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- **BLOCKCHAIN AND DECENTRALISED  
FINANCE**
- **MAJOR LEGAL IMPLICATIONS**

# BLOCKCHAIN AND GENERAL LAW: SOME ISSUES

- Substance and/or form (a classical dilemma!)
- Technological neutrality (is it true?)
- “if something **looks like an ETF** and operates **like an ETF**, the law says it should be regulated **like an ETF**” (SEC – Jay Clayton)





MAJOR QUESTIONS

- *which* laws apply
- *how* they apply
- *how* they are enforced



**MAIN AREAS ON  
THE TABLE - OPEN  
TO DISCUSSION**

- Digital assets
- Blockchain and DLT
- Smart contracts



- Tokenized asset:
  
- the process of “tokenization” should not change (in principle) the applicable regime
  - Tokenized Security
  - Tokenization of real estate, art, precious metals, other goods or services...
  
- IS THIS TRUE???



- 3-type classification
  - **Utility** token: access to a service or asset, or platform
  - **Payment** or exchange token: is it 'money'?
  - **Security** token or investment token: security/financial product?
- + **Hybrid** token: hierarchy or cumulative (Switzerland)?





- **CASE I : TOKENS TRADED ON SECONDARY MARKETS / COMMODITY FUTURES?**
- **CASE II : DIGITALIZED ASSETS AS FINANCIAL PRODUCTS?**





- **Public law**
  - Securities law
  - Banking law
  - Data protection law
  - Criminal law
  - Tax law
  - AML
  
- **Private law**
  - Contract law
  - Property law
  - Family law (assets in case of inheritance)
  - Company Law





- International law
  - Private international law (which law, which court)
  - Public international law (international sanctions) – actually not very relevant



- **Securities laws**
  - *US 1946 Howey Test*
    - Investment contract = an investment of money, in a common enterprise, with a reasonable expectation of profits, to be derived from the efforts of others.
  - EU MiFID II – **financial instrument**, includes transferable securities
    - Prospectus Regulation, Market Abuse Regulation, Short Selling Regulation, Transparency Directive,
  - NATIONAL LAW – “**FINANCIAL PRODUCT**” **BROADER THAN FINANCIAL INSTRUMENT**
    - ITALY, Belgium, other countries – similar to the Howey Test



**FOCUS:  
DIGITAL ASSETS —  
BANKING AND PAYMENT  
LAWS — MAIN ISSUES**

- **Banking & payment laws**
  - **EBA: EMD2 and PSD2 could apply.**
  - **Even if not:**
    - **(i) domestic laws may apply;**
    - **(ii) other EU rules may apply (e.g., risk management).**
- **Capital requirements (Basel regime), AML, KYC, etc.**
- **Central Banks and Cryptocurrencies: the current debate**



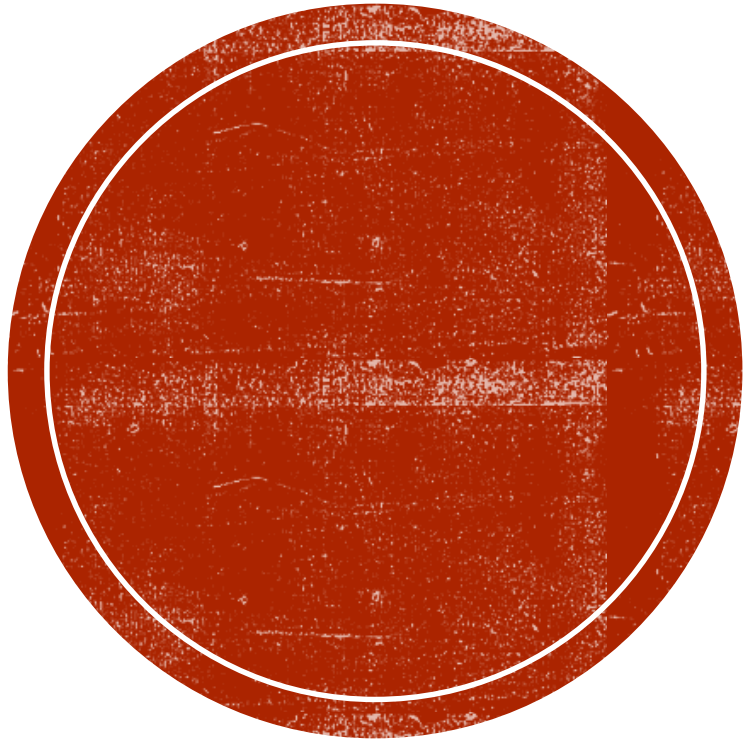
- Anti-Money Laundering Legislation
- EU 5AMLD – 1 January 2020
  - AML rules apply to fiat-to-crypto exchanges and custodial wallet providers
  - NOT crypto-to-crypto exchanges
  - NOT ICOs as such (although both EBA and ESMA urged to cover both)
- Financial Action Task Force (FATF)
  - Recommends AML to cover also crypto-to-crypto and non-custodian wallets



**MAJOR LEGAL ISSUES**  
— **DIGITAL ASSETS**

- Other issues, including private law issues, such as:
  - Contract law
  - Property law:
    - are digital assets “property” ?





- Some implications...
  - Bankruptcy law
  - Family law: what happens to DeFi assets in inheritance or divorce proceedings?
  - Payment or “datio in solutum”?
  - Barter or payment?
  - Bona fide purchasers’ protection?



- **International law**
  - **Private international law**
    - **For cross-border transactions, applicable laws and competent Courts**
  
    - **Rome I Regulation (Applicable law)**
    - **Brussels I Regulation (Courts)**
    - **How to decide ? Finding a link....**
    - **If no choice of law :**
      - **identification of default provisions**
  
  - **Tort: place of residence or business of victim**



MAJOR LEGAL ISSUES  
— BLOCKCHAIN AND  
DLT

- **Data protection: GDPR**
  - Personal (=identifiable) data: irreversibly anonymized?
  - Processor and controller
  - EU Forum report
  - Non-EU, e.g.: South Korea's KCC fined local cryptoasset exchanges for insufficiently protecting users' personal data



**MAJOR LEGAL ISSUES**  
— **BLOCKCHAIN**  
**AND DLT**

- **Competition law**
  - Data visibility on DLT platforms
  - Agreements that restrict competition /cartels on Platforms (e.g. sharing information with competitors)
  - Abuse of dominant position if 50% market share (market=?)



MAJOR LEGAL ISSUES  
— BLOCKCHAIN AND  
DLT

- **Liability** of those involved in the blockchain (miners, developers, partnerships - unlimited liability, organizations)
  - Problem: we think of liability in terms of “an” entity
  - Very few laws explicitly regulate the issue:
  - Bermuda: Digital Asset Business Act, 2018 excludes miners and developers
  - Decentralisation is not sufficient to exclude liability of those involved.
  - However, enforcement may be different because of decentralization (e.g. miners)





**MAJOR LEGAL ISSUES**  
— **SMART**  
**CONTRACTS**

- **Some examples:**
- **Interpretation**
  - **Meaning to be gathered from communities, blogs, forums, ?**
- **Liability of coders**
- **Contract law: capacity; will; signature; error/mistake; fraud, etc.**
- **Again: applicable law and Courts**



- **OPTION A - Let's apply existing laws**
  - MiFID II
  - Other EU capital markets laws
  - Banking legislation
  - Data Protection
  - The so-called "sandboxes"



- **OPTION B -  
Adaptation of existing  
laws**
- 5AMLD: Crypto  
assets are added to the  
existing regime



## REGULATORY APPROACHES

- **OPTION C – SPECIAL, NEW LEGISLATION**
  - Malta - *Virtual Financial Assets Act*
  - Abu Dhabi - *Spot Crypto Asset Market*
  - San Marino – Special legislation
- In the EU: under discussion, does not seem to be close...



**SOME FOOD FOR  
THOUGHT**

- Decentralisation = absence of rules (NO)
- Decentralisation = difficulties in applying existing legislation
- Decentralisation = future legislation always necessary ? (NO)
- Opportunity for sandboxes?
- Need for special legislation = a case for “marketing the marketplace” or a true need?
- Exemptions/de minimis etc. likely to be useful