



The Legal 500 & The In-House Lawyer  
Comparative Legal Guide  
Germany: Blockchain

This country-specific Q&A provides an overview of the legal framework and key issues surrounding blockchain law in Germany.

This Q&A is part of the global guide to Blockchain.

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- 1. Please provide a high-level overview of the blockchain market in your jurisdiction. In what business or public sectors are you seeing blockchain or other distributed ledger technologies being adopted? What are the key applications of these technologies in your jurisdiction, and what is the state of development of the**


## **market?**

The German federal government passed a comprehensive Blockchain strategy on September 2019, which it hopes will foster the technology and mitigate the risks regarding the implementation of Blockchain technology. Berlin is a hub for startup companies of which around 170 in one way or another look at Blockchain, the distributed ledger technology that underpins the Bitcoin currency. There is great interest from would-be participants and investors across a raft of industries including automotive, pharmaceuticals, energy and public sector administration that hope to transform mass market processes via Blockchain.

However, according to a study report from Bitkom e.V. (Bundesverband Informationswirtschaft, Telekommunikation und neue Medien e.V.) currently almost nine out of ten companies (89%) do not use the Blockchain technology. 86% did not consider possible applications, whereas 3% did consider the use, but rejected it in the end. In companies that use Blockchain, it is mostly used in the fields of accounting/finance/controlling (56%), logistics/storing/shipment (34%), marketing/customer services/ distribution (26%), purchase (19%), production/manufacturing/project management (18%), human resources (17%), research & development (7%) and legal department and contract administration (3%).

## **2. Have there been any notable success stories or failures of applications of these technologies in your jurisdiction?**

In 2016, Deutsche Bundesbank and Deutsche Börse jointly presented a functional prototype for the Blockchain technology-based settlement of securities. While Berthold Kracke, CEO of Clearstream Banking AG of




Deutsche Börse Group said, that “the tests showed, that the Blockchain technology is a proper base for applications in the field of securities settlement and other financial market infrastructures the President of the Bundesbank, Jens Weidmann, stated in an interview, that the Blockchain was slower and more costly, compared to the traditional way of handling operations. Weidmann said, that compared to the traditional way of handling operations, the process took a bit longer and resulted in higher computational costs. Besides, similar experiences had been made elsewhere in the financial sector. Despite numerous tests of Blockchain-based prototypes, a real breakthrough in application is missing so far, according to Weidmann.

3. **Please outline the principal legislation and the regulators most relevant to the use of blockchain technologies in your jurisdiction. In particular, is there any blockchain-specific legislation or are there any blockchain-specific regulatory frameworks in your jurisdiction, either now or envisaged in the short or mid-term?**

Currently, there are no specific legislations or regulatory frameworks with regard to the use of Blockchain technologies in Germany. The use of Blockchain technology is not subject to an authorisation requirement in and of itself because, first and foremost, it is simply a form of technology.

However, different configurations are possible and the Blockchain application in different areas is conceivable. Therefore, banking law may, for example, apply to the granting of loans or payment via Blockchain if digital means of payment are regarded as financial instruments within the meaning of the German Banking Act (Kreditwesengesetz, “KWG”).



Antitrust law, for example, must be observed for purchasing platforms that are organized decentrally with Smart Contracts. Public authorities must also be involved, for example the BaFin (Bundesanstalt für Finanzdienstleistungsaufsicht, “BaFin”) for financial products or the Federal Network Agency (Bundesnetzagentur) for energy supplies or communication services.

As already outlined above, in September 2019 the German government developed and published a Blockchain strategy. The government’s aim is to design the legal framework in such a way that it offers sufficient investment security.

4. **What is the current attitude of the government and of regulators to the use of blockchain technology in your jurisdiction?**

The German government has recognised the potential of the Blockchain technology and is willing to use it for a “digital transformation”. According to the German finance minister, the Blockchain technology can make a contribution to strengthen Germany as a leading technology location. As outlined above, the government has adopted a strategy for dealing with the Blockchain technology. Under the leadership of the Ministry of Finance, more than 150 experts and organisations have been consulted since spring 2019 and more than 6,000 responses have been evaluated.

The government has set itself the goal to make use of the opportunities offered by the Blockchain technology and mobilising its potential for digital transformation. According to the government, the young and innovative Blockchain community in Germany should be preserved and



continue to grow and Germany should be an attractive location for the development of Blockchain applications and investments in their technology. To achieve this goal, the government stated, that it will seek to ensure that applications based on Blockchain technology are compatible with applicable law and to prevent abuse of the Blockchain (e.g. for money laundering).

**5. Are there any governmental or regulatory initiatives designed to facilitate or encourage the development and use of blockchain technology (for example, a regulatory sandbox)?**

In September 2019, the German government published a Blockchain strategy (see answer to question 4. above). It emphasises the importance of developing Blockchain based solutions not only in the public sector, but also in the private sector. By the end of 2021, the German government stated, that it will take measures to exploit the opportunities offered by the Blockchain technology and mobilise its potential.

In March 2019, the federal government published a key-issues paper on the regulatory treatment of electronic securities and crypto token. The paper is the first measure to be implemented as part of the Blockchain strategy. The plan is to open German legislation to electronic, dematerialised securities and to publish a draft legislation to regulate the public offering of specific crypto token. The introduction of electronic securities means that the current rule, whereby securities must be represented by physical certificates, will no longer apply across the board. Rules on electronic securities shall be technologically neutral, i.e., it should also be possible to issue electronic securities on a Blockchain. These measures are intended to establish the Blockchain technology in

the financial sector.

Furthermore, the government stated, that it will introduce a “round table” on the topic of Blockchain technology and data protection. The “round table” shall offer an exchange format to investigate frequently occurring case constellations and to point out possible solutions.

**6. Have there been any recent governmental or regulatory reviews or consultations concerning blockchain technology in your jurisdiction and, if so, what are the key takeaways from these?**

In spring 2019, the government launched an online consultation in order to develop the Blockchain strategy. The strategy came out as a result of the broad consultations with the industry and involved 158 experts and company representatives, who submitted 6,261 responses. The consultation has revealed that many participants consider the tokenisation of assets, and in particular securities, as one of the central Blockchain applications in the future. With the issuance of securities on a Blockchain the number of intermediaries required could be reduced. A Blockchain can serve as the “trust” agent in a transaction, thereby cutting out the intermediaries and allowing true peer-to-peer transfer of assets, the benefits of which include reduced transaction costs, reduced transaction time, and increased privacy and security.

Therefore, the government intends to open the German law to electronic securities. It should also be possible to issue electronic securities on a Blockchain. The federal government launched a consultation process on this issue with the publication of the key issues paper. It intends to publish a draft legislation on this matter by the end of this year.

**7. Has any official guidance concerning the use of blockchain technology been published in your jurisdiction?**

The German Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik, “BSI”) has published a guideline in March 2019. In this guideline, the BSI covers its opinion on many topics regarding the Blockchain technology, reaching from data protection to legal aspects to practical applications of the Blockchain.

The guideline is primarily aimed at potential users who are considering the use of the Blockchain technology and have basic technical knowledge. The aim is to provide a structured and comprehensive overview, particularly of those aspects of the topic that are related to IT security.

**8. What is the current approach in your jurisdiction to the treatment of cryptocurrencies for the purposes of financial regulation, anti-money laundering and taxation? In particular, are cryptocurrencies characterised as a currency?**

In accordance with the binding decision of BaFin on units of account within the meaning of the German Banking Act (“KWG”), Bitcoins are financial instruments. Units of account are comparable to foreign exchange with the difference that they do not refer to a legal tender (gesetzliche Zahlungsmittel). This classification applies in general to all cryptocurrencies. What software they are based on or which encryption technologies they apply is immaterial in this respect. Financial regulation is therefore mainly found in two areas: banking (supervision) law and



anti-money laundering law.

By contrast, cryptocurrencies are not legal tender and so are neither currencies nor foreign notes or coins.

There are no explicit legal provisions governing the taxation of cryptocurrencies. In fact, the general tax regulations apply, although, due to the novelty of the assets concerned, their application is not always unproblematic.

9. **Are there any prohibitions on the use or trading of cryptocurrencies in your jurisdiction?**

Just using cryptocurrencies as a substitute for cash or deposit money to participate in exchange transactions as part of the economic cycle does not require authorisation. A service provider or supplier may receive payment for his or her services in cryptocurrencies without carrying out banking business or financial services. The same applies to the customer. Equally, mining cryptocurrencies in and of itself does not trigger an authorisation requirement as the “miner” does not issue or place the cryptocurrencies. The sale of cryptocurrencies, either self-mined or purchased, or their acquisition are generally not subject to authorisation.

However, under additional circumstances, a commercial handling of the cryptocurrencies may trigger the authorisation requirement under the German Banking Act (“KWG”). Failure to obtain authorisation generally constitutes a criminal offence under section 54 of the KWG.



**10. To what extent have initial coin offerings taken place in your jurisdiction and what has been the attitude of relevant authorities to ICOs?**

The market for cryptocurrencies and ICO's has grown rapidly in recent years. In the first half of 2018, 13 of approximately 200 start-up financings in Germany were ICOs.

At the same time, the number of reports on fraud cases and warnings from the supervisory authorities is increasing. The Federal Government of Germany has published a warning relating to the unlawful marketing of cryptocurrencies, where it expressly underlines the fact that cryptocurrencies are not legal tender, but merely substitute currencies (Ersatzwährungen). Furthermore, the BaFin released a public warning that the acquisition of cryptocurrency coins - also referred to as token, depending on their form - as part of ICOs may result in substantial risks for investors. BaFin states that an ICO is a highly speculative form of investment that is often not subject to existing capital market regulations. As is the case with most trends, the high level of public interest in ICOs is also attracting fraudsters.

**11. If they are permissible in your jurisdiction, what are the key requirements that an entity would need to comply with when launching an ICO?**

It is not necessary to have either a particular form of enterprise or any actual business operations in order to conduct an ICO. Individual persons who do not conduct any business operations are technically able to offer token; provided they possess the knowledge of programming or

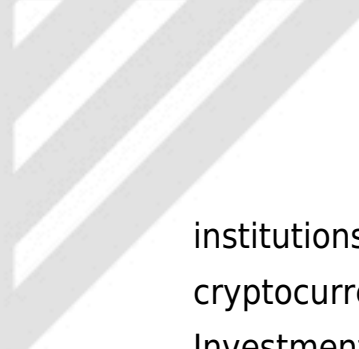
commission someone with such knowledge. The costs associated with the issuance of token are extremely low in comparison to those of issuing shares.

However, under certain circumstances it is possible that the issuer is required to publish a prospectus. Particularly, this is the case if token can be qualified as securities within the meaning of the German Securities Prospectus Act (Wertpapierprospektgesetz, "WpPG") in conjunction with the provisions of the EU Prospectus Regulation and if they are offered to the public. BaFin decides on a case-by-case basis, looking at the technical and contractual details of an ICO, whether the issuer requires authorisation under supervisory laws and is obliged to publish a prospectus. Because of the large number of different token structures on the market, a general statement regarding their legal nature would be too sweeping.

**12. Is cryptocurrency trading common in your jurisdiction? And what is the attitude of mainstream financial institutions to cryptocurrency trading in your jurisdiction?**

Cryptocurrency trading is quite common in Germany. There are many different (unregulated) trading platforms like Binance, Bitfinex, Bitpanda and many more platforms on which a potential investor can buy and trade cryptocurrencies. In the near future, the Stuttgart stock exchange is planning a regulated market for cryptocurrencies called "Bsdx" which allows only Bitcoin trading at first, but then shall expand its offering of cryptocurrencies on other cryptocurrencies as well.

While many retail investors invest in cryptocurrencies, certain financial



institutions are sceptical when it comes to Bitcoin and other cryptocurrencies. Markus Müller, worldwide leader of the Chief Investment Office of Deutsche Bank, states in an interview with Bloomberg News, that the high volatility, price-manipulations, as well as data-loss and data-theft can cause problems.

13. **Are there any relevant regulatory restrictions or initiatives concerning tokens and virtual assets other than cryptocurrencies (e.g. trading of tangible property represented by cryptographic tokens)?**

In order to fully comply with any legal requirements, the market participants must give careful consideration to whether the token constitutes a regulated instrument, for instance a financial instrument or a security.

The classification of a token as a security or a financial instrument within the meaning of the Securities Trading Act (Wertpapierhandelsgesetz, “WpHG”) or MiFID II determines which of the relevant capital market laws and EU regulations apply, for example the Market Abuse Regulation, which contains relevant requirements for the trading on secondary markets.

The decisive factor is which rights are associated with the respective token. A typological designation is not a determining factor, although a categorisation – for example as an “investment token”, “utility token” or “payment token” – may give an initial indication of the token type.


Currently, there are no regulatory restrictions in place concerning most of the “Payment-Token”, unless they are qualified as financial instruments according to the KWG.

Utility-Token are not qualified as security pursuant to the German Securities Prospectus Act (WpPG) or investments pursuant to the German Capital Investment Act (Vermögensanlagengesetz, “VermAnlG”) so that no regulation is provided, even though regulatory steps are discussed in the key issues paper of the Federal Ministry of Finance.

Security Token, which grant rights to their bearers equal to the bearer of securities, are generally qualified as securities pursuant to the German Securities Prospectus Act (“WpPG”) and Securities Trading Act (“WpHG”), as well as financial instruments pursuant to the German Banking Act (“KWG”) and are regulated as a consequence.

**14. Are there any legal or regulatory issues concerning the transfer of title to or the granting of security over tokens and virtual assets?**

A legal issue that might occur is that there is no civil law framework developed yet regarding the transfer of token and virtual assets and therefore the granting of security over token and virtual assets. There is a consensus that a security is to be understood as a deed, which securitises a private right in such a way that the right from the deed can only be asserted against the debtor if the holder of the deed submits it to the debtor. Since there is no physical deed concerning token, a transfer is only possible by assignment of the tokenised claim. In this case, it needs to be ensured, that the claim is inseparably connected with the token.



From a regulatory point of view, there are no concerns regarding the transfer of title to or the granting of security over token and virtual assets. The BaFin states, that as long as the token is not changed in its legal or technical content during the transfer, there are no problems.

15. **To what extent are tokens and virtual assets in use in your jurisdiction? Please mention any key initiatives concerning the use of tokens and virtual assets in your jurisdiction.**

The use of token in Germany is not widely spread yet, which might be due to the lack of a legislative and regulatory framework. Nonetheless, the BaFin published a paper to support potential issuers of crypto token on which information needs to be delivered to the BaFin when it comes to obligations regarding the publication of a prospectus or permission requirements (e.g. White Paper/General Terms and Conditions/Agreements etc.).

A key initiative regarding the use of token is the Security Token Offering, (“STO”), by the German Bitbond GmbH in cooperation with solarisBank. The Bitbond STO, which has been opened in March 2019 raised over EUR 2.1 mio. Bitbond is the first company that was approved by the BaFin to issue tokenised bonds. To our knowledge, there is no information available regarding the use of virtual assets or any key initiatives concerning the use of virtual assets.

16. **How are smart contracts characterised within your legal framework? Are there any enforceability issues specific to the**


## **operation of smart contracts which do not arise in the case of traditional legal contracts?**

As Smart Contracts encode traditional contracts, the law applicable to Smart Contracts is determined according to general principles. This means that the question of whether a legal contract was concluded depends on the applicable legal provisions, which may, for example, require certain formalities.

The risks associated with Smart Contracts primarily have to do with the lack of a central entity which can take corrective action against any intentional or unintentional misconduct. Furthermore, Smart Contracts might result in legal risks. It is currently unclear whether decisions made by the program code will also be recognised as binding by the courts. It is also highly questionable whether market participants would accept such proceedings or whether courts should even be allowed to take action in the event of illegitimate or inefficient decisions. Furthermore, there is also the question of how comprehensible the contract conditions stipulated in the program code are to consumers or retail investors.

### **17. To what extent are smart contracts in use in your jurisdiction? Please mention any key initiatives concerning the use of smart contracts in your jurisdiction.**

Smart Contracts are useful within the task field of industries that previously functioned as trusted authorities in terms of archiving, verifying, authenticating, licencing and providing information. Besides, an implementation in classical production and distribution chains and the organisation of a company is conceivable.



Exemplary fields of application are:

- Accounting, auditing and bookkeeping: Due to the unified standards used within accountancy, any financial transaction on the Blockchain could be used as certified proof of (cost) accounting.
- Supply chain: blockchain-based applications offer shorter and more transparent distribution chains and, above all, can take over clearing tasks efficiently.
- Technologically advanced financial innovations, (“FinTech”), banks, insurance companies: Transactions amounting to billions can be transferred across continents within milliseconds.
- Energy industry: Possible applications include P2P-energy trading and the establishment of new markets. RWE is already attempting to combine Blockchain with the internet of things and physical delivery.
- Healthcare: Although the health sector is subject to numerous regulations, an implementation within process optimisation is possible, as well as optimising the billing between patients and health insurance funds.

18. **Have there been any governmental or regulatory enforcement actions concerning blockchain in your jurisdiction?**

To our knowledge, there have not been any governmental or regulatory enforcement actions concerning Blockchain (e.g. verdicts regarding

enforcement in Blockchain), even though there are voices who speculate on how an enforcement could take place.

Therefore, the question of how to execute an enforcement order in Bitcoins under current German legislation arises. Lacking of material and monetary characteristics, consequently a seizure or transfer in accordance with sec. 808 of the German Code of Civil Procedure, (Zivilprozessordnung, ("ZPO"), or respectively secs. 829, 835 of the ZPO, would have to be withdrawn. Hence, solely the acquisition of a non-fungible act in accordance with sec. 888 para. 1 of the ZPO would remain conceivable.

19. **Has there been any judicial consideration of blockchain concepts or smart contracting in your jurisdiction?**

The Berlin Appellate Court decided in its judgment of 25 September 2018, [Ref. (4) 161 Ss 28/18 (35/18)], that Bitcoins are not units of account within the meaning of the KWG and thus opposes hereby the view of BaFin. Since there are very few judgments relating to cryptocurrencies, this judgment is understood as a fundamental decision. In view of a criminal legal background, it deals with the question, which legal nature lies within the classification of cryptocurrencies.

The defendant operated an internet-trading platform, over which, Bitcoins could be traded. As he had not obtained a permission of the BaFin for his trading platform, the District Court of Berlin-Tiergarten sentenced him to pay a fine because of negligent infringement in accordance with sec. 54 para. 1 no. 2, para. 2 KWG. In response to the defendant's appeal, the Regional Court of Berlin acquitted the defendant on the grounds that the



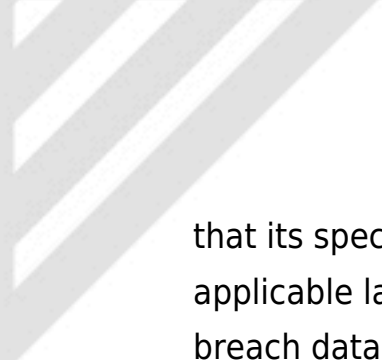
sale of Bitcoins on the trading platform was not subject to the obligation of obtaining a permission, which is why there was no starting point for a criminal liability. The Public Prosecutor's Office turned against this with an appeal before the Court of Appeal in Berlin, ("KG"), which decided upon the initial case in the second instance and concurred with the opinion of the Regional Court. With its decision, the KG has set a tone that contradicts the current administrative practice of Bafin.

20. **Are there any other generally-applicable laws or regulations that may present issues for the use of blockchain technology (such as privacy and data protection law or insolvency law)?**

Currently, there are no specific legislations or regulatory frameworks with regard to the use of Blockchain technologies in Germany.

However, European data protection rules are likely to apply to many blockchain-based transactions. Following the entry into force of the European General Data Protection Regulation ("GDPR") at the end of May 2018, the European legislator established a general "right to be forgotten" enforceable against any data controller and now being legally anchored in Article 17 GDPR. Given the fact that certain application scenarios inevitably require personal data to be documented in the ledger, it becomes clear that concerned service providers might face severe difficulties to fulfill respective claims of their customers.

At the same time, it is clear from this example that companies engaging in use of Blockchain technology will have to deal with the relevant regulatory framework, including data protection law, at an early stage in the development of any blockchain-based application, and must ensure



that its specific technical design meets the requirements set out by the applicable laws. Firms supervised by BaFin may face large fines if they breach data protection regulations.

21. **Are there any other key issues concerning blockchain technology in your jurisdiction that legal practitioners should be aware of?**

The usage of Blockchain technology itself is not subject to authorisation, due to the fact that Blockchain technology is only a technology. Depending on the business-model, an authorisation by BaFin is required, though. Another problem that might occur is that Blockchain generally works without regard for national borders, especially in public Blockchain scenarios, which creates the possibility of two parties being located in two different jurisdictions. This might cause an issue over the applicable law.

Another problem might be the irreversibility of each transaction and the long duration of the confirmation regarding the correctness of transactions.