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DIGITAL AND BLOCKCHAIN-BASED LEGAL REGIMES: AN EEA CASE STUDY BASED ON INNOVATIVE LEGISLATIONS – COMPARISON OF FRENCH AND LIECHTENSTEIN DOMESTIC REGULATIONS

Abstract

The financial crisis of 2007/08 had shattered the global financial system and led – besides a flood of regulations – to a wide range of new concepts and business models. One of these new concepts was “Bitcoin”, a private digital monetary system, which is characterized by decentralization, transparency and immutability. To date the underlying Blockchain or Distributed Ledger Technology (DLT) has evolved and offers an extensive range of possibilities, particularly in the financial industry. So far, an EU-wide legal basis for Blockchain or DLT applications and services is missing. France and the Principality of Liechtenstein took a step forward and adopted national laws trying to offer legal certainty in this field. This article aims to provide a comparison of the two acts and underline the similarities and differences.

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1. Introduction

The financial industry sector has changed drastically over the past decade. In particular, the financial crisis of 2007/08, which had triggered a shock wave throughout the global markets, reveals its consequences to date. Legislators all over the world tried to rebuild and foster trust and customer protection, as well as the protection of the integrity of the financial markets, by a rising tide of regulations. This holds also true for the European Union, which enacted numerous EU-laws and established new authorities to prevent or even mitigate future crisis with systemic dimension like the financial crisis of 2007/08.

But not only the legislators reacted. The consequences of the crisis were also the engendering of new concepts and business models. One of these new concepts was “Bitcoin”, a private digital monetary system, which is based on blockchain technology. Blockchain technology is characterized by decentralization, transparency and immutability, provided by the fact that this technology is based on mathematical procedures, e.g. cryptography, and predetermined rules. In effect, this means immutable records of data (“information”) managed by a cluster of computers not owned by any single entity and without a central authority. This new technology has entailed other changes in the field of the financial regulation and financial services in Europe and more broadly in the law implementation process itself, as most European legislations assume a centralized system of law (and are based on such assumption) – and therefore on the “hyper-centralization” of the financial entities themselves. On the opposite, the blockchain technology assumes a form of decentralization which creates numerous regulatory challenges (e.g., anti-money laundering, reporting, etc.).

Over the past years both the blockchain or Distributed Ledger Technology (DLT) and the applications enhanced. It’s not only about cryptocurrencies anymore, rather than a wide range of possibilities to use the technology, e.g. offering financial services, financing companies or projects, or use it in the field of logistics, mobility, industry and many more [Hofert 2018:25-34]. Such extension has been a remarkable trend of banking and financial law over the last decades as reflected notably by Directive 2014/65/UE of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments (as amended) (“MiFID II”), Regulation 648/2012 of the European Parliament and of the

Council of 4 July 2012 on OTC Derivatives, central counterparties and trade repositories (as amended) ("EMIR") and Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services (as amended) ("PSD II").

In any case and so far, an EU-wide legal basis for blockchain or DLT applications and services is missing. However, a draft regulation of the European Parliament and of the Council on Markets in Crypto-assets ("MiCA") has been issued in September 2020 and notably provides for certain licensing / authorisation requirements prior to the provision of certain services on crypto-assets in the EU / EEA as well as passporting rights (subject to certain conditions to be met). Doubtless, the rapid development of the technology is one of the reasons for the lack of legal certainty on an EU-wide level, considering the fact that by the time a harmonized framework is enacted, it might become obsolete due to new developments. This situation creates a day-to-day challenge for regulators and market players.

Such proposal follows various efforts in Europe notably of the European Commission (EC) under the EU Blockchain Observatory and Forum and various partnerships, e.g. the European Blockchain Partnership or the International Association for Trusted Blockchain Applications (INATBA). Further, an initiative of the European Parliament to bring ICOs into the scope of the EU-wide crowdfunding regulation [COM (2018) 113 final] failed. Solely the 5th Anti-Money-Laundering Directive ("AMDL 5"), which had to be implemented by the Member States by 10th of January 2020, aimed at submitting exchange virtual currencies platforms (cryptocurrency exchanges) and providers of electronic wallets, for virtual currencies such as Bitcoin, Ether or Ripple, to such framework which provided a regulatory recognition to these new Fintech and market players. In accordance with this new set of regulations, these providers are now obliged to register.

Having said that, pending the implementation of the MiCA regulation (or of any comprehensive EU / EEA legislative and regulatory framework in this area), it is currently up to the national legislator to determine a specific legal framework or not. Liechtenstein is – like France – required to comply with codified EU/ EEA law, e.g. European Capital Markets Law, and by virtue of the principle of subsidiary of the EEA-Agreement only allowed to set regulatory standards itself for sectors who haven't been harmonized (yet). For the area of **services** provided via decentralized networks, the EU legislator has, apart from the applicable regulatory framework for financial markets and services and the AMLD 5, so far failed to adopt harmonized regulations. A missing framework though leads to legal uncertainty for both, businesses and customers. France and the Principality of Liechtenstein took on the task and adopted national laws trying to put a step forward

when it comes to legal certainty in the field of blockchain respectively Distributed Ledger Technology. The example of these two jurisdictions offer a fruitful case study for the European Union (and more particularly the European Commission), the national legislators, the authorities and academics, as being a rare example of innovative legislations converging to the blockchain and fintech area whilst promoting frameworks under slightly different approaches.

In the following the two acts are examined for their similarities and differences as well as the similarities and discreteness with the EU MiCA regime.

2. Sources of law and regulation

The French PACTE law [2019] (action plan for business growth and transformation) (the “PACTE Law”), which came into force on May 24th 2019, provides an innovative regime applicable to a new investment product and concept: the digital asset, defined by article L. 54-10-1 of the French monetary and financial code (*Code monétaire et financier*) (the “French Financial Code”). This law has been inspired by various working groups many of them with the support of the French authorities.

Motivated by the great potential for the economy, Liechtenstein designed a “technologically neutral” legal framework with an all-encompassing approach to address all aspects of tokenization, while on the other hand EU law remains unaffected. The Liechtenstein Token and TT Service Provider Act (TVTG) [2019], also called the “**Blockchain Act**” (Token and TT Service Provider Act) came into force on January 1st 2020 and provides a legal framework for TT Service Providers domiciled in Liechtenstein. Similar to the French law, the Blockchain Act is the achievement of more than three years of intensive work by the government and experts from a wide variety of fields (supervision, science and practice).

3. The concept of blockchain and digital assets

3.1. Token and the Liechtenstein Token Container Model

A token pursues the goal of enabling or facilitating the circulation and tradability of different rights. Functionally, this is very similar to securities and book-entry securities, which also serve the purpose of enabling the marketability of rights. A classification, as discussed in other legal systems or as it has already been partly done in banking and financial market law, has been deliberately avoided by the Liechtenstein legislator as a too

narrowly defined classification would lead to (new) discussions and thus to legal uncertainty. This is quite understandable due to the different manifestations of tokens and the uncertainty about further developments.

Token are defined as *“a piece of information on a TT system that:*

- 1. may represent rights of claim of membership against a person, rights in property or other absolute or relative rights, and*
- 2. is assigned to one or more TT identifiers”* [Liechtenstein Blockchain Act 2019: Art. 2 (1) c] by the Blockchain Act.

With other words, a token is the digital image of ownership-, membership-, entitlement-, use-, claim- or other rights to assets and economic goods and is not limited to banking and financial assets. Any right to stocks, bonds, gold and other precious metals, real estate, art (collections), patents, etc. can be tokenized. According to this understanding, the token issuers are granted great freedom of design.

To cover all aspects of tokenization, including the different functions of tokens like legitimization, liberation and transportation, and at the same time, define the term “token” technologically neutral, the Blockchain Act created the “Token Container Model” (TCM).

Within the new framework, a token serves as a container, which has the ability to hold basically any right or even be “empty” in cases when the token represents e.g. a digital code like Bitcoin. By that pre-existing rights that are being tokenized and rights to digital information that is based on a TT system are covered by the Blockchain Act¹. Any transfer of a token on a TT system constitutes a binding transfer of the represented right, whether it is a pre-existing right or the right to digital information.

To assure that the (physical) right represented by the token is actually enforceable and that items hold by the token actually exist, a new role was created: The “Physical Validator” [Liechtenstein Blockchain Act 2019: Art. 2 (1) p. 3], a trusted third party in the middle of the contracting parties who confirms that the tokenized right represented online exists and the person who claims to possess the right offline is the lawful owner.

In respect of the Token Container Modell, and by way of a comparison between the two legislations, it is questionable whether “empty” tokens (within the meaning set forth above) could be issued as a matter of French law under the PACTE Law and how “empty” tokens issued under an EU or an EEA legislation (such as in accordance with the Liechtenstein

¹ National civil law therefore had to be adapted as it was not readily applicable to the transmission of tokens in the digital space and prompted the legislator to define its own digital transmission rules for tokens.

Blockchain Act) could be characterized as a matter of French law notably for the purposes of being assigned / transferred under securitization of future projects programs.

Currently, the plans of the European Commission for an EU regulatory framework for crypto-assets address both: crypto-assets that are covered by EU rules by virtue of qualifying as financial instruments under MiFID II or as e-money under EMD 2, and other crypto-assets not covered by EU rules. The definition of the term “crypto-assets” in the draft regulation is broad and similar to the Blockchain Act: “(...) *a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*” [COM/2020/593 final : Art. 3 (1)]. For crypto-assets not covered by EU rules a “*proportionate common regulatory approach at EU level*” [EC Consultation on an EU framework for markets in crypto-assets 2009, 4] is considered.

3.2. Distinction between blockchain (DLT) recorded assets and other legal concepts

3.3.1. Electronic money and payment instruments

It is questionable whether the definition of electronic money (“e-money”) under the Electronic money directive (EMD) [Directive 2009/110/EEC] encompasses money “stored” on a blockchain. In the 2019 Report on crypto assets, EBA confirmed that crypto-asset with specific characteristics may qualify as “e-money” and would therefore be in the scope of the EMD [EBA Report on crypto-assets, 2019]. As a result, PACTE Law and EMD provisions could both apply (European law prevailing in general over domestic legislation).

The same holds true for Liechtenstein. The Blockchain Act has to be seen as a supplement to the existing legal regulations, especially in the field of banking- and financial markets rules. If a token qualifies as e-money, the corresponding special rules of the EMD (implanted in Liechtenstein in the Electronic Money Act 2011) take precedence over the Blockchain Act. Nevertheless, the national rules of the Blockchain Act regulating professional activities in the area of DLT applications and services still apply and TT service providers must be registered with the FMA (Financial Markets Authority Liechtenstein) [Report and Application of the Blockchain Act 2019: Nr 54/2019, 121] .

This situation may lead to confusion in both jurisdictions and stresses the importance of a EU/ EEA Legislation on blockchain containing clear precedence rules. In this respect, MiCA provides that issuers of e-money tokens (within the meaning of such proposal) should be authorized as e-money issuers (often described as issuers of “stablecoins”) under EMD (*i.e.*, as credit institution or electronic money institution) and be subject to additional

requirements notably set forth in articles 37 *et seq.* of MiCA. Article 37 provides in this respect that e-money tokens are deemed to be electronic money. This may, in practice, require legal analysis under the laws of each jurisdiction taking into account the e-money criteria under EMD.

3.3.2. Financial instruments

The French PACTE Law expressly excludes the financial instruments from the definition of digital assets. This is the approach taken by the MiCA proposal in accordance with its article 2(2) (a). However, given the broad definition of derivative contracts (or financial contracts) within the meaning of MiFID II [Directive 2014/65/EU] (as implemented into French law in the French Financial Code), in certain situations, it is questionable whether the underlying of such contract can be a digital asset itself (though not constituting, as a result, a digital asset within the meaning of PACTE Law). In 2018, the AMF clarified that "a derivative whose underlying asset is a crypto-asset and which closes out by a payment in cash is deemed a financial contract". Conversely, digital asset assets may reference a financial instrument and constitute, as set forth in the MiCA proposal, "asset-referenced tokens" and be notably subject to certain segregation requirements under its article 21(4).

As mentioned above, the Blockchain Act has a very broad understanding of the term "token", which can represent any physical or digital right. Therefore, the token (or token container) may also hold a financial instrument within the meaning of MiFID II, with all the rules, licenses, duties, etc. applying to it. Whoever owns the token can transfer it, manage it in a portfolio or can have it held by a depositary. To ensure the inclusion of financial instruments based on DLT, the European Commission proposes a clarification of the current definition of "financial instruments" of MiFID II.

It is also important that rules related to collateral on digital assets, and notably Directive 2002/47/EC of 6 June 2002 (as implemented into French and Liechtenstein, law, respectively) are amended to determine conditions for eligibility of digital assets in the scope of financial collateral arrangements (and/or rights on custodian of such assets).

4. Conflict of law related to the Blockchain

4.1. PACTE Law

MiCA does not provide for specific conflict of law rule which would therefore pertain to domestic private international laws.

In this respect, French law does not expressly provide for the time being any conflict of law rule neither related to the recording of unlisted securities on a blockchain, nor on any transfer of assets through blockchain. Unfortunately, the opportunity has been missed because the French original text of the ordinance provided, in line with other legislations related to moveable and electronic assets, that the French law on blockchain was triggered when the issuer of the securities (or shares or equities of fund) recorded on a blockchain is incorporated in France, or when the issue of such securities (or shares or equities of funds) is governed by French Law.

As a result, general principles arising from French private international law should be relevant – although they may not fit to DLT's specificities – to determine the law applicable *inter alia* to : (i) the issue of tokens and digital assets whether or not such assets are recorded on stored on a blockchain; (ii) the rights over digital assets transferred through a blockchain; and (iii) in rem rights over such assets (though requiring to confirm whether such assets may be subject to the EU Collateral Directive and if specific conflict of law rules should apply when assets are subject to those specific collateral rules). The abovementioned Study on Blockchain (*Legal, governance and interoperability aspects*) of the European Commission has outlined the importance of clear conflict of law rules and the difficulty to apply the Rome I Regulation in the context of “abstract” relationships based on an electronic technology where tokens (or digital assets) are by themselves difficult to “locate” (as well as rights and obligations hereunder).

4.2. Blockchain Act

Under the Blockchain Act and its concept of the Token Container Model, any right (*e.g.* real assets, listed and unlisted securities, even rights with respect to the token itself in terms of *e.g.* derivatives) can be represented in a Token Container. In the legislative process, questions were raised concerning a legal concept for book-entry systems in regard of securities. Since its original version from 1926, the Liechtenstein Persons and Companies Act (PCA) was highly influenced by the idea of linking a right with a physical information carrier (certificate) [Liechtenstein Persons and Company Act 1926 : § 73. para 1]. But despite the need for a physical information carrier, digital value chains had been created already in the past and physical securities certificates have long since lost their original meaning. Even more, the obligation to securitize a right in a physical document has long been outdated and is proving more than ever to be an obstacle to the digitization of the economy. Therefore, it was only logical to dispense with them altogether and replace them

with a digital register-based information carrier [Liechtenstein Amendment of Property Law Act 2016].

To ensure legal certainty and avoidance of conflicting law, Liechtenstein amended, among others, its Persons and Companies Act and the Trade Act to take account of the special blockchain and DLT characteristics.

It drew a clear line between the aspects regarding civil law and regulatory respectively supervisory law and created a solid foundation for the future. However, Liechtenstein is breaking new ground in civil and regulatory/supervisory law and the further development of the token economy will reveal any legal ambiguities.

The legal effect of the transfer of a token has to be based on the underlying legal transaction and it depends on the design in each individual case. The Blockchain Act imposes on the token producer the obligation to ensure by appropriate measures that the disposal of the represented right is effected and that competing disposals are excluded. It is therefore a central duty of the token producer to check the business model - the token to be generated - to see whether the represented rights can actually be transferred with legal effect by means of DLT [Layr, Marxer 2019: 11 (17)].

Nevertheless, it is important to bear in mind, that the Blockchain Act only regulates the right of disposal of the token and its transfer. The effect of a transfer of a token on the legal responsibility regarding the rights represented are only in the scope of Liechtenstein law to the extent that they are subject to Liechtenstein law under the rules of private international law (IPRG). Thus, depending on the (legal) nature of the represented right, different conflict-of-law rules apply (e.g. moveable property is only subject to Liechtenstein law if it is located in Liechtenstein at the time of the order) [Report and Application of the Blockchain Act 2019: Nr 54/2019, 69]. To ensure legal certainty, these rules are also applicable to “empty” tokens.

5. Which relates services are regulated?

5.1. Source - PACTE Law

Article D. 54-10-1.- 1° of the French Financial Code, as amended by French Decree No. 2019-1213 of 21 November 2019 related to digital assets services providers, defines and details each of the services entering into the scope of such services providers. The list of regulated services on digital assets is limited (although certain of such services is defined quite broadly).

5.2. Source - Blockchain Act

A major part of the Blockchain Act contains more detailed requirements for the provision of services on TT systems, the transaction systems which ensure the secure transmission and retention of tokens by use of trusted technologies (TT) in Liechtenstein. All these new business models revolve around tokens and the assurance of the integrity of tokens, association with their TT identifier (private and public key) and the user's disposal of tokens on TT systems. In concrete terms, the Blockchain Act puts forth new TT service providers [Liechtenstein Blockchain Act 2019 : Art. 2 (1) d,k-t], each with a special role and various requirements.

Some of the new service providers need not only a registration with the Financial Markets Authority (FMA), but also a license to operate.

This approach, focusing on the technological role of the relevant parties, has not been chosen so far by the French legislator in the "PACTE" Law. We though believe that should a European Blockchain framework be drafted, a combination of both approaches (i.e., in terms of types of services and taking into account in detail the role of each provider in the tokenization / digital asset issuance itself) could ideally be considered, i.e. both financial / banking services and technological services could trigger the application of the European framework. More specifically, a role such as the one vested to TT Identity Service Provider or the TT Verifying Authority in the Blockchain Act should be critical to determine the content of the obligations of the parties in the context of a blockchain under the anti-money laundering regulation. The same comment would apply, for instance, and *mutatis mutandis*, to the TT Price Service Provider as regards the market abuse regulation.

5.3. No EU/ EEA passport regime available (domestic regime)

Due to the status of France as an EU-member and Liechtenstein as an EEA-member, compliance with codified EU/EEA law is required. These base line regulations build a floor that both, the French and the Liechtenstein legislator, were able to build on. None of digital assets services set forth in the PACTE Law and none of the TT services and service providers in the Blockchain Act benefit from the EU / EEA passport mechanism and therefore, such businesses cannot extend automatically in other EU / EEA jurisdictions unless specifically approved in such jurisdictions (as the case may be) and not prohibited herein (or unless complying with applicable local conditions, as the case may be), pending (and ongoing) EU / EEA legislation related to such assets, subject to the issue referred to

above, casting unclarity at the moment, of the frontier between digital assets and regulated services subject to passporting rights notably under EMD 2 and PSD 2.

However, article 53 and 58 of MiCA provides for a passport of crypto-assets services providers (subject to specific conditions herein). Service providers, authorized and registered under national law (e.g. PACTE Law or Blockchain Act) at the time of entry into force of MiCA may benefit from the transitional measures introduced by Art. 123 MiCA. EEA member States, such as France or Liechtenstein, may apply a simplified procedure for applications for an authorization for these service providers.

5.4. Mandatory / optional registration of services (PACTE Law)

French law provides a closed list of services, obviously inspired by MiFID II, and which are, depending on their characteristics, subject either to a mandatory authorization (e.g. custody / safe-keeping, purchase of digital asset against legal tender) or an optional registration with the French market authority (e.g. reception and transmission of orders and execution of orders, portfolio management on digital assets, etc.).

It is indeed critical that custody of digital assets entails mandatory licensing as digital assets services providers (“DASPs”) given that any lost or corruption of “keys” could affect the very rights of the holder over such assets (whereas, by comparison, it is worth noting that seakeeping / custody of financial instruments is a “mere” MiFID II ancillary investment service). In the same vein, the exchange of a digital asset against legal tender has a monetary impact.

DASPs are further subject to organizational, conflict of interests and good conduct rules as well as capital and segregation requirements.

5.5. Registration requirements for TT service providers

Pursuant to Art 12 any person or entity who has a registered office or place of residence in Liechtenstein and who wishes to provide services as Token Issuer, Token Generator, TT Key Depositary or TT Token Depositary, TT Protector, Physical Validator, TT Exchange Service Provider, TT Verifying Authority, TT Price Service Provider or TT Identity Service Provider professionally in Liechtenstein via a TT system must register with the Liechtenstein FMA before commencing business. This also applies regardless of whether another license has already been granted by the FMA, e.g. a banking license. A registration for several services is possible.

A registration under the Blockchain Act is effective exclusively in Liechtenstein. For cross-border operations this means that any licensing obligations and legal requirements must be clarified independently with the country concerned.

The Blockchain Act has several requirements for TT service providers. They need have a personally and professionally qualified management that is of good repute as well as an appropriate minimum capital and need to meet certain organizational requirements. TT service providers are supervised by the FMA Liechtenstein as of registration and entry into the TT Service Provider Register (Art. 23). The fact, that the authority does not exercise permanent system supervision as it does for other financial intermediaries like banks, led to discussions in advance. Nevertheless, the FMA only intervenes in the event of irregularities of which it has become aware.

TT service providers are not only subject to the rules of conduct set out by the Blockchain Act itself. Depending on their business model, they have to observe various standards of other regimes in parallel, such as company law, EEA financial market law or EEA data protection law. A corresponding clarification of this legal consequence in the Act was not considered necessary and was obviously taken for granted [Raschauer, Silbernagl, 2020: 11(16)].

As outlined above, the approach of the French and Liechtenstein legislators has therefore been different as regards the classification of services triggering mandatory requirements: on the one hand, the approach followed by French law seems clearly to have been inspired by more “traditional” services regulations notably under MiFID II i.e., by reasoning in terms of content of services provided under the traditional banking or financial “taxonomy” where such orientation seems to have guided AMLD 5 as regards crypto assets. This approach seems to prevail in MiCA. On the other hand, the approach of the Blockchain Act in Liechtenstein is more based on the separation of law (meaning the right and the asset on the one side) and the technology (meaning the token technically displayed on a DLT system on the other side). As outlined above, the two approaches could be ideally “mixed” or “combined” in the (future) European Blockchain framework.

Consistent with MiCA, the PACTE Law aims at providing protection to investors (customers and users) in digital assets. Professional service providers on TT-systems as well as the French and Liechtenstein financial centres also need protection, e.g. in regard of securing confidence in digital legal transactions or the protection against money laundering and terrorist financing. This concept is also central to other economic and financial market laws and is based on the fact that users are structurally inferior to service

providers, as they may be disadvantaged due to lower expertise, information, resources and/or experience. To achieve this protection on different levels, it is of great importance to ensure a minimum quality level of TT service providers.

Also, token issuers have to publish “basic information” [Liechtenstein Blockchain Act 2019: Art.2. (2)h , 30 and subsequent] on tokens which are offered publicly, to enable user to assess the rights and risks associated with the tokens and the TT service providers involved, which can be compared to the requirements of the Prospectus Law. This information has to be accessible in an easy manner; the FMA has to be notified of the token issue.

6. Sanctions

French law provides for criminal law sanctions in case of infringement of certain rules related to tokens and digital assets as regards the services referred to above which entail mandatory registration requirements (as well as ICOs giving notably rise to public offer and solicitation or marketing in France) as opposed to the services which merely trigger an optional registration. Disciplinary sanctions for DASPs may also arise.

In Liechtenstein, administrative penalties and criminal law sanctions may be imposed. While the Financial Market Authority has the power to impose administrative penalties up to 100 000 Swiss francs if a VT service provider does not meet the requirements (e.g. if it fails to comply with the minimum capital requirements, internal control mechanism or violates the reporting obligations) [Liechtenstein Blockchain Act 2019: Art. 47.2]. The regional court (*Landgericht*) on the other hand may punish offences with fines or even imprisonment of up to one year if *inter alia* a registration as a VT service provider based on false information or by other unlawful means was obtained or a VT service provider systematically and seriously infringed its legal obligations [Liechtenstein Blockchain Act 2019: Art. 47.1].

Articles 85 *et seq.* of MiCA provide for a set of administrative sanctions (e.g. fines and other measures in case of infringement of certain requirements).

7. Investing in digital assets

Pursuant to the conditions set forth in the PACTE Law, investment in a digital asset may be made either directly by an investor to an issuer; by subscribing units or shares of an

investment fund; or, where appropriate, by concluding financial contracts (i.e., derivative contracts) exposed to such assets (or their value).

As stated above, the Liechtenstein Blockchain Act intends to provide clarity and legal certainty for TT systems, TT services providers as well as users, regardless of the types of tokens they include. Nevertheless, a lot of these new blockchain- and DLT-based applications and business models are close to the financial market. Though the Blockchain Act does neither include new rules nor change existing rules regarding activities in the financial market, questions arise specifically in the context of the applicability of financial markets law with regard to tokens. In Liechtenstein, particularly the Asset Management Act (implementing MiFID II), the UCITS Act (implementing the UCITSD) and the AIFM Act (implementing the AIFMD) may be relevant when it comes to investing in digital assets. With other words, while the Blockchain Act provides a legal framework for token-based applications, these special legal regulations must be complied with, if the activities fall within the scope of financial markets laws.

7.1. Funds investing in digital assets

The PACTE Law entitles professional specialized investment funds (*fonds professionnels spécialisés*, FPS) and professional private equity funds (*fonds professionnels de capital-investissement*, FPCI) to invest in digital assets, subject to specific conditions and limits set forth in the regulation. Subject to certain conditions to be met, life insurance contracts may be exposed to such assets.

In Liechtenstein, the first “Crypto Fund” was approved by the Financial Market Authority (FMA) in early 2018 and was, regarding to reports the world's first regulated investment fund to invest in cryptocurrencies structured under the European Alternative Investment Fund Manager Directive (AIFMD) [PWC, Liechtenstein plays a pioneering role in government regulation of the crypto-financial market]. The fact, that the Fund was released way before the Blockchain Act was enacted proves again that European Financial Market Law is generally technology-neutral.

Based on the Blockchain Act, investment funds can now – in addition to investing in digital assets as alternative investments – also be set up on blockchain or DLT systems and thus tokenize their fund shares. Nevertheless, requirements according to the AIFM Act and UCITS Act must be met anytime. This includes *inter alia* that the head office of the AIFM or Management Company must be situated in Liechtenstein [UCITSG Act 2011: Art. 15 (1) e, AIFMG Act 2012: Art. 30 (1) d].

In contrast to the French legislator, Liechtenstein has waived to regulate certain digital assets; as mentioned above the concept of the Blockchain Act is targeting the gap between the “offline” and the “online” world regardless of the kind of digital asset, respectively token.

It is further questionable how the new “sustainable finance” rules arising notably from amendments to the European Benchmark Regulation will apply to such funds.

7.2. Offer of digital assets / the ICO Regulation

An initial coin offering (“ICO”) is an operation of fund raising by which a company is financed by issuing tokens (*jetons*), which investors subscribe generally by a payment in crypto-currency. This technique is now widely known as an alternative source of financing based on the blockchain technology. MiCA does not propose a specific regime for ICO issuance.

These utility tokens (*jetons de service*), traditionally opposed to tokens conferring voting or financial rights (security tokens/security token offering, STO) which are more similar to financial instruments, allow investors to benefit from the company's products or services. An optional ICO six-months visa may be filed with the AMF, entailing the requirement for the issuer to publish a white paper to be approved (and then published) by such authority. The AMF publishes a “black list” of non-compliant issuers (and issuances). Among other requirements, the ICO issuer must implement a process for tracking and safeguarding the assets.

The Blockchain Act distinguishes between the generation of token (requiring technical and programming knowledge to generate the token) and the issuance of token. The latter concerns the first public offering of tokens and is independent of whether the tokens were generated during or before the issuance and whether the issuance was made in one's own name or in the name of a third party by the token issuer. In order to effectively address risks associated with the issuance of token, the Liechtenstein legislator stipulated firstly, that token issuers are subject to legally defined minimum standards (*e.g.* minimum capital, professional suitability, business continuity management, etc.) [Liechtenstein Blockchain Act 2019: Art. 14 and subsequent] and need to register with the Liechtenstein Financial Markets Authority (FMA) [Liechtenstein Blockchain Act 2019: Art. 12 , 13]. Secondly, basic information about the token issued must be published to enable (potential) buyers to assess the rights and risks associated with the tokens and their issuer correctly [Liechtenstein Blockchain Act 2019: Art. 30 – 38].

Under MiCA any issuer of crypto-assets must publish a whitepaper and notify the competent authority. Among other things, the whitepaper must include information regarding the main features of the crypto-asset and the associated risks. Issuer of asset-referenced tokens need an authorisation by the competent authority as well as an approval for their whitepaper. For «other crypto assets» a content-wise examination by the competent authority does not take place.

The requirements for basic information under the Blockchain Act are very similar to the requirements of the European Prospectus regime. The key difference between the two is that, though the basic information under the Blockchain Act must be made available to the Financial Markets Authority (FMA) and must be published (e.g. on the website), no formal approval by the FMA is required. Since token can represent all types of rights, the obligation to publish basic information under the Blockchain Act also differs from the Prospectus regime insofar that buyers of the token are not necessarily investors.

8. Conclusion

France and Liechtenstein have been at the forefront of the setting up of innovative pieces of legislation despite the novelty of this technology. The enactment of both PACTE Law and the Blockchain Act has succeeded to enhance and promote the development of the Fintech sector. Examples of such legislations are of interest for other EU / EEA Jurisdictions, the European Commission in the drafting and implementation of MiCA.

Further, the current case study has shown the variety of potential approaches which may be undertaken at the level the European framework and which will still be relevant at the stage of implementation of MiCA in France and Liechtenstein, respectively given that such regulation would not cover all aspects (e.g. ICO issuance) or address all the issues (conflict of law, etc.) discussed in this paper. The PACTE Law and the Blockchain Act are predominantly based on two different approaches of the regulation of tokens or digital assets (and more generally of the blockchain itself): the PACTE Law is based on a “taxonomy” or service by service approach (in the same way as, e.g., MiFID II, PSD II or EMD) whereas the Blockchain Act seems to focus more on the technological side of services provided. MiCA seems to provide for a useful combination of both approaches, although it does not regulate ICOs (as in PACTE law) nor the tokenization process itself (compared to the Blockchain Act).

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