Digital and blockchain-based legal regimes: An EEA case study based on innovative legislations – comparison of French and Liechtenstein domestic regulations

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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.

Keywords
Blockchain, Blockchain Act, digital assets, Distributed Ledger Technology, electronic money, financial instruments, PACTE Law, payment instruments, Token container model, Token

Legal Sources
Act of 31 August 2016 on the Amendment of Property Law, LGBl 2016 Nr 349; Directive 2009/110/EEC of the European Parliament and the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, OJ L 2009/267; Regulation 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, central counterparties and trade repositories, OJ L 2012/201; Directive 2014/65/UE of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 2014/173; Directive 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services, OJ L 2015/337; Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, OJ L 2018/156; Loi n° 2019-486 relative à la croissance et à la transformation des entreprises, 22 May 2019; Ordonnance n° 2014-559 relative au financement participatif, 30 May 2014; Token and TT Service Provider Act, LGBl 301/2019, 3 October 2019.

Sources
Hofert, Regulierung der Blockchains (2018); *Raschauer/Silbernagl,* Grundsatzfragen des liechtensteinischen »Blockchain-Gesetzes« – TVTG, ZFR 2020, 11–18; *Layr/Marxer,* Rechtsnatur und Übertragung von »Token« aus liechtensteinischer Perspektive, LJZ 1/19, 11–19; *Lyons/Courcelas,* Blockchain Use Cases in Healthcare, Report, EU Blockchain Observatory and Forum, 2020.

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I. 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 it´s consequences to date. Legislators all over the world tried to rebuild and foster trust and costumer 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 challenges notably as regards the applicable law and the determination of the intermediaries responsible for the implementation of certain regulatory requirements (e.g., anti-money laundering, reporting, etc.). This opposition creates challenges in the sphere of the financial regulation as both models may hardly be combined and at the same time, it is difficult to apply most pieces of the current regulation to a purely decentralized model.

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[1]. 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. 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.

Nevertheless, the European Commission (EC) has set several initiatives, such as the EU Blockchain Observatory and Forum, to connect with European and Global Experts (which has led to the publication of the most remarkable *Study on Blockchains including on legal, governance and interoperability*[2]*),* and to such end, the EC joined several partnerships, *e.g.* the European Blockchain Partnership or the International Association for Trusted Blockchain Applications (INATBA). However, an initiative of the European Parliament to bring ICOs into the scope of the EU-wide crowdfunding regulation[3] 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. Exchanges which offer the exchange between different virtual currencies only are not covered though by Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 *(i.e.,* the fifth Anti-Money Laundering and Counter-Terrorism Financing (AMLD 5).

Therefore, and pending a 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 law, e.g. European Capital Markets Law, and by virtue of the prin-

1 Cf *Hofert,* Regulierung der Blockchains, ch. C. I.

2 *EC,* Study on Blockchains, SMART 2018/0038, <ec.europa.eu/digital-single-market/en/news/study-blockchains-legal-governance-and-interoperability-aspects-smart-20180038>.

3 Proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business, COM(2018) 113 final.

ciple 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.

II. Sources of law and regulation

The French PACTE law[4] (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 financial market authority, the AMF, which has taken a leading role in this initiative (noting as well the emerging »sandbox« process for Fintech entities with the French prudential control and resolution authority, the ACPR since a few years and on a quite innovative manner).

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)[5], 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 Liechtenstein Blockchain Act is the achievement of intensive work by the government and experts from a wide variety of fields (supervision, science and practice), who started in October 2016 the first working group.

III. The concept of blockchain and digital assets

A. The concept of blockchain – PACTE Law

The regulations provided for in the PACTE Law supplement a French 2014 ordinance[6] taken in accordance with article 120 of Law of 9 December 2016 (so-called »**Sapin II Law**«) on crowdfunding which allows, for such operations, the use of the distributed ledger technology, *i.e.,* blockchain *(»dispositif d'enregistrement électronique partagé«),* equally a new French law concept which content casts however some uncertainties which should be addressed in amended legislation.

Such operations are those related to:

(i). securities not admitted to trading on a regulated platform or on a multilateral trading platform issued by joint stock companies and not admitted to a custody through a central securities depositary (CSD);

(ii). shares or equities issued by collective investment schemes *(organismes de placement collectif);*

(iii). transferrable debt securities *(titres de créances négociables);* and

(iv). debt securities other than transferrable debt securities provided they are neither traded on a multilateral trading platform or transferred pursuant to a financial collateral agreement *(as regards collateralization of digital assets, see section 5 c. below).*

The core aspect – and novelty – of this new set of rules is to officially recognize the legal value of recording on a blockchain of securities and share of funds (as defined above) and their enforceability to third parties. This rule, arising from specific banking and financial laws, constitute therefore an exception to French civil and commercial code provisions on legal acts and proof.

The PACTE Law extends the scope of DLTs to digitally-registered assets including cryptocurrencies that are accepted as means of payments that can be transferred, stored or exchanged electronically.

We should though note that financial contracts *(i.e.,* derivative products) have not been included *per se* in

4 Loi n° 2019-486 relative à la croissance et à la transformation des entreprises, 22 May 2019.

5 Token and TT Service Provider Act, LGBl 301/2019, 3 October 2019.

6 Ordonnance n° 2014-559 *relative au financement participatif,* 30 May 2014.

the field of this legislation. This may be explained by the specific features of such contracts which consist in commitments or agreements between parties leading to the recording of related positions or values (as well as related flows of payments) in specific accounts maintained by counterparties, clearing members, central clearing counterparties as well as, to a certain extent, trade repositories within the meaning of the EU EMIR (rather than »assets« recorded in accounts such as securities accounts). However, market association such as ISDA has produced master agreements and other templates based on SMART contracts and thus using the blockchain technology for the purposes of the entering into and execution of such agreements (whilst next step could be the »tokenization« of the financial contract itself and the rights and obligations hereunder as well as the assets provided as collateral of transactions on such financial contracts).

B. The concept of blockchain – »Blockchain Act«

While the French PACTE Law refers to operations which allow the use of blockchain- respectively Distributed Ledger Technology, the Liechtenstein approach is a »technology-neutral« formulation (noting though that the French PACTE law has not provided a specific definition of the DLT itself, from a technological standpoint, nor deferring to the government to provide such definition by way of decree or administrative order). Therefore, it chose the term »**transaction systems based on trustworthy technologies (TT)**« as an as abstract as possible definition of the term »Blockchain«[7] as it is characteristically, that Distributed Ledger Technology creates trust and security by itself, the technology, not by any organization or organizational measures.

The Liechtenstein framework aims to conquer the gap between the »offline« and the »online« world and to synchronize the physical with the digital world of tokens. In future, the range of assets and other rights that can be represented on a DLT system will continue to grow. Low transaction costs will open up new opportunities, especially in the financial sector, but also in logistics, mobility, energy, industry, media, etc. All this is summarized under the so-called »Token Economy«[8]. Subsequently it creates new legal definitions as well as new services and service providers. The law, which also adapts pre-existing laws,[9] essentially consists of two parts: a civil law part, which subjects the transmission of tokens in decentralized networks like DLT networks to specific requirements, and a part with prudential rules, which determines the conditions under which TT service providers may provide their business models respectively their services via decentralized networks.[10]

With the Blockchain Act, Liechtenstein also addresses the challenge of how to treat a company that offers services which do not constitute a financial service in a legal sense, but which nevertheless have to do with securities or financial instruments *(i.e.,* trading platforms that purely serve as mediator for sale and purchase interests between private individuals, but are not involved in pricing, trading and settlement of the transactions).[11] Furthermore, the Liechtenstein legislator deals with the question on how to treat a company that offers services that are functionally comparable to financial services, but are not within the scope of financial market regulation *(i.e.,* crypto-exchanges for payment or utility tokens with a high trading volume, which are thus similar to regulated trading venues).

In the center of the Blockchain Act is the »Token« and the so-called »Token-Container Model«, a unique framework with the ability to hold rights. By that, the Liechtenstein legislator captures all aspects of tokenization and ensures the perfect synchrony between physical and digital world, including enforceability.

C. Definition of digital assets/limitation or not to blockchain/limitation or not to banking and financial items – PACTE Law

In accordance with article L. 54-10-1 of the French Financial Code, as amended by the PACTE Law, a digital asset consists of either:

(i). a token within the meaning of article L. 552-2 of the French Financial Code, *i.e.* any intangible asset representing, in a digital form, one or several rights capable of being issued, written, stored or transferred by means of a DLT (as defined above) which allows, directly or indirectly, the identification of the owner of the aforementioned asset;

(ii). a crypto-asset such as a crypto-currency; or

(iii). more broadly *»any digital representation of a value which is neither issued or guaranteed by a central bank or by a public authority; is not necessarily related to a currency which is legal tender and does not have the legal status of a currency but is accepted by legal entities or natural persons as a mean of ex-*

7 Report and Application of the Government to the Parliament of the Principality of Liechtenstein concerning the creation of a Law on Tokens and TT Service Providers, Nr 54/2019, 53.

8 Report and Application, Nr 54/2019, 47.

9 The TVTG includes adaptions of the Liechtenstein Persons and Companies Act, the Trade Act, Due Diligence Act and the Financial Market Authority Act.

10 See *Raschauer/Silbernagl,* Grundsatzfragen des liechtensteinischen »Blockchain-Gesetzes« – TVTG, ZFR 2020, 11–18.

11 Report and Application, Nr 54/2019, 45.

change and can be transferred, stored or exchanged digitally«[12]

As a result, the definition of digital assets is not limited to digital assets:

(i). recorded, stored or transferred in/through a blockchain (a DLT); or

(ii). pertaining to banking and financial items or instruments, and may therefore extend (and already extends in practice) to other industries (e.g., retail, transportation, healthcare, media, shipping) though potential implications in the banking and financial sphere are huge (payments, purchase or sale of securities, custody activities, etc.). Banks and corporates have developed in such spirits DLTs for various purposes, from truck or car repair tracking to the issuance of shipping stand-by letter of credits though not of these initiatives pertain to tokens, digital assets or DLTs under PACTE law (some of these projects charactering sometimes as mere peer-to-peer information data transfer platforms).

Such potential extension to any type of asset may enable tokens both under PACTE law and the Blockchain Act to play a role in the sustainable finance plan of the European Commission and notably as regards the promotion of the so-called »circular economy«. The EU Commission Observatory Forum has shown a deep interest in this area, as reflected by its much publicized report on the *blockchain use cases in healthcare*[13]*).*

D. 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.«*[14] 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 Act.

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. Since 1st January 2020 Liechtenstein ensures that the 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«[15], 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 Blockchain Act) could be characterized as a matter of French law.

12 In this article, translations in English are only for information purposes in the context of this article and are not meant to constitute an official translation of such provision, only the original provision in French language set forth in the French *Journal Officiel* being legal and binding as a matter of French law.

13 *Lyons/Courcelas,* Blockchain Use Cases in Healthcare, Report, EU Blockchain Observatory and Forum, 2020, <eublockchainforum.eu/reports>.

14 Art 2 (1) c TVTG.

15 Art 2 (1) p TVTG.

In particular, discussions may be held under French law whether future claims, which are generally capable of being created and assigned under the French civil code (and could even generally be »securitized« under the French securitization regime set forth under the French Financial Code) may be »tokenized« through digital assets under the French PACTE Law. It may be critical for this reason to consider under French law further amendments to the PACTE Law to provide for clarity both for national issued tokens and for the purposes of ensuring the validity and enforceability of non-French tokens meeting the core PACTE Law requirements (such as those issued in accordance with the Blockchain Act). In the same vein, it is important that the future European legislation on blockchain and digital assets takes into account the possibility to issue »empty« and future tokens. 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. For the latter a *»proportionate common regulatory approach at EU level«*[16] is considered.

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

1. Electronic money and payment instruments

Although the European framework related to electronic payments *(i.e.,* the Electronic money directive or »e-money« directive, EMD)[17] does not literally include payments made through a blockchain in the scope of the definition of »electronic means« used for the purposes of defining electronic money, there could be arguments to consider that the definition of e-money could be broad enough, under certain aspects, to encompassed money stored on a blockchain (although this issue remains highly uncertain and requires a case by case analysis pending clear legislative option taken at the level of the European Commission). 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.[18]

Should PACTE Law and e-money regime cumulatively apply to a digital asset pertaining to both regimes? This should be the case, although there is not, to our knowledge, for the time being, any case law or official guidance from the authorities confirming such views or containing a relevant position in this respect. In any case, since European law should generally prevail over domestic legislation although the result of such precedence may not be satisfactory for the market from a practical standpoint.

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).[19]

This situation may lead to confusion in both jurisdictions and stresses the importance of a EU/EEA Legislation on blockchain containing clear precedence rules. Further, in order to bring clarity to the market, the European Commission may either be looking for amendments to EMD (as well as potentially other European legal instruments) to enlarge its material scope to tokens (and other digital assets, as the case may be) or to exclude such assets from EMD's scope. The same issue may arise as regards the frontier between PSD2 and the European digital assets framework imposing here again clarity both as regards precedence rules and the content of each relevant piece of legislation. Such type of legal issue should indeed not be left to the own »arbitrage« of each EU/EEA Member State.

2. Financial instruments

The French PACTE Law expressly excludes the financial instruments from the definition of digital assets. However, given the broad definition of derivative contracts (or financial contracts) within the meaning of MiFID II[20] (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).

As mentioned above, the Blockchain Act has a very broad understanding of the term »token«, which can

16 *EC,* Consultation Document on an EU framework for markets in crypto-assets, 4.

17 Directive 2009/110/EEC of the European Parliament and the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, OJ L 2009/267.

18 *EBA,* Report with advice for the European Commission on crypto-assets, 9 January 2019, 13.

19 Report and Application, Nr 54/2019, 121.

20 Directive 2014/65/EU of the European Parliament and the Council of 15 May 2014 on markets in financial instruments, OJ L 2014/173.

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.

The market industry may be more comfortable in the inclusion in the scope of the (future) European Blockchain framework of any financial instrument. However, in such situation, for the same reasons as those outlined above related both to EMD and PSD II, a line may need to be clearly drawn at the European level between the respective scope of MiFID II and such Blockchain framework.

IV. Conflicts of law related to the Blockchain

A. PACTE Law

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 related to DLTs (referred to in our introduction) 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 apply but are likely to create issues as they should not reflect the very specificities of a blockchain which distributes the same data across the chain, and entails the potential application of several legislations (at each point of access to the blockchain), hence the importance of a private law convention (a minima at an EU/EEA level) providing clear conflict of law rules applicable at least to the following types of operations: (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).

B. 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).[21] 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.[22]

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.[23]

Nevertheless, it is important to bear in mind, that the Blockchain Act only regulates the right of disposal

21 Cf § 73 para. 1 Final Division PCA.

22 Cf Act of 31 August 2016 on the Amendment of Property Law, LGBl 2016 Nr 349.

23 Cf also *Layr/Marxer,* Rechtsnatur und Übertragung von«Token« aus liechtensteinischer Perspektive, LJZ 1/19, 11 (17).

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).[24] To ensure legal certainty, these rules are also applicable to »empty« tokens.

V. Which related-services are regulated?

A. 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).

B. 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 the following TT service providers[25], each with a special role and various requirements:

TT Identifier: Enables the unique assignment and allocation of tokens (e.g. a public key);

Token Issuer: A person or entity who publicly offers tokens on his own behalf or on the behalf of another person or entity;

Token Generator: A person or entity generating tokens;

TT Key Depositary: A person or entity acting as a custodian, holding the keys on behalf of the principal;

TT Token Depositary: A person or entity who holds tokens in the name of a third party for the account of a third party;

TT Protector: A person or entity who holds tokens in his own name on TT systems for the account and benefit of a third party;

Physical Validator: A person or entity who ensures the existence and contractual enforcement of rights to property represented in tokens within the meaning of property law on TT systems;

TT Exchange Service Provider: a person or entity who exchanges legal tender (e.g. fiat money) for tokens and vice versa as well as tokens for tokens;

TT Verifying Authority: a person who verifies the legal capacity and the requirements for the disposal of a token;

TT Price Service Provider: a person or entity who provides users of TT systems with aggregated price information on the basis of offers to buy and sell or completed transactions;

TT Identity Service Provider: a person who identifies the person authorized to dispose a token on a TT system and enters the person in a register.

Some of these 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.

C. 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

24 Cf Report and Application, Nr 54/2019, 69.
25 Art 2 (1) d, k- t TVTG.

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.

It should be further noted that AMLD 5 includes certain digital assets in the scope of such regulation and therefore, digital assets services providers within the meaning of French law, in the scope of such regulation.

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

French law provides a closed list of services which are, depending on their characteristics, subject either to a mandatory authorization or an optional registration with the French market authority.

The following services on digital assets trigger an optional registration: the reception and transmission of orders on digital assets, the portfolio management of digital assets for the account of third parties; advice to digital assets purchasers/investors; the underwriting of digital assets; the placement of digital assets (either on a firm commitment basis or without a firm commitment basis). The service of purchase of digital assets is defined as the purchase (or sale) of digital assets by a digital assets services provider (who may, or not, use its own balance sheet) against a legal tender. In the same vein, the regulated service of exchange of a digital asset against another digital asset (which triggers an optional registration only) does not require, in order to characterize as such, the digital asset services provider, to use its own balance sheet. The approach is therefore similar as the one prevailing in the sphere of investment services under MiFID 2 where the use of the balance sheet is critical to qualify a service as an own account dealing service.

Conversely, the following services are subject to a mandatory registration with the French financial market authority (AMF) again »mirroring« in the sphere of digital assets the classification under MiFID 2: safekeeping/custody of digital assets – *i.e.,* as a matter of principle, of the keys providing the holder with such access – purchase or sale of digital assets against a legal tender. The reason why such services should be prior authorised by the supervisor lies in the importance of such services: if keys are lost or corrupted, they could affect the very rights of the holder over such assets as bringing outside evidence of their existence may happen to be critical, it being noted that, by comparison, the activity of seakeeping/custody of financial instruments is a »mere« ancillary investment service. Further, the service of exchange of a digital asset against legal tender has an impact on the economy (as the conversion in a legal tender impacts the calculation of the monetary aggregates). Conversely, the service of exchange of digital assets against other digital assets does not involve *per se* the raising or payment in a legal tender (although such digital assets may have a price or value expressed in a legal tender) and triggers an optional registration with the French authorities, in accordance with the PACTE Law.

A French administrative order *(arrêté)* dated 5 December 2019 has provided amendments to the AMF General Regulation to provide specific provisions related to digital assets services providers. This regulation details the conditions for licensing (or registering, as the case may be, depending on the nature of the relevant service on digital assets) digital assets services providers. Such regulation further provides specific organizational and good conduct rules, applicable to such providers, which are again directly inspired by the legislation and regulation applicable to investment services providers, notably arising from MiFID 2 (and related legislation and regulation aiming at implementing such European regime).

E. 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.[26]

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, PSD II and to a certain extent, EMD, *i.e.,* by reasoning in terms of content of services provided under the traditional banking or financial »taxonomy« (reception and transmission of orders and execution of orders related to the purchase, sale or exchange of digital assets is akin to the MiFID II equivalent services) where such orientation seems to have guided AMLD 5 as regards crypto assets. 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.

F. The purpose of the authorization/registration requirements: strengthening the investors' protection

The PACTE Law aims at providing protection to investors in digital assets. A comparison can be drawn with the so-called French regime on intermediation on miscellaneous assets which has given rise to a pure French-domestic regime (set forth under the French Financial Code) and not benefiting from any EU/EEA passport, requiring intermediaries in such assets to register and provide a specific prospectus, except if an exemption applies, when promoting such assets to the public/potential investors. The protection of such investors has justified that the French financial market authority supervises *inter alia* the promotion, advertisement and marketing activities on such assets, even if they relate to non-banking or financial items (wine, antiques, etc.). In the same vein, services on digital assets may require protection of clients/investors on such assets which are potentially placing their money on such assets, justifying that the French financial market authority (AMF) has jurisdiction on such assets even if they do not relate, by themselves, to items generally pertaining to French banking and financial laws (e.g., tokens issued by healthcare industry or blockchain tracking and »securing« a supply chain).

Customers and users have a special need for protection. But also the professional service providers on TT-systems as well as the Liechtenstein financial centre itself 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«[27] 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. These information has to be accessible in an easy manner; the FMA has to be notified of the token issue.

VI. 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. The same approach has therefore been followed under French law as regards notably the so-called French banking monopoly, the French investment services monopoly and payment services provider monopoly rules as well as in relation to the infringement of the rules related to intermediaries in banking operations and on miscellaneous approach. The PACTE law's approach in

26 See *Raschauer/Silbernagl,* Grundsatzfragen des liechtensteinischen »Blockchain-Gesetzes« – TVTG, ZFR 2020, 11 (16).

27 Art 2 (2) h and Art 30 et seq TVTG.

this respect seems therefore to be consistent with the general and »historical« approach of French law.

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)[28]. 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 it legal obligations.[29]

VII. Rules applicable to providers on digital assets

A. Good conduct and organization rules

The French PACTE Law provides a specific set of rules, equally inspired by the rules applicable to investment services providers (and notably MiFID II as well as, to a certain extent, EMIR), which relate *inter alia* to internal control procedures, resilient IT system requirements, governance rules, etc. Some of these rules are general and apply notwithstanding the type if service provided whilst others are specific to certain services on digital assets. For instance, digital asset services providers providing the service of execution or reception and transmission of orders as well as those related to management or operation of a multilateral trading platform or facility over digital assets are required to set up and publish appropriate transparent policy rules.

B. Collateralization of digital assets

The terms for the constitution of rights, including *in rem* rights (e.g. pledge or title transfer on digital assets or on tokens recorded on a blockchain or more generally a security interest or rights *in rem* on such assets), will require that the applicable regulations be clarified; along with the conditions of the sale or transfer of such assets. In the current state of the law, it is relevant to question the terms and conditions of the assignment of a digital asset as collateral/security under the French regime set forth in article L. 211-38 of the French Financial Code aiming at implementing the EU Collateral Directive (Directive 2002/46/EC of the European Parliament and the Council of 6 June 2002) into French law.

The legislator should also take the opportunity of such amendments to provide a clear legal international private law instrument addressing any conflict of law issue related to the setting up and enforceability of in rem rights benefiting from the EU Collateral Directive regime.

VIII. 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) within the meaning of the French Financial Code (aiming at implementing the MiFID II rules involving one or more digital assets as underlying assets (or an index related to the evolution of these assets' 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.

A. Funds investing in digital assets

The PACTE Law entitles professional specialized investment funds *(fonds professionnels specialisés,* 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.

Indeed, article 88 of the PACTE law widens the scope of assets that are eligible to an FPS to those registered in a blockchain. Article L. 214-154 of the French Financial Code provides that: *»notwithstanding articles L. 214-24-29, L. 214-24-34 and L. 214-24-55 [of such code], a specialised professional fund may invest in property if they comply with the following rules: 1° The ownership of the asset is based*

28 Cf Art 47 par 2 Blockchain Act.
29 Art 47 par 1 Blockchain Act.

either on a register, an authenticated/certified document or a private agreement whose value is recognized by French law«; the condition pertaining to the register *»is deemed fulfilled for the assets registered on a blockchain«.* As a result, subject to compliance with several conditions (and notably investments limitations and appropriate transparency and disclosure requirements related to risks), life insurance contracts may be exposed to such types of assets (through the aforementioned type of professional funds investing in those assets) subject to fulfilment of conditions set forth in the French insurance code *(Code des assurances).*

In the same vein, PACTE Law intended to broaden the scope of assets that an FPCI may invest in order, for the government and the parliament, to create an opportunity for investment for *»informed professionals with a strong appetite for risk«*[30] and, as a result, to foster fundraising of digital assets in France (in conjunction with the implementation of the optional visa also provided for in the PACTE Law and referred to above). Given the risks incurred by this type of investment, and the novelty of such set of provisions, investments in digital assets should not exceed 20 % of the fund's assets (article L. 214-160 of the French Financial Code). Credit institutions are required to open a deposit and payment account to issuers of tokens and digital assets service providers (article L. 312-23 of such code), which requirement should also benefit to investment management companies as depositories (of the assets of the related fund) should qualify as credit institutions in accordance with the provisions of such code.

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).[31] 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.[32]

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.

B. 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.

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. This distinction is clearly reflected by the PACTE Law. Indeed, such law implemented a specific regime applicable to digital assets (as defined herein) requiring companies applying to an optional registration of its assets to draft a white paper containing sufficiently clear, precise information about the issuer and the ICO. When granting the visa, the AMF confirms having proceeded with the verification of the offer's white paper and that it is complete and understandable for the investors. The AMF will then proceed to the publication on their website of a »white list« of the ICOs that received their visa (along with a black list of issuers or ICOs that do not comply with the AMF regulations), for the investors and the public.

The duration of the visa for the ICO shall not exceed six months, and may only be delivered on the ICO itself, and not the issuer (or the issuing company) of the tokens. Besides, during this period of time, the AMF may withdraw the visa in the case where the ICO becomes incompatible or non-compliant with the white paper. Attention should be drawn to the fact that as the ICO is by nature based on the blockchain technology, the AMF does not check the computer programmes linked to the digital offer of tokens.

The other measures for protecting the investment in tokens established by the PACTE Law include the obligation for the issuer of tokens to implement a process for tracking and safeguarding the assets, which would both require further regulatory input.

The Blockchain Act distinguishes between the generation of token (requiring technical and programming knowledge to generate the token) and the issuance of token. The later 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

30 French Senate (TA *Sénat* n° 28, 2018–2019, amendment Nr COM-561).

31 <dfpa.info/investmentfonds-news/vertriebszulassung-fuer-postera-fund-crypto-i-aif.html> (17.08.2020).

32 Art 30 (1) d AIFM Act and 15 (1) e UCITS Act.

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.)[33] and need to register with the Liechtenstein Financial Markets Authority (FMA).[34] 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.[35]

The requirements for basic information under the Blockchain Act is 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.

C. Financial contracts on digital assets

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«.* Indeed, the definition of financial contracts (or derivatives contracts) within the meaning of MiFID II, as implemented in articles L 211-1 and D 211-1 of the French Financial Code is, in accordance with such European regulation, so broad (the AMF confirming such extensive content of the concept of financial contracts in these 2018 guidelines) that it should include *(inter alia)* digital assets in the scope of the definition of underlying assets to derivative contracts (such assets not being expressly excluded from such definition).

Therefore, without prejudice to the mandatory or optional registration requirements applicable to digital assets in accordance with the PACTE Law, investment services on derivatives on crypto-assets would trigger the French investment services monopoly rules (and related regulations). As a result, unless duly licensed/registered digital asset services providers are also licensed (or passported) as investment services providers in accordance with the provisions of the French Financial Code (aiming at implementing the MiFID II into French law), such providers are not entitled to provide investment services on derivative contracts. In the same vein, advising on a digital asset should not extend to the advice on a derivative on such asset as such advice would trigger the French investment services monopoly rules. Violation of such rules is criminally sanctioned in accordance with such code.

Further, in accordance with article L. 214-154 of the French Financial Code, an FPS can be, subject to compliance with rules herein (notably related to applicable concentration limits, valuation rules and assets eligibility requirements) exposed to tokens or crypto-assets by holding derivatives which underlying assets are tokens or crypto-assets. Conversely, holding derivatives whose underlying asset would consist of tokens or crypto-assets is not possible for an FPCI (articles R. 214-32-22 to R. 214-23-26 of such code).

The EU observatory on blockchain appointed by the European commission should ideally provide an analysis on the opportunity of an extension of MiFID II on financial instruments (including financial contracts) related to, or linked, to digital assets and tokens.

IX. Conclusio

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 have 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 of the new digital assets and blockchain framework as well as, potentially, non-EU/EEA Member States (such as candidate to EU/EEA accession).

Further, the current case study has shown the variety of potential approaches which may be undertaken at the level the European framework. The PACTE Law and the Blockchain Act seem to adopt two different conception of the regulation of tokens or digital assets (and more generally of the blockchain itself):

The French PACTE Law tends to regulate digital assets as products and services related to such assets in the same vein as more traditional banking and financial services such as those arising from MiFID II, PSD II and EMD. Conversely, the approach of the Blockchain Act in Liechtenstein seems to be more focusing on the technological side of the services provided, which could address many issues entailed by the »decentralization« aspect of the blockchain and notably in relation to the identification of »intermediaries« in charge of an anti-money laundering as well as potentially reporting entities for the purposes notably of MiFID II and EMIR. A combination of both approaches could be ideal for the

33 Art 14 subseq Blockchain Act.
34 Art 12 and 13 Blockchain Act.
35 Art 30 to 38 Blockchain Act.

purposes of the European framework, by cumulating the type of services subject to such framework and by vesting technological actors of the blockchain with certain assignments (such as those pertaining to AML and reporting).

In addition, the French PACTE Law has included a specific legal and regulatory regime for tokenized products, *i.e.,* notably as regards Initial Coin Offerings (ICOs) which should ideally be included in the European framework or through related amendments to MiFID II, but then subject to clear precedence rules and unambiguous determination of the scope of each piece of legislation. By contrast, the Blockchain Act has provided clear rules on the tokenization process itself, which we believe would be critical to consider from a European standpoint.

Finally, although no specific conflict of law rules have been provided by the two set of legislations considered in this article, both jurisdictions are considering such issues as being, as echoed by the European Commission's Blockchain Observatory, potential obstacles to the development of tokens, digital assets and blockchain.

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