the business community due to heavy reporting obligations in respect of transactions with digital currency and strict liability for their breach.

The developments introduced by the DFA Law raised interest in the Russian market. For example, Sberbank has announced launch of its own digital asset that will be used as a unit of settlement and applied to the Bank of Russia for registration of its digital platform.[11] The Bank of Russia itself considers issuance and implementation of digital Ruble.[12]

Switzerland

With the permission of Eversheds Sutherland Ltd., a firm with offices in Zurich and Zug, attached here is an update on Swiss blockchain developments in 2020. The update has been prepared by Dr. Michael Mosimann, a partner of that firm.

---

[11] *See, e.g.*, https://www.forbes.ru/newsroom/finansy-i-investicii/419141-sberbank-podal-zayavku-dlya-vypuska-sobstvennoy-kriptovalyuty.

[12] *See, e.g.*, https://cbr.ru/analytics/d_ok/dig_ruble/,

United Kingdom

There has been further clarification of the UK government's approach to cryptoassets over the past year, including separate consultations by HM Treasury on cryptoasset promotions, and on the UK regulatory approach to cryptoassets and stablecoins. In addition, the Financial Conduct Authority ("FCA") made rule changes prohibiting the sale to retail clients of investment products referencing cryptoassets. The implementation in the UK of the Fifth EU Money Laundering Directive means that cryptoasset exchanges and custodian wallet providers now fall within the scope of UK anti-money laundering and counter-terrorism financing legislation.

Cryptoasset Promotions

In July 2020, HM Treasury issued a consultation on cryptoasset promotions.[13] The Treasury proposes extending the UK financial promotion rules (which require financial product marketing materials to be issued or approved by a UK authorised person) to apply to *qualifying cryptoassets*, defined as any cryptographically secured digital representation of value of contractual rights that uses a form of distributed ledger technology and which:

- is fungible;
- is transferable or confers transferable rights, or is promoted as being transferable or as conferring transferable rights;
- is not any other *controlled investment* (such as a security);
- is not electronic money (as defined by the e-money regulations); and
- is not currency issued by a central bank or other public authority.

This would include utility tokens and exchange tokens if they are both fungible and transferable, but not tokens used within a closed system.

When the rule changes come into force, marketing materials in respect of qualifying cryptoassets will need to be issued or approved by a UK authorised person in order to be distributed in the UK.

---

[13] HM Treasury, "Cryptoasset promotions", *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902891/Cryptoasset_promotions_consultation.pdf.

UK Regulatory Approach to Cryptoassets and Stablecoins

On January 7, 2021 HM Treasury issued a consultation paper on the UK regulatory approach to cryptoassets and stablecoins.[14] The UK government proposes to introduce a regulatory regime for stablecoins (referred to in the consultation as 'stable tokens') that are used as a means of payment. The regulatory regime would cover firms issuing stable tokens and firms providing services to consumers in relation to stable tokens. The government does not propose (at least in the short term) to extend the regulatory regime to other cryptoassets (such as 'utility tokens' and 'exchange tokens') that are not already within the UK regulatory perimeter. Cryptoassets already within the UK regulatory perimeter include 'security tokens' and 'e-money tokens'.

The government's stated priority is to ensure that tokens which could reliably be used for retail or wholesale transactions are subject to appropriate regulation. This would include stable tokens backed by collateral in the form of an asset or a basket of assets, such as gold or a fiat currency. It would not include 'algorithmic stablecoins', which seek to maintain a stable value though the use of algorithms to control supply, without any backing by a reference asset. The government considers that such tokens more closely resemble unbacked exchange tokens and so may not be suitable for retail or wholesale transactions. They are therefore outside the scope of the government's proposals for stable tokens.

The government's view is that regulation would apply to firms undertaking the following functions or activities:

- Issuing, creating or destroying asset-linked tokens;
- Issuing, creating or destroying single fiat-linked tokens;
- Value stabilisation and reserve management;
- Validation of transactions;
- Providing services or support to facilitate access to the network or infrastructure;
- Transmission of funds;
- Providing custody and administration of a stable coin for a third party (including storage of private keys);

---

[14] HM Treasury, "UK regulatory approach to cryptoassets and stablecoins", *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950206/HM_Treasury_Cryptoasset_and_Stablecoin_consultation.pdf.

- Executing transactions in stable tokens; and/or?
- Exchanging tokens for fiat money and vice versa.

Where stable tokens also fall within the existing e-money regime, the government's view is that the existing e-money requirements should continue to apply.

The government considers that it may be appropriate for stable token arrangements which play a similar function to existing payment systems (*i.e.* systems which enable people to make transfers of funds) to be subject to regulation by the Payment Systems Regulator ("PSR"). This may require amendments to the relevant payment systems legislation.

Due to the digital, decentralized and cross-border nature of stable tokens, the government and UK authorities are considering whether firms actively marketing stable tokens to UK consumers should be required to have a UK establishment and be authorised in the UK.

The consultation closes on 21 March 2021. The government says it will carefully consider the responses received and use these to inform a response, setting out more detail on how the proposed approach may be implemented in law (the Consultation does not include any draft legislation). The timing of any eventual legislation has not yet been determined.

FCA Prohibits the Marketing of Cryptoasset Derivatives and Cryptoasset Exchange Traded Notes to Retail Clients

On October 6, 2020, the FCA published rule prohibiting the marketing, distribution and sale of cryptoasset derivatives and cryptoasset exchange traded notes in or from the UK to a retail client.[15] The new rules came into force in the UK on January 6, 2021 and make it clear that 'marketing' includes communicating and/or approving financial promotions.

The FCA prohibition applies specifically to the marketing, distribution and sale of cryptoasset derivatives and cryptoasset exchange traded notes. Trading platforms offering cryptoassets themselves (*e.g.*, exchange tokens, utility tokens, stablecoins etc.) are not within the scope of the prohibition. However, the future changes to the financial promotion rules proposed by HM Treasury in July 2020 (*see* 'Cryptoasset Promotions' above) mean that, once the Treasury proposals are implemented (there is no indicative timetable, but the consultation paper states that the changes will be brought into effect without a transitional period), the only cryptoassets that will be

---

[15] Financial Conduct Authority, "PS20/10: Prohibiting the sale to retail clients of investment products that reference cryptoassets", *available at* https://www.fca.org.uk/publication/policy/ps20-10.pdf.

outside the UK regulatory perimeter will be non-fungible tokens (*e.g.*, digital collectables) and tokens used within a closed system. The financial promotion restriction will apply to most cryptoassets.

Anti-Money Laundering and Counter-Terrorism Financing

The Fifth EU Money laundering Directive ("5MLD")[16] entered into force on July 10, 2018 and was implemented in the UK on January 10, 2020. The relevant UK amending Regulations[17] were made on December 19, 2019. As a result of the Regulations, "providers engaged in exchange services between cryptoassets and fiat currencies" and "custodian wallet providers" are required to fulfil customer due diligence obligations, assess money laundering and terrorist financing risks they face, and report any suspicious activity they detect. They are also required to register with the relevant UK supervisor. The UK Government asked the FCA to take on the role of supervision of cryptoasset exchanges and custodian wallet providers in fulfilling their AML/CTF obligations, and the FCA assumed this role with effect from January 10, 2020.

A UK Central Bank Digital Currency

On March 12, 2020, the Bank of England issued a Discussion Paper on a potential Central Bank Digital Currency ("CBDC").[18] The Bank says it had not yet made a decision on whether to introduce CBDC, and intends to engage widely on the benefits, risks and practicalities of doing so. However, CBDC could present a number of opportunities for the way that the Bank of England achieves its objectives of maintaining monetary and financial stability. It could support a more resilient payments landscape. It also has the potential to allow households and businesses to make fast, efficient and reliable payments, and to benefit from an innovative, competitive and inclusive payment system. It could help to meet future payments needs in a digital economy by enabling the private sector to create services that support greater choice for consumers. CBDC may also provide safer payment services than new forms of privately issued money-like instruments, such as stablecoins. A domestic CBDC might also be an enabler of better cross-border payments in the future.

---

[16] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/128/EC and 2013/36/EU, *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN.

[17] The Money Laundering and Terrorist Financing (Amendment) Regulations 2019, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/860279/Money_Laundering_and_Terrorist_Financing__Amendment__Regulations_2019.pdf.

[18] Bank of England, "Discussion Paper: Central Bank Digital Currency Opportunities, challenges and design" (Mar. 2020), *available at* https://www.bankofengland.co.uk/paper/2020/central-bank-digital-currency-opportunities-challenges-and-design-discussion-paper.

The Bank says that CBDC would also introduce important policy challenges and risks that need to be carefully considered and managed. If significant deposit balances are moved from commercial banks into CBDC, it could have implications for the balance sheets of commercial banks and the Bank of England, the amount of credit provided by banks to the wider economy, and how the Bank implements monetary policy and supports financial stability.

The Discussion Paper outlines an illustrative 'platform' model of CBDC designed to enable households and businesses to make payments and store value. This is not a blueprint for CBDC; rather, it is intended to illustrate the key issues as a basis for further discussion and exploration of the opportunities and challenges that CBDC could pose for payments, the Bank's objectives for monetary and financial stability, and the wider economy.

Although CBDC is often associated with Distributed Ledger Technology ("DLT"), the Bank does not presume any CBDC must be built using DLT, and says there is no inherent reason it could not be built using more conventional centralised technology. However, DLT does include some potentially useful innovations, which may be helpful when considering the design of CBDC.

On April 19, 2021, the Bank of England and HM Treasury announced the joint creation of a Central Bank Digital Currency Taskforce to coordinate the exploration of a potential UK CBDC.

United States

Federal Regulatory Developments

CFTC Final Guidance on "Actual Delivery" of Digital Assets. On March 24, 2020, the Commodity Futures Trading Commission (the "CFTC") published final guidance on the meaning of "actual delivery" for retail transactions involving digital assets constituting virtual currency.[19] Under the Commodity Exchange Act (the "CEA"), certain retail transactions involving commodities are made subject to regulatory requirements that are typically limited to futures contracts, with an exception if the commodity that is the subject of the transaction is actually delivered within 28 days of the date of the transaction. Whereas actual delivery of physical commodities is relatively easy to determine, questions existed as to what "actual delivery" means in the context of virtual currency. The CFTC's guidance addresses this question and indicates that there are two

[19] *See* CFTC Release No. 8139-20, CFTC Issues Final Interpretive Guidance on Actual Delivery for Digital Assets (Mar. 24, 2020), *available at* https://www.cftc.gov/PressRoom/PressReleases/8139-20.

primary factors that demonstrate "actual delivery" in this context. In summary, those factors are: (1) the customer securing *both* possession and control of the entire quantity of the commodity (whether purchased on margin, or using leverage or any other financing arrangement) *and* the ability to use the entire quantity of the commodity freely in commerce (away from any particular execution venue) no later than 28 days from the date of the transaction and at all times thereafter and (2) the offeror and counterparty seller (including affiliates and those acting in concert with them) not retaining any interest in, legal right or control over any of the commodity purchased on margin, leverage or other financing arrangement at the expiration of 28 days from the date of the transaction.

OCC Guidance on Ability of National Banks to Offer Custody and Other Services for Digital Assets. On July 22, 2020, the Office of the Comptroller of the Currency (the "OCC"), published an interpretive letter confirming that national banks and federal savings associations are permitted to provide custody services for cryptocurrencies and cryptographic keys.[20] The release also indicates that such banks may provide banking services to cryptocurrency businesses so long as they manage associated risks and comply with other applicable law. Building on this theme, on September 21, 2020, the OCC published an interpretive letter indicating that national banks and federal savings associations may hold reserves on behalf of stablecoin issuers so long as the stablecoins are one-to-one fiat-backed and the bank verifies at least daily that the reserves are greater than or equal to the number of outstanding stablecoins.[21] The OCC guidance expressly declines to address whether banks may support unhosted wallet transactions involving stablecoins.[22]

FinCEN Proposes Recordkeeping, Reporting and Identity Verification Rules for Certain Transactions Involving Unhosted Wallets. On December 18, 2020, the Financial Crimes Enforcement Network ("FinCEN") published a Notice of Proposed Rulemaking (the "NPRM") imposing on banks and money services businesses certain recordkeeping, reporting and identity verification obligations in relation to convertible virtual currency and legal tender digital asset transactions involving wallets not hosted by a financial institution (*i.e.*, "unhosted wallets") or wallets hosted by financial institutions located in

---

[20] *See* OCC News Release 2020-98, Federally Chartered Banks and Thrifts May Provide Custody Services for Crypto Assets (Jul. 22, 2020), *available at* https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-98.html.

[21] *See* OCC News Release 2020-125, Federally Chartered Banks and Thrifts May Engage in Certain Stablecoin Activities (Sep. 21, 2020), *available at* https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-125.html.

[22] The OCC provided further interpretive guidance on January 4, 2021 clarifying that national banks and federal savings associations are able to connect to and participate on independent node verification networks and to use stablecoins to conduct payment activities and other bank-permissible functions. *See* OCC News Release 2021-2, Federally Chartered Banks and Thrifts May Participate in Independent Node Verification Networks and Use Stablecoins for Payment Activities (Jan. 4, 2021), *available at* https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-2.html.

certain high-risk jurisdictions.[23] Initially providing a comment period of only 15 days, the NPRM was met with considerable objections from the digital asset industry, and FinCEN subsequently extended the comment period.[24]

SEC Statement on Custody of Digital Assets by Broker-Dealers. On December 23, 2020, the SEC issued a statement setting forth its position that, for a period of five years, a broker-dealer operating under specified circumstances will not be subject to a SEC enforcement action on the basis that the broker-dealer deems itself to have obtained and maintained physical possession or control of customer fully paid and excess margin digital asset securities for purposes of the "Customer Protection Rule" (SEC Rule 15c3-3).[25] The Customer Protection Rule requires a broker-dealer to obtain promptly and thereafter maintain physical possession or control of all fully-paid and excess margin securities it carries for the account of customers. As currently set forth in the statement, the circumstances that must be met by the broker-dealer include, among other things: (1) limiting the business of the broker-dealer to digital asset securities, (2) establishing and implementing policies and procedures reasonably designed to mitigate associated risks, and (3) providing customers with certain disclosures regarding the risks of engaging in transactions involving digital asset securities.

Legislative Efforts

Several legislative proposals were introduced in Congress during the course of 2020, some favoring blockchain development efforts and others seeking to erect barriers.

In September 2020, the House of Representatives passed two pieces of blockchain-related legislation, though neither was later adopted in the Senate before the end of the legislative session. The American COMPETE Act[26] would have required the Department of Commerce and the Federal Trade Commission to study and submit reports on the state of specified technology industries, including blockchain. The Consumer Safety Technology Act[27] would have required, among other things, a study to examine how blockchain can be used to protect consumers and an assessment by the Department of Commerce as to federal regulations that require greater regulatory clarity to promote

---

23 *See* U.S. Dep't of the Treasury Press Release, The Financial Crimes Enforcement Network Proposes Rule Aimed at Closing Anti-Money Laundering Regulatory Gaps for Certain Convertible Virtual Currency and Digital Asset Transactions (Dec. 18, 2020), *available at* https://home.treasury.gov/news/press-releases/sm1216.

24 *See, e.g.*, FinCEN Release, FinCEN Extends Reopened Comment Period for Proposed Rulemaking on Certain Convertible Virtual Currency and Digital Asset Transactions (Jan. 26, 2021), *available at* https://www.fincen.gov/news/news-releases/fincen-extends-reopened-comment-period-proposed-rulemaking-certain-convertible.

25 *See* SEC Press Release No. 2020-340, SEC Issues Statement and Requests Comment Regarding the Custody of Digital Asset Securities by Special Purpose Broker-Dealers (Dec. 23, 2020), *available at* https://www.sec.gov/news/press-release/2020-340.

26 H.R. 8132, 116th Cong. (2020).

27 H.R. 8128, 116th Cong. (2020).

blockchain innovation. In addition, the Securities Clarity Act[28] was introduced in the House of Representatives in September 2020, but never received a vote prior to the end of the legislative session. This Act proposed to amend the securities laws to exclude assets underlying investment contracts from the definition of a security.

An example of legislation with a potential dampening effect on blockchain activity is the STABLE Act,[29] which was introduced in the House of Representatives in November 2020. It would have required, among other things, that stablecoin issuers be regulated depository institutions and follow banking regulations and that such issuers notify and obtain approval from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the relevant banking regulator six months prior to issuing a stablecoin. The STABLE Act did not receive a vote prior to the end of the legislative session.

State Developments on Custody of Digital Assets

In 2019, Wyoming enacted HB 74, authorizing the establishment of special purpose depository institutions ("SPDIs"). SPDIs are Wyoming-chartered state banks that receive deposits and conduct certain other incidental activities, including custody. Although SPDIs may focus on traditional assets, the legislation was enacted with a focus on promoting Wyoming-based custody solutions for digital assets. On September 16, 2020, an affiliate of Payward Inc., the operator of the Kraken cryptocurrency exchange, obtained the first Wyoming charter to operate a SPDI.[30]

Increasing Fragmentation

Over the course of 2020, the SEC and various state enforcement authorities continued to be active in bringing enforcement actions against certain market participants, including actions for fraudulent activities and unregistered initial coin offerings (ICOs).

Overall, unlike the situation in some other jurisdictions (such as the EU's adoption of MiCA), the patchwork of federal and state regulations and the relative lack of efforts at enforcement coordination has led to increasing regulatory fragmentation in the United States for blockchain projects and tokens.

* * *

Please do not hesitate to contact us with any questions.

---

28 H.R. 8378, 116th Cong. (2020).

29 H.R. 8827, 116th Cong. (2020).

30 *See, e.g.*, Jason Brett, "Cracking Landlocked Wyoming, Kraken Wins First Crypto Bank Charter In U.S. History," Forbes.com (Sep. 16, 2020), *available at* https://www.forbes.com/sites/jasonbrett/2020/09/16/cracking-landlocked-wyoming-kraken-wins-first-crypto-bank-charter-in-us-history/.

NEW YORK

Byungkwon Lim
blim@debevoise.com

Gary E. Murphy
gemurphy@debevoise.com

LONDON

Philip Orange
porange@debevoise.com

MOSCOW

Anna V. Maximenko
avmaximenko@debevoise.com

Elena Klutchareva
emklutchareva@debevoise.com

FRANKFURT

Dr. Friedrich Popp
fpopp@debevoise.com

Attachment

Switzerland – 2020 Blockchain Year in Review

Prepared by Dr. Michael Mosimann, Partner, Evershed Sutherland Ltd.

On September 25, 2020, after nearly one year following the publication of the first draft by the Federal Council, Switzerland's government, the Swiss parliament approved the Federal Act on the Amendment of the Federal Law to the Developments of the Technology of Distributed Ledgers ("DLT Act").

With the DLT Act, Switzerland decided not to follow the path of other countries like Malta or the Principality of Liechtenstein that have implemented comprehensive legal frameworks on blockchain-based tokens, but to punctually amend the existing law only. The most significant amendments implemented by the DLT Act are the following:

- **Ledger-Based Securities**. The DLT Act introduced ledger-based securities to Swiss law. Compared to traditional uncertificated securities, validly issued ledger-based securities do not require a written declaration of assignment to be transferred. A transfer of the relevant token on the distributed ledger in accordance with its rules is also a valid transfer of the security represented by the token. This finally provides certainty regarding blockchain based transfers of securities. In order to be validly issued, ledger-based securities have to be issued on a ledger that meets the following requirements: (i) it uses technical processes to give the creditor of the relevant security the power to dispose of their rights, (ii) technical and organizational measures must protect the integrity of the ledger, (iii) the content of the rights, the functioning of the ledger and the registration agreement have to be recorded in the ledger or in the linked accompanying data, and (iv) creditors must be able to view relevant information and ledger entries, and check the integrity of the ledger contents relating to themselves without intervention by a third party. The Federal Council enacted the provisions of the DLT Act on the ledger-based securities with effect as of February 1, 2021.

- **Bankruptcy**. In case of bankruptcy of a crypto asset custodian, the DLT Act ensures that crypto assets do not become part of the custodian's estate if they are directly attributable to the client and if the custodian has committed to keep the crypto assets at the client's disposal. The client can request that the bankruptcy trustee transfers these crypto assets to the client.

- **Trading Facility**. Besides these civil legal changes, the DLT Act provides for a new ledger-based trading facility specifically designated for the transfer and exchange of

ledger-based securities. Compared to traditional security trading facilities, the licensing requirements are substantially identical to the ones of traditional security trading facilities. New is that the entire trading is effected, cleared, and settled automatically via the distributed ledger. A particular feature of the new ledger-based trading facility will be that holders of ledger-based securities can trade their securities directly through the ledger-based facilities without the involvement of regulated intermediaries such as security dealers. Given that all transactions on a distributed ledger are transparent, market participants are no longer deemed to require the additional layer of protection.

The significance of the first amendment cannot be emphasized enough. Until recently, the only way to transfer ownership in securities was by executing a written declaration of assignment, which is not suitable in a completely digitalized ecosystem. The only exemption were intermediated securities which are transferred by way of crediting them in the account of the transferee. However, the issuance of intermediated securities requires that a bank or a securities firm must issue them after having taken the certificated securities into custody. This complicated and costly process has not been used to issue blockchain-based security tokens, although this would have been the only option to ensure valid transfers without written declarations of assignment. The ledger-based securities according to the DLT Act allow an issuer to issue securities that are digitally transferrable without the engagement of an intermediary.

It is noteworthy that the Federal Council did not deem it necessary to interfere with the regulatory qualification of ledger-based tokens applied by the Swiss Financial Market Supervising Authority ("FINMA") since 2018. FINMA has outlined three regulatory classes of tokens, *i.e.*, asset, payment, and utility tokens, whereby it made it clear that the distinction between the classes are not clear and that hybrid forms combining several characteristics may emerge.

- **Asset Tokens**. Asset tokens represent assets like participations in real physical underlyings, companies, or earning streams, or entitle their holder to dividends or interest payments, comparable to equities, bonds, or derivatives. Assuming they are standardized and suitable for mass trading, they would qualify as securities. Their public issuance would require a prospectus, but not per se any governmental authorization or registration. From a regulatory perspective, ledger-based securities will qualify as asset tokens.

- **Payment Tokens**. These tokens are crypto currencies and can be used as means of payment to pay for goods or services. Under Swiss law, the issuer of payment tokens qualifies as financial intermediary and must affiliate with a self-regulatory organization. In addition, the issuer must verify the identity of each purchaser of payment tokens and, if required, the source of the funds.

- **Utility Tokens**. Utility tokens give their holders digital access to an application or service provided by the issuer. They are irrelevant from a regulatory perspective.

Hybrid tokens fall in different classes and the issuer would have to comply with all regulatory requirements applying to each class.

Besides the token that is intended to be issued, the business model of the issuer could also require a regulatory authorization.

In October 2020, the Bank for International Settlements and seven central banks, among them the Swiss National Bank, published a report in which they laid down principles and core features of central bank digital currencies ("CBDC"). A year earlier, the Swiss National Bank saw no necessity to engage in the development of its own CBDC due to perceived risks associated with digital currencies. Besides that, a digitalized Swiss Franc was not deemed to be need since cash-less wire transfers work reliably, securely, and efficiently. Despite this initial reluctance, the Swiss National Bank has in the meantime developed its own CBDC and tested it in a virtual stock exchange environment. Other central banks have also engaged in the development of their own CBDCs. This is evidence enough that the race is on.