

On 6 May 2021, the German Federal Parliament passed the Law on the Introduction of Electronic Securities (*Gesetz zur Einführung von elektronischen Wertpapieren – eWpG*). The main aim of the introduction of electronic securities is to make the German financial market more flexible and viable while protecting the German legal system, as well as the transparency and functioning of capital markets. The eWpG will enter into force the day after its promulgation in the German Gazette (*Bundesanzeiger*).

The central element of the eWpG is the introduction of electronic securities. Consequently, the possibility to certify securities under German Civil Law will be modified and can be achieved by entry into an electronic securities register. Currently, a physical certificate must legally represent securities. This certificate forms the basis for the demonstration and protection of ownership in the security and its transfer pursuant to German property law, which states that the transfer and ownership of securities are governed by the legal principles applicable to movable assets. This legal stipulation is still essential in order to ensure the equal legal treatment of securities in electronic form and securities represented by a certificate. To preserve the legal certainty of the ownership regarding the purchase and the transfer of securities, the new electronic securities will be legally equated with securities certified by a physical certificate. Accordingly, a security represented by a certificate can be replaced by an electronic security with identical terms unless the terms expressly prohibit this. The same applies to the replacement of an electronic security by a security then represented by a global or single certificate. Ultimately, the aim of the eWpG is that electronic securities will have the same legal implications as securities represented by a certificate.

Notably, the eWpG introduces two relatively different types of electronic securities based on the respective registrations:

- **Electronic Securities**

These securities will be registered in a central securities register that uses the same custody and trading infrastructure as for traditional certificate-based securities. According to section 12 clause 2 of the eWpG, the central electronic register must be administered by a central securities depository (CSD). This must be licensed pursuant to Article 16 of the Central Securities Depository Regulation (CSDR), and provide its core services as set out in the CSDR in Germany, or by a custodian, provided that the issuer expressly authorises the custodian to do so in text form. Clearstream Banking AG will generally remain the registration entity for these purposes. Upon registering the electronic securities in the central electronic register, the securities will be registered into the existing book-entry system (*Effektengiroverkehr*) of the CSD. This will enable the electronic securities to be traded in the same way as traditional securities on the German and EU capital markets venues. As with certified securities, the CSD will become the legal owner of the registered electronic securities but will hold them as a trustee for the beneficial owners.

- **Crypto Securities**

Crypto securities will be registered in a crypto securities register (section 4 clause 3 of the eWpG), which will require an entirely new custody and trading infrastructure based on distributed ledger technology (or similar technology). The crypto securities register must be administered by a licensed crypto custody service provider, or by the issuer itself, provided that the issuer has obtained the required regulatory licence. From a regulatory perspective, the administration of a crypto securities register will be considered a financial service within the meaning of the German Banking Act (*Kreditwesengesetz*) and will require a licence under the German Banking Act. The administrators of crypto securities registers will, therefore, having such licence be supervised by the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – BaFin*). The Federal Ministry of Justice and Consumer Protection and the Federal Ministry of Finance may, by joint statutory order, enact more detailed provisions for crypto securities registers pursuant to section 23 clause 1 of the eWpG. As electronic securities registers, crypto securities registers also allow global entries, as well as single entries for individual holders. In the case of individual registration, the crypto securities register shall ensure that the crypto securities register contains, in particular, information on the registered security about impediments to disposal and the rights of third parties. Further, a key difference between the crypto securities infrastructure and the electronic securities infrastructure is that the crypto securities register will register the initial issuance of crypto securities and any subsequent transfers of such securities to new holders. The central electronic registers, in contrast, will only record the initial issuance of electronic securities, but any further transfers of such securities will be recorded by way of book entries in the existing book-entry system of the CSD. If the issuer wants to transfer a crypto security to another electronic securities register, it requires the consent of all holders of the crypto security or the consent of the supervisory authority pursuant to section 22 of the eWpG.

Prior to registering the electronic security in the electronic securities register, the issuer shall make the terms and conditions of issue available to any person for direct and repeated perusal, accessible as a permanent electronic document in the securities register. If the electronic security is not registered one month after it has been deposited, the securities register shall delete the deposited terms and conditions of issue pursuant to section 5 clause 1 of the eWpG.

The eWpG is a starting point for the further digitisation of the securities law in Germany. Further legislative measures will probably follow – in particular, proposals in relation to electronic stocks are anticipated. In addition, efforts to harmonise the various securities laws are to be expected at the European level, and will have to be taken into consideration.

Contact

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