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Paradigm shift in the regulatory classification of Bitcoin? - Hardly!

At the end of September, the Higher Regional Court of Berlin (Kammergericht) ruled that Bitcoin did not fall under the term *unit of account* under criminal law and therefore do not qualify as a financial instrument. The media and competitors are already jubilating over unexpected freedoms and in some cases are even seeing a "disgrace for BaFin". However, it is more likely that the legal opinion and supervisory practice of BaFin will not change, with good legal arguments even.

Legal background

The question of whether virtual currencies such as Bitcoin are financial instruments has both a regulatory and a criminal component. Pursuant to section 54 (1) no. 2 of the German Banking Act (Kreditwesengesetz, "**KWG**"), anyone who conducts banking business or provides financial services without permission pursuant to section 32 (1) sentence 1 KWG is liable to prosecution. Financial services include the operation of certain trading platforms on which financial instruments can be traded.

Whether individual trading platforms for Bitcoin actually fall under the terms multilateral trading system (MTF) or organised trading system (OTF) or constitute investment brokerage subject to authorisation depends on the particular circumstances. For the sake of simplicity, we assume that such services are subject to regulation. Under these conditions, the operation of a trading platform for Bitcoin requires the permission of BaFin if Bitcoin are financial instruments. Operating such a platform without permission would then be a criminal offence.
BaFin has repeatedly made its view on Bitcoin's qualification public. It classifies Bitcoin as a unit of account within the meaning of § 1 (11) sentence 1 KWG and thus as a financial instrument.

The Higher Regional Court's decision

Following BaFin's opinion, the public prosecutor's office has brought charges against the operator of

a trading platform for Bitcoin. After several instances, the case has been brought to an end by a decision of the Higher Regional Court of Berlin dated 25 September 2018 (Case No. 161 Ss 28/18). The responsible Senate has decided that Bitcoin is not a unit of account and therefore not a financial instrument, accordingly the operator of the platform did not require permission and did not commit any criminal offence.

In its reasoning, the Senate argues against the opinion of BaFin. It discusses its interpretation in the context of the requirement of certainty in Article 103 (2) of the German Basic Law (Grundgesetz, "**GG**") which stipulates that essential questions of criminal liability and impunity must be clarified in the democratic-parliamentary decision-making process and that the prerequisites for criminal liability must be described in such a way that the scope and scope of application of the criminal offences can be identified and determined by interpretation. Since the classification of Bitcoin as a unit of account was neither obvious nor was the BaFin part of the democratic-parliamentary decision-making process, the recognizing Senate came to the conclusion that the interpretation of the BaFin had no relevance in criminal proceedings and that BaFin had overstretched its scope of duty.

In the media and in the evaluation of the decision by various competitors, there is talk either of a paradigm shift, a correction of the misguided financial supervision or even a slap in the face for BaFin.

An embarrassment for BaFin?

In fact, the answer to the question of the overstretching its scope of duty will probably have to be different, and the supervisory practice of the BaFin will most probably not change at all; with good legal arguments even.

For special rules apply to the interpretation in criminal law, to which BaFin is not bound in its administrative practice: "An administrative provision of permission (here: § 32 para. 1 sentence 1 KWG), which is referred to in a criminal provision (here: § 54 para. 1 no. 2 KWG), is generally not subject to the restrictions of Article 103 para. 2 GG, but only to the extent that it is used to fill in the criminal blanket norm and thus becomes itself part of criminal law". This is not said by anyone, but by the Federal Constitutional Court in its decision of 5 April 2006 (cf. NJW 2006, 3340, editorial guiding principle no. 2).

Split interpretation of § 32 KWG

As long as § 32 KWG is to be interpreted within the framework of the criminal provision of § 54 KWG, i.e. as long as the question is to be answered as to whether someone is to be sanctioned under criminal law because of the conduct of business requiring permission, the law determined by the interpretation of the provision must satisfy the requirements of Article 103 (2) GG. One can now - like the Higher Regional Court of Berlin in the case under consideration - quite strongly argue that this is not the case when subsuming Bitcoin under the term *units of account*, as BaFin does.

If, however, BaFin acts by way of administrative proceedings, it is at liberty to interpret the reference provision, § 32 KWG, extensively, in particular in such a way that in practical application it does justice to the purpose pursued by the legislator. According to the case-law of the Federal Constitutional Court, it is not bound by the restrictions of Article 103 (2) GG.

Sec. 32 KWG is thus to be interpreted differently in criminal law and in administrative law under certain circumstances; a case of so-called *split interpretation*. We do not want to keep back that the German Federal Court of Justice (Bundesgerichtshof, "**BGH**") categorically rejects this the concept of split interpretation (e.g. BGH, NZG 2011, 1147). However, administrative law is part of the BGH's jurisdiction but rather part of the jurisdiction of the Federal Administrative Court (Bundesverwaltungsgericht, "BVerwG") which has been recognizing the concept for decades

(*Schürnbrand*, NZG 2011, 1213, 1215 with further references).

Significance for crypto companies

As a result, the authority neither overextends its area of responsibility nor can conclusions for the future supervisory practice of BaFin be drawn from the criminal law decision of the Higher Regional Court of Berlin. Until further notice, however, the following will have to be accepted: If Bitcoin are financial instruments, then the operation of a trading platform for Bitcoin requires the permission of BaFin. Although the operation of such a platform without permission is not necessarily a criminal offence, BaFin can suspend operations by executive order. Companies active in this area would therefore do well not to jump to conclusions from the judgment of the Berlin Court and to continue to align their operations with the published legal opinion of BaFin. An executive order to suspend operations by BaFin is completely sufficient to terminate the best business model as long as there are no administrative court decisions to the contrary. The fact that in the end the actors will not also be prosecuted under criminal law is then perhaps only a small consolation.

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