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## Legal Opinion

Regarding the XDC Token in relation to the XinFin ecosystem, under Liechtenstein law.

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To

**XINFIN FINTECH PTE. LTD**  
111 NORTH BRIDGE ROAD  
#08-04 PENINSULA PLAZA  
SINGAPORE (179098)

From

**Law Firm Bergt and Partners Ltd.**  
Buchenweg 6  
9490 Vaduz  
Liechtenstein

Subject

Assessment of the regulatory classification of XDC Token in relation to the XinFin ecosystem, under Liechtenstein Supervisory Law



5. March 2024

Dear Sir or Madam

In the matter described above, XINFIN FINTECH PTE. LTD, 111 NORTH BRIDGE ROAD, #08-04, PENINSULA PLAZA, SINGAPORE (179098) (the "Client"; "XinFin") has mandated and authorized us to prepare a legal opinion on the legal classification of the XDC Token in relation to the XinFin ecosystem under Liechtenstein law.

This legal opinion may be submitted to the FMA for a request pursuant to Art. 43 para. 2 lit. b TVTG that the FMA provide information on the applicability of the Liechtenstein Act on Tokens and Trusted Technology Service Providers (TVTG) or another law listed in Art. 5 para. 1 FMAG (Financial Market Act) to the facts outlined and determined below. This legal opinion may also be submitted to a regulated Virtual or Crypto Asset Service Provider (VASP/CASP) in Liechtenstein for placement and issuance of the XDC Token in Liechtenstein by such VASP on behalf of the client.

Yours sincerely

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## I. Assumptions & Scope of Legal Assessment

- 1 This legal opinion ("Legal Opinion") is rendered to you at your request for issuing and/or listing of XDC Tokens in Liechtenstein by a regulated VASP and in connection with the intended token properties and functionalities with regard to XDC Tokens ("XDC Tokens" or the "Token(s)"). In rendering this legal opinion, we have only reviewed copies of the following documents provided to us:
  - Whitepaper as provided to us on February 28, 2024 ("whitepaper-business.pdf"), with the title "BLOCKCHAIN FOR TRADE AND FINANCE BUSINESS WHITEPAPER By XinFin Organization Version 1.2, updated March 2021".
- 2 In rendering this Legal Opinion, we have not done any factual research or reviewed other documents, in particular we have not reviewed the executed version of any agreements, terms or contracts. If there are any characteristics of the Tokens other than as mentioned in the facts, please let us know as this may change our advice. We assume the accuracy and completeness of the facts. We assume the completeness and accuracy of the information provided to us, though please let us know if there is any information about the characteristics of the Tokens that would merit our review once you have considered this advice.
- 3 This Legal Opinion is given only as to circumstances existing on the date hereof and known to us and exclusively as to the laws of Liechtenstein as the same are in force at the date hereof. It should be understood that we shall have no duty to inform you of any changes in Liechtenstein or foreign law that may affect the matters addressed in this Legal Opinion after the date hereof, and this Legal Opinion does not purport to constitute a comprehensive legal opinion in connection with the facts at hand. We express no opinion in relation to any matters of fact or the commercial terms of the business contemplated in relation to XDC Token in conjunction with the XinFin ecosystem or any business conducted by the Client.
- 4 Finally, we do not provide tax advice or information and our legal advice under this opinion does not cover privacy and data protection laws, issues relating to the licensing of information technology, intellectual property, money laundering and countering the financing of terrorism or related compliance or corporate law advice. If such considerations may play a role in the matter at hand, we recommend getting a separate opinion and assessment. We also do not assume any responsibility to update this advice after the date hereof.
- 5 This Legal Opinion generally uses the male, female and other genders. For better readability, the use of masculine and feminine forms is occasionally omitted.
- 6 The observations contained hereunder represent our assessment of the Token based on the properties of the Token known to us. It is possible that the FMA Liechtenstein or another competent national supervisory authority has a contrary assessment of the Token and the underlying project.

## **II. Facts of the matter**

### **1) XinFin Ecosystem Overview**

- 7 The XinFin platform ("XinFin"), as detailed in the whitepaper, is a decentralized platform. The XinFin ecosystem centers on bridging the gap between traditional finance and decentralized finance by leveraging blockchain technology to facilitate secure, efficient, and low-cost international transactions. Its business model revolves around the XDC token, which serves various purposes including transaction fees, smart contracts execution, and incentivizing participants. The platform aims at fostering a robust environment for enterprises, enabling real-world applications of blockchain technology in areas like supply chain, finance, and procurement, thereby streamlining processes and reducing costs associated with global trade and finance.
- 8 XinFin offers a hybrid blockchain solution targeting the global trade and finance sector through the XDC01 Protocol, merging Ethereum and Quorum's features for enhanced security, scalability, and interoperability. This platform enables the deployment of distributed applications, notably TradeFinex, to facilitate international trade financing and settlements. The network employs a delegated proof of stake for consensus, emphasizing efficiency and cost-effectiveness with the XDC token. It's designed for broad sector application, leveraging smart contracts and IoT integration, while minimizing the environmental impact of traditional blockchain mining through its distributed consensus mechanism.

### **2) XDC Token**

- 9 The XDC token, integral to the XinFin network, functions within the hybrid blockchain architecture designed to support global trade and finance. It operates on the XDC01 Protocol, offering both public and private state transactions to enhance security, scalability, and interoperability with other blockchains. This hybrid approach allows for efficient, secure, and transparent cross-border transactions. Economic incentives are provided through token staking and participation in the network's consensus mechanism, promoting engagement and investment within the ecosystem.
- 10 XDC token acts as the main utility and payment token within the XinFin network, enabling transactions and business processes in global trade and finance. It's designed for use in both tokenized and non-tokenized solutions across various industries, accessible through authorized exchanges. XinFin also provides a wallet built on the XDC01 Protocol, offering secure and efficient real-time payments worldwide, available for download from major app stores.
- 11 The XDC01 Protocol supports the development of distributed applications (DApps) for a broad range of uses, such as supply chain management and financial services. An example given is an Uber-like DApp for booking rides, demonstrating the blockchain's potential for

instant transaction recording and settlement. XinFin encourages further exploration and development of DApps for various sectors.

TradeFinex, as part of XinFin's ecosystem, involves three key participant types: beneficiaries (project owners seeking financing), suppliers (providers of goods/services), and financiers (investors seeking returns). The system addresses challenges like limited funding sources, visibility for suppliers, and investment risks, aiming to improve trade finance's overall efficiency and transparency.

100 billion pre-mined XDC tokens exist, with a structure designed to support ecosystem growth. Allocations include a portion to the founding team and ecosystem development, with incentives for network participation and specifics on how tokens are locked and released over time.

To counteract the volatility of digital tokens and make them more appealing for long-term contracts, a hedge pool has been created. This ensures participants can engage in contracts with stable fiat value equivalent denominations, safeguarding against fluctuations in XDC's value. Thus, the hedge pool ensures that participants receive the agreed upon fiat currency value, based on agreed upon conditions, regardless of fluctuations in the value of the XDC token.

XDC token holders can stake their tokens and participate in governance mechanisms (voting power). XinFin will put in place punitive smart contracts that ensure those who stake XDC to run network infrastructure remain honest (slashing penalties).

- 12 The XDC Token thus also provides access to features of the XinFin platform and its ecosystem. It has a utility within the platform in the sense that it may be used to procure services within the XinFin ecosystem and functions similar to a payment voucher (means of exchange with the token in general not being burned upon exchange).
- 13 In the absence of any information to the contrary, the Tokens do not have any inherent rights that are enforceable against any person (e.g., contractual rights or claims). The Tokens do not represent an interest in any company, and do not give any ownership or proprietary rights to the platform or ecosystem or the intellectual property of the platform or ecosystem or any company.
- 14 In the absence of any information to the contrary, there are no voting privileges/rewards that are inherent in the Tokens or which may be earned that might give rights to the Token holder to vote on changes to the platform or ecosystem or which would otherwise give rights to Token holders to make changes to the platform or ecosystem or any revenues generated by the platform or ecosystem, except as are inherent to decentralized consensus mechanisms and for validation of transactions among DLT network nodes. Token holders have no contractual right to receive any pro rata share of the platform's or ecosystem's revenues.

- 15 In the absence of any information to the contrary, it is assumed that the Token is freely transferable. In the absence of any information to the contrary, it is assumed that Token holders cannot request a re-exchange/redemption for the monetary value vis-à-vis any issuer. In the absence of any information to the contrary, it is assumed that the Token's value or price is not contractually determined by the fluctuation of the value or price of an underlying asset. As the Token does not represent any contractual rights or claims, there is no deferral of settlement in this regard. The Token does not represent any rights or claims and hence does not have a maturity after which any rights or claims represented by the Token could be claimed.
- 16 Lastly, in the absence of any information to the contrary the staking activity refers to traditional decentralized staking mechanisms based on proof of stake concepts to validate transactions.

### III. Executive Summary

- 17 On the basis of the facts presented and subject to the detailed explanations that follow, it can be summarized as follows:
- The XinFin platform's tokenomics and distribution strategy, encompassing its main utility token XDC Token, are structured to grant access to features on the platform and support the platform's growth and incentivize user participation in the decentralized platform services.
  - XDC Token Utility and Tokenomics:
    - o Role: XDC Token is the primary utility token for all transactions on the XinFin ecosystem.
    - o The XDC Token provides access to features of the XinFin platform and its ecosystem. It has a utility within the platform in the sense that it may be used to procure services within the XinFin ecosystem and functions as a payment voucher/means of exchange which is not burned/redeemed upon usage. The XDC token enables various functionalities including transactions, smart contract execution, and network participation incentives. It supports the development of distributed applications across various sectors and incorporates mechanisms like staking and a hedge pool to stabilize its value, while ensuring governance participation without inherent rights against the platform or entitlement to profits.
  - We are of the opinion that XDC Tokens do not constitute financial instruments (equity or debt instruments or derivatives);
  - We are of the opinion that XDC Tokens do not constitute electronic money (e-money);
  - We are of the opinion that XDC Tokens do not constitute a collective investment scheme;

- We are of the opinion that XDC Tokens constitute Tokens respectively Crypto Assets pursuant to the Liechtenstein Act on Tokens and Trusted Technology Service Providers (TVTG).
- Regulatory change is on the horizon with the EU Markets in Crypto Assets Regulation (MiCAR) being in force, while not being applicable yet. We are of the opinion that MiCAR in general does not regulate truly decentralized systems (Decentralized Finance or DeFi), and also does not apply to minting, staking (as part of Proof of Stake mechanism, carried out on one's own behalf), NFTs (truly non-fungible tokens), non-custodial wallets or other decentralized activities. While this opinion is not an assessment under MiCAR, as outlined in its Article 142, the mentioned activities and mechanisms in general are not regulated but may be regulated in the future subject to a report and legislative proposal to amend MiCAR to be presented by 30. December 2024 by the Commission to the European Parliament after consulting EBA and ESMA (European Banking and Securities & Markets Authorities).
- Conclusively, the XDC Token in our opinion has significant utility features and therefore may be qualified as a utility token.



#### IV. Banking and Securities Services

18 In the following, the XDC Token is examined with regard to the provision of banking transactions on the XinFin ecosystem in the narrow sense. This includes lending and deposit business (Art. 3 (3) BankG also defines other activities requiring a license as banking business, which is due to the cascade of licenses under financial market law). Subsequently, the provision of investment services is also examined.

##### a) Banking Services

19 Article 4(1)(1) of Regulation EU 575/2013 (CRR) defines the taking of deposits or other repayable funds from the public (deposit-taking business) and the granting of loans for own account (lending business) as activities reserved for CRR credit institutions. Art. 3(3)(a) and (b) of the Liechtenstein Banking Act (BankG) are also to be interpreted in this way, despite their different wording, in order to ensure conformity with EU law. It should be noted that the CRR has been directly applicable in Liechtenstein since 30 March 2019 by decision of the EEA Joint Committee of 29 March 2019.

20 The granting of loans for own account can be excluded without further examination, as a subsumption under this circumstance, based on the facts described above, is not indicated. The XDC Tokens do not constitute loans.

21 The deposit business can also be negated, since no funds of the public are accepted. From a legal point of view, it is characteristic for the term, "deposit", that the civil law qualification can be different, but in any case provides for an (unconditional) repayment obligation (Laurer/Kammel in Laurer/M. Schütz/Kammel/Ratka, BWG 4th edition, § 1, Rz 5). An (unconditional) repayment obligation is to be excluded objectively. Such an unconditional repayment claim is not indicated with the XDC Tokens as the tokens may be used for various activities on the XinFin ecosystem and also no redemption or unconditional repayment claim in fiat funds towards any centralized intermediary exists.

22 Legally, this also results from Art. 3 para. 5 lit a BankG, which reads as follows: "*Deposits and other repayable funds pursuant to para. 3 subpara. a [BankG] do not include: Funds that constitute consideration under a contract for the transfer of property or a contract for the provision of services, or that are transferred as collateral; [...]*".

23 Since a service is procured on a quid pro quo basis (smart contract execution, transactions, network participation as a protocol token) the required elements of the deposit business are not fulfilled per definition of the deposit taking business and further per exception under statutory law (no unconditional repayment obligation). XDC Tokens do not constitute deposits.

## b) Securities Services

24 With reference to the assessment of the provision of investment services with regard to XDC Tokens, it has to be assessed whether the Tokens constitute securities under Liechtenstein securities law which is based on the EU MiFID II.

25 The classification of the Token as a financial instrument under MiFID II is not only prerequisite for the application of MiFID II (respectively the Liechtenstein Banking Act) itself with regard to, inter alia, the performance of certain investment services, but also in determining whether other capital market laws and EU regulations, which refer to certain financial instruments, are applicable (it is assumed that there is no deviation between the definitions under MiFID II and the relevant implementations in Liechtenstein law as Liechtenstein is part of the harmonized European single market).

26 The first, and notably most prominent, category of MiFID II financial instruments are “transferable securities” (Annex I, Section C (1) MiFID II). “Transferable securities” are defined under Art. 4(1)(44) MiFID II (Art. 3a (1)(42) BA) as

*“those classes of securities which are negotiable on the capital market, with the exception of instruments of payment, such as:*

*(a) shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*

*(b) bonds or other forms of securitised debt, including depositary receipts in respect of such securities;*

*(c) any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.”*

27 In order to qualify as transferable securities, the following relevant qualification criteria will therefore need to be met.

### Classes of securities

28 The term “classes” is not specifically defined under MiFID II. The European Securities and Markets Authority (the “ESMA”) points out in one of its surveys, however, that there is common ground among different jurisdictions by the different national competent authorities (the “NCAs”) that “class” can be understood as any number of somehow interchangeable units. Interchangeability in this sense means that there is a level of uniformity, i.e., the units are similar to a certain degree and, thus, comparable, for example comprising essentially the same rights vis-à-vis the same issuer. Whereas ESMA is only quoting the different opinions of the NCAs, it can, in our opinion, be assumed that ESMA’s perspective should not materially differ from such broad definition (ESMA, Legal qualification of crypto-assets – survey to NCAs, Annex 1, ESMA50-157-1384, Ref. 16; Zivny, Kapitalmarktgesetz 2007, § 1 Rz 40).

### Transferability and negotiability on the capital market

- 29 Transferability is a logical prerequisite for any financial instrument being negotiable, since there can be no effective trading of an instrument if a transfer is not possible in the first place. In the legal context of MiFID II, which deals with market risks and supervision, a transfer has to be understood as the legal transfer of ownership between parties.
- 30 Negotiability is not directly defined under MiFID II, either. However, Art. 35(1) of the Commission Regulation 1287/2006 of August 10, 2006, which served as a means of implementation of Directive 2004/39 of April 21, 2004 (the “MiFID I”) and is still in effect and, consequently, also relevant for the interpretation of MiFID II, reads:
- “Transferable securities shall be considered freely negotiable for the purposes of Article 40(1) of Directive 2004/39/EC if they can be traded between the parties to a transaction, and subsequently transferred without restriction, and if all securities within the same class as the security in question are fungible.*
- Transferable securities which are subject to a restriction on transfer shall not be considered as freely negotiable unless that restriction is not likely to disturb the market.”*
- 31 Consequently, the investor and market-oriented perspective of MiFID II needs to be taken into account when evaluating whether negotiability exists. Therefore, even if the transfer of certain instruments is restricted to a certain degree, such instruments can be considered as freely negotiable under MiFID II if they can be effectively traded on a capital market. Negotiability, therefore, is not a narrow criterion but merely means that instruments can effectively (and legally) be the subject of sales and transfers between parties.
- 32 Correspondingly, “capital market” in this context has to be understood in a broad sense as well, meaning any “place where buying and selling interests meet” (ESMA, Legal qualification of crypto-assets – survey to NCAs, Annex 1, ESMA50-157-1384, Ref. 23.). The fact that trading needs to take place on a (capital) market does not necessarily mean that this needs to be done on a regulated market, multilateral trading facility or organized trading facility, i.e., trading venues within the meaning of Art. 4(1)(24) MiFID II, but should, in our view, also mean a typical centralized “crypto exchange”. Crypto exchanges regularly meet the requirements of a capital market as they are typically a central institution which is accessible to a large number of potential participants and brings together supply and demand requests. It is also not necessary that a market has actually already been formed; the abstract possibility of being traded is considered sufficient, even if there is not yet a specific market for the product or even if there is a temporary lock-up (ESMA, Legal qualification of crypto-assets – survey to NCAs, Annex 1, ESMA50-157-1384, Ref. 20; Seggermann in Brandl/Saria, WAG 2018, § 1, Rz 54 et seqq.).

### Functional comparability

- 33 Furthermore, applying a systematic approach, relevant instruments need to be functionally comparable to the examples provided as transferable securities under MiFID II in order to qualify as transferable securities themselves. While the list in Art. 4(1)(44) MiFID II is not meant to be exhaustive, its function is to outline typical examples of transferable securities under MiFID II. Those examples must, in our view, be understood as giving relevant guidance to the classification for instruments not mentioned therein. In the absence of relevant case law, such interpretation leads to the conclusion that Liechtenstein, like European regulators, will likely be guided by the idea that only equity and debt instruments and certain derivatives should be traded as securities in that sense on the capital market.
- 34 This means that relevant instruments, in order to be qualified as “transferable securities”, must either embody a membership right similar to a share or another property right comparable to the examples (e.g., debt securities). There must hence be either
- a profit or return participation right (by promising a (potential) participation in future cash flows), i.e., a shareholder-like equity interest; or
  - a financial claim against the issuer of such an instrument, for example interest or similar payments or a repayment of the nominal value under certain conditions, i.e. a debt capital interest comparable to a creditor.
- 35 This interpretation is convincing not only from a systematic perspective taking into account the specific function of the examples under Art. 4(1)(44) MiFID II as general guidance, but also from a teleological point of view considering the regulation’s rationale: The MiFID II definition of “transferable securities” implemented in the Liechtenstein Banking Act is a key trigger for the tight European, and correspondingly Liechtenstein, investor protection regimes addressing issues arising where investors deal with products that have a clear expectation of profits. Conversely, where no such expectation is created, a similarly strict regulation cannot be justified accordingly.

### No Instrument of Payment

- 36 As a negative criterion, “instruments of payment” shall not constitute transferable securities in terms of MiFID II and the Liechtenstein Banking Act. With “instruments of payment” also not being further defined, a systematic approach, taking into account the context of the definition of transferable securities, is necessary.
- 37 According to ESMA, the majority of NCAs refer to the Directive 2015/2366 of November 25, 2015 (the “PSD2”; implemented into national Liechtenstein law in the Zahlungsdiensteegesetz; ZDG) for a more detailed understanding of “payment instruments”. Consequently, payment instruments, as opposed to securities, shall serve a “payment function that is characteristic of instruments of payment” (ESMA, Legal qualification of crypto-assets – survey to NCAs, Annex 1, ESMA50-157-1384, Ref. 41.).

38 However, it is unclear how to qualify such instruments that comprise both an investment and a payment component. It should, due to lack of legal certainty, out of legal caution in our opinion, be assumed that any hybrid instruments with not only a clear payment, but also some sort of investment component, may be qualified as securities and subsequently do not qualify as instruments of payment.

#### Interim conclusion

- 39 Financial instruments are defined as transferable securities which are mass-issued, standardized, transferable as well as tradable instruments on the capital market which come with an equity-like or debt like interest or have a derivative character and do not constitute payment instruments. Derivative contracts are characterized as forward/futures transactions, which diverge from spot market transactions in that the conclusion and fulfillment of a transaction do not coincide. Specifically, the price-relevant conclusion time and the value-relevant fulfillment time diverge on the timeline, with the value depending on the performance of a reference variable, the underlying asset, which is referenced. Thus, conclusion and fulfillment diverge, and settlement only takes place at a later point in time.
- 40 The Token does neither represent any form of profit or return participation rights comparable to shares, nor any financial claims against an issuer similar to typical debt instruments. As a consequence, there is no equity- or debt-like connecting point for the XDC Tokens to any issuer.
- 41 While the Token may be, due to the technical nature in general be exchanged (even with a profit), the holder of the Token does not have a shareholder-like equity interest due to the lack of any contractual promise of profit or return participation rights (or equivalents), neither does the holder have a debt capital interest that is comparable to the position of a creditor. On the contrary, the economic and contractual position of the Token holder is more similar to a user/peer who bears the risk of usage of their own items – including the risk of a resale. The Token also does not derive its value from any underlying asset.
- 42 We are hence of the opinion that the Token is not functionally comparable to the examples of transferable securities under Art. 4(1)(44) MiFID II respectively the Liechtenstein Banking Act and cannot, in our opinion, fall under the category of transferable securities of Annex I, Section C (1) MiFID II or the Annex 2, Section C (1) Banking Act, respectively.
- 43 For the reasons stated above, XDC Tokens do not constitute deposits, loans or securities pursuant to the Liechtenstein Banking Act as they grant access to the XinFin platform and have utility within the platform's ecosystem and may be used similar to a payment voucher as means of exchange and they enable and maintain the XinFin network functionality.

## V. E-money-business and Payment Services

### a) E-Money

44 E-money is defined in accordance with Art. 2(2) of the second E-Money Directive (Art. 3(1)(b) EMA) as well as Art. 3 (1) (b) Liechtenstein E-Money Act (EMA) and Art. 2 (2) of the E-Money Directive (2009/110/EC) as any form of

- Electronically or magnetically stored,
- monetary value,
- in the form of a claim on the issuer, which is
- issued against payment of sums of money in order to
- carry out payment transactions, and
- which is also accepted by persons other than the Issuer.

#### Electronic storage

45 Electronic storage as technological foundation has to be, in our opinion, interpreted in a very broad sense due to the explicit technical neutrality of the definition as highlighted under recital (7) of the E-Money Directive, which also highlights the other criteria mentioned above:

*"It is appropriate to introduce a clear definition of electronic money in order to make it technically neutral. That definition should cover all situations where the payment service provider issues a pre-paid stored value in exchange for funds, which can be used for payment purposes because it is accepted by third persons as a payment."*

46 Consequently, tokens in general may qualify as electronically stored monetary value.

#### Monetary value

47 The E-Money Directive does not define the term "monetary value". Teleologically this criterion should, in our opinion, be interpreted in the context of the other criteria "claim on the issuer", "issued against payment of sums of money" and lastly "for the purpose of making payment transactions". In this context it becomes clearer that the term "monetary value" specifically relates to denomination in legal tender.

48 This view is in alignment with recital 6 of the E-Money Directive, pursuant to which the E-Money Directive does not apply to monetary value that is used to purchase digital goods or services, where, by virtue of the nature of the good or service, the operator (here: an issuer) adds immanent value to the monetary value, e.g. in the form of access, search or distribution facilities, provided that the good or service in question can be used only through a digital device, such as a mobile phone or a computer, and provided that the telecommunication, digital or information technology operator (here: an issuer) does not act only as an intermediary between the payment service user and the supplier of the goods and services. This is a situation where a mobile phone or other digital network subscriber pays the network operator

directly and there is neither a direct payment relationship nor a direct debtor-creditor relationship between the network subscriber and any third-party supplier of goods or services delivered as part of the transaction.

#### Claim on the Issuer

49 Furthermore, the electronically stored monetary value also has to represent a claim on the issuer.

50 With regard to the Token's qualification or non-qualification as electronic money pursuant to the E-Money Directive, we are of the opinion that the redeemability of electronic money pursuant to Article 11 No. 2 of the E-Money Directive (resp. Art 44 EMA), i.e. the right of electronic money holders to redeem the monetary value of electronic money upon request at any moment, is a constitutive criterion for the electronic money definition. This view seems also to be backed by the European Central Bank. In its report on virtual currency schemes, the European Central Bank indicated the guaranteed redemption of funds as a key feature of electronic money, distinguishing virtual currency schemes from electronic money on the basis that the possibility of redeeming funds is not guaranteed in virtual currency schemes. Consequently, for the purposes of this Memorandum, it will be assumed that an exclusion or non-existence of such a redeemability by the issuer of specific instruments means that the relevant instruments will not be qualified as electronic money pursuant to the E-Money Directive; in other words: it is assumed that an exclusion of redeemability by the issuer prevents crypto assets from being qualified as electronic money.

51 This is in line with the legal notion of e-money as a form of deposit business privileged under supervisory law (Bergt, Token als Wertrechte, p 173, section 2.2.3, para 225).

52 The XDC Tokens do not confer any particular contractual rights, and may in general only be used for the functioning of the XinFin network (smart contract execution, network participation) and are, therefore, being treated similarly to a commodity (electronic) with a utility, and, in our opinion, do not constitute such a claim, as they may be used for various activities on the XinFin platform and decentralized apps on the network and grant access to the XinFin platform. Likewise, certain tokens may be generated by participants (e.g., peer-to-peer; "mining" or "minting" based on various underlying mechanisms like proof-of-work or proof-of-stake in order to enable creating a consensus on a decentralized network). In this case, such tokens are not issued by a central entity or at least do not represent a claim on a central entity in terms of an issuer. For this reason, even typical crypto currencies that serve a payment function may, in our opinion, not be qualified as electronic money under the E-Money Directive, resp. the EMA, since they lack an existing claim on the issuer represented by the respective token. This view is also held by the European Banking Authority (EBA) (EBA opinion on „virtual currencies“, EBA/Op/2014/08 dated 04. July 2014, p. 12.):

*“VCs can be (i) transferred from one user to another via electronic means, (ii) stored on an electronic device or server and (iii) traded electronically. [...] The aim of the above definition is*

*to distinguish VCs from (fiat) currency and, in particular, from e-money as digital representation of FC. In economic theory, money performs three different functions: (1) a unit of account, (2) a means of exchange and (3) a store of value. In principle, VCs could potentially fulfil one or more of the functions of money. However, the definition of VC above reflects the fact that these functions are, at least currently, not comparable in terms of quality, and are not always fulfilled at the same time as each other or to the same extent.*

#### Issued against payment of sums of money

- 53 Furthermore, the electronically stored monetary value has to be issued against payment of sums of money in order to qualify as electronic money under the E-Money Directive, resp. the EMA. The term “sums of money” generally refers to legal tender (cash and book money). The XDC is not (exclusively) issued against fiat currency.

#### To carry out payment transactions and acceptance by parties other than the issuer

- 54 Another essential feature of electronic money is the aforementioned feasibility of payment transactions within the meaning of Art. 2 (2) E-Money Directive icw Art. 4 (5) PSD II (Art. 3 (1)(b) EMA icw Art. 4 (1)(54) PSA). Such a payment transaction is defined as an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee.
- 55 Ultimately, the electronically stored monetary values must also be accepted by third parties and not only the issuer in order to constitute electronic money.

#### Interim conclusion

- 56 As described, the Tokens do not confer any specific contractual rights and, therefore, also do not constitute a claim on the issuer. In particular, the Tokens may be used for access to the XinFin platform and the functioning of the native protocol (transactions respectively smart contract execution, network participation through governance/voting mechanisms by staking). XDC are the native protocol tokens and have an access and governance function and may be used as a means of exchange.
- 57 As outlined above, the Token do not constitute a monetary value as represented by a claim on the issuer and in addition they are also not (exclusively) issued against sums of money. Furthermore, XDC Tokens in general do not purport to maintain a stable value by referencing the value of one (or more) official currencies.
- 58 In addition, due to this, the monetary value of the Token cannot be redeemed by the Token holder. The possibility of redeeming the monetary value of electronic money upon request at any moment is a constitutive criterion for the electronic money description. In the case at hand, the Token is not exclusively acquired by means of a monetary value and the Token is required for added functionality within the platform.



- 59 Against this background, the Token cannot, in our opinion, be qualified as electronic money under the E-Money Directive or the EMA. Each of the above reasons individually as well as collectively excludes the applicability of the E-Money Directive or EMA.
- 60 As outlined already, e-money represents a form of deposit business privileged under supervisory law (Bergt, Token als Wertrechte, p 173, section 2.2.3, para 225). As explained, XDC Tokens do not constitute deposits and consequently also do not constitute e-money.
- 61 The XDC Token is a digital token used within the blockchain-based XinFin ecosystem to facilitate operations and comes with an inherent utility and therefore does not constitute e-money.
- 62 Even if the Token was for the sake of argument to be assumed hypothetically as e-money, the very limited range of products (decentralized transactions, smart contract execution, network participation) as well as the limited range of network (or shop-in-shop solution) on the XinFin ecosystem may apply, as it is a closed ecosystem and the Token may not be used respectively is not intended to be used or accepted outside of the ecosystem as the tokens may only be used to receive very limited related items or services on the XinFin platform (closed platform) and in this regard primarily have a payment voucher and access utility function. Also, the inherent functionality and utility is only given within the XinFin ecosystem (shop in shop solution).

#### **b) Payment Services**

- 63 The ZDG (Liechtenstein Payment Service Act; PSA) applies to the professional provision of payment services by payment service providers (Art. 2 para. 1 ZDG). Payment services include withdrawal transactions, deposit transactions, financial transfer transactions, account information services, payment initiation services, payment transactions (direct debit transactions, credit transfer transactions, payment card transactions), payment transactions with the granting of credit and payment instrument transactions with regard to legal tender.
- 64 None of these payment services or instruments are indicated concerning the XDC Tokens, as they do not constitute legal tender, which is why a more detailed examination is not necessary and general reference is made to the section on e-money. The tokens may not be deemed payment instruments in the sense of the Liechtenstein PSA and even if they would for the sake of argument hypothetically fall under the PSA, the mentioned exemptions (limited range of products or of network including shop in shop solutions) may apply.

## VI. Fund Regulation

### a) Overview

65 Since undertakings for collective investment (UCITS) are only eligible for certain securities and liquid financial assets under the product regulation of the UCITSG (Art. 3 para. 1 item 1 Liechtenstein UCITSG), which is not indicated with regard to the XDC Tokens, the following examination is made in particular with regard to alternative investment funds (AIFs) under the manager regulation of the AIFMG. According to Art 4 (1) AIFMD (Directive 2011/61/EU) and Art 4 (1) no. 1 Liechtenstein AIFMG, AIFs are

- Undertakings
- for collective investment, including subfunds,
- which collect capital
- from a number of investors
- in order to invest it in accordance with a defined investment strategy
- for the benefit of the investors.

66 In this context, an organism or undertaking is understood to be a vehicle in which the external capital collected from investors is "pooled" (BaFin, Interpretative letter on the scope of application of the KAGB and the concept of "investment assets", amended on 09.03.2015).

67 With regard to the raising of capital, it is irrelevant whether the activity takes place only once, several times or on an ongoing basis and whether the transfer or commitment of capital takes place in the form of cash or contributions in kind (ESMA, Guidelines on Key Terms of the Alternative Investment Fund Managers Directive (AIFMD), ESMA/2013/611, p 6).

68 A number of investors is already given if there is more than one single investor or investor. This is also the case if a single investor represents several beneficial owners, e.g., in the case of feeder/fund-of-funds structures (ESMA, Discussion Paper Key Concepts of the Alternative Investment Fund Managers Directive and types of AIFM, ESMA/2012/117, para 29; ESMA/2013/611, p 7).

69 These criteria in general leaves little room for interpretation often making it necessary to discuss the other individual elements in detail.

#### Collective investment

70 A collective investment is deemed to exist if the investors participate in the opportunities and risks of the organism (profit and loss participation); investors therefore ultimately bear the profits and losses of the organism (BaFin, interpretative letter on the scope of application of the KAGB and on the term "investment fund", amended on 09.03.2015).

71 It should be noted that in general operationally active companies outside the financial sector pursuing a commercial activity do not fall under collective investment schemes for lack of participation.

### Defined investment strategy

72 According to ESMA, a defined investment strategy, as opposed to a mere business strategy, exists if the capital raised from the investors is to be managed in order to achieve a joint return (ESMA/2013/611, p. 7). The following criteria are regarded as indications of the existence of a defined investment strategy (ESMA/2013/611, p. 7 f):

- The investment strategy is determined and established at the latest at the time when the investors' obligations towards the undertaking become binding on them;
- the investment strategy is set out in a document that is part of or referred to in the fund rules or articles of association;
- the undertaking or the legal entity managing the undertaking has a legally enforceable obligation (however arising) towards the investors to comply with the investment strategy, including any changes made thereto;
- the investment strategy also includes investment guidelines with reference to all or any of the following criteria:
  - o Investment in certain categories of assets or in accordance with restrictions on the allocation of investments;
  - o Pursuit of specific strategies;
  - o Investing in specific geographic areas;
  - o Compliance with restrictions on leverage;
  - o Compliance with minimum holding periods; or
  - o Compliance with other risk diversification restrictions.

73 In this regard, ESMA further states that the fact that investment decisions are left exclusively to the legal person managing an undertaking should not be used to circumvent the provisions of the AIFMD (ESMA/2013/611, para 22). It should be noted that portfolio management in the sense of managing a portfolio on an individual basis with discretionary powers is the counterpart to managing a portfolio on a collective basis (collective investment undertakings or funds) with discretionary powers (although in the case of portfolio management, the management activity must relate to individual client assets, despite the fact that the assets of various clients may be combined in a portfolio). For the interpretation of this discretionary concept, as cited by ESMA, reference must therefore be made to the investment service of portfolio management (Bergt, Token als Wertrechte, p 90 f, para 112, p 98 f, para 123; Tollmann in Dornseifer/Jesch/Klebeck/Tollmann, AIFM Directive, Art 2, para 51 and 57; Seggermann in Brandl/Saria, WAG 2018, § 1, para 26).

### For the benefit of investors

74 The preceding remarks also lead directly to this section. The capital collected (if any, out of staking) is not invested for the benefit of a number of investors, but directly serves each individual Token holders own operational activities with regard to staking instructions as part as transaction validation on a proof of stake blockchain.

75 According to BaFin, an undertaking for collective investment must invest the collected capital in accordance with a defined investment strategy for the benefit of these investors. In order to

meet the criterion "for the benefit of the investors", the collected capital may not be invested for the benefit of the own company. There is no investment for the benefit of the investors if one is free to use the funds and invests them for one's own benefit. In this case, only an own profit-making intention is pursued. (BaFin, Auslegungsschreiben zum Anwendungsbereich des KAGB und zum Begriff des "Investmentvermögens", amended on 09.03.2015).

#### Interim conclusion

- 76 In our opinion it can be stated that due to the lack of a joint investment, no defined investment strategy and no investment for the benefit of the investors, the XDC Tokens do not constitute a collective investment scheme subject to the fund regulation.

## **VII. Tokens under the Liechtenstein TVTG**

### **a) Applicability of the TVTG**

- 77 In the following, it will be examined whether the XDC Tokens constitute tokens pursuant to the TVTG. Services provided with regard to such tokens may in general be subject to registration with the Liechtenstein FMA if provided in Liechtenstein as they are deemed Virtual Asset Service Providers or Crypto Asset Service Providers; VASP; CASP). Art 11 et seqq TVTG governs the registration and supervision of TT (trusted technology) service providers domiciled or resident in Liechtenstein.
- 78 The legislative materials (BuA 2019/54, p 212) prescribe three cumulative criteria for the applicability of the supervisory provisions of the TVTG, these are:
- a registered office in Liechtenstein (according to Art 113 PGR);
  - a service must be provided at least in part in Liechtenstein;
  - the provision of services in Liechtenstein must be carried out on a professional basis (e.g., issuance of tokens on behalf of third parties against payment or for other direct or indirect consideration; cf. BuA 2019/54, p 218).
- 79 According to Art 2 para 1 lit c TVTG, tokens are defined as information on a TT system which may, but do not have to, represent a claim or membership rights vis-à-vis a person, rights to things or other absolute or relative rights and which is assigned to one or more TT identifiers. In this context, the TT identifier corresponds to the public key (wallet) on the blockchain (Art 2 para 1 lit d TVTG: an identifier that enables the unique assignment of tokens). The TT system is understood to be a blockchain respectively a distributed ledger technology (Art 2 (1) (b) TVTG: transaction systems which enable the secure transfer and storage of tokens as well as the provision of services based thereon by means of trustworthy technologies). Crypto Assets are defined as fungible tokens (Art 2 (1) (z) TVTG), implying that tokens also encompass non-fungible tokens (NFTs).
- 80 XDC Tokens will be blockchain-based tokens (XDC01 Protocol – a fork of Ethereum and Quorum) and insofar in general fulfill the above-mentioned characteristics (an information which is assigned to a TT identifier or wallet). The scope of application of the TVTG is insofar applicable. The issuance of XDC Tokens shall inter alia be carried out by a Liechtenstein regulated VASP in Liechtenstein.

## **VIII. Conclusion**

- 81 In consideration of the assumptions made and the assessment carried out on XDC Tokens, it is our professional opinion, that XDC Tokens do not constitute financial instruments, deposits, electronic money or a collective investment scheme. In our opinion XDC Tokens constitute utility tokens pursuant to the Liechtenstein TVTG in line with Union Law token taxonomy.

Conclusively, the XDC Token in our opinion has significant utility features and therefore may be qualified as a utility token.