Legal Aspects of Digital Assets and Services

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JVI Webinar

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Digital Assets and Services - Benefits and Risks

- Enabling innovation & potential benefits
  - Higher speed, greater reach, transparency, lower cost, programmability…

- Must be balanced against risks to
  - Inform and justify regulatory and supervisory intervention
  - Shape objectives & scope of legal framework, mandates & powers of supervisors

- Loss of funds/trust
  - Investor/Consumer Protection

- Manipulation/information abuse
  - Market Integrity

- Currency substitution
  - MonPol Transmission

- Means of exchange
  - Functioning of payment systems

- Interconnections
  - Financial Stability

- Illicit transaction
  - Financial Integrity
# Digital Assets and Services – Types of tokens

- Multitude of tokens – multitude of functions – multitude of risks

<table>
<thead>
<tr>
<th>NFT tokens</th>
<th>Security tokens</th>
<th>Utility tokens</th>
<th>Unbacked Crypto Asset</th>
<th>Stablecoins</th>
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</thead>
<tbody>
<tr>
<td>Usually centrally issued</td>
<td>Centrally issued – Meets the definition of a security in each respective jurisdiction</td>
<td>Centrally issued – Accepted across multiple ecosystems – Transferable – Can be used as a means of exchange</td>
<td>Designed to be value stable – Stability mechanism can be backing or collateralization with a commodity, fiat currency, multiple currencies, crypto assets or algorithms</td>
<td>interaction similarities exemptions</td>
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<tr>
<td>Right to ownership of specific product</td>
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<td>Accepted across multiple ecosystems – Transferable – Can be used as a means of exchange</td>
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<td>Collectible and non-substitutable</td>
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- CBDC
  - Centrally issued by a state or central bank
  - Designed to be value stable
  - Stability mechanism is usually sovereign fiat currency

PNG icons: NFT, Security token, Utility token, Unbacked Crypto Asset, Stablecoins, CBDC
Digital Assets And Services – Legal Design

- No internationally agreed upon taxonomy/classification

- (Legal) Principles
  - Same activity, same risk, same regulation
  - Technological neutrality, proportionality, risk-based
  - Powers/tools to enforce (new/existing) laws
  - Effective and comprehensive regulation, supervision
  - Cooperation and information sharing

- Legal design questions:
  - Principle of equal treatment/non-discrimination
  - Coherence of the legal framework
  - Translation of economic substance into legal criteria:
    - One size fits all?
    - Broad vs targeted? Flexibility? Discretion?
  - What to regulate/supervise? Activity, service-provider, product…

Classification criteria
- Issuer
- Degree of (de)centralisation
- Stabilization mechanism
- Reference to a currency(ies)
- Use as a means of exchange
- Reference to rights
- Financial use, substitution
- Access to a service/product/asset
- Claim against issuer/reserves
- Redemption rights
- Interest-bearing
  - …
Digital Assets and Services – Classification & the law

Assigning crypto assets to specific legal categories is essential in order to provide legal certainty.

- Financial law classification: e.g. (tokenized) deposit, security, payment instrument or regulated types of crypto-assets will define regulatory perimeter, regulatory regime, competent supervisor etc.
- Private law classification: property, personal claims, or sui generis asset; informs, among others, modalities of transfers, custody arrangements, rights in insolvency →
- Interaction: private law informs regulatory approach: transparency rules, information obligations, minimum contractual content, marketing, statutory rights for investors/consumers (redemption, withdrawal, liability…)

Approaches
- Bespoke (new rules, eg MiCA)
- Amendments (eg CH, JP,…)
- Enforcement (US)

Mode
- Legislative
- Regulatory
- Supervisory

Objectives
Mandate(s)
Powers
Scope of application (material/personal)
Exemptions
Regulated Entities/Activities/services
Substantive obligations
Digital Assets and Services – Interaction with monetary and payment law

• Digital Assets as a form of money?
  • Unit of account
  • Store of value
  • Means of payment

• Legal concept of money wider
  • Redeemability in currency (book money or e-money)
  • Stablecoins?

• Currency: Legal tender – reserved for coins/banknotes?
  • Official means of payment in official monetary unit as recognized by monetary law
  • Sovereign monopoly to issue, cours forcé, privileges under civil/criminal law…
  • Extension to CBDC, but not to privately issued assets

• Payment instruments
  • neither currency nor money but legally used to effect payments in book money or currency

→ While stablecoins are not currency or money, they could constitute payment instruments or resemble book/e-money
Digital Assets and Services – Wrap Up

• Classification essential for
  • Legal certainty – regulatory perimeter – coherence of legislative framework
  • Allocation of competences – delineation of tasks – mandates – powers

• Alignment with monetary law
  • Preservation of “singleness of money“
  • Role of sovereign to issue and control currency – also in digital format

• Private law considerations need to inform regulation
  • Investor protection: eg segregation or safekeeping rules
  • Crypto-asset services: information, transparency, contractual obligations

• Legal framework will in turn shape market practice
  • Standardization & adequate labelling & convergence
  • Singling-out of illicit actors → credibility & trust

→ How to do it in practice? What taxonomy under which design?