

Utility Tokens in Transition – Legal Nature Under the German Banking Act (KWG) and MiCAR

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Evolution and Historical Context

Ethereum's Impact

The 2015 launch of Ethereum and the rise of the smart contract economy made utility tokens a viable alternative for corporate financing.

Startup Financing

Utility tokens became particularly popular among startups and tech companies seeking new ways to raise capital.

Strategic Design

Issuers originally aimed to design tokens specifically as utility tokens to avoid being classified as financial instruments under German law.

Terminology

In the industry, these were commonly referred to as "**app tokens**," "**usage tokens**," or "**consumption token** .

Network Focus

Conceptually, these tokens were intended for use within the issuer's own network to purchase specific goods or services.

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Former Legal Status under the German Banking Act (KWG)



BaFin's Classification

The German Federal Financial Supervisory Authority (BaFin) viewed utility tokens as a subtype of crypto tokens.



Financial Instrument Definition

Under the KWG and WpIG, tokens were only regulated crypto assets if they served as a medium of exchange, payment, or investment.



Unregulated Status

Many utility tokens did not meet these specific legal criteria, meaning they were often not classified as regulated financial instruments.

No License Required

Because they were unregulated, services related to these specific tokens typically did not require authorization or a license.

Transition Period

This national regulatory framework remained the standard in Germany until it was replaced by **MiCAR at the end of 2024**.

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Definition of Utility Tokens under MiCAR

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Crypto Asset Umbrella

MiCAR defines crypto assets broadly as digital representations of value or rights transferable via distributed ledger technology (DLT).

2

Explicit Legal Definition

Article 3(1)(9) of MiCAR provides a clear and specific definition for utility tokens for the first time.

3

Exclusive Function

These tokens must be exclusively intended to provide access to a good or service provided by their issuer.

4

End of "Unregulated" Items

Since they are now legally defined as crypto assets, utility tokens can no longer be considered unregulated items.

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New Licensing Rules

Commercial activities involving utility tokens may now require official licensing under Articles 59 ff. of MiCAR.

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Regulatory Obligations and Offeror Privileges

White Paper Rule

Generally, issuers of crypto assets are now obligated to prepare and publish a white paper.

Title II Exemptions

Article 4(3)(c) of MiCAR provides significant privileges for certain utility token offerings.

Exemption from Documentation

If requirements are met, issuers are not required to produce or publish a crypto asset white paper.

Reduced Marketing Oversight

Privileged offerings are exempt from strict marketing communication and transparency requirements.

No Right of Withdrawal

Under these specific privileges, purchasers do not have a legal right of withdrawal as otherwise required by **Article 13 MiCAR**.

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Strict Conditions for Regulatory Advantages

1

Existing Services Only

Privileges apply only if the goods or services accessed by the utility token already exist or are already being provided.

2

No Development Financing

The exemptions are invalid if the utility token sale is used to finance the future development of the service.

3

The Exclusivity Rule

A utility token must only provide access; if it has additional relevant functions, it loses its privileged status.

4

Issuer Requirement

The goods or services must be provided specifically by the issuer of the utility token.

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Compliance Necessity

Issuers must strictly verify these conditions, as they are legally required to qualify for **MiCAR's regulatory advantages**.

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