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LEGAL OPINION

LEGAL NATURE OF THE \$BKN TOKEN

ISSUED BY BRICKKEN



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1 PURPOSE AND SCOPE

The purpose of this legal opinion is to identify the characteristic elements of the token issued by the company BRICK TOKEN S.L (hereinafter, "Brickken"), called \$BKN, in order to determine the legal nature of the same, in accordance with the applicable regulations in Spain, the country of issue of the aforementioned token, determining exactly whether the aforementioned token has the legal consideration of a "utility token" or a "security token", taking into account the characteristics of the same.

2 LEGAL ANALYSIS

2.1 SECURITY TOKEN" AND "UTILITY TOKEN" CONCEPT

"Security tokens" refers to a type of token that is considered in financial regulation as a "financial instrument".

Pursuant to the provisions of article 2 of Spanish Royal Legislative Decree 4/2015, of 23 October, approving the revised text of the Spanish Securities Market Act, only those instruments included in Annex I of the aforementioned regulation shall be considered financial instruments.

In this regard, the Spanish National Securities Market Commission (CNMV) has confirmed that tokens that grant their holders the right to obtain or, as the case may be, the expectation of obtaining some kind of economic return (in most cases, this return is not guaranteed) are financial instruments (and therefore "security tokens").

Specifically, those considered as security tokens are **those that attribute "rights or expectations of participation in the potential revaluation or profitability of businesses or projects" to which they are associated.**

"Utility tokens", on the other hand, refers to tokens that *"give the right to access a service or receive a product, without prejudice to which, on the occasion of the offer, reference is usually made to expectations of revaluation and liquidity or to the possibility of trading them on specific markets"*, as confirmed by the CNMV in its communiqué of 28 February 2018.

In this way, utility tokens should be considered as those tokens or coupons that can be subsequently exchanged or used to consume certain products or services of the company that launches them, being, in themselves, a mere tool to take advantage of or use the company's products and services.

In these cases, as they are not considered financial instruments under Spanish law in view of the above, prior authorisation by the CNMV or supervision by an Investment Services Company is not required if the token issue is less than 8 million euros.

2.2 CHARACTERISTICS OF THE \$BKN TOKEN



Taking into consideration what is expressly indicated by Brickken in its Whitepaper, the token called \$BKN is a token that "will be used for all transactions made within the platform", being the necessary element to be able to operate with the smart contract that allows the automated generation of third-party Security Token Offerings. The concept explained throughout the whitepaper is that Brickken's decentralized application or dApp will be able to be used by third parties who want to issue their own STOs, and in order for such event to occur, the \$BKN token must be used as a form of payment to the dApp itself.. Therefore the \$BKN token has the following characteristics:

- It is the necessary means to be able to operate with the smart contract through which the STOs will be generated, and it is not possible to operate with this smart contract in any other way.
- It is the means by which STO owners can provide liquidity to STOs that may be created by them through the smart contract.
- This is the means by which specialised professional services (lawyers, programmers, etc.) can be paid for through the smart contract in order to create the STO.
- It is the means by which the owners will be able to participate in the DAO - Decentralized Autonomous Organization to be created by Brickken.

In other words, in view of the provisions of the aforementioned Whitepaper, as well as ECIJA's knowledge of the operations that Brickken. intends to carry out in relation to the use of the \$BKN token, we can state that:

- The \$BKN tokens are used to operate the BRICK TOKEN S.L. smart contract for the purposes indicated above.
- The \$BKN tokens may be purchased on a public marketplace or from third parties.
- The \$BKN tokens allow the holder the right to trade freely with his instrument and to transfer any or all of them to whomever he pleases.
- The \$BKN tokens will allow the owners to participate in the DAO - Decentralized Autonomous Organization to be created by Brickken.
- The \$BKN tokens do not give the holder the right to participate in the capital of any company, financial asset or financial instrument.
- The \$BKN tokens do not entitle the holder to receive proceeds from the liquidation of the company in excess of the nominal value of the token and no appreciation or capital gain is guaranteed.
- The \$BKN tokens do not give the holder the right, or obligation, to be registered in the shareholder register of any company.
- The \$BKN tokens do not entitle the holder to a fixed sum principal amount due with a fixed or variable maturity.
- The \$BKN tokens do not entitle the holder to be entered in the register of bondholders of the Company.

2.3 LEGAL REGULATION IN SPAIN OF "UTILITY TOKEN" AND "SECURITY TOKEN" AND LEGAL QUALIFICATION OF THE \$BKN TOKEN

As indicated above, in accordance with the CNMV and the Bank of Spain itself, for a given token to be classified as a financial instrument, it must fall within the criteria established in the



MiFID II Directive¹ (hereinafter, "**MiFID II**") and, specifically, within one of the financial instrument alternatives detailed in the Annex to the Securities Markets Law² (hereinafter, "**LMV**").

The European legislator, who is also aware of this fact, intends to amend MiFID II to include, within the list of the Annex to the LMV, "*those instruments issued through decentralised registry technology*", something that has not occurred up to the date of this legal opinion.

In this regard, the "*Joint Communiqué of the CNMV and the Bank of Spain on "cryptocurrencies" and "initial offerings of cryptocurrencies"*" of February 2018 referred to above establishes criteria regarding when a certain token can be considered as a security token, and when it can be considered a "*utility token*", as follows:

- "**Security tokens** generally provide a share in the future income or increase in value of the issuing entity or a business.
- **Utility Token:** entitles the holder to access a service or to receive a product, subject to which, when offered, reference is usually made to expectations of revaluation and liquidity or the possibility of trading on specific markets.

In accordance with this, the CNMV once again lends its support through its communication "*CNMV considerations on "cryptocurrencies" and "ICOs" addressed to professionals in the financial sector"* of February 2018, establishing, as relevant criteria for determining when an Initial Coin Offering may or may not be offering security tokens, the following:

- "*That the tokens grant rights or expectations of participation in the potential revaluation or profitability of businesses or projects or, in general, that present or grant rights equivalent or similar to those of shares, debentures or other financial instruments included in article 2 of the TRLMV*".
- "*In the case of tokens giving the right to access services or to receive goods or products, which are offered by referring, explicitly or implicitly, to the expectation that the purchaser or investor will obtain a benefit as a result of their revaluation or any remuneration associated with the instrument or by mentioning their liquidity or their possibility of trading on markets equivalent or purportedly similar to markets in regulated securities.*"

In addition, the CNMV in its document of 20 September 2018 on "*Interpretative criteria in relation to ICOs*", in relation to the scope of application of the capital markets and financial products regulations, expressly established that "*it is considered appropriate to exclude from consideration as a negotiable security those cases in which it is not reasonably possible to establish a correlation between the expectations of revaluation or profitability of the instrument and the evolution of the underlying business or project*".

In addition to the above, another way of determining whether we are dealing with a security token - or not - is by applying the "*Howey Test*". Although it is true that this test is based on the

¹ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directives 2002/92/EC and 2011/61/EU

² Royal Legislative Decree 4/2015, of 23 October, approving the revised text of the Markets Act.



jurisprudence of the United States Supreme Court, and therefore does not necessarily fit in with European law, it is commonly applied by the European authorities in cases such as the one we are dealing with, and is a useful instrument when assessing the nature of this type of token.

As the CNMV is well aware, this test determines when a given transaction can be considered an investment contract, defining it as an "investment of money in a common enterprise with the reasonable expectation of making a profit from the efforts of others". This can be broken down into the following 4 criteria:

- **Investment of money:** according to the US SEC, all or most cryptoasset offerings generally meet this criterion;
- **Common enterprise:** according to the US SEC, all or most cryptoasset offerings generally meet this criterion;
- **Reasonable expectation of benefits:** as noted by the SEC, a primary consideration in assessing reasonable expectation of benefits is to take into account the economic reality of the transaction and the character given to the instrument in the trade by the terms of the offering, the distribution plan and the economic incentives offered to the prospect, depending to a large extent on how the digital asset is offered and sold. Among others, some factors that are taken into account are, for example, **(i)** that the digital asset gives the holder rights to share in the revenues or profits of the company, **(ii)** that the digital assets are tradable in secondary markets, **(iii)** that buyers can reasonably expect that, through the efforts of an active participant (such as a promoter or sponsor) there is an expectation of profit, **(iv)** the digital asset is offered on a generalized basis to potential buyers rather than being targeted at intended users of the asset or services or those who have a need for the functionality of the network, and **(v)** the active participant can benefit from its efforts as a result of owning the same kind of digital asset as those distributed to the public;
- **Dependence on the efforts of others:** There are several factors that affect whether or not there is a dependence on the efforts of others, and while none of the factors is necessarily determinative, the stronger their presence, the more likely it is that this criterion will be met. Some of the factors are **(i)** the expectation of performance of essential tasks and responsibilities by an active participant rather than an unaffiliated or dispersed community, **(ii)** that an active participant takes steps to support a market price for the digital asset, such as limiting supply or ensuring scarcity, or **(iii)** that buyers can reasonably expect an active participant to undertake efforts to promote its own interests and enhance the value of the network or digital asset.

On the other hand, the SEC also provides indicators or factors that, if met, **can help determine that a given transaction does not meet the Howey test and is therefore not considered an investment contract:**

- The decentralised registration and digital network and the digital asset are **fully developed and operational;**
- Holders **can immediately use the digital asset** for its intended purpose;



- The creation of the digital asset and its structure are **designed and implemented to meet the needs of its users**, rather than to fuel speculation about its value;
- In the case of assets that represent rights to obtain goods or services, they can be **exchanged within a network or platform developed to acquire or otherwise use those goods or services** (i.e. the digital asset is available in tranches that correlate with a consumption intent versus an investment or speculative purpose);
- Any economic benefit that may arise from the **appreciation in value of the digital asset is ancillary** to obtaining the right to use it for its intended functionality.
- The digital asset is **marketed in a way that emphasizes the functionality** of the asset, rather than the potential increase in market value.
- **Restrictions on the transferability** of the digital asset are consistent with the use of the asset and do not facilitate a speculative market.
- If the active participant facilitates the creation of a secondary market, **transfers of the digital asset can only be made by and between users of the platform.**

Finally, we must bear in mind that Brickken and the platform have been selected by two important institutions in Spain, the CDTI, which has granted significant public funding for the proper development of the project, having been determined by this important public body that the token used by Brickken is considered a "utility token", as it does not comply with the regulatory requirements for it to be considered a "security token".

Similarly, we must take into account that the CNMV itself, which, as indicated above, is the body responsible for the supervision and inspection of the Spanish securities markets and the activity of all those involved in them, has accepted Brickken's project and its platform, in the so-called "Financial Sandbox" approved during the year 2021, expressly determining that the token used by the platform proposed by Brickken must be considered, without any doubt and in view of the regulations in force in Spain, a "utility token".

Therefore, in view of the arguments set out above, we must take into consideration that, **under no circumstances, in accordance with the** regulations in force in Spain at the time this legal opinion was issued, **could the \$BKN token be considered a security token.**