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German investment funds investing in crypto-Assets or DTL-based financial instruments

Key takeaways from BaFin Circular 15/2026 (WA)

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Background

On 19 November 2026, the German Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin) published Circular 15/2026 (WA) (the Circular).

The Circular provides long-awaited guidance on direct investments by German investment funds in crypto-assets and in financial instruments issued using distributed ledger technology (DLT). It addresses several practical questions that have arisen as German fund regulation has gradually opened to digital assets, and it gives fund managers, depositaries and custodians greater certainty in this evolving market. The Circular applies from the date of its publication. It supplements BaFin Circular 05/2020 (WA) on the duties of depositaries (the Depositary Circular), and where the two overlap, it is, in case of doubt, to be treated as the more specific guidance.

The Circular's central message is straightforward. Although crypto-assets and DLT-based financial instruments both rely on distributed ledger technology, they are not subject to the same custody framework. BaFin distinguishes between crypto-assets within the meaning of Section 1(19) No. 24a of the German Capital Investment Code (*Kapitalanlagegesetzbuch* – KAGB), which refers to Article 3(1)(5) of Regulation (EU) 2023/1114 on markets in crypto-assets (MiCAR), and financial instruments, which are excluded from that definition and remain subject to the traditional investment fund custody regime.

This distinction is more than a matter of classification. It determines which institution holds the assets and, consequently, how responsibilities are allocated between the capital management company (*Kapitalverwaltungsgesellschaft* – KVG), the depositary and any crypto-asset custodian. Throughout the Circular, BaFin applies a depositary-centred custody model to DLT-based financial instruments and a custodian-centred model to crypto-assets.

Scope

Following the entry into force of the German Future Financing Act (*Zukunftsfinanzierungsgesetz*), it is not only special alternative investment funds (AIFs) with and without fixed investment terms that may invest directly in crypto-assets – other domestic public AIFs (Section 221 KAGB) and closed-ended public AIFs (Section 261 KAGB) may do so too. DLT-based financial instruments, by contrast, may be acquired by all types of investment funds in accordance with the general requirements (e.g. sections 193 *et seq.* KAGB).

The Circular does not cover indirect exposure to crypto-assets, for example through delta-1 certificates. Nor does it address the issuance and redemption of fund units recorded on decentralised crypto-securities registers under Section 95(5) KAGB in conjunction with sections 2 and 3 of the German Crypto Fund Units Ordinance (*Verordnung über Kryptofondsanteile* – KryptoFAV).

Two categories of digital assets and two distinct custody regimes

Crypto-assets are defined in Section 1(19) No. 24a KAGB by reference to Article 3(1)(5) MiCAR and include assets such as Bitcoin and Ether. The KAGB definition expressly excludes two categories: financial instruments within the meaning of Article 2(4)(a) MiCAR in conjunction with Annex I, Section C of Directive 2014/65/EU (MiFID II), and utility tokens within the meaning of Article 4(3)(c) MiCAR. As a result, crypto-securities under Section 4 of the German Electronic Securities Act (*Gesetz über elektronische Wertpapiere* – eWpG), crypto fund units under the KryptoFAV and other electronically issued securities within the meaning of Section 1(1), Sentence 3 of the German Safe Custody Act (*Depotgesetz* – DepotG) are treated separately from crypto-assets. The Circular refers to these collectively as "DLT-based financial instruments".

The Circular makes clear that the technological infrastructure on which an asset is issued or recorded is not decisive for regulatory purposes. In BaFin's view, the relevant question is the legal nature of the asset. An instrument does not cease to be a financial instrument merely because it is issued on a distributed ledger, nor does the use of blockchain technology automatically bring an asset within the scope of MiCAR.

This distinction is fundamental because it determines whether the traditional depositary custody regime remains applicable or whether custody must instead be entrusted to a crypto-asset custodian. Much of the Circular can therefore be understood as an effort to draw the practical consequences of that single classification question.

DLT-based financial instruments: The depositary remains responsible for custody

For DLT-based financial instruments, BaFin largely preserves the existing custody architecture. Financial instruments do not cease to be financial instruments merely because they are issued, transferred, or recorded using DLT; Article 4(1)(15) MiFID II expressly provides that financial instruments may be issued using DLT.

Crypto-securities and crypto fund units are securities within the meaning of the DepotG and therefore generally qualify as financial instruments eligible for safekeeping under sections 72(1) No. 1 and 81(1) No. 1 KAGB. Eligibility is not limited to these instruments: other DLT-based financial instruments may also be eligible, provided the relevant requirements are met. Where an instrument is eligible, the depositary continues to perform its traditional custody function, either directly or through a subcustodian.

BaFin confirms that an asset is in any event eligible for safekeeping where it can be booked or held in a financial instruments account, directly or indirectly in the name of the depositary. This includes registration in the name of the depositary or a subcustodian at the level of a central securities depository, including one with a specific permission under Article 8 of the DLT Pilot Regime (Regulation (EU) 2022/858), and direct registration with the issuer or its agent, such as the crypto-securities register keeper appointed under Section 16(2) eWpG.

The Circular's focus is therefore less on whether a depositary may hold DLT-based financial instruments than on how custody is exercised in a DLT environment. The depositary or its subcustodian must generally be identifiable as the holder of the instrument or be in a comparable position; for domestic crypto-securities, this is achieved through entry in the crypto-securities register. The depositary must also ensure that the private cryptographic key or keys needed to dispose of the asset are assigned to it or to its subcustodian. Where an asset can only be registered directly in the name of the fund, or of the KVG for the fund's account, the depositary does not perform custody (Article 88(2) of the AIF Managers Directive (AIFMD) Level 2 Regulation and Article 12(2) of the Undertakings for Collective Investment in Transferable Securities (UCITS) Level 2 Regulation).



Any additional licensing requirements arising from the custody of DLT-based financial instruments or the related keys must be met, for example authorisation for qualified crypto-custody business under Section 1(1a), Sentence 2 No. 6 of the German Banking Act (*Kreditwesengesetz* – KWG). German branches of Capital Requirements Regulation (CRR) credit institutions that hold a home-state authorisation for the safekeeping and administration of securities, and conduct custody business in Germany under the European passport, may safeguard the keys relating to eWpG crypto-securities and KryptoFAV crypto fund units without a separate German licence, provided they submit to BaFin a written confirmation from their home-state supervisor that this activity falls within its oversight.

From a practical perspective, DLT changes the mechanics of custody but does not alter the fundamental allocation of responsibilities: the depositary remains the institution responsible for safekeeping.

Crypto-assets: Custody lies with the crypto-asset custodian

The position is fundamentally different for crypto-assets. Because Section 1(19) No. 24a, Sentence 2 KAGB excludes financial instruments from the definition of crypto-assets, crypto-assets cannot qualify as financial instruments eligible for safekeeping under sections 72 and 81 KAGB. BaFin therefore concludes that crypto-assets such as Bitcoin and Ether are generally not eligible for safekeeping by the depositary. For crypto-assets issued abroad, the depositary must assess eligibility case by case and as promptly as possible, in coordination with the KVG.

Instead, the KVG must appoint a crypto-asset custodian (*Kryptoverwahrer*), whose function is the safekeeping of crypto-assets within the meaning of Article 3(1)(17) MiCAR.

This separation of roles is arguably the Circular's most important practical consequence. While DLT-based financial instruments remain integrated into the established depositary framework, crypto-assets are treated differently. Responsibility for safekeeping shifts to a specialised crypto-asset custodian, whereas the depositary's role focuses on verification, oversight and control.

The result is a split-function model that differs fundamentally from the traditional custody structure applicable to securities and other financial instruments. Fund managers contemplating direct crypto-asset exposure will therefore need to ensure that reporting arrangements, operational processes and contractual information rights are capable of supporting the depositary's supervisory functions despite the absence of direct custody.

Implications for depositary duties

The Circular effectively establishes two operating models.

Where a fund invests in DLT-based financial instruments, the depositary continues to perform traditional safekeeping functions under sections 72 and 81 KAGB, including custody, record-keeping, reconciliation and oversight of any subcustody arrangements.

Where a fund invests in crypto-assets, the depositary's verification duties derive from Section 81(1) No. 2 KAGB. It must verify that the KVG has acquired ownership, or an equivalent legal position, for the fund's account, check (where possible) whether third parties hold rights over the assets and maintain a complete and up-to-date inventory. Its general control duties under Section 83 KAGB continue to apply alongside these verification duties (see below).

Because the depositary does not hold the assets itself, it depends on information from the KVG and the crypto-asset custodian to fulfil its regulatory obligations. This explains why the Circular places considerable emphasis on information flows between them.

Ownership verification and information flows

For supervisory purposes, BaFin assumes that an equivalent legal position exists where the segregation requirements for crypto-assets in Article 75(7) MiCAR are met.

To enable verification, the crypto-asset custodian must provide the depositary with a holdings report on the fund's crypto-assets whenever holdings change, and at least once a year, including the public addresses used by the custodian. The KVG must provide the depositary with a list of all trading counterparties and crypto-asset custodians, their public addresses, and their confirmation that they segregate their own holdings from client holdings.

In its agreement with the crypto-asset custodian, the KVG must ensure that the depositary has access to the custodian's systems where needed for verification, in particular where the custodian holds the private keys or holds the assets on trust, and the KVG has only a claim for their return. Alternatively, the KVG may agree with the custodian that suitable evidence is provided to the depositary. Appropriate reporting arrangements and contractual information rights will therefore be a key component of fund structures involving direct crypto-asset investments.

Control duties

The depositary's control duties under Section 83 KAGB apply regardless of whether an asset is eligible for safekeeping. Because crypto-asset transactions usually settle quickly, the depositary may check after settlement whether a transaction complies with the fund rules and the applicable law; if a crypto-asset proves not to have been eligible, the transaction must be unwound. The general eligibility of a crypto-asset must, however, be checked when the mandate is accepted or before its first acquisition. Investment limits are monitored under the general rules of the Depositary Circular and must refer expressly to crypto-assets.

The depositary must also check that transactions are executed at market prices. Given the volatility of crypto-assets and potentially significant price differences between trading platforms, the KVG must notify the depositary of new crypto-assets in good time so that it can arrange price and market data.

Subcustody arrangements

The distinction between crypto-assets and DLT-based financial instruments also shapes BaFin's approach to delegation.

For DLT-based financial instruments, custody may be delegated to subcustodians in accordance with sections 73 and 82 KAGB. BaFin takes a substance-over-form approach to determining whether subcustody exists. A third party is a subcustodian not only where it is entered as holder in the crypto-securities register, but also where it can access the private keys or can obtain them through a right to give instructions. What matters is the factual ability to access the keys, not any legal entitlement to do so. Purely technical service providers must never have access to the keys; mere storage providers, such as web hosting or cloud providers, are generally not subcustodians unless their services are expressly offered for storing private keys.

Depositaries should therefore review existing key-management arrangements carefully. Sub-custodians must be subject to effective ongoing supervision, minimum capital requirements and regular external audits, and must have an organisational structure and expertise suited to holding DLT-based financial instruments. Because the depositary can usually hold such instruments itself, it faces a higher burden of justification when showing an objective reason for subcustody, and it must be prepared to take over custody itself if a subcustodian fails, unless alternative subcustodians are available.

For crypto-assets, by contrast, the custody function already lies with the crypto-asset custodian appointed by the KVG. The selection of that custodian, and the ongoing exchange with it, are matters the KVG must address in its new-product process.

Implications for fund managers

The Circular also has important implications for KVGs seeking direct exposure to digital assets.

Before investing directly in crypto-assets for the first time, or before the corresponding licence extension, a KVG must complete and document in writing a new-product process under Section 9 of BaFin's Minimum Requirements for the Risk Management of Capital Management Companies (*Mindestanforderungen an das Risikomanagement von Kapitalverwaltungsgesellschaften* – KAMaRisk). The process must confirm that adequate resources, IT infrastructure and processes are in place and should address in particular the risk management process, the specific risk of losing crypto-assets, the selection of and ongoing exchange with the depositary and any crypto-asset custodian, the best execution policy and the calculation of net asset value. The compliance function must be involved, and the depositary must be involved early and in any event before the first acquisition. No new-product process is required for eWpG electronic securities or comparable instruments governed by foreign law, because only the form of issuance changes.

Direct investment in crypto-assets must also be covered by the KVG's licence. BaFin treats references in existing licences to the asset catalogues in Section 284(2), Section 221 (1) or Section 261(1) KAGB as static, so assets added to those catalogues by later amendments, such as crypto assets, are not automatically covered. KVGs should therefore review whether a licence extension is required before implementing a crypto-asset strategy.

At least one of the managing directors responsible for portfolio management and risk management must have sufficient theoretical and practical knowledge of crypto-assets. In individual cases, theoretical knowledge may suffice at the time of the licence extension if the KVG plausibly demonstrates how practical experience will be built, but sufficient expertise must be in place no later than six months after the licence extension decision. A comparable six-month window applies to the managing directors of the depositary from when it takes on the mandate; staff below management level must have sufficient expertise.

BaFin further makes clear that a KVG may not hold its crypto-asset funds itself. Such holding would always be custody for others, amounting to crypto-asset custody under Article 3(1)(17) MiCAR or qualified crypto-custody business under Section 1(1a), Sentence 2 No. 6 KWG, and would require a licence. This applies whether the fund is managed externally or internally.

Conclusion

Circular 15/2026 (WA) marks another important step in the gradual integration of digital assets into the German regulated funds market. Rather than treating all blockchain-based assets in a uniform manner, BaFin has opted for a functional approach that preserves established custody principles for financial instruments while accommodating the distinct characteristics of crypto-assets.

For market participants, the practical implications are significant. The classification of an asset as either a crypto-asset under MiCAR or a DLT-based financial instrument is no longer merely a question of regulatory taxonomy. It determines custody structures, ownership verification mechanisms, delegation arrangements, governance requirements and, in many cases, licensing considerations. Consequently, asset classification will increasingly become the starting point for structuring digital asset investment strategies within German fund vehicles.

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