

# Memorandum

Translated by Metastack Data GmbH from the Original German Version of the Memorandum  
22-METAS-1 | AS | AP Memo-METAS\_SVLAW\_2022-07-13a prepared by Stadler Völkel -  
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## Legal issues in context with the operation of a "stacking pool" on the Stacks Network

### 1. Definitions

Stacks is a decentralized blockchain ("Stacks Network"). The Stacks Network is supported by the Stacks Open Internet Foundation, Inc. located at 1950 W Corporate Way 32799, Anaheim, California 92801 (USA). STX is the name of the native token ("STX"). STX may be delegated to a STX address by nodes in the Stacks network. The nodes are operated by, among others, the Miners of the Stacks network ("Miner"). The Stacks Network is based on the Proof-of-Transfer method ("PoX" or "PoX Method"). MetaStack Data GmbH, with its registered office at Pater-Schwartz-Gasse 11A, 1150 Vienna, and company registration number FN 569704a ("MetaStack") intends to participate in the Stacks Network as an Aggregator for STX holders ("STX Holder").

#### 1.1 Functionality of the PoX procedure

PoX is used as an alternative to the Proof-of-Work mechanism. Both algorithms form the basis for reaching a consensus on which Miner within the network may generate the next block. In the PoX process, only Miners that transfer BTC to participants in the Stacks network ("Stackers") are eligible for validation of new blocks. The more BTC a Miner transmits to Stackers, the higher his chance of validating the next block in the Stacks Network.

In addition to the number of BTC transferred, Miners are selected by a random function of the Stacks network as part of the PoX process to validate transactions, create the next block in the Stacks Network, and thereby secure the system. Miners receive rewards in the form of issued STX tokens for maintaining the Stacks network transferred by the Stacks Network and in return transfer BTC to Stackers. Stackers thus receive BTC transferred from Miners as a reward for delegating STX.

## 1.2 Requirements for Miners

Certain minimum technical requirements are imposed on Miners' hardware to ensure the functionality and reliability of the system. Miners transfer BTC to Stackers in order to be selected by the random function of the Stacks Network for the creation of a new block on the Stacks Network and thereby receive STX from the Stacks Network.

## 1.3 Stacker requirements

PoX is designed such that a STX Holder must currently hold at least approximately 120,000 STX ("minimum number") in order to participate in the Stacks Network as a Stacker, or he delegates his STX to a STX address of another STX Holder ("Aggregator"), who can then participate in the Stacks Network as a Stacker. For delegating STX to the Aggregator, the STX Holder receives an aliquot reward from the Aggregator as a Stacker, depending on the agreement. The reward transferred to the STX Holder for delegating depends on the number of STX delegated to the Aggregator as Stacker.

## 1.4. How are STX delegated?

In order to delegate STX, STX must first be transferred to a STX address that supports delegation in the Stacks Network. The technical procedure of delegating to the Aggregator is done according to the particular wallet software chosen. In addition to this, a Stacker needs a public BTC address to be able to receive BTC directly from the Miners. A STX holder also needs a public BTC address to be able to receive BTC directly from the Aggregator as a Stacker. The BTC addresses are automatically generated when the STX addresses are created.

A STX holder holding the minimum number of STX in his wallet can directly participate in the Stacks Network as a Stacker. If a STX holder does not hold the minimum number of STX in his wallet, he can alternatively delegate his STX to the Aggregator by entering the Aggregator's STX address, which will then be credited with the delegated STX to reach the minimum number of STX in order to participate in the Stacks Network as a Stacker.

Delegating STX to the Aggregator does not result in the transfer of STX to the Aggregator by the STX Holder. The assignment of STX to an Aggregator is done through the appropriate delegation command directed to the Aggregator's STX address. As part of the delegation of STX, both the Aggregator as a Stacker and the STX holder receive BTC or STX as a reward for participating in the Stacks Network.

The Stacker provides STX while the Miner meets the technical requirements to participate in the Stacks Network and operates the node. The more BTC transferred from a Miner to the Stackers, the more frequently that Miner is selected to confirm blocks on the Stacks Network. The more blocks that are confirmed, the higher the financial reward for the Miner in the form of issued STX.

## 1.5 Who controls delegated STX in the Stacking process?

A STX holder, as the owner of the STX address key pair, retains control over all of his transactions at all times. In principle, delegated STX can neither be sent nor exchanged. However, STX can be delegated to the Aggregator by the STX Holder through a function of his wallet software, which are then allocated to the Aggregator as a Stacker for a certain period (approximately 2 weeks minimum to a maximum of 6 months) ("Cycle") to reach the minimum number. Updates or changes to delegated STX occur upon completion of a Cycle. A Cycle is defined as a specified number of blocks in the Bitcoin network. Delegated STX are locked during the cycle. This prevents delegated STX from being transferred to another address or allocated to another Aggregator before the completion of a Cycle. The STX holder still maintains de facto power of disposal over the delegated STX.

Delegation is determined by the STX Holder only and can be changed after each Cycle to specify a different STX address of an Aggregator to delegate his STX to another Aggregator or to engage in other transactions of his choice.

## 2. Legal Question

Does the ability to delegate STX from STX holders to Aggregators as Stackers fulfill a regulatory matter under the Alternative Investment Fund Managers Act (AIFMG), Banking Act (BWG), Electronic Money Act 2010 (E-Money Act), Payment Services Act 2018 (ZaDiG 2018), Capital Markets Act 2019 (KMG 2019) or Securities Supervision Act 2018 (WAG 2018)?

## 3. Legal assessment

### 3.1 Alternative Investment Fund Managers Act (AIFMG).

The Alternative Investment Fund Managers Act, enacted by the Austrian legislator in implementation of the AIFM Directive 2011/61/EU, is applicable to alternative investment funds (AIF). The management of AIF requires a license as Alternative Investment Fund Manager (AIFM) by the FMA (§ 4 AIFMG). Unlike the Investment Fund Act 2011 (InvG 2011), AIFMG does not aim at the fund itself, but at the management of the fund.

AIF means any undertaking for collective investment, including sub-funds, which collects capital from a number of investors in order to invest it in accordance with a defined investment strategy for the benefit of these investors, without the collected capital directly serving an operational activity, and which does not require authorization pursuant to Art 5 of

Directive 2009/65/EC (§ 2 para 1 no 1 AIFMG). The asset class of the investments are not relevant, therefore investments in virtual currencies can also constitute an AIF theoretically.

Based on this definition, there are four characteristics that an undertaking must satisfy in order to be considered an AIF within the AIFMG: (a) the existence of an undertaking for collective investment, (b) the raising of capital by the undertaking, (c) a number of investors, and (d) the existence of a defined investment strategy.<sup>1</sup>

### 3.1.1 Undertaking for collective investment

When considering whether an undertaking qualifies as an AIF, a case-by-case approach must be taken, based on structural and substantive circumstances, but not on the structure of the undertaking.<sup>2</sup> ESMA has published guidelines on the key terms of the AIFM Directive 2011/61/EU of 13.8.2013 as interpretative guidance on the relevant terms of an AIF or AIFM (Guidelines).<sup>3</sup> The purpose of the Guidelines is to provide for a uniform interpretation of the definition of an AIF. According to the Guidelines, an undertaking should be considered an AIF if all the elements included in the definition are met on a cumulative basis.

In determining whether such an undertaking exists, the following characteristics should be considered:<sup>4</sup>

- (i) the undertaking does not pursue a general commercial or industrial purpose or there is no operational activity;
- (ii) the undertaking pools the capital raised from its investors for the purpose of investment with the goal of achieving a joint return for these investors;
- (iii) the undertaking's shareholders, as a group, have no ongoing discretionary or supervisory power.

Miners operate hardware and software systems for the purpose of validating transactions in order to maintain the operation of the Stacks Network. The activity of Miners is therefore, in our view, an operational activity. The 'capital' stacked by Aggregators in the form of STX is not pooled for the purpose of achieving a collective return, but is always shared between individual STX holders depending on their delegated STX. While multiple STX holders may delegate STX by holding them at aSTX address and delegating them to an Aggregator, there is no pooling of capital. The delegated STX reside on different STX addresses of the STX holders. In addition, the 'holders' have discretionary or controlling power, as they have the ability to return the delegated STX to the non-delegated original state. STX holders are thus only bound during a cycle once they have delegated STX to an Aggregator.

Therefore, in our view, there is no undertaking of collective investment.

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<sup>1</sup> See Völkel/Ley in Piska/Völkel (eds.), *Blockchain rules* (2019) para 12.25; Tomanek/Wintersberger, *Mining - Geschäftsmodelle im Anwendungsbereich des AIFMG*, in Kirchmayr-Schliesselberger/Klas/Miernicki/Rinderle-Ma/Weilinger (eds.), *Kryptowährungen* (2019) 407 et seq.

<sup>2</sup> FMA, *FAQ zur Anwendung des AIFMG* (Oktober 2018) 13.

<sup>3</sup> ESMA/2013/611.

<sup>4</sup> ESMA/2013/611, 12.

### 3.1.2 Raising of capital by the undertaking

According to the Guidelines, any transfer of assets constitutes raising of capital. This requirement is to be interpreted broadly.<sup>5</sup> Aggregators receive STX from various STX holders as part of the delegation of STX. However, the delegation of STX does not constitute a transfer of assets because the STX Holder has the ability to cancel the delegation and STX are not transferred from the STX Holder's address to the Aggregator's STX address. However, in case of doubt, we assume a broad interpretation of this characteristic, so that raising of capital in the form of STX is present.

### 3.1.3 Number of investors

The characteristic 'number of investors' is to be interpreted just as broadly. The mere possibility of one or more investors participating in the undertaking is sufficient for the fulfillment of this characteristic.<sup>6</sup> Aggregators may receive delegated STX from various STX holders. In any case, this characteristic is fulfilled.

### 3.1.4 Specified investment strategy

Investment strategy refers to the intended investment guidelines for investments in specific assets.<sup>7</sup> The investment strategy is usually in writing and must go beyond the scope of general business strategies.<sup>8</sup>

In our view, the delegation of STX is not a defined investment strategy. There is no investment in specific assets. The Miner, Aggregator, and STX holders participate in maintaining the Stacks Network by validating transactions. While the Aggregator and the STX holder provide STX, the Miner provides the necessary hardware, computing power, software and BTC. There is no specific investment associated with the delegation of STX. Therefore, this characteristic is not met.

### 3.1.5 Result

In our opinion, already the first characteristic, the existence of a collective investment undertaking, is not fulfilled. Miners engage in operational activities by validating transactions. Furthermore, there is no pooling of capital for the purpose of achieving a collective return for all investors. STX holders' capital remains on STX addresses and is not pooled in any way.

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<sup>5</sup> See Völkel/Ley in Piska/Völkel (eds.), *Blockchain rules* (2019) para 12.45.

<sup>6</sup> Völkel, *ZFR* 2018, 317.

<sup>7</sup> Kalss/Oppitz/Zollner, *Kapitalmarktrecht*<sup>2</sup> § 30 Rz 33.

<sup>8</sup> Kalss/Oppitz/Zollner, *Kapitalmarktrecht*<sup>2</sup> § 30 Rz 33.

Overall, we are of the opinion that AIFMG is not applicable and that the delegation of STX does not constitute an Alternative Investment Fund.

### 3.2 Austrian Banking Act (BWG)

The Austrian Banking Act (BWG) defines that the operation of certain businesses is reserved for credit institutions and requires a license from the FMA (section 4 BWG). Section 1 of the Banking Act determines which transactions require a license as a credit institution.

The banking transactions listed in § 1 BWG are not relevant. At no time are funds accepted for deposit. STX cannot be used for payment purposes, so that the issuance and administration of means of payment pursuant to section 1(1)(6) BWG is also not fulfilled.

Moreover, banking activities within the meaning of the BWG are based on a narrow concept of money. Since the BWG does not define "money", it is necessary to refer to the definition of means of payment in the Euro Act.<sup>9</sup> § Section 1 of the Euro Act covers legal tender issued by a central bank of a Member State, i.e. banknotes denominated in Euro. In a broader sense, book money is also covered by the concept of money.<sup>10</sup> Formerly valid currencies, gold, precious metals, but also securities and bitcoin, for example, do not constitute money because they do not have the function of legal tender.<sup>11</sup> Virtual currencies or other digital assets are therefore not regarded as monetary units, in contrast to the Euro or USD.

The BWG is therefore not applicable.

### 3.3 E-Money Act (E-GeldG)

E-money is understood to be any electronically stored monetary value in the form of a claim against the e-money issuer, which is issued in exchange for an amount of money in order to carry out payment transactions within the meaning of the ZaDiG 2018 and which is also accepted by parties other than the issuer itself (Section 1 E-Money Act). Therefore, the following elements of fact must be cumulatively present: (i) an electronically stored monetary value, (ii) issued in exchange for the receipt of funds, (iii) an existing claim against the issuer, (iv) issued for the purpose of payment, and (v) accepted by third parties.<sup>12</sup>

E-money is thus characterized by central issuance by the e-money issuer. However, e-money must also be accepted as a means of payment by persons other than the issuing entity. The existence of at least a three-person relationship is therefore required. It is also

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<sup>9</sup> Waldherr/Ressnik/Schneckenleitner in Dellinger (ed.), BWG I (9th ed.) (2017) § 1 Rz 14.

<sup>10</sup> Tuder, Die möglichen Konzessionspflichten eines ICO im Rahmen der Bankenaufsicht, in Kirchmayr-

Schliesselberger/Klas/Miernicki/Rinderle-Ma/Weillinger (eds.), Kryptowaehrungen (2019), 287.

<sup>11</sup> Waldherr/Ressnik/Schneckenleitner in Dellinger (ed.), BWG I (9th ed.) § 1 Rz 15.

<sup>12</sup> Steiner, Krypto-Assets 103.

required that the issuance is made in exchange for the receipt of monetary amounts of legal tender.<sup>13</sup> It is also required that payment transactions can be triggered.

Pursuant to Section 4(5) ZaDiG 2018, payment transactions are the provision, transfer or withdrawal of a sum of money initiated by the payer, on behalf of the payer or by the payee, irrespective of any underlying obligations in the relationship between the payer and the payee.

Whether tokens, and therefore STX, are a monetary value is debatable.<sup>14</sup> In any case, it is undisputed that there is electronically stored data from systems based on decentrally operated transaction infrastructures.<sup>15</sup> The location, the number of copies and versions as well as the technical system for storage, synchronization and evaluation are irrelevant for the qualification as electronic money. Functionally, Section 1 E-Money Act links the issuance with a downstream processing of payment transactions within the meaning of Section 4 Z 5 ZaDiG 2018, the existence of which is to be denied. Since STX are not accepted by others in lieu of payment, the constituent element - acceptance by third parties - cannot be considered fulfilled either.

Furthermore it is essential whether STX represent a claim against the issuer. STX does not qualify as e-money as defined in Section 1 (1) of the E-Money Act because digital units of account do not have any inherent claim against any issuer, as there is no issuer due to the decentralized design.<sup>16</sup>

The E-Money Act is not applicable.

### 3.4 Payment Services Act 2018 (ZaDiG 2018)

The ZaDiG 2018 sets out those conditions under which persons may provide payment services in Austria. The scope of application extends to the provision by payment service providers located in Austria as well as the provision to payment service users in Austria. Only the commercial provision of payment services requires a license as a payment institution from the FMA.

The following activities are payment services within the scope of the ZaDiG 2018:

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<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Sillaber, Dezentrale Transaktionseinheiten als E-Geld, ÖBA 2020, 248 (249).

<sup>16</sup> Engelhardt/Klein, Bitcoins - Geschäfte mit Geld, das keines ist, MMR 2014, 355; Lerch, als Bitcoin Evolution des Geldes: Herausforderungen, Risiken und Regulierungsfragen, ZBB 2015, 190 (199); Schlund/Pongratz, Distributed-Ledger-Technologie und Kryptowährungen – eine rechtliche Betrachtung, DStR 2018, 598 (600); Shmatenko/Möllenkamp, Digitale Zahlungsmittel in einer analog geprägten Rechtsordnung, MMR 2018, 495; Spindler/Bille, Rechtsprobleme von Bitcoins als virtuelle Währung, WM 2014, 1357 (1361); Lintner in Vonkilch, E-GeldG 2010 (2015) Rz 12, 16; Omlor, JZ 2017, 758; ders, ZHR 2019, 308 f; zuletzt Völkel, "Zum Begriff virtuelle Währung", ZFR 2019, 350.

- Services with which cash deposits are made to a payment account, as well as all operations required for the management of a payment account (deposit business);
- Services enabling cash withdrawals from a payment account as well as all operations required for the management of a payment account (withdrawal business);
- Execution of payment transactions including the transfer of funds to a payment account with the payment service provider of the payment service user or with another payment service provider (payment transaction):
  - Execution of direct debits including one-off direct debits (direct debit business);
  - Execution of payment transactions by means of a payment card or similar instrument (payment card business);
  - Execution of credit transfers including standing orders (credit transfer business);
- Execution of payment transactions if the amounts are covered by a credit line for a payment service user (payment transaction with credit granting):
  - Execution of direct debits including one-time direct debits;
  - Execution of payment transactions by means of a payment card or similar instrument;
  - Execution of credit transfers including standing orders;
- Issuing of payment instruments (issuing) or the acceptance and settlement of payment transactions (acquiring);
- Services where, without setting up a payment account in the name of the payer or the payee, a sum of money from a payer is received only for the purpose of transferring a corresponding amount to the payee or to another payment service provider acting on behalf of the payee, or where the sum of money is received on behalf of the payee and made available to the payee (money remittance business);
- Services that, at the request of the payment service user, initiate a payment order in relation to a payment account held with another payment service provider (payment initiation services);
- Online services for communicating consolidated information on a payment account or payment accounts held by a payment service user either with another payment service provider or with more than one payment service provider (account information services).

Those payment services mentioned in the ZaDiG 2018 are not relevant. STX do not represent monetary units and are not used for payment purposes. Delegating STX to Aggregators for the purpose of maintaining the Stacks Network and obtaining a reward in the form of BTC does not fulfill any of the stated matters of the ZaDiG 2018.



### 3.5 Capital Markets Act 2019 (KMG 2019)

A public offer of investments may only be made in Austria if a capital market prospectus prepared and approved in accordance with the provisions of the Capital Markets Act 2019 has been published no later than one banking day prior thereto (Section 2 of the Capital Markets Act).

Investments are defined in Section 1(1)(3) KMG 2019 as follows:

"property rights, over which no securities are issued, from the direct or indirect investment of capital of several investors for their joint account and joint risk or for joint account and joint risk with the issuer, provided that the management of the invested capital is not carried out by the investors themselves [...]."

In three decisions, the Austrian Supreme Court (OGH) has specified the essential characteristics of investments, whereby the OGH interprets the term "investment" broadly.<sup>17</sup> According to case law, the existence of a risk association is decisive, which can be organized under company law or under the law of obligations, whereby it should make no difference whether this is legally or merely economically founded.

The decisive factor is the existence of a risk of total loss for the investors, which depends on the economic success of the issuer. For the OGH, the core of the concept of investment is the joint bearing of risk. In detail, investments have the following constituent elements:

#### 3.5.1 Existence of a property right under capital market law

According to the Lit, property rights include obligatory and real rights, intangible property rights and inheritance rights.<sup>18</sup> Membership rights (such as the right to information or the right to vote) are also counted as property rights by the established doctrine.<sup>19</sup>

By introducing the concept of investment, the Austrian legislator intended to include financing instruments of the so-called "grey capital market", which are comparable to securities, in the scope of application of the Capital Markets Act.<sup>20</sup> STX or STX addresses on which STX are located may also constitute a property right in the sense of capital market law.

This characteristic is therefore fulfilled.

#### 3.5.2 No security

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<sup>17</sup> OGH, 27.03.2020, 4 Ob 184/11d; OGH, 12.07.2016, 4 Ob 47/16i; OGH, 28.06.2018, 6 Ob 97/18k.

<sup>18</sup> Kalss/Oppitz, Die Neuregelung der KMG-Novelle 1994, ÖBA 1994, 350 (357).

<sup>19</sup> Zib/Russ/Lorenz, in Zib/Russ/Lorenz, Kommentar zum KMG § 1 Rz 30.

<sup>20</sup> 147 BlgNR XVIII. GP 17.

No security may be issued over the property right. The term security is generally understood to mean so-called transferable securities pursuant to Art. 4 para. 1 no. 44 of Directive 2014/65/EU (MiFID II). Transferable securities are defined as those categories of securities that can be traded on the capital markets, with the exception of instruments of payment, namely

- (a) Shares and other securities equivalent to shares or units in companies, partnerships or other legal entities, as well as share certificates;
- (b) bonds or other securitized debt instruments, including certificates (depository receipts) for such securities;
- (c) any other securities giving the right to purchase or sell such securities or giving rise to a cash payment determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

Securities within the meaning of MiFID II also exist if securitization is carried out by linking the right and the token - i.e. if the exercise of the right requires ownership of the token (tokenization). It is therefore not necessary that a physical security is actually issued in order to meet the definition of a security as defined by MiFID II.

In the context of delegating STX, however, no securitization takes place. Therefore, this characteristic is also fulfilled.

### 3.5.3 Direct or indirect investment of capital

Direct or indirect investment of the investors' capital is sufficient. By including indirect investment of capital in the wording of the law, trust structures are also covered.<sup>21</sup>

It is questionable whether the creation of a STX address and the delegation of the STX to Aggregators constitutes an investment at all. Since this characteristic is interpreted quite broadly to cover as many forms of investment as possible, the delegation of STX may also constitute an investment of capital.

In our view, the characteristic of indirect investment of capital is fulfilled.

### 3.5.4 Risk association organized under corporate law or debt law

The law describes this characteristic with the phrase "for their [the investors'] joint account and joint risk or for the joint account and joint risk of the issuer." This is to be understood as a pooling of risk of the persons involved.<sup>22</sup> What is essential is the joint risk of total loss for

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<sup>21</sup> Lorenz in Zib/Russ/Lorenz, Kommentar zum KMG § 1 Rz 32.

<sup>22</sup> Ibid. para 33.

the investors. The question is whether all investors would end up empty-handed in the event of the issuer's bankruptcy.<sup>23</sup>

The decisive reference criterion for the existence of a risk association is the existence of a risk of total loss and that this risk is dependent on the economic management or the economic success of the issuer.<sup>24</sup> In the opinion of the Austrian Supreme Court, it is irrelevant in which form this risk association is founded; a purely economically founded risk association is also sufficient.

If STX holders delegate STX to the Aggregator, the STX holders and the Aggregator each bear the joint risk that the delegated STX will lose value during a cycle. In our view, there is also a risk of total loss should Miners no longer see an economic incentive to transfer BTC to Stackers for the receipt of STX due to such a decline in STX value. We therefore assume that the regulator will conclude that there is a risk association between the STX holders and the Aggregator in this case.

In our view, the characteristic of joint risk is met.

### 3.5.5 Management of invested capital not by the investors themselves

This legal distinction of an investment from other property associations, in which the investors manage the capital themselves, should exclude pure co-ownership communities or condominium communities from the definition of an investment.<sup>25</sup>

In our view it is true that there is no management of capital, since at no point are STX transferred from the STX holders to the Aggregator. However, even this characteristic could be interpreted broadly by the regulator to conclude that delegation is tantamount to the Aggregator taking over the management of STX.

In our view, the characteristic of managing the invested capital is met.

### 3.5.6 Result

The decisive feature for the assessment of the delegation of STX by STX holders to the Aggregator is the interpretation of the concept of risk association. As explained above, we believe that there are good reasons for the existence of a risk association, which is why we take the legal view that the delegation of STX to Aggregators constitutes an investment within the scope of the KMG 2019.

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<sup>23</sup> OGH, 27.3.2012, 4 Ob 184/11d.

<sup>24</sup> OGH, 12.7.2016, 4 Ob 47/16i.

<sup>25</sup> Lorenz in Zib/Russ/Lorenz, Kommentar zum KMG § 1 Rz 34.

### 3.6 Securities Supervision Act (WAG 2018)

The commercial provision of certain investment services requires a license from the FMA, namely (i) investment advice in relation to financial instruments, (ii) portfolio management by managing portfolios on a client-by-client basis with discretionary authority under a power of attorney of the client, provided that the client portfolio contains one or more financial instruments, (iii) acceptance and transmission of orders, provided that these activities have one or more financial instruments as their object, (iv) the operation of a multilateral trading facility, and (v) the operation of an organized trading facility (section 3 para 2 WAG 2018).

According to the taxative enumeration of section 1 fig. 7 WAG 2018, financial instruments are:

- Transferable securities, i.e. those classes of securities that can be traded on the capital markets, with the exception of means of payment (section 1 no. 5 WAG 2018);
- Money market instruments, which are those classes of instruments that are usually traded on the money markets, such as treasury bills, certificates of deposit and commercial papers, with the exception of means of payment (section 1 fig. 6 WAG 2018);
- Shares in undertakings for collective investment in transferable securities (UCITS) and certain shares in alternative investment funds (section 1 fig. 7 lit c WAG 2018);
- Options, forward contracts (futures), swaps, over-the-counter interest rate futures (forward rate agreements) and all other derivative contracts relating to securities, currencies, interest rates or yields, or other derivative instruments, financial indices or measures that can be effectively delivered or settled in cash (section 1 fig. 7 lit d WAG 2018);
- Options, forward contracts (futures), swaps, forward transactions (forwards) and all other derivative contracts relating to commodities that must be settled in cash or may be settled in cash at the request of one of the parties without a default or other termination event (section 1 fig. 7 lit e WAG 2018);
- Options, forward contracts (futures), swaps and all other derivative contracts relating to commodities that can be effectively delivered if these instruments are traded on a regulated market, via an MTF or via an OTF, with the exception of wholesale energy products traded via an OTF, which must be effectively delivered (section 1 fig. 7 lit f WAG 2018);
- Options, forward contracts (futures), swaps, over-the-counter interest rate futures (forward rate agreements) and all other derivative contracts relating to commodities that can be effectively delivered, which are not otherwise mentioned in lit f and do not serve commercial purposes, which have the characteristics of other derivative financial instruments (section 1 fig. 7 lit g WAG 2018);

- derivative instruments for the transfer of credit risk (section 1 fig. 7 lit h WAG 2018);
- financial contracts for difference (section 1 fig. 7 lit i WAG 2018);
- Options, forward contracts (futures), swaps, over-the-counter interest rate futures (forward rate agreements) and all other derivative contracts relating to climate variables, freight rates, emission allowances, inflation rates or other official economic statistics that must be settled in cash or may be settled in cash at the request of one of the parties and such cash settlement does not occur because of a contractually specified termination reason, as well as other miscellaneous derivative contracts (section 1 fig. 7 lit j WAG 2018);
- Emission allowances consisting of units whose compliance with the requirements of Directive 2003/87/EC (Emissions Trading Scheme) is recognized.

A detailed discussion of the respective characteristics of the financial instruments mentioned can be omitted. In terms of a holistic view of STX in the light of the WAG, they do not constitute financial instruments.<sup>26</sup> The WAG 2018 cannot be applied for this reason alone.

### 3.7 Summary

In summary, the following can be stated:

- Delegating STX to Aggregators is not subject to licensing obligation under the AIFMG. The capital employed is not pooled for the purpose of achieving a joint return. Therefore, there is no collective investment undertaking. Furthermore, there is no defined investment strategy on the basis of which STX are invested.
- Delegation of STX to Aggregators is not subject to the licensing requirement under the Austrian Banking Act (BWG). Banking activities within the meaning of the BWG are linked to the narrow concept of money. STX do not constitute money within the scope of this narrow concept of money. Furthermore, none of the activities mentioned in the BWG are carried out by Aggregators.
- Delegation of STX to Aggregators is not subject to the licensing requirement under the E-Money Act. E-money is characterized by the fact that it must be accepted as a means of payment by the issuer as well as by persons other than the issuing party. This does not apply to STX. Digital assets do not represent claims against an issuer. For this reason alone, the E-Money Act cannot be applied.
- Delegation of STX to Aggregators is not subject to the licensing obligation under the ZaDiG 2018. Aggregators do not provide any of the payment services mentioned in the ZaDiG 2018. No payment function is associated with STX, nor can they be used for payment purposes.

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<sup>26</sup> Diwok/Gritsch, Bitcoin, Geldbegriffe und Zahlungsmittel, ZFR 2020, 64 (66).

- In our view, delegating STX to Aggregators constitutes an investment within the meaning of the KMG 2019. The term investment comprises several elements, which in our opinion are cumulative. In order to be able to offer an investment to the public, a capital market prospectus approved by the FMA must be prepared. Exempt from the prospectus requirement under Section 3(1) KMG are, inter alia:
  - an offer of investment addressed to investors who invest a minimum amount of EUR 100,000;
  - an offer of investment of a total consideration in the European Economic Area (EEA) of less than two million Euros. Such investments may be offered with an information sheet pursuant to the Alternative Financing Act;
  - an offer of investment addressed exclusively to qualified investors;
  - an offer of investment addressed to less than 150 natural or legal persons per EEA Contracting State.

**Addendum:** KMG 2019 does not explicitly require the issuer of an investment to identify his investors, as in the past the subscription to an investment without establishing the identity of the investor was de facto not possible. However, with blockchain technology, an investment without identification by the issuer is technically possible - an example would be a subscription to a Stacking Pool on the Stacks Network by delegating STX to the address of an Aggregator/Stacking Pool Operator. Even if no explicit KYC obligations for the Aggregator can be derived from the KMG 2019, we recommend identifying the subscribing Stackers, as the sole knowledge of STX addresses seems insufficient as proof of origin of the subscribers to the pool.

- Delegation of STX to Aggregators is not subject to the licensing requirement under WAG 2018. Neither do STX fall under the concept of financial instrument pursuant to Section 1 fig. 7 WAG 2018 nor does the activity of an Aggregator constitute an investment service.