Rome, October 2018

To:
SANUSLIFE INTERNATIONAL GmbH / Srl
Luigi-Negrelli-Straße 13/C 39100
Bolzano/Bozen, Italia

Subject: opinion on the legal classification of the SANUSCOIN digital *token* .

I have been asked to draw up an opinion on the possible legal classifications to be attributed to the digital *token* issued by the company SANUSLIFE INTERNATIONAL GmbH / Srl through the implementation of *blockchain/Bitcoin*[1] technology and which is being placed on the market.

To this end, it is first necessary to clarify what the possible classifications are in their abstract sense, taking into account that, both domestically and at supranational level, there is currently no legislation that establishes the legal categories to which reference can be made[2].

[1] Without going too much into detail, the aforementioned technology allows us to issue, thanks to an intelligent use of asymmetric cryptography or a pair of keys, digital assets characterised primarily by scarcity, which is made possible because the digital asset, far from being identified in a computer file (which as such would be replicable endlessly without the possibility of distinction between original and copies), is technically constituted by a continuous sequence of digital signatures, corresponding to a sort of continuous series of endorsements, linked to one another in such a way as to ensure that each digital *token* can unambiguously identified at any time on the basis of the history of the relative transfers, without the signature sequence being altered, replicated or falsified and, therefore, without any form of counterfeiting being in any way possible.

[2]The question of the legal classification of the *tokens* must be kept distinct from that related to the definition of the legal category, if indeed there is one, of "*cryptocurrencies* ". In fact, a definition of virtual currencies exists solely in Community law, which must be understood as such, according to the V DIRECTIVE AML - (EU) 2018/843, each " *representation of digital value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess the legal status of currency or money, but is accepted by natural and legal persons as a means of exchange and can be transferred, stored and traded electronically* " (The definition was included in the new Article 3, point 18, of Directive (EU) 2015/849). The V AML DIRECTIVE - (EU) 2018/843 can be found at the following link: https://eur-lex.europa.eu/legal-

The absence of specific legislation, as is well known, has not prevented national, foreign and international authorities from attempting to offer an exhaustive picture of the existing categories which the interpreting person can apply to the individual case in point.

In this regard, reference may, by way of example, be made to the case of the Swiss Financial Market Supervisory Authority (FINMA) which [3]proposed to distinguish cryptographic digital *tokens* into three categories in the guidelines published on 16 February 2018 [4]:

1) *Payment tokens* (or virtual currencies): their function is intended as a simple means of exchange/payment for the purchase of goods and services or to carry out transfers of value;
2) *Utility tokens*: these are created to allow access to specific digital applications or services based on a *blockchain* infrastructure;
3) *Investment tokens*: these represent positions comparable to shares or bonds and, more generally, to financial instruments or products. As a result, their legal treatment is similar to that of financial instruments or products. However, *token*s representing physical assets also fall within this category.

content/IT/TXT/?uri=uriserv:OJ.L_.2018.156.01.0043.01.ITA&toc=OJ:L:2018:156:TOC. It should be noted that the definition of virtual currency provided above must obviously be considered functional with respect to the objectives of the legislation, which obviously concern the fight against the phenomenon of money laundering and terrorist financing. This explains why the definition provided is particularly broad, responding to the need of the Community legislator to prevent new technological tools from being used to circumvent the system of safeguards and controls in place in the traditional financial market. Therefore, the definition of virtual currency might change depending on the various, specific needs prevailing in different sectors. What is certain is that the definition offered by V DIRECTIVE AML - (EU) 2018/843 is of such a scope as to include completely different phenomena and in which perhaps, even on a factual basis, a digital *token* issued by means of *blockchain/Bitcoin technology* is not even included. This confirms the fact that the notion of "virtual currencies" appears to have been originally established by the European Central Bank in the context of its October 2015 report dedicated to the analysis of the so-called "*Virtual currency schemes*", a conceptual category in which, according to the said authority, the premium systems ordinarily known as "*frequent flyers' programmes*" should be theoretically included (https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes 201210en.pdf).

3The guidelines can be viewed at the following link: https://www.finma.ch/en/news/2018/02/20180216-mm-ico-wegleitung/. With the FINMA communique on surveillance 04/2017 of 29 September 2017, FINMA had already expressed its opinion on the so-called *initial coin offerings* (ICOs), explaining the possible points of contact between ICO and the laws in force governing the financial market. The communique is available at the following link: https://www.finma.ch/it/documentazione/comunicazioni-finma-sulla-vigilanza/#Order=4.

4It should be noted that the classification proposed by FINMA has also been considered as reliable and correct also by the Securities and Markets Stakeholders Group in the report on digital assets published on 19 October 2018 which contains a number of suggestions concerning the approaches that the legislator and the supervisory authorities on the European financial markets (starting obviously from ESMA) should hopefully adopt towards this new phenomenon (https: //www.esma.europa.eu/sites/default/files/library/esma22-106-1338_smsg_advice_-_report_on_icos_and_cryptoasse ts.pdf).

FINMA has also specified that the individual classifications of the *tokens* are not necessarily mutually exclusive. The investment and utility *tokens* can also fall within the category of payment *tokens* (so-called "*hybrid tokens*"). In these cases, the *token* is cumulatively classified as a transferable security and a means of payment.

The notions put forth by FINMA are obviously devoid of any value in relation to situations in which such authority has no power and also do not have even a normative value. the fact that a digital *token* can be categorised, according to this authority, in a certain way does not prevent other entities, of the same or different type and nature, from coming to different conclusions within their institutional functions.

The question is eventually made even more complex due to the *borderless* nature of *blockchain/Bitcoin* technology. The transfer of the digital *token* in both the primary and secondary markets takes place, due to the nature of the technology, by simply sending a digital message to a corresponding network (P2P) of nodes and with the subsequent verification of the same message and its "registration" in the virtual register (so-called *blockchain*) which reports in order all transactions occurred on the *tokens* in question; these transfers are made as mere digital transactions, and as such, with no attachment to any one territory other than that of the nationality/residence of the concerned parties (assignor and assignee). However, these data are mostly unknown to the parties themselves, in the sense that the *token* transfer between them can take place - either directly or through exchange platforms (which can take on the function of exchange or marketplace) - without the parties knowing each other and even not knowing their identity.[5]

It is therefore necessary to underline how, in most cases, it is not even possible to identify those connecting elements which are indispensable for determining the law applicable to the individual case and under which jurisdiction it falls.

[5]This is obviously made possible by the fact that *blockchain/Bitcoin* technology is basically *trustless* that is, it eliminates at the root the need for a sufficient degree of mutual trust to be established between the parties of a transaction. The technology itself allows in fact to eliminate at the root the risk of certain abuses expected by the parties, among other things, the irreversible nature of the transactions, for example, prevents any risk of *charge back*.

These circumstances, of course, increases the risks considering the abstract possibility that, with respect to a particular case, there could be at least two if not more authorities who may in parallel fulfil the conditions for competences over the matter, even if it is evident that the affirmation of the competence of one would lead to the exclusion perhaps of the other one or the other ones.

The possible problems connected to identifying the applicable law and the competent authorities that can decide on the nature of the *token* cannot however find a univocal solution but is resolved on a case by case basis.

In general terms, it may be considered that to ensure fairness, the issuer should not be burdened by the task of verifying the legal treatment of the *token* in all possible jurisdictions.

From a *de jure condendo* perspective it would therefore be desirable to recognise this principle and the consequent affirmation of the corollary for which the assessment of the nature of the *token* should be carried out according to the law applicable to the issuer's nationality, wherein this element can always be determined in every operation of issuance and placement on the market of *tokens* and allowing the same to give a univocal answer to a question which otherwise could be solved only case by case.

In any case, the question of the legal classification of the digital *token* arises above all, if not exclusively, due to the possible interferences between the issue and placement transactions and the financial market law (it is not by chance that the question was first raised by the US *Securities and Exchange Commission* in the report on the case *The DAO*[6]) and it is precisely on this specific issue that the present opinion is concentrated. Any further assessment concerning the existence of any other regulatory constraints in the different legal systems that can be abstractly taken into consideration and which prohibit or limit the possibilities of issuance and placement on the market of non-configurable digital *tokens* such as "*financial products*" (or "*securities*" if you prefer), shall thus remain excluded from the field of investigation.

[6] SEC (see https://www.sec.gov/litigation/investreport/34-81207.pdf) were the first to raise the question of the possible classification of the digital *tokens* as financial instruments, deriving the need to verify in advance the nature of the token in order not to violate applicable laws relating to the issuance and placement of such instruments.

Likewise, evaluations related to the legal feasibility of the project of SANUSLIFE INTERNATIONAL GmbH / Srl and its sustainability in economic, fiscal and/or equity-related terms are not included in this opinion (moreover, the author of the opinion would not have the information necessary to carry out a full evaluation on these aspects).

In any case, going back to the topic of whether the digital *token* issued by SANUSLIFE INTERNATIONAL GmbH / Srl can be classified as a "*securit*y", the fact that the European legislation is generally in line with that of the United States provides some much needed security.

It follows that, if the level of uncertainty is in fact unavoidable with regard to identifying the competent authorities within a certain jurisdiction rather than that of another one, the principles for determining whether the digital *token* constitutes an instrument or financial product are generally common.

In this regard, reference may therefore be made, in the first instance, to the criteria already established by the US jurisprudence in the case of *Securities and Exchange Commision v. W.J. Howey Co.*, 328 U.S. 293 (*Supreme Court of the United States*, 1946[7]), in which it was asserted that the notion of *security* depends on the recurrence of the following three factors: "(1) *an expectation of profits arising from* (2) *a common enterprise that* (3) *depends predominantly for its success on the efforts of others*".

The first element concerns the expectation of a profit which will then properly assume the nature of financial return and not economic benefit deriving from the consumption or enjoyment of an asset.

The second and third elements are strictly connected to the existence of a collection activity held by third parties who thus assume a risk due to the possible economic results of the initiative to which the return is linked.

This seems to indicate that the notion of "*security*" is essentially equivalent to that of the

[7] https://supreme.justia.com/cases/federal/us/328/293/.

financial product of the Italian legal system, which then, in turn, by placing the common root in the relevant Community legislation, is equivalent to that applicable in all other member states of the European Union.

It is therefore worth recalling that pursuant to art. 1, paragraph 1, lett. U)of T.U.F.[8] (Legislative Decree no. 58/1998) "*financial products*" must be understood as:

1) both the "*financial instruments*";

2) and "*any other form of investment with a financial nature*".

The notion of "*investment with a financial nature*", for peaceful and consolidated[9] practice, implies "*the coexistence*" of the following three elements:

a) a use of capital;

b) an expectation of financial return;

c) the assumption of a risk directly connected and correlated with the use of capital[10].

However, it may be considered that the first of the elements of the so-called *Howey Test* (i.e. the one connected with the expectation of a profit) coincides in all respects with the requirement indicated above in the text sub-lett. b).

The other assumptions of the so-called *Howey Test* (i.e. those relating to the configurability of "…(2) *a common enterprise that* (3) *depends predominantly for its success on the efforts of others*") presuppose instead:

(i) the use of capital by the investor and

(ii) the fact that this capital is destined to be managed by others, that is, by those who will manage the enterprise to which the return is linked.

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[8] The text can be found at the following link:
http://www.consob.it/documents/46180/46181/dlgs58_1998_in_vig_2018.pdf/ 0fe608b5-aa7b-41af-a0ca-2164f9471fe8.

9 See the Consob Communication of 16 April 2008 no. DEM / 8035334 available at the following link: http://www.consob.it/documents/46180/46181/c8035334.pdf/e47c4bea-6f30-4d17-ad0d-3a410fc19fcd.

[10] For this, the judgement of the Civil cass, section II 17 April 2009, no. 9316 is of major importance; as it has revised the notion of "financial product" given by the industrial sector, denouncing its "extreme generality" such as to be "in clear contrast with the principle of legality and typicality of the administrative offence dictated by art. 1 L. of 24 November 1981, no. 689 "as it would allow Consob to impose administrative sanctions essentially at their discretion. The Supreme Court has therefore pushed forward a rescaling of the defining features of financial instruments, i.e. instruments that " by their nature are subject to rapid mass exchanges and changing quotations in short periods ". The case concerned an investment in real estate. On the subject see A.Pomelli, I confini della fattispecie «prodotto finanziario» nel Testo Unico della Finanza, in Giur. Comm., folder 1, 2010, p. 106..

This is, therefore, in a nutshell, the reference frame which can help reach the answer to the question that is subject of this opinion.

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Coming, therefore, to the present case, it first should be underlined that the present opinion is based on the documentation provided by the client constituted, in particular, by the so-called *White Paper* published with the launch of ICO.

The datum is obviously relevant since the legal classification of the *token*, at least in abstract terms, could be affected by the declarations and the circumstances that are not included in the *White Paper,* in relation to which the client must be made directly responsible.

However, based on the evidence of the aforementioned document, it is possible to state the following:

1. Description of SANUS project.

SANUS project was initiated by the company SANUSLIFE INTERNATIONAL GmbH / S.r.l with headquarters in Luigi-Negrelli-Straße 13/C 39100, Bolzano/Bozen, Italy (hereinafter the "Company").

The *White Paper* states that the Company has many years of experience in the development, production and marketing of drinking water treatment and health-care products and is among the national and international *leading* operators in the processes of ionisation of drinking water. As part of its activities, the Company have already developed reward mechanisms and discounts for its users, through which they can earn the so-called SANUSCREDITS (which seem to be essentially equivalent to the credits that consumers can accumulate through *loyalty programmes* [11]).

[11] It should be noted that according to the European Central Bank (see Virtual Currency Schemes, October 2012, p. 15 ff.: https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf) even *loyalty programmes* constitute an example for a virtual *currency*: "*Loyalty programmes in the form of vouchers, coupons and bonus points have long existed. Airlines' points/air miles programmes are one of these reward systems implemented to increase frequent flyers' loyalty towards the company. Every time a customer buys a flight or pays with a credit card linked to the frequent-flyer programme, they receive additional air miles that can be exchanged for free flights or for an upgrade to business class. As highlighted by The Economist (2005), these programmes have reached outstanding values, even surpassing the total amount of dollar notes and coins in circulation (i.e. the M0 supply). Airline companies also sell miles to credit card firms, generating substantial additional revenue for airlines. In addition, these programmes form part of the airlines' marketing and business strategies. By providing the frequent flyer with air miles for buying a flight at a particular time or, on the contrary, by making it harder to spend air miles (e.g. requesting more*

More specifically, SANUSCREDITS can be accumulated by participating in various activities within the virtual user community (defined as "*SANUSWORLD community*"):

a) activities of interaction with the community (invitation of new users to the community, connection to the platform, confirmation of friendship among users, comments to posts of other users ...);

b) purchase of products of the Company through the online sales platform (in this case the number of acquired SANUSCREDITS varies according to the applied discount which, in turn, seems to depend on the position held by the individual user in the community);

c) achievement of a certain position in the promotion plan developed by the Company (in this case, the company has declared that it has carried out its activity for some time using network marketing plans in full compliance with the provisions of Law 173/2005[12]);

d) addition of a new *merchant* into the *e-commerce* platform for users (in which products of the Company are sold, as well as those of third-party manufacturers who enter into the system, defined as SANUSCOMPANIES);

e) sponsorship of new SANUSCOMPANIES (in this case the acquired SANUSCREDITS vary depending on the position of the *sponsoring* user in the promotion plan. Different positions correspond to different levels of discount reserved for the user);

f) participation in events organized by the Company;

g) new initiatives and new user incentive programmes to be launched by the Company.

It is important to note that, by express provision, SANUSCREDITS can be used exclusively:

- for the purchase of products on the e-commerce platform managed by the Company;

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air miles for a free flight or restricting the number of seats available), the airlines can influence their customers' demand. In practice, this means that the airlines can manage the supply of air miles according to their own strategy. Based on the definition and concept of virtual currency schemes developed in this section, frequent-flyer programmes can be viewed as a specific type of virtual currency scheme, which exhibits the following features:

- Users usually receive air miles for buying a flight, but they can also earn them in many other ways (e.g. by paying with a linked credit card, by responding to a promotion, etc.). Users can also buy air miles with real money at a specific exchange rate.

- Once the money is in the system, it cannot legally be redeemed into real money. However, as is the case with other virtual currencies, there may also be a black market for air miles.

- Air miles can be used to purchase real goods, i.e. flights. However, it seems that some schemes also allow air miles to be used when buying other real goods and services, but this practice seems to be marginal at this stage.

Taking all these elements into account, it is possible to classify the airlines' frequent-flyer programmes as characteristic of the Type 2 virtual currency schemes." with unidirectional flow" that according to BCE, "*…can be purchased directly using real currency at a specific exchange rate, but it cannot be exchanged back to the original currency. The conversion conditions are established by the scheme owner. Type 2 schemes allow the currency to be used to purchase virtual goods and services, but some may also allow their currencies to be used to purchase real goods and services*").

[12] The author of this opinion is not in a position to express any type of judgement regarding whether or not the activity carried out by the Company actually complies with the provisions of the aforementioned law. The question is outside the scope of the investigation covered by this opinion.

- for converting to SANUSCOINS within the envisaged conversion periods.

2.SANUSCOINS.

SANUSCOINS, on the other hand, are issued directly by the Company in a predetermined and fixed quantity (777,777,777) and then placed on the market according to a well-defined timeframe: 111,111,111 SANUSCOINS will be placed in each year from 2018 to 2024; for the first year only (2018)m 11,111,111 SANUSCOINS will be retained by the Company, of which 6,000,000 SANUSCOINS will be sold on the market through *initial coin offering*. For the rest, the purchase of SANUSCOINS by users will take place through the conversion of SANUSCREDITS they acquired (which is temporally restricted to the month of January of each calendar year until 2024).

The *White Paper*, however, states that SANUSCOINS are configured as "*Coloured Coins"*, i.e. digital *tokens* created by exploiting the code and the *Bitcoin* network through the inclusion of certain specific data in the so-called " "*Op-Return*" of the transaction string *bitcoin*.

However, the information provided by the Company makes it possible to state that SANUSCOINS distributed on the market according to the procedure described above may be used by users, like SANUSCREDITS, in order to purchase products or services offered by the Company or by third parties that have joined the commercial network.

The owners do not seem to have any other right than to spend the SANUSCREDITS in the network: in this sense it may be confirmed with a degree of certainty that these digital *tokens* have been conceived as *payment tokens*, i.e. digital *tokens* having the exclusive function of exchange or payment with a limited use within a specific commercial market.

It is certain that users, in order to acquire SANUSCOINS, must use financial resources, both if the purchase takes place on the occasion of the sales programme that the Company will launch in 2018 for the placement of the first 6,000,000 SANUSCOINS on the market, and if it happens subsequently by conversion of the accumulated SANUSCREDITS into SANUSCOINS during the period dedicated to it.

The use of economic resources for the aforementioned purposes can therefore take place either by subscribing the SANUSCOINS with payment of the related fee in *bitcoin* at the time of placement through the *initial coin offering*, and by using a corresponding amount of SANUSCREDITS (it should

be considered that while the exchange rate of the latter towards the euro was determined once and for all, the exchange rate of SANUSCOINS is instead intended to vary over time according to the trend of supply and demand).

Returning, therefore, to the notion of " *investment with a financial nature*"- for a first profile - the existence of the element connected to the configurability of "*a use of capital*" seems evident, while considerable uncertainty arise regarding the existence of the other two elements required for the purpose of the classification of this capital use in terms of financial investment.

In this sense, the element of "*expectation of a return with a financial nature*" by the users seems to be completely absent; not only because the Company has in no way committed itself to ensuring any form of remuneration for the subjects that will result as the owners of SANUSCOINS but also because, ultimately, the only function they seem to have is the one to allow the purchase of virtual or real goods or services within the commercial network developed by the Company.

Nor, in this context, should the conclusion be made that SANUSCOINS could possibly be traded on the secondary market, hypothetically also realising a possible capital gain.

Apart from the consideration regarding the lawfulness, in the abstract sense, of a secondary market of *tokens* configurable as *vouchers* or *coupons* (a question that clearly remains outside the scope of the present opinion), it should also be noted that such a hypothesis has also been expressly taken into consideration by the Italian Revenue Agency as part of a recent response (no 14 of 28 September 2018) to a question presented by a taxpayer[13].

In this document, the Revenue Agency clarifies that:
a) if *tokens* are representative only of the right to purchase goods and services of the issuer (so-called *utility token*), with the express exclusion of monetary, speculative and participatory purposes, they will feature "*characteristics that tend to be similar to vouchers, as instruments that give the holder the right to benefit from certain goods and/or services. For the purposes of identifying the applicable tax treatment... the issuing and circulation of vouchers do not assume VAT relevance, not being an anticipation of sale/performance to which the "vouchers" give the right. The tax relevance, and*

[13] The answer is available at the following link: https://www.agenziaentrate.gov.it/wps/file/nsilib/nsi/normativa+e+prassi/risposte+agli+interpelli/interpelli/archivio+interpelli/interpelli+2018/settembre+2018+interpelli/interpello+14+2018/Risposta.+14.pdf.

therefore the application of VAT, is therefore assumed at the time of the use of the voucher, i.e. at the time of purchase of the goods/service that it itself incorporates (i.e. final consumption)";
b) *"For the purposes of the taxation of income made by natural persons, outside the exercise of a business activity, who hold utility tokens, it is thought that they constitute relations from which the right to buy (when it becomes available) temporally-limited product or service derive and, therefore, are likely to generate a different income pursuant to Article 67, paragraph 1, letter c-quater) of TUIR*".

Now, although the applicability of the aforementioned principles must necessarily be limited to the specific case described in the clarification and not necessarily applicable under different circumstances, and despite the document referring to the case of *utility tokens* , what is relevant for the purposes of this opinion is the fact that the financial administration considered the resale operation on the market of *vouchers* and discount coupons to be essentially legitimate, even if configured as digital *tokens* to the point that the income deriving from such a transaction (as the difference between the purchase cost and the resale price) must be considered as subject to taxation (pursuant to Article 67, paragraph 1, letter *c- quater* , of the TUIR).

It can therefore be considered that the abstract possibility of variations in the price of the *token* on the secondary market as well as the possibility to accrue capital gains connected to such variations are not sufficient, if per se considered, for the formulation of a conclusion in the sense of configurability of an expectation of a financial return, being the capital gain on the resale of *tokens;* a fact which is not only merely possible, but also likely independent of the Company's intentions. It is true that if the Company did not actually provide for the development and management of the commercial network envisaged, the market value of the *tokens* would be influenced, but inversely it should be excluded that it is sufficient for the Company to provide for it in the planned way to ensure that this value increases over time.

In this sense, the fact that the number of *token*s to be issued by the Company has been determined in a fixed and invariable way is not sufficient to state that its value is necessarily destined to grow over time; on the other hand, the scarcity of *tokens* (which determines the rigidity of the offer and, in the presence of a growing demand, can lead to an increase in price) does not correspond to the scarcity of goods and services that can be purchased by using *tokens*, or the exclusivity of the hypothetically more favourable purchasing conditions that the Company intends to reserve to users who pay the expected consideration in digital *tokens*.

For the aforementioned reasons, therefore, we can also exclude the recurrence, in the case in question, of the third element required for the purposes of configurability of a *security token* (i.e. the one connected to "*assumption of a risk directly connected and correlated with the use of capital*").

2. Conclusions

On the basis of all the foregoing findings, it can be concluded that the classification of "*financial products*" according to the regulations in force in the Italian legal system and in that of the European Union should not be recognised for "SANUSCOINS".

I remain at your disposal for any further questions or in-depth examination.

Kind regards,

Att. Giorgio Maria Mazzoli