NOERR

MEMORANDUM

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Our references: P-0003-2024
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From **Noerr s.r.o.**
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For **APF DIGITAL AGRIFUND CR s.r.o.**
Karel Mičulka, portfolio manager, real estate broker / CSO

Subject **Analysis of the APFC token offering in the Czech Republic**

A. INTRODUCTION

I. Scope of review

The company APF DIGITAL AGRIFUND CR s.r.o. ("**Client**") asked us to review the offering of Tokens and Options (as defined in Section B below) by the Client in the Czech Republic.

II. Factual basis of review

With regard to the Tokens and Options, we examined the following documents ("**Documents**"):

- the "Whitepaper" document available on the Client's website;[1]
- the template purchase agreement relating to the sale of Tokens by the Client provided to us by the Client on 12 December 2023;

[1] https://apfdigitalagrifund.com/site/assets/files/1034/apf_whitepaper.pdf

Noerr s. r. o., ID No.: 271 21 810,
DIC: CZ27121810
The company is registered in the Commercial Register maintained by the Municipal Court in Prague, Section C, Insert 173446.

- a template preliminary purchase agreement (option agreement) relating to the Token resale Option provided to us by the Client on 12 December 2023;

- a questionnaire completed by the Client regarding the issuance and public offering of crypto-assets in the Czech Republic provided to us by the Client on 16 January 2024; and

- additional information provided by the Client via e-mail on 31 January 2024.

Capitalized terms used in this Memorandum have the meanings ascribed to them in the Documents unless they are defined independently or differently in this Memorandum.

III. Legal basis of review

The basis of the review in this Memorandum are the following legal acts applicable under Czech law in the areas of law dealt with below:

- Act No. 256/2004, the Capital Markets Undertakings Act (*zákon o podnikání na kapitálovém trhu*) ("**Capital Markets Act**");

- Act No. 240/2013, the Act on Management Companies and Investment Funds (*zákon o investičních společnostech a investičních fondech*) ("**Investment Funds Act**");

- Act No. 21/1992, the Act on Banks (*zákon o bankách*) ("**Banking Act**");

- Regulation (EU) 2023/1114 of the European Parliament and of the Council on markets for crypto-assets (*nařízení o trzích kryptoaktiv*) ("**MiCA Regulation**");

- Regulation (EU) No 648/2012 on OTC derivatives, central counterparties and trade repositories (*nařízení o OTC derivátech, ústředních protistranách a registrech obchodních údajů*) ("**EMI Regulation**");

- Regulation (EU) 2017/1129 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market ("**Prospectus Regulation**");

- Commission Delegated Regulation (EU) 2017/565 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (*nařízení v přenesené pravomoci, kterým se doplňuje směrnice Evropského parlamentu a Rady 2014/65/EU, pokud jde o organizační požadavky a provozní podmínky investičních podniků a o vymezení pojmů pro účely zmíněné směrnice*) ("**Regulation 2017/565**").

B. FACTS

We understand that in 2023, the Client issued an *initial coin offering* (ICO) of the tokens APF Coin (APFC) with a total volume of 250,000,000 units (the "**Tokens**"). The Tokens are stored and transferred through the decentralized blockchain platform Ethereum Mainnet (www.ethereum.org). The Tokens may be bought and sold through online cryptocurrency centralized exchange trading platforms (HitBTC, Coinsbit, LATOKEN, IndoEx, BitMart, P2B, BitForex, CoinW) operated by entities different from the Client and based outside the Czech Republic, or directly without using organized trading platforms.

The Client itself offers the Tokens through a call center using its own client database. The Client sells Tokens directly (i.e. not through a trading platform) only on the condition that the purchaser of Tokens is a qualified investor, the amount of investment is at least CZK 1,000,000 and the purchaser has already invested more than EUR 125,000 in APF Group products.

The Client uses the proceeds of the Token issue within the APF Group to purchase agricultural land in the Czech Republic (the registered owner of the agricultural land is APF VENTURE CAPITAL s.r.o. ("**APF VC**")). The current value of the Tokens is determined solely on the basis of supply and demand in the relevant market. The Tokens are not intended to maintain a stable value, either by reference to one or more official currencies or by reference to other values or rights, including agricultural land acquired by the Client group from the proceeds of the Token issue.

Tokens are transferable without restriction. The Tokens do not carry any special rights vis-à-vis the Client such as the right to repay a certain amount, the right to an interest payment, the right to exchange the Tokens for other assets, preferential subscription rights, the right to participate in decisions on disposal of proceeds of the Token issue or the assets acquired from the proceeds of the Token issue, or the right to participate in the management of the Client or its profits.

However, the holders of the Tokens may, by agreement with the Client (or another company in the Client's group), use the Tokens to pay (a part of) the purchase price for the purchase of agricultural land from the Client (or another company in the Client's group).

Pursuant to a separate option agreement with the Client, the holder of the Token may have the right to ask the Client to enter into a future purchase agreement for the resale of Tokens to the Client at a predetermined price ("**Option**") within a specified time.

The claim of the holder of the Token vis-à-vis the Client for the settlement of the Option shall be secured by a mortgage in favor of the holder of the Token over the agricultural land or land owned by APF VC.

APF VC intends to transfer the purchased (and, if applicable, mortgaged) agricultural land to the qualified investment fund APF GROUP CR SICAV a.s. ("**APF Fund**"),

with APF Fund assuming the guarantor liability for the Client's obligation to settle the Option.

If the Option is exercised, the Client will purchase the Tokens from the holder of the Tokens at a pre-agreed price, thereby terminating the mortgage over the affected lands owned by APF VC and the guarantee obligation of the APF Fund. If the Option is not exercised, then the Option (and with it the security interest therein) will terminate on the expiry of the pre-agreed period for exercising the Option.

C. EXECUTIVE SUMMARY

Subject to the comments in Section D and the closing remarks in Section E, the conclusions of this Memorandum can be summarized as follows:

I. Investment instruments regulation	In our view, the Tokens do not qualify as investment securities (*investiční cenné papíry*) or other investment instruments. In our view, the Options qualify as derivative investment instruments under Section 3(1)(k) of the Capital Markets Act. A prospectus under the Prospectus Regulation is not required for the public offering of Tokens.
II. OTC derivatives regulation	In our view, the Options qualify as over-the-counter (OTC) derivatives. Under the EMI Regulation, the Client shall: • calculate and/or report to the Czech National Bank its positions in OTC derivatives; and • report its derivatives transactions to the so-called trade repository.
III. Crypto-assets regulation	In our view, the Tokens qualify as crypto-assets other than asset-referenced tokens or electronic money tokens under the MiCA Regulation. From 30 December 2024, the Tokens may only be offered to the public after prior preparation, notification and publication of a crypto-asset white paper. The public offering of Tokens in the Czech Republic does not require an authorization under the MiCA Regulation.
IV. Investment funds regulation	The offering and sale of the Tokens shall not formally constitute an underhand investment fund (*pokoutný fond kolekitvního investování*) provided that additional conditions described further below are met. From the investment funds regulation perspective, there is no obstacle to offering the Tokens to the public, however we recommend continuing with the current practice of addressing and offering the Tokens to persons in the minimum amount of CZK 1,000,000, provided that the

	purchaser has invested more than EUR 125,000 through the APF Group. We recommend considering striking off the Client from the list of asset-managing entities comparable with management firms maintained by the Czech National Bank pursuant to Section 596(f) of the Investment Funds Act.
V. Banking regulation	In our view, the issuance/sale of the Tokens shall not constitute taking deposits within the meaning of the banking regulation. However, it cannot be ruled out that the issuance of Options may constitute taking deposits, and we therefore recommend that the Options be granted by the Client to no more than 20 persons (regardless of the amount of the investment and not including financial institutions), or alternatively to verify with the Czech National Bank through a qualified inquiry whether the issuance of the Tokens together with the Options may be considered as taking deposits within the meaning of the banking regulation.

The details of the reasoning for the above summary can be found in the following analysis.

D. ANALYSIS

I. Investment instruments regulation (Tokens as investment securities)

1. Legal categories of investment instruments

Investment instruments under Czech law are:[2]

- investment securities (*investiční cenné papíry*);
- collective investment securities (*cenné papíry kolektivního investování*);
- derivative investment instruments (*derivátové investiční nástroje*);
- money market instruments (*nástroje peněžního trhu*); and
- greenhouse gas emission allowances (*povolenky na emise skleníkových plynů*).

Only the categories of investment securities, collective investment securities and derivative investment instruments are relevant for the assessment of the Tokens as investment instruments (cf. Sections D.I.2, D.I.3 and D.I.4).

In our view, the categories of money market instruments and greenhouse gas emission allowances are not relevant for the assessment of the Tokens, and are therefore not considered further in this Memorandum.[3]

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[2] Cf. § 3(1) of the Capital Markets Act.

[3] For the sake of completeness, we note that money market instruments are instruments which are normally traded on the money market, in particular treasury bills, deposit certificates and commercial papers (Section 3(4) of the Capital Markets Act), and which have the following characteristics: a) they have a value that can be determined at any time, b) they are not derivatives and c) their maturity at issue is 397 days or less. The Tokens do not correspond to any of these categories of instruments, they are not derivatives (cf. Section D.I.4) and have no maturity.
Greenhouse gas emission allowances are property values corresponding to the right to emit the equivalent of one ton of carbon dioxide into the air and are issued only by the market operator (the state-controlled company OTE, a.s.) pursuant to Act No. 383/2012 Coll., on the conditions for trading greenhouse gas emission allowances. The Tokens have been issued directly by the Client and do not correspond to this right.

2. Tokens as investment securities

a) Legal definition of investment securities

Investment securities are "*securities which are negotiable on the capital market*" (*cenné papíry, které jsou obchodovatelné na kapitálovém trhu*).[4] Although the statutory definition refers to "securities" (*cenné papíry*), it is not necessary the investment securities are securities under civil law, i.e. certificated or book-entry securities.[5] In other words, any asset traded on the capital market (regardless of whether it is formally a security) may qualify as an investment security.

b) Negotiability on the capital market

Investment securities are negotiable (*obchodovatelné*) on the capital market if (i) they are transferable (*převoditelné*) and fungible (*zastupitelné*)[6] and (ii) they are tradable on a financial investment instruments market where instruments with a maturity of more than 1 year or equity securities are traded.[7] Such markets include any marketplaces or other places where the demand for such instruments meets the supply, including regulated markets or other markets such as online trading platform (crypto exchanges).[8]

Considering that the Tokens are freely transferable and fully fungible, and as of the date of this Memorandum are traded on at least 8 online trading platforms (crypto-exchanges), and no Document indicates that the Tokens shall have a maturity of less than 1 year (the Tokens do not have a maturity in the legal sense), we conclude that the Tokens are assets negotiable on the capital market and therefore formally qualify as investment securities under the Capital Markets Act.

c) Material comparability to "traditional" investment securities

In addition to the above formal criteria, the assessment of an asset as an investment security shall also be subject to the material

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[4] Cf. § 3(2) of the Capital Markets Act.

[5] Cf. Hobza. ICO a tokeny optikou práva kapitálového trhu: mohou být tokeny investičními cennými papíry? *Bulletin advokacie* 3/2019, p. 41. Also cf. § 1(1) of the Czech Civil Code providing that „*the application of private law is independent of the application of public law*" (*uplatňování soukromého práva je nezávislé na uplatňování práva veřejného*), whereas the Capital Markets Act is a part of the public law.

[6] Cf. Husták in Husták/Šovar/Franěk/Smutný/Cetlová/Doležalová. *Zákon o podnikání na kapitálovém trhu. Komentář.* Praha: C. H. Beck, 2012, p. 49–59.

[7] Cf. Kohajda in Karfíková et al. *Teorie finančního práva a finanční vědy*. Praha: Wolters Kluwer, 2017, p. 253–254.

[8] Cf. Hobza (note no. 5).

comparability of the asset with traditional transferable securities in terms of its investment function in the economic sense.[9] If the formal criteria described above are met, an asset shall be considered an investment security if its investment purpose prevails and if the asset confers rights similar to those attached to shares or bonds in particular.[10]

In our opinion, the prevailing purpose of the Tokens is the investment function (the reason for purchasing the Tokens would usually be to speculate on future growth in their value), as evidenced by the Whitepaper, according to which the main purpose of Tokens is to offer their holders "an *investment based on modern technology*".[11] On the other hand, the Tokens do not, according to the Documents, confer on their holders any special rights similar to those associated with shares (such as the right to profit-sharing or voting rights) or bonds (such as the right to a predetermined return) or other securities. We therefore consider that the Tokens are not materially comparable to traditional investment securities.

d) The Czech National Bank's position on digital assets

On 19 May 2023, the Czech National Bank ("**CNB**") published on its website an opinion on the possibility of investment funds to invest in crypto-assets.[12] Although the opinion is explicitly addressing cases where crypto-assets do not qualify as investment instruments under the Capital Markets Act, the CNB stated in the introductory section of the opinion the following general introduction:

"*At the outset, it is necessary to distinguish between cases when crypto-assets are investment instruments under the Capital Markets Act and when they are not. Czech law, according to the prevailing view respected by the CNB, does not recognize securities in digital form other than book-entry securities in central or separate registers. Crypto-assets typically do not meet this requirement*." (*Úvodem je potřebné rozlišit případy, kdy jsou kryptoaktiva investičním nástrojem podle ZPKT a kdy nikoliv. České právo podle převažujícího názoru, který ČNB respektuje, nezná cenné papíry v digitální podobě jiné než zaknihované cenné*

[9] Ibid.
[10] Ibid.
[11] Whitepaper, p. 4.
[12] Cf. Czech National Bank. *K možnosti investičních fondů investovat do kryptoaktiv*. https://www.cnb.cz/cs/dohled-financni-trh/legislativni-zakladna/stanoviska-k-regulaci-financniho-trhu/RS2023-05/.

papíry v centrální nebo samostatné evidenci. Tento požadavek kryptoaktiva typicky nesplní.)

A book-entry security (*zaknihovaný cenný papír*) is defined by the Czech law as a "*registration in a corresponding register replacing the security*" (*zápis do příslušné evidence nahrazující cenný papír*),[13] whereas such corresponding registers are the central register (*centrální evidence*) maintained by the central securities depositary (*centrální depozitář cenných papírů*) or by the CNB,[14] or the separate register (*samostatná evidence*) maintained by an investment firm (*obchodník s cennými papíry*), a management company (*investiční společnost*), a settlement system operator (*provozovatel vypořádacího systému*), or a bank (*banka*).[15]

The Documents show that the Tokens are registered (stored and transferred) on the decentralized blockchain platform Ethereum Mainnet, which is not maintained by any of the entities listed above (by its nature, this platform cannot be maintained by a single entity as it is a decentralized peer-to-peer database). Therefore, the Tokens cannot be considered as book-entry securities in a central or separate register.

e) Opinion of the European Securities and Markets Authority on the qualification of crypto-assets as investment instruments

On 29 January 2024, the European Securities and Markets Authority ("**ESMA**") published a consultation paper on draft guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.[16] Also according to ESMA, crypto-assets can be considered as transferable (investment) securities if they are negotiable, transferable and encapsulate rights attached to securities.[17]

f) Tokens are not investment securities

Based on the above, we consider that the Tokens, although they are assets negotiable on the capital market, are neither materially comparable to traditional investment securities nor do they

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[13] Cf. § 525 of the Czech Civil Code.

[14] Cf. § 92 of the Capital Markets Act.

[15] Cf. § 93 of the Capital Markets Act.

[16] Cf. ESMA. *Consultation paper On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments*. ESMA75-453128700-52. https://www.esma.europa.eu/sites/default/files/2024-01/ESMA75-453128700-52_MiCA_Consultation_Paper_-_Guidelines_on_the_qualification_of_crypto-assets_as_financial_instruments.pdf.

[17] Id. at 35.

encapsulate the rights (traditionally) associated with securities, nor are they book-entry securities held in a central or separate register. In our view, therefore, the Tokens are not investment securities within the meaning of Section 3(1)(a) and Section 3(2) of the Capital Markets Act.

g) Regulation of public offerings of investment securities in relation to the Tokens

The obligation to publish a prospectus in connection with a public offering of investment instruments applies only to public offerings of investment securities.[18] As Tokens are not, in our view, investment securities, the obligation to publish a prospectus under the Prospectus Regulation does not apply to the public offering of the Tokens.

3. Tokens as collective investment securities

a) Definition of collective investment securities

Collective investment securities are "*securities representing an interest in investment funds or foreign investment funds*" (*cenné papíry představující podíl na investičních fondech nebo zahraničních investičních fondech*).[19] Investment funds are collective investment funds (*fondy kolektivního investování*) and qualified investor funds (*fondy kvalifikovaných investorů*)[20] registered in the relevant lists maintained by the CNB pursuant to Section 597 of the Investment Funds Act.

b) Tokens are not collective investment securities

The Client is registered in the CNB's list maintained pursuant to Section 596(f) of the Investment Funds Act as an entity under Section 15(1) of the Investment Funds Act managing assets collected from investors for the purpose of investing them jointly on the basis of a designated strategy for the benefit of investors.

However, the persons referred to in Section 15(1) of the Investment Funds Act are not authorized to manage investment funds, and the Client does not hold an authorization to operate a management firm or a self-managed investment fund under the Investment Funds Act nor is it registered in the list of investment funds under Section 597 of the Investment Funds Act. Therefore, the Client is not an investment fund

[18] Cf. Articles 3(1) and 2(a) of the Prospectus Regulation.
[19] Cf. § 3(3) of the Capital Markets Act.
[20] Cf. 92(1) of the CCPA.

and the Tokens cannot constitute securities representing an interest in an investment fund.

On the basis of the above, we consider that the Tokens are not collective investment securities within the meaning of Section 3(1)(b) and Section 3(3) of the Capital Markets Act.

4. Tokens and Options as derivative investment instruments

a) Definition of derivative investment instruments

Derivative investment instruments are:

- options, futures, swaps, forwards and other instruments whose value is related:
  - to the price or value of securities, foreign exchange rates, interest rates or interest yields, greenhouse gas emission allowances, as well as other derivatives, financial indices or financial quantitative indicators;[21]
  - to commodities;[22]
  - to climate indicators, transport tariffs or inflation rates and other economic indicators published by the official statistics department;[23]
  - to assets, rights, debts, indices or quantified indicators other than those listed above which have the characteristics of other derivative investment instruments; in particular those traded on a European regulated market or multilateral trading facility or organized trading facility;[24]
- credit risk transfer instruments;[25]
- financial contracts for differences.[26]

b) Tokens as derivative investment instruments

A derivative is generally defined as an instrument, contract or arrangement whose value is dependent on the value of an underlying

[21] Cf. § Section 3(1)(d) of the Capital Markets Act.
[22] Cf. § Section 3(1)(g), (h) and (i) of the Capital Markets Act.
[23] Cf. § Section 3(1)(j) of the Capital Markets Act.
[24] Cf. § Section 3(1)(k) of the Capital Markets Act.
[25] Cf. § Section 3(1)(e) of the Capital Markets Act.
[26] Cf. § Section 3(1)(f) of the Capital Markets Act.

asset and which will be settled in the future, with a negotiation-to-settlement period shorter than a spot transaction.[27]

Under the Documents, the value of the Tokens is not directly linked to the value of any underlying asset and is determined solely by the market effects of supply and demand for the Token. In any event, the business model of the Tokens does not assume any link between the Tokens and the price or value of securities, foreign exchange rates, interest rates or interest yields, greenhouse gas emission allowances, other derivatives, financial indices or financial quantitative indicators, commodities, climate indicators, freight rates, inflation rates, other economic indicators published by the official statistics authorities, or other rights, debts, indices or quantitative indicators. Furthermore, Tokens neither serve to transfer credit risk nor are they in any way a financial contract for differences.[28]

The Documents imply that the purchase and sale of the Token between the Client and the customer is settled as a spot trade within a maximum of 3 business days. By its very nature, therefore, the Token cannot be considered a derivative instrument as it lacks the basic defining characteristic of a derivative – settlement in the future.

This conclusion is not affected by the fact that the proceeds of the Token issue are to be used by the Client to finance the purchase of agricultural land in the Czech Republic, the value of which may (at least indirectly) affect the market value of the Token. As already mentioned, the value of the Tokens is not directly related to agricultural land and may be completely independent of it, depending on market conditions.

c) Options as a derivative investment instrument

The Documents show that the Client offers to the holders of the Tokens an Option conferring the right to sell the Tokens back to the Client at a certain time at a pre-agreed price, which corresponds to the standard economic understanding of an Option as "a *financial market instrument* under *which one party (the buyer, the option holder) has the right to require the other party (the seller, the option provider) to buy or sell the underlying instrument during or after a specified period of time at a pre-agreed price (the so-called 'strike price'). "The other party has the*

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[27] Cf. Czech Accounting Standard No. 110 available at https://www.mfcr.cz/assets/cs/media/Ucetnictvi_2018_Ceskeucetnistandardypro501-2002.pdf.

[28] A financial difference contract is a contract between a "seller" and a "buyer" to settle the difference between the current price of an underlying asset (stocks, currencies, commodities, indices, etc.) and its price at contract settlement. Cf. European Securities and Markets Authority. *Contracts for difference (CFDs)*. https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-267.pdf.

obligation to sell or buy the underlying instrument when requested to do so by the first party (exercise of the option)."[29]

As the Options relate to the value of Tokens as things in the legal sense, it is appropriate to consider the Options as "*instruments whose value relates to things and which have the characteristics of other derivative investment instruments*" within the meaning of Section 3(1)(k) of the Capital Markets Act.

d) Characteristics of other derivative investment instruments

In order to assess the Options as derivatives, it is necessary to assess whether the Options have the characteristics of other derivative instruments. The following are considered to be investment instruments having the characteristics of other derivative investment instruments:

- instruments that are or may be settled in cash if one or more of the parties chooses that option for reasons other than default or other reasons to terminate the contractual relationship; or
- instruments that are traded on a regulated market, multilateral or organized trading facility; or
- instruments that are standardized, so that price, unit of quantity (lot), delivery time and other terms are determined mainly by reference to regularly published prices, standard units of quantity (lots) or standard delivery times, and at the same time:
    - they are traded on a trading venue in a non-EU country that performs similar functions to a regulated market, multilateral or organized trading facility; or
    - it is expressly agreed that they will be traded on a regulated market, multilateral or organized trading facility or trading facility in a third country or that they will be subject to their rules; or
    - are equivalent to a contract traded on a regulated market, multilateral or organized trading facility or trading facility in a third country in terms of price, quantity unit (lot), delivery time and other contractual terms.[30]

In relation to Options, the first condition mentioned above is already met, namely that the settlement of the Option is made in cash at the option of one of the parties (the holder of the Token). It is therefore irrelevant for

[29] Cf. Kotáb in Bakeš et al. *Finanční právo*, 5th edition. Prague: 2009, p. 432.

[30] Cf. § Article 3(8) of the Capital Markets Act and Article 7(1) and (3) and Article 8 of the Regulation 2017/565.

the assessment of Options as derivatives whether or not they are traded on a regulated market, multilateral or organized trading facility or whether they are standardized.

At the same time, however, even if any of the above conditions are met for a particular instrument, an instrument shall have "*the characteristics of other derivative instruments*" only if it relates to one of the asset classes listed in Article 8 of Regulation 2017/565. One of these asset categories is "*any other asset or right of a fungible nature, other than a right to receive a service, that is capable of being transferred* "[31] . In our view, the Tokens to which the Option relates are an asset of a fungible nature that is transferable and therefore the second condition set out above for treating the Options as derivative investment instruments is met.

e) Options are derivative investment instruments

Based on the above, we consider that the Options meet the definitional criteria of an investment instrument under Section 3(1)(k) of the Capital Markets Act as they are instruments whose value relates to things (Tokens) and which have the characteristics of other derivative investment instruments.

f) Options as OTC derivative contracts

As the Option is not exercised on a regulated (exchange) market, the Option meets the definition of an over-the-counter (OTC) derivative under the EMI Regulation[32] and the Client meets the definition of a non-financial counterparty under the EMI Regulation.[33]

In particular, each non-financial counterparty has the following basic obligations under the EMI Regulation:

- reporting obligations to the CNB and ESMA regarding the calculation of positions in OTC derivatives;
- the obligation to clear derivatives; and
- reporting obligations on derivatives to the so-called trade repository.

Each of these obligations will only apply under predefined conditions, and specifically:

[31] Cf. Article 8(f) of the Regulation 2017/565.
[32] Cf. Article 2(7) of the EMI Regulation.
[33] Cf. Article 2(9) of the EMI Regulation.

- **the reporting obligation to** the CNB and ESMA regarding the calculation of positions in OTC derivatives will apply in one of the following variants depending on whether or not the non-financial counterparty calculates its positions in OTC derivatives:

    - if the non-financial counterparty does not calculate its positions in OTC derivative contracts, it shall notify the CNB and ESMA without further delay; or

    - if the non-financial counterparty calculates its positions in OTC derivative contracts, then:

        - it must calculate at the end of each month the average of its positions in OTC derivative contracts over the previous 12 months; and

        - it is only required to notify the CNB and ESMA if the aggregate of its average positions exceeds the so-called clearing threshold, which for OTC derivatives category relevant for the Options is at EUR 4,000,000,000;[34] ; and

        - as long as the clearing threshold is not exceeded, the notification obligation does not need to be fulfilled;

- as of the date of this Memorandum, **the clearing obligation** applies only to certain categories of derivatives to which the Option does not correspond[35]. Therefore, the obligation to clear Options will not arise even if the clearing threshold is exceeded;

- **the reporting obligation** on derivatives entered into to a trade repository applies in relation to each Option regardless of whether the clearing threshold has been exceeded, provided that:

    - information about each derivative contract entered into and any changes or terminations are reported no later than the following business day; and

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[34] Cf. Article 11(e) of Commission Delegated Regulation (EU) No 149/2013 supplementing Regulation (EU) No 648/2012 of the European Parliament and of the Council with regard to regulatory technical standards on indirect clearing arrangements, the clearing obligation, the public register, access to a trading venue, non-financial counterparties, and risk mitigation techniques for OTC derivatives contracts not cleared by a CCP.

[35] Specifically, basis swaps, coupon swaps, forward rate agreements and overnight rate swaps, index-based credit default swaps and interest rate swaps. For more details, cf. Commission Delegated Regulations (EU) 2015/2205, 2016/592 and 2016/1178.

- the notification is made to one of the trade repositories registered with ESMA, a list of which is available on ESMA's website.[36]

In view of the above, we recommend that the Client adjusts its processes and systems to ensure compliance with the reporting obligation and calculation of positions in OTC derivatives.

II. Crypto-assets regulation (Tokens as crypto-assets)

1. Definition of crypto-assets under MiCA Regulation

A crypto-asset is defined under the MiCA Regulation as "*a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology*".[37] The technology that enables the operation and use of a distributed ledger is defined as an information repository that keeps records of transactions and that is shared across, and synchronized between, a set of network nodes (devices or processes holding a complete or partial replica of records of all transactions on a distributed ledger) using a consensus mechanism.

According to publicly available information,[38] the Ethereum Mainnet technology through which the Tokens are stored and transferred is a public electronic decentralized blockchain database based on a *proof-of-stake* consensus mechanism. In our view, therefore, the Ethereum Mainnet technology meets the definition of a distributed ledger technology and the Tokens meet the definition of crypto-assets under the MiCA Regulation.

The MiCA Regulation specifically regulates the following special categories of crypto-assets:

- electronic money tokens, which are a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency;[39]

- asset-linked tokens, which are a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies;[40]

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[36] https://www.esma.europa.eu/document/list-registered-trade-repositories

[37] Cf. Article 3(1)(5) of the MiCA Regulation.

[38] Cf. https://ethereum.org/developers/docs/intro-to-ethereum.

[39] Cf. Article 3(1)(7) of the MiCA Regulation.

[40] Cf. Article 3(1)(6) of the MiCA Regulation.

- utility tokens, which are a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer.[41]

It is clear from the Documents that it is not the objective or purpose of Tokens to maintain a stable value by reference to any other value. Therefore, Tokens are neither electronic money tokens nor asset-referenced tokens. The Documents further imply that Tokens may be used to pay (part of) the purchase price for the purchase of agricultural land from the Client, but this is not the sole purpose of the Tokens. Therefore, Tokens are not utility tokens either.

2. Public offering of crypto-assets under MiCA Regulation

All crypto-assets, including crypto-assets other than asset-referenced tokens or electronic money tokens, are subject to public offering regulation under the MiCA Regulation. The primary obligation of a person offering crypto-assets to the public is to draw up, notify and publish a crypto-asset white paper.

A public offering of crypto-assets is defined as "*a communication to persons in any form, and by any means, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets*."[42] The term "persons" is not defined by the MiCA Regulation, however, Article 4(1)(a) of the MiCA Regulation implies that the white paper related obligations do not apply in the case of offers to less than 150 natural or legal persons per Member State. It follows that the limit of 149 persons per Member State applies as a threshold above which information on crypto-assets may only be publicly communicated after the prior preparation, notification and publication of a crypto-asset white paper.

As the Tokens are, in our view, crypto-assets within the meaning of the MiCA Regulation, it follows that if any information about the Tokens and the terms of the Token offering sufficient to support a decision to purchase the Tokens is disclosed to more than 149 persons, then such information may be publicly communicated after the preparation, notification and publication of a crypto-asset white paper, unless one of the statutory exemptions applies (cf. Section D.II.3 below).

3. Exemptions from the obligation to prepare a crypto-asset white paper under the MiCA Regulation

In some cases, the obligation to prepare, notify and publish a crypto-asset white paper under Article 4(1) of the MiCA Regulation will not apply. These cases include:

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[41] Cf. Article 3(1)(9) of the MiCA Regulation.

[42] Cf. Article 3(1)(12) of the MiCA Regulation.

- offers to less than 150 natural or legal persons per Member State, if these persons are acting on their own account – as already mentioned in Section D.II.2 above;[43]

- offers whose total value of consideration over a 12-month period (starting from the beginning of the offer) does not exceed EUR 1,000,000;[44]

- offers of a crypto-asset exclusively to qualified investors, provided that the crypto-asset can only be held by such qualified investors.[45]

If any of the above exceptions apply, there is no need to prepare, notify and publish a crypto-asset white paper in relation to the public offering of Tokens.

In the case of offers addressed exclusively to qualified investors, only professional clients as defined in Article 3(1)(30) of the MiCA Regulation, i.e. the following entities, are considered to be such investors:

- banks;

- savings and credit cooperatives;

- securities traders;

- insurance companies;

- reinsurance companies;

- management firms;

- investment funds;

- pension companies;

- any other person operating on the financial market on the basis of an authorization granted by the financial market supervisory authority, except for tied agents;

- the persons carrying out securitization;

- traders in commodities and commodity derivatives;

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[43] Cf. Article 4(2)(a) of the MiCA Regulation.
[44] Cf. Article 4(2)(b) of the MiCA Regulation.
[45] Cf. Article 4(2)(c) of the MiCA Regulation.

- a legal entity that is competent to manage state property;
- a state or member of a federation;
- the Czech National Bank, a foreign central bank or the European Central Bank;
- the World Bank, the International Monetary Fund, the European Investment Bank or another international financial institution;
- a legal person established for the purpose of carrying on a business which, according to its most recent accounts, meets at least 2 of the following 3 criteria:
    - o assets of at least EUR 20,000,000;
    - o an annual net turnover of at least EUR 40,000,000;
    - o equity capital of at least EUR 2 000 000.

Other persons [including, for example, qualified investors within the meaning of Section 272(1)(h) of the Investment Funds Act, i.e. persons investing at least EUR 125,000 or CZK 1,000,000] cannot be considered qualified investors within the meaning of the MiCA Regulation.

4. Applicability of the rules under the MiCA Regulation and the transitional period

The MiCA Regulation will be fully applicable to public offerings of crypto-assets in the Czech Republic from 30 December 2024. Prior to this date, public offerings of crypto-assets that are not also investment securities are not separately regulated.

As stated above, in our opinion, Tokens are not investment securities or any other category of investment instruments. Accordingly, prior to 30 December 2024, the public offering of Tokens in the Czech Republic is not subject to the obligation to prepare, notify and publish a crypto-asset white paper under the MiCA Regulation.

III. Investment funds regulation (Tokens as a collective investment instruments)

1. Asset management comparable to investment management

Pursuant to Section 15(1) of the Investment Funds Act, a legal entity that is not authorized to manage investment funds may, on the basis of its registration in the CNB list, manage assets in the Czech Republic consisting of funds or valuables collected from investors or acquired with such funds or valuables for the purpose of investing them jointly on the basis of a defined strategy for the benefit of such investors.

The Client is registered in the relevant CNB list as a person managing assets pursuant to Section 15(1) of the Investment Funds Act.

However, according to the information provided by the Client, its activity consisting in offering and selling of the Tokens does not correspond to the activity under Section 15(1) of the Investment Funds Act, as the funds obtained by the Client through the sale of Tokens are not jointly invested by the Client for the benefit of the holders of the Tokens, but are used by the Client for its own business activity consisting in acquiring of agricultural land (and thus it is essentially a form of financing of its own activity).

If the Client's activity does not correspond to the activity pursuant to Section 15(1) of the Investment Funds Act, we recommend considering striking the Client off from the CNB list maintained pursuant to Section 596(f) of the Investment Funds Act.

2. Prohibition of an underhand collective investment fund

According to Section 98(1) of the Investment Funds Act, it is prohibited to collect funds from the public for the purpose of joint investing without the permission of the CNB if the return on investment or the investor's profit is to depend, even partially, on the value or yield of the property in which the funds were invested.

Joint investing means the investment of capital raised from investors according to a common investment strategy with the aim of generating a pooled return for those investors, where the investors bear the potential pooled return and the pooled risk. [46]

However, the purpose of the Client's (and its group's) business model related to the issuance, offering and sale of the Tokens is not to collect funds from investors for the purpose of pooling such funds for the benefit of such investors. The Documents show that the Client, as part of the APF Group, uses the funds raised from the sale of the Tokens to purchase agricultural land in the Czech Republic, but does not do so for the benefit or at the risk of the holders of the Tokens. The return on the Token-holder’s investment is in no way formally dependent on the value or yield of the agricultural land acquired by the Client's group from the funds raised through the sale of the Tokens.

The Token-holder may negotiate and subsequently exercise the Option, but in such case the Token-holder's return or yield on investment becomes fixed.

Therefore, in relation to the Tokens, the conditions for assessing the business model as a collective investment fund are not met, as the funds obtained from

[46] Cf. Czech National Bank. *Pokoutné fondy kolektivního investování (§ 98 ZISIF)*. https://www.cnb.cz/cs/dohled-financni-trh/legislativni-zakladna/stanoviska-k-regulaci-financniho-trhu/RS2022-06/, point 11 *et seq*.

the sale of the Tokens are not pooled for the purpose of their joint investing, and moreover, the return on investment or profit of the Token-holder is not even partially dependent on the value or yield of the assets acquired by the Client group from the pooled funds.

3. Addressing the public from the perspective of investment funds regulation

Since the statutory conditions for a collective investment fund are not met (joint investing of pooled funds and dependence of the investment on the value or yield of the assets), and the Client's activity does not correspond to the activity according to Section 15 (1) of the Investment Funds Act (joint investing of pooled funds for the benefit of investors), it is possible to address the public with the offer of the Tokens also within the sense of investment funds regulation.

From the point of view of regulatory prudence and in view of the relative unpredictability of future CNB opinions, we recommend that the Client continues the current practice of addressing and offering Tokens to persons in the minimum amount of CZK 1,000,000, provided that the buyer has invested an amount exceeding EUR 125,000 through the APF Group.

IV. Banking regulation

1. Prohibition on taking deposits from the public

Under Czech law it is prohibited to take deposits from the public (*přijímat vklady od veřejnosti*) without a banking license issued by the CNB.[47] A deposit is defined by the Banking Act as monetary funds entrusted to a third party entitling the depositor to repayment of these funds (*svěřené peněžní prostředky, které představují závazek vůči vkladateli na jejich výplatu*).[48] The CNB advocates for a broad interpretation of this definition, and understands a deposit as any form of monetary obligation arising as a result of accepting monetary funds (*jakýkoli peněžitý závazek vzniklý v důsledku přijetí peněžních prostředků*).[49]

The Token as such does not carry the right of its holder vis-à-vis the Client to return the funds paid by the Client for the Tokens. The Client's monetary obligation towards the Token-holder does not arise from the Option Agreement either, as the Token-holder's right to settle the Option will only arise from a purchase agreement concluded upon a call made by one of the parties under the Option Agreement. Moreover, under the Option Agreement, the Option

[47] Cf. § 2(1) of the Banking Act.

[48] Cf. § 1(2)(a) of the Banking Act.

[49] Cf. Czech National Bank. *K neoprávněnému přijímání vkladů od veřejnosti (tzv. černé bankovnictví)*. https://www.cnb.cz/cs/dohled-financni-trh/legislativni-zakladna/stanoviska-k-regulaci-financniho-trhu/RS2022-04.

may also be terminated by expiry of the option period without the Client incurring any obligation to pay the Token-holder the Option settlement. In light of the foregoing, we consider that neither the Tokens nor the Options should be considered as taking deposits within the meaning of the banking regulation. Therefore, whether or not the Tokens are offered to the public is irrelevant for banking regulation purposes.

However, in our opinion, we cannot rule out an interpretation, primarily aimed at satisfying and promoting banking regulation standards, according to which the issuance of Tokens with the simultaneous granting of an Option may be considered as taking deposits, since, as a result of the contractual mechanisms set up, the Client may (indirectly) incur a monetary obligation (settlement of the Option) as a result of the receipt of funds (for the initial sale of Tokens). In such a case, it cannot be excluded that the issuance of Tokens together with Options should be considered as taking deposits within the meaning of banking regulation, and therefore Options should not be made available to the public. The public for the purposes of banking regulation is defined as a group of no more than 20 persons, which does not include financial institutions. Therefore, the public for the purposes of banking regulation shall include qualified investors (persons investing more than EUR 125,000). In view of the above, we recommend that the Options are granted by the Client to no more than 20 persons (regardless of the amount of investment and not including financial institutions) or, alternatively, to check with the CNB via a "qualified enquiry"[50] whether the issuance of Tokens together with Options can be considered as taking deposits within the meaning of banking regulation.

E. CONCLUDING REMARKS

The above statements have been thoroughly researched and reflect our professional analysis. However, there is no (established) practice of the relevant public authorities, no case law and no extensive comments in legal literature on a number of issues addressed in this Memorandum. Furthermore, it cannot be ruled out that the authorities or the courts will in the future not follow the statements made in this Memorandum, especially given the fact that the subject matter of this Memorandum remains in a state of constant regulatory flux, with differing and often unexpected regulator opinions published without prior warning.

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[50] Cf. https://www.cnb.cz/cs/verejnost/kontakty/formular-kvalifikovany-dotaz/.

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