



E-money, Tokens and the Payment Service Directive II

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Agenda

- › NÄGELE Attorneys at Law – Who we are
- › The Blockchain, Transactions and Token Classification
- › Token & Coins
- › Stablecoins and E-Money
- › E-Money and the PSD II
- › Regulatory & Passporting Framework in Liechtenstein
- › Closing Thoughts

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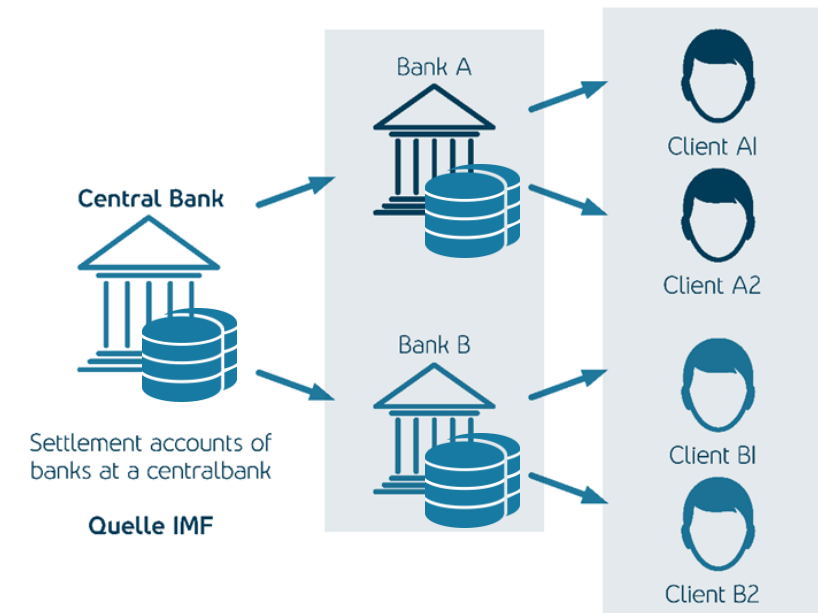




The Blockchain, Transactions and Token Classification

Traditional Bank Transactions

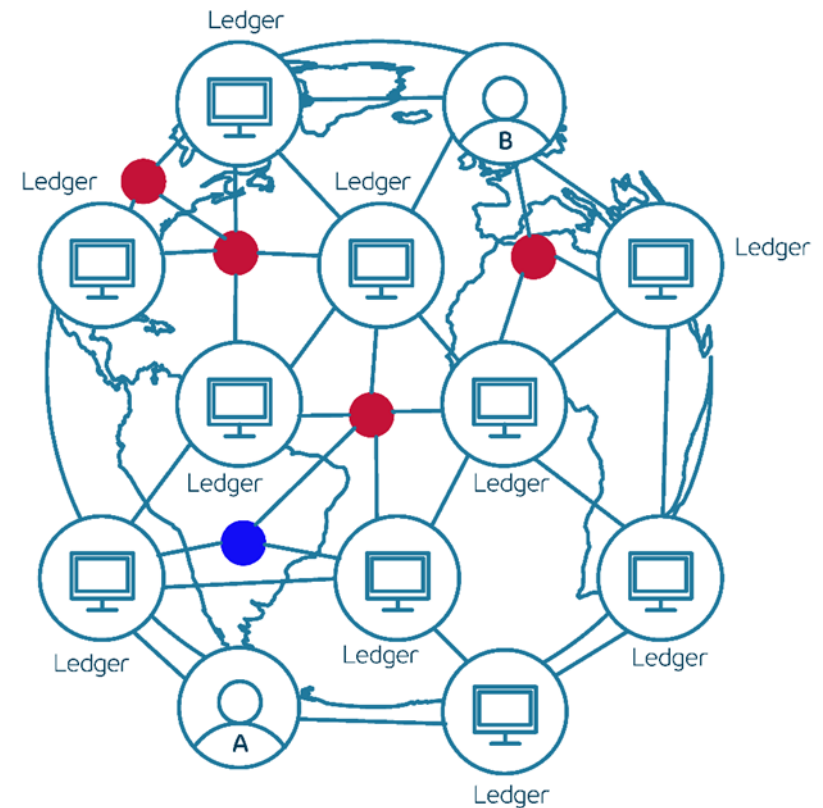
- › Transaction between person A and B
- › Person A has a deposit at (claim against) a banking institution
- › Assignment of claim against banking institution from person A to B (at the same or different bank)
- › Bank to bank transfer required if person B has an account at a different bank (as deposits resemble obligations of the bank)
- › The Central Bank maintains the accounts of the interbank payments (clearing account)



Bitcoin Transactions

› Payment from A to B

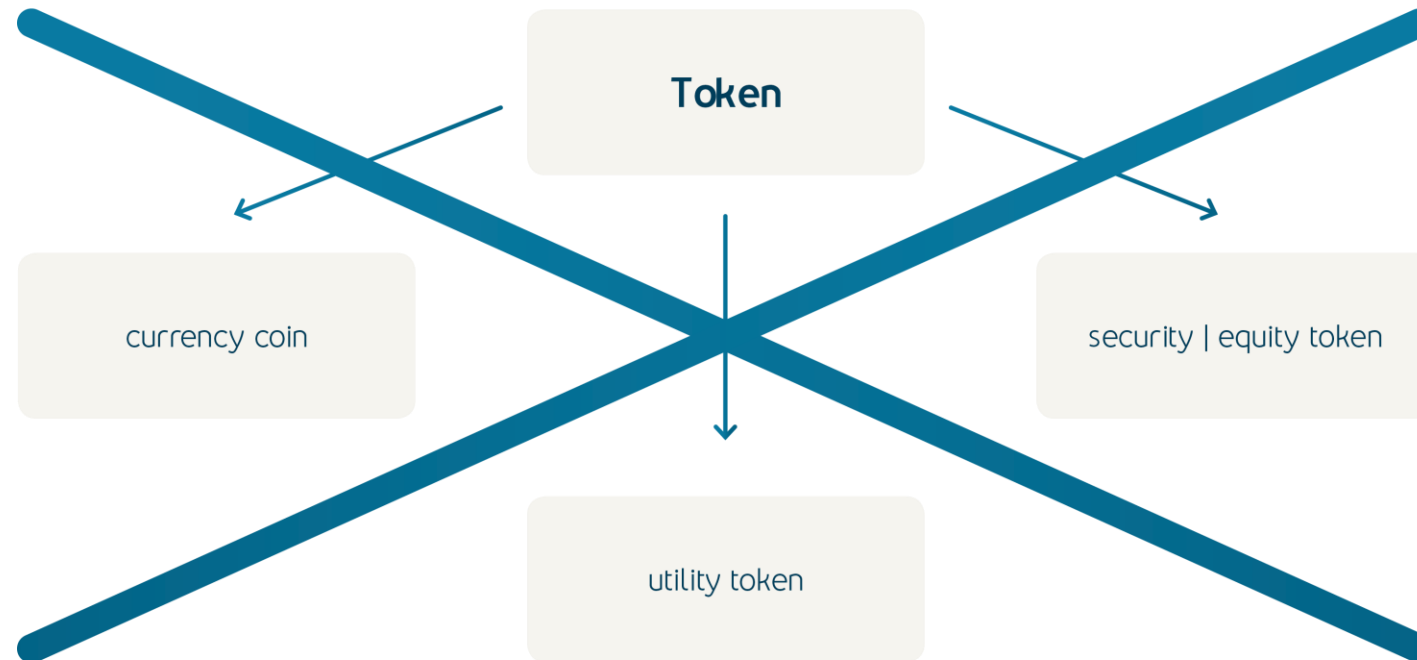
- Copies of the transaction documents (ledgers) are stored locally on all nodes (laptops, tablets, computers) in the network and are visible to all (decentralized ledger).
- The payment is executed by the miners (nodes) by means of a validation process.
- The transaction is documented on the computers of all parties involved with the blockchain.





Token & Coins

Token Classification 1/2



Token Classification 2/2

- › No legal definition yet (however compare Blockchain Act)
- › **Token:** Information on a data storage system that can represent rights and in this data storage system is assigned to one or more identifiers (via their respective address or the public key).
- › **Coin:** A subspecies of a token that typically represents no rights. The value of coins is created by supply and demand on the market (exchange value)



Stablecoins and E-Money

Electronic Money 1/2

- › E-Money Directive refers to the Payment Service Directive
- › Licensing procedure pursuant to Payment Service Directive
 - Approval and registration
 - Calculation of capital requirements
 - Safeguarding requirements
 - Agents and liability
 - Supervision
- › PSD II enters into force in Liechtenstein on October 01, 2019

Electronic Money 2/2

- › Electronically or magnetically stored monetary value
- › Represented by a claim on the issuer
- › Issued on receipt of funds
- › For the purpose of making payment transactions (PSD)
- › Acceptance by persons other than the issuer

Stablecoins and E-money

- › Depending on the exact nature of stablecoins they may be e-money, derivative instruments or unregulated (utility) tokens
- › Stablecoins are usually issued centrally against fiat
 - If issued against crypto, e-money regime not applicable
 - Issuance against fiat and crypto – need to differentiate
- › Functions as a means of payment
- › Usually redeemable to a certain extent

Currency-pegged Stablecoins

- › E-Money needs to be redeemable at all times at a 1:1 ratio
 - Legal consequence, not criterion for e-money
 - If coin/token qualifies as e-money, redemption not excludable
- › Many stablecoins backed by legal tender qualify as e-money but are implemented incorrectly
- › USDT, USDC, etc – issuers outside of EEA/EU probably unaware of European E-Money regime

Asset-backed Stablecoins

- › EFTA-Court Decision in Case E-9/17 Falkenhahn v Liechtenstein FMA
- › Currency pegged to the price of gold does not constitute e-money
- › Value/Price of e-money must be equivalent to the par value of currency received upon issuance at all times
- › Token may represent ownership/title in tangible assets (right in rem)

Caveat

- › Asset-backed stablecoins may be financial instruments
- › Potentially a (commodity) derivative
- › Derivative contracts differ from spot market transactions in that the
 - price-relevant point in time of conclusion and
 - the value-relevant point in time of settlement
 - differ in time and
 - their value depends on an underlying asset.
- › Eg if a token derives its value from the price of gold



E-Money and the PSD II

E-money on the Blockchain?

- › E-Money may be held
 - on a payment device in the electronic money holder's possession
 - or remotely on a specific account for electronic money
- › As it is a claim against the issuer it contradicts the decentral technological nature of a blockchain
 - Bitcoin/Ethereum lack both a central issuer and the representation of the value by a claim
- › Recital 8 of the E-Money Directive:
 - *“The definition should be broad enough to avoid hampering technological innovation”*

E-money Transactions

- › Transfer of funds (e-money) is a payment service pursuant to PSD II
- › Other payment services include push- or pull-payments
- › Transactions with purpose of conducting payment services not deemed deposits (banking business)
 - Deposits are contingent on an unconditional repayment obligation
- › Also applicable for the issuance of e-money

Caveat

- › Even if the token structure does not entail any obligations under financial market law, the business model may entail licensing obligations:
 - Eg: A token is unregulated under financial market law if it represents an access or voucher function for a software platform. However, assuming that the platform facilitates (p2p) lending business (based on deposits), the business itself is regulated and reserved for banking institutions;
 - Operating a crypto-fiat exchange which matches the interests on the buy- and sellside of unregulated tokens (matched principal trading) may be unregulated itself aside from due diligence duties, however the actual settlement/clearing in fiat is a payment service subject to a license.



Licensing Requirements

Keystones of a Licensing Application 1/2

- › Business Model / Business Plan / Corporate Governance
- › Security- and Data Protection concepts / Contingency Plans (Risk Management)
- › Security Policy / AML / Organizational Requirements / Monitoring and Control Mechanism
- › Initial Capital / Solvency Requirements / Safeguarding Requirements
- › Qualified Holdings ($\geq 10\%$ analogous CRR)

Keystones of a Licensing Application 2/2

- › Fit & Proper Management
- › Compliance Personnel
- › IT-Solution / Tech Audit



Payment Service Providers

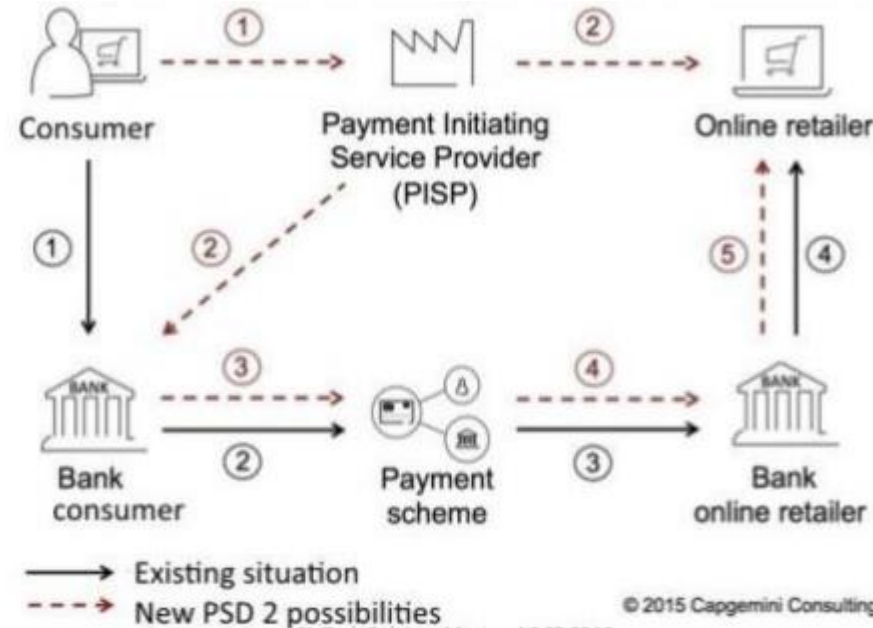
Payment Service Providers

- › EMI: All payment services and issuance of e-money
- › Full License Payment Institution: All payment services

- › Other licenses for:
 - Payment Initiation
 - Money Remittance
 - Account Information

Payment Initiation Service Provider (PISP)

- › PISP provides comfort to payee that payment has been initiated
- › Incentive for payee to release goods or to deliver services to payer

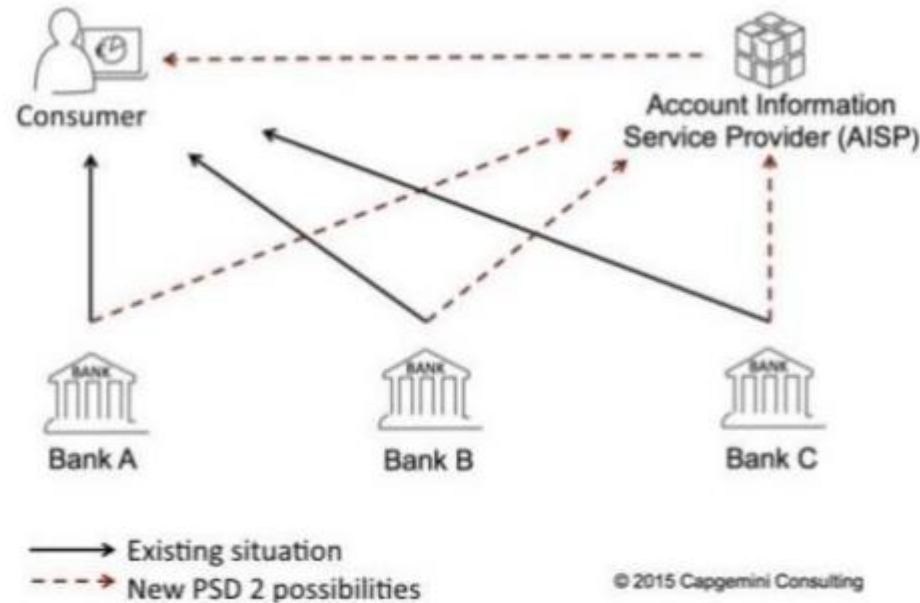


Money Remittance

- › Payment service where funds are received from a payer
- › without any payment accounts being created for a payer or payee (instead: omnibus account of the Payment Institution)
- › for the sole purpose of transferring an amount to
- › a payee or to another payment service provider acting on behalf of the payee

Account Information Service Provider (AISP)

- › Provide overall view of financial situation of user
- › Immediately at any given moment





Minimum Capital

Minimum Capital Requirements

- › E-Money Institutions: EUR 350'000.00
- › Payment Institutions (full license): CHF 125'000.00 (down from CHF 250'000.00)
- › Payment Initiation Service Provider: CHF 50'000.00
- › Institution for Money Remittance: CHF 20'000.00 (down from CHF 40'000.00)+
- › Account Information Service Provider: No capital requirements / registration

initial coin offering
token generating event



Exemptions

Exemptions of the EMD/PSD II 1/3

- › Limited network exemption
 - Services based on instruments which may be used to acquire goods or services only from a retailer or a specific retail chain (under franchise agreement)

- › “Instrument” means any personalized device and/or set of procedures used to initiate a payment (eg PIN & TAN or Signature)

- › E-Money Directive is not applicable if only issuer accepts e-money as a means of payment

Exemptions of the EMD/PSD II 2/3

› Limited range of products exemption

- Services based on instruments which can be used only to acquire a very limited range of goods or services

› This exemption is applicable when the use of the payment instrument is limited to a fixed/specific number of functionally related goods or services or groups/classes of goods or services, eg:

- clothing including footwear and accessories or
- sportswear, sports nutrition and training accessories

Exemptions of the EMD/PSD II 3/3

› Commercial agent exemption

- payment transactions from the payer to the payee through a commercial agent authorised via an agreement to negotiate or conclude the sale or purchase of goods or services
- In other words: the intermediation or settlement of transactions in the name and for the account of another party
- since PSD II: only on behalf of either the payer or the payee

› Matching both buy- and sellside as a commercial agent does no longer fall under an exemption under PSD II



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Regulatory & Passporting Framework in Liechtenstein

Passporting out of Liechtenstein

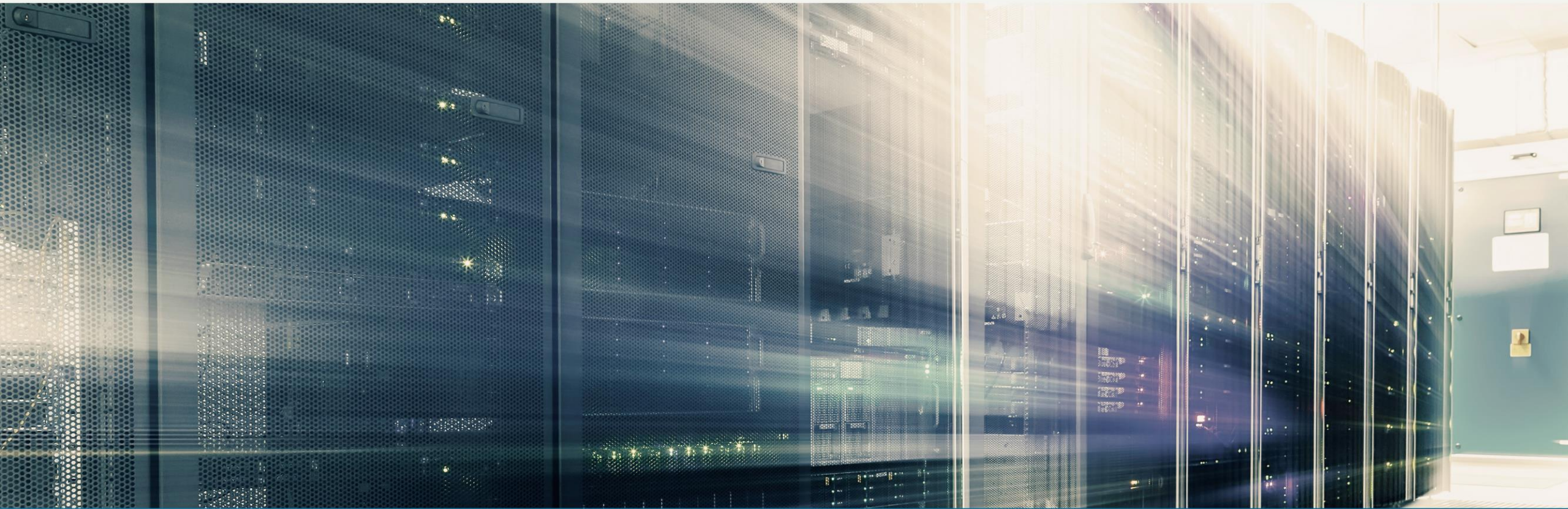
- › As a member of the EEA, Liechtenstein participates in the European Passporting System („Notification-Proceeding“)
- › Possible to passport financial intermediaries and institutions (also securities prospectuses) within the European Single Market
 - in order to provide services in a member state (freedom of services)
 - in order to open a branch in a member state (freedom of establishment)

Split Supervision 1/2

- › When opening a branch, supervision is split to a certain extent
- › Payment Institution provides payment services in another (host) Member State - supervision remains with the home Member State
- › When providing services through agents or branches host Member State can act in case of (suspected) infringements (regularly reports required)

Split Supervision 2/2

- › Split supervision of Payment Institutions different to Banking Institutions and Investment Firms
- › Cp Art 52 CRD IV:
 - Responsibility for solvency and organizational regulations (eg compliance) at the home state authority
 - Responsibility for conduct of business rules (eg consumer protection) with host State authority



Closing Thoughts

Legal Status Quo...

- › Bilateral trading of e-money:
 - Possible without license requirement; due diligence duties/concepts (exchange office)

- › Matching with regard to e-money:
 - Contradicts the e-money regime as it must always represent the par value; therefore not feasible

- › Listing of stablecoins, implemented incorrectly under the e-money regime:
 - If issued outside of the EEA/EU (jurisdictions unfamiliar to e-money): potentially possible; legal ruling required
 - If issued in EEA/EU: probably not possible as they would qualify as e-money if implemented correctly; legal ruling required

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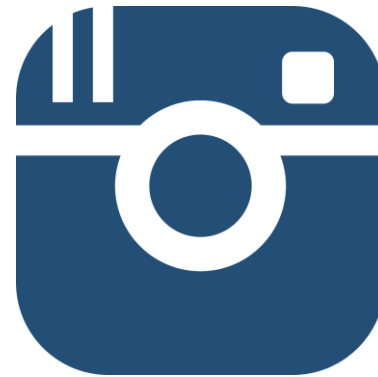
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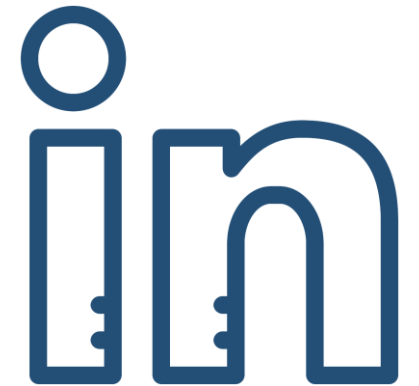
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Thank you very much for your time!

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