

COUNTRY UPDATE-Luxembourg: Crypto-asset regulation

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Few areas of finance are developing faster than crypto-assets, a category that includes cryptocurrencies, securities tokens and utility tokens, whose common feature is use of distributed ledger technology (DLT). Their rise has led to calls for better regulation due to potential investor protection, money laundering and market integrity risks.

Several European governments have enacted or proposed legislation affecting crypto-assets. Regulatory differences can also arise when EU member states transpose directives into national law.

The EU's proposed [Markets in Crypto-Assets Regulation](#) (MiCA) would establish a framework for issuing crypto-assets and providing services relating to them. This includes stablecoins: crypto-assets purporting to maintain value by reference to another asset or assets.

This article provides an outline of EU legislation followed by an overview of crypto-asset regulation in the Grand Duchy of Luxembourg by [Patrick Goebel](#) and [Christine Renner](#) of [Dechert LLP](#).

Principal existing EU legislation:

Money Laundering Directives [EU 2015/849](#) and [EU 2018/843](#)

The Fifth Money Laundering Directive (5MLD) extended the Fourth Money Laundering Directive (4MLD) regime to "providers engaged in exchange services between virtual and fiat currencies" and to "custodian wallet providers".

Second Electronic Money Directive [EU 2009/110](#) (EMD2)

Article 2(2) of EMD2 defines electronic money as "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions ... and which is accepted by a natural or legal person other than the electronic money issuer".

Some stablecoins can be "electronic money tokens" under this definition.

Revised Markets in Financial Instruments Directive [EU 2014/65](#) (MiFID)

Some crypto-assets qualify as "financial instruments" under MiFID, art 4(1) point 15 and the associated list in section C of annex 1.

Proposed MiCA regulation ([COM 2020/593](#))

MiCA would apply to persons engaged in the issuance or provision of services related to crypto-assets not within scope of existing EU regulation.

It distinguishes between stablecoins and other crypto-assets. Stablecoins are divided into "asset-referenced tokens" and "electronic money tokens". Any that pass threshold conditions would be classified as "significant" by the European Banking Authority (EBA).

Crypto-asset regulation in Luxembourg

1. Which body regulates crypto-assets and related services?

There is currently no specific law dedicated to the regulation of crypto-assets and related services in the Grand Duchy of Luxembourg.

Regulation of crypto-assets and related services in Luxembourg is currently limited to the prevention of money laundering and terrorist financing. Consequently, regulation of crypto-assets is based on the Luxembourg act of November 12, 2004 on the fight against money laundering and terrorist financing, as amended (the AML Act).



The AML Act was amended to specifically include crypto-assets by the act of March 25, 2020 amending: 1° the Law of November 12, 2004 on the fight against money laundering and terrorist financing, as amended; 2° the Law of December 9, 1976 on the organisation of the profession of notary, as amended; 3° the Law of December 4, 1990 on the organisation of bailiffs, as amended; 4° the Law of August 10, 1991 on the legal profession, as amended; 5° the Law of June 10, 1999 on the organisation of the accounting profession, as amended; 6° the Law of July 23, 2016 concerning the audit profession, as amended; with a view to transposing certain provisions of Directive (EU) 2018/843 of the European Parliament and of the Council of May 30, 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU.

In the absence of specific Luxembourg regulation in the crypto-asset space, the provisions of the Luxembourg act of April 5, 1993 on the financial sector, as amended (the Financial Sector Act), apply where the crypto-asset qualifies as a financial instrument as defined in MiFID.

Where crypto-assets are subject to a public offer, the provisions of the Regulation 2017/1129/EU on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market (the Prospectus Regulation) would apply.

There are two competent authorities for crypto-assets and related services in Luxembourg: the Luxembourg supervisory of the financial sector (Commission de Surveillance du Secteur Financier, "CSSF") and the Authority for Indirect Taxes (L'Administration de l'enregistrement, des domaines et de la TVA, "AED").

a. Anti-Money Laundering and Counter-Terrorist Financing

The CSSF regulates and supervises AML matters for those entities which are under its supervision, notably credit institutions and investment firms under the Financial Sector Act, and alternative investment fund managers (AIFMs) registered or authorised with the CSSF under the Luxembourg act of 12 July 2013 on alternative investment fund managers, as amended (the AIFM Act) when managing alternative investment funds (AIFs) based inside or outside of Luxembourg.

The AED regulates and supervises AML matters in relation to crypto-assets for all entities that are not under the supervision of the CSSF except VASPs which are specifically under the CSSF's supervision.

b. Intermediary Services and General MiFID Services

As mentioned above, the CSSF is the competent supervisory authority for credit institutions or investment firms under the Financial Sector Act, including when credit institutions or investment firms provide services in relation to crypto-assets (regardless of whether the crypto-assets qualify as financial instruments or not). The services include portfolio management, investment advisory services or reception and transmission of orders of crypto-assets.

Intermediary services relating to crypto-assets which (i) are not financial instruments as defined in MiFID, or (ii) are not provided by credit institutions or investment firms under the Financial Sector Act, are not subject to any crypto-asset related regulatory supervision. However, they are still subject to the supervision of the AED for AML purposes.

c. VASPs

[Directive 2018/843/EU](#) on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (5MLD), included certain crypto-assets and cryptocurrencies within its scope. 5MLD was transposed into Luxembourg law through the AML Act. Articles 1(20c) and 7-1(1) of the AML Act require that virtual asset service providers (VASPs) established in Luxembourg or that provide services in Luxembourg must be registered with the CSSF and supervised by the CSSF for AML purposes.

A VASP is defined in the AML Act as any entity which provides one or more of the following services on behalf of, or for the benefit of, its clients: (i) exchange between virtual assets and fiat currencies, including the exchange between virtual currencies and fiat currencies; (ii) exchange between one or more forms of virtual assets; (iii) transfer of virtual assets; (iv) safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets, including custodian wallet services; (v) participation in and provision of financial services related to an issuer's offer and/or sale of virtual assets.

2. Does any non-EU-derived law regulate crypto-assets or crypto-asset service providers such as exchanges?

As mentioned above, there is no specific Luxembourg law regulating crypto-assets or crypto-asset service providers. Regulation in this field is limited to rules established for the prevention of money laundering and terrorist financing, that were transposed into Luxembourg law to a large extent through 5MLD. We note that the act of 25 March 2020 brings a larger group of assets and services into the scope of the AML Act than 5MLD.

The CSSF has issued guidance on VASPs (as defined above) (the "VASP Guidance") and a white paper on DLT which sets out guidance on the risk assessment service providers should undertake when using DLT.

The CSSF has issued two sets of frequently asked questions which aim to fulfil the gap left by the current fragmented legal framework, but which, to a certain extent, go beyond the statutory requirements. One of the frequently asked questions provides the CSSF's views on the requirements to be fulfilled in the context of investments in virtual assets by undertakings for collective investment (the VA UCIs



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FAQ) and the other sets out the CSSF's views on the requirements to be fulfilled by credit institutions when investing in or servicing virtual assets (the VA Credit Institutions FAQ).

a. VASP Guidance

Under the VASP Guidance, the CSSF clarifies the conditions for the registration of the VASP with the CSSF and the professional obligations a VASP is subject to. The registration includes fit and proper documentation on the key personal, shareholder and beneficial owner identification as well as information on certain key staff numbers.

b. VA UCIs FAQ

By referring to the definition of "crypto-assets" in the AML Act (which is replicated below, and which excludes financial instruments as defined in MiFID), the CSSF clarifies in the VA UCIs FAQ that crypto-assets are not eligible for undertakings for collective investment in transferable securities (UCITS), but can be eligible for AIFs subject to the conditions laid down in the VA UCIs FAQ.

Where an authorised AIFM based in Luxembourg intends to manage an AIF investing in virtual assets, the AIFM must obtain prior authorisation from the CSSF for the strategy "Other-Other Fund-Virtual assets".

The application must include, amongst other requirements, a description of the project and the involvement of the various services providers (e.g., the depository), a description of the delegates of the AIFM (e.g., the investment manager), a description of the investment strategy (direct or indirect investments by the AIF in virtual assets), a risk management policy and a valuation policy specifically detailing how the value of the virtual assets will be determined, information on the custody of crypto-assets, information on the process to comply with the requirements of the AML Act and information on the target investors and the distribution channels of the AIF.

The CSSF underlines in the VA UCIs FAQ that particular emphasis will be put on the assessment of the AIFM and other participants in the control of virtual assets by means of access to and control over the cryptographic keys.

Where the AIFM is performing activities that fall within the scope of article 1 (20c) of the AML Act (which defines VASPs, as mentioned above), the AIFM must be registered as a VASP before starting to manage the relevant AIF.

The VA UCIs FAQ does not provide specific guidance for Luxembourg-registered AIFMs which are exempted from requiring authorisation under the AIFM Act. The VA UCIs FAQ provide general guidance related to the prevention of money laundering and terrorist financing, which is also applicable to the registered AIFMs. In practice, the CSSF requires information and documents on risk management and valuation policy, on custody of crypto-assets and on target investors during the registration process of these AIFMs.

In addition to the requirements imposed on AIFMs, the CSSF clarifies [in the VA UCIs FAQ] the conditions to be fulfilled by Luxembourg depositories that wish to service AIFs investing in virtual assets. Luxembourg depositories must provide the CSSF with prior notification when they intend to act as depository for an AIF investing directly in virtual assets and ensure that they have put in place adequate organisational arrangements and an appropriate operational model, considering the specific risks related to the safekeeping of virtual assets.

The CSSF takes the view that a depository is not considered as offering safekeeping or administration-type of services to virtual assets if the AIFM (with the direct contractual participation of the AIF) or the AIF (with the direct contractual participation of the AIFM) directly appoints a specialised VASP which is offering custodian wallet-type services. In this case, the virtual assets are not recognised in the off-balance sheet of the depository because the depository is not liable for the restitution of the virtual assets, which directly falls to the specialised VASP.

In addition, the depository directly providing safekeeping or administration services relating to the virtual assets of the AIF that has invested in virtual assets (including custodian wallet service) must seek registration as a VASP before providing these services. In this case, the virtual assets are recognised in the off-balance sheet of the depository and the depository has an obligation of restitution for the loss of the virtual assets in accordance with the general principle of Luxembourg civil law (but not under the strict liability regime of the AIFM Act, which is only applicable if the virtual asset is a financial instrument recordable in a bank account).

Where the depository is a credit institution, it must also follow the guidance laid down in the VA Credit Institutions FAQ.

c. VA Credit Institutions FAQ

In the VA Credit Institutions FAQ, the CSSF clarifies the conditions to be fulfilled by a credit institution when investing in virtual assets for their own account or for the account of their clients as well as when providing other services in connection with virtual assets, such as custody services.

The VA Credit Institutions FAQ aims to ensure that the stability of the credit institution is not jeopardised by investments in or servicing of virtual assets. A credit institution that intends to offer virtual asset services (irrespective whether these services fall within the scope of the Financial Sector Act) must submit a detailed business case to the CSSF prior to offering any virtual asset services.

The business case must include a risk-benefit assessment, details of the required adaptations to its governance and risk management frameworks, the effective handling of counterparty and concentration risk and the implementation of investor protection rules. Where the services fall within article 1(20c) of the AML Act (which defines VASPs, as mentioned above), the credit institution must be registered as a VASP (defined above) before starting to provide these services.



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Furthermore, the VA Credit Institutions FAQ clarifies that a credit institution may open accounts comparable to securities accounts that allow clients to deposit virtual assets, provided these accounts are segregated from the [credit institution's/bank's] own assets. Credit institutions cannot open bank accounts (e.g., current accounts) in virtual assets and consequently cannot take deposits in virtual currencies, nor can they facilitate or execute the settlement of payments in virtual currencies.

When providing investment advisory services to clients in connection with virtual assets, the VA Credit Institutions FAQ requires credit institutions to undertake sufficient steps to guarantee best execution, suitability and appropriateness of the investments, and to inform investors accordingly of the underlying risks by way of educational material and transparent reporting regarding holdings in virtual assets even where the virtual assets do not qualify as a financial instrument under MiFID.

3. Has a national law or regulation defined "crypto-asset" and/or "cryptocurrency"?

The AML Act defines "virtual asset" and "cryptocurrency" as follows:

"Virtual currency shall, in accordance with this law, mean a digital representation of 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 a legal status of currency or money, but is accepted by persons as a means of exchange and which can be transferred, stored and traded digitally."

"Virtual asset shall, in accordance with this law, mean a digital representation of value,

including a virtual currency, that can be digitally traded, or transferred, and can be used for

payment or investment purposes, except for virtual assets that fulfil the conditions of electronic money within the meaning of point (29) of Article 1 of the Law of 10 November 2009 on payment services, as amended, and the virtual assets that fulfil the conditions of financial instruments within the meaning of point (19) of Article 1 of the Law of 5 April 1993 on the financial sector, as amended."

From a legal point of view, the purpose of these definitions is in principle limited to the scope of the AML Act. We note that the CSSF uses these definitions in the VA UCIs FAQs and these definitions are generally used in practice in the absence of any other formal definitions of these terms.

4. What money laundering regulations, including any due diligence requirements, apply to crypto-assets?

As mentioned above, VASPs are subject to the supervision of the CSSF. Any entity established in Luxembourg or providing services in Luxembourg falling within the scope of article 20(1c) of the AML Act (listed above) must be registered with the CSSF as a VASP before starting to provide these services and is subject to the supervision of the CSSF for the purposes of anti-money laundering and anti-terrorist financing.

Under the VA UCIs FAQ, the CSSF requires AIFMs and entities supervised by the CSSF to compute a money laundering and terrorist finance risk scoring of the virtual asset and perform due diligence in line with this risk scoring. The CSSF refers to the Vertical Risk Assessment on Virtual Assets Service Providers published by the Luxembourg Ministry of Justice in December 2020 and re-iterates that the content of this report must be considered in this context.

The mitigation measures must be commensurate with the risks embedded in the relevant virtual asset (e.g., cryptocurrency, utility token, etc.) and the way of their acquisition and transfer (e.g., via exchange platform, ITO, ICO, etc.). The CSSF expects that the persons and bodies within the supervised entities in charge of compliance and the fight against money laundering and terrorist financing, namely, the anti-money laundering officer (responsable du contrôle du respect des obligations professionnelles, "RC") and their supervisory body or person (responsable du respect des obligations professionnelles, "RR"), possess and can demonstrate an adequate understanding of money laundering and terrorist financing risks as well as the additional financing risks posed by virtual assets and the necessary measures to mitigate them.

5. What rules apply to the promotion of crypto-assets?

As mentioned above, to provide services in Luxembourg relating to the offer or the sale of a virtual asset, the relevant provider must be registered with the CSSF as a VASP and comply with the obligations of a VASP as determined by the CSSF in the VASP Guidance.

In addition, where the crypto-asset qualifies as a financial instrument as defined by MiFID, the promotion of the crypto-asset falls within the scope of the Financial Sector Act. The promotion activity then qualifies as a service on financial instruments (e.g., reception and transmission of orders) and can only be provided in Luxembourg by an investment firm (i) authorised for this purpose in Luxembourg, (ii) authorised in another member state of the European Union and using the MiFID passport or (iii) otherwise registered to provide the services in accordance with the equivalence regime established by the Financial Sector Act.

In case of a public offer, the requirements of the Prospectus Regulation will apply unless one of the exemptions of the Prospectus Regulation applies (e.g., the offer is limited to professional investors or the minimum investment is set at 100,000 euros).

6. Do different crypto-asset rules apply to wholesale and retail markets, for example, on the sale of derivatives?

There are no rules specifically designed for the sale of crypto-assets to retail investors. That said, the investor protection provisions under MiFID as laid out within the Financial Sector Act apply where the crypto-asset qualifies as a financial instrument and, more generally, the provisions to protect consumers under the Luxembourg Consumer Code may apply where the sale of crypto-assets is to retail investors who are considered consumers.



The CSSF generally takes the view that crypto-assets and AIFs investing directly or indirectly in crypto-assets are not suitable for retail investors, even though there are no specific statutory provisions in Luxembourg law providing a basis for this strict approach. For example, the CSSF states in the VA UCIs FAQ that investments in virtual assets are not suitable for all types of investors and that AIFs addressed to non-professional investors or pension funds should not be allowed to invest directly or indirectly in virtual assets (as defined in the AML Act, which however excludes virtual assets qualifying as financial instruments). On the other hand, we also note that in the VA Credit Institutions FAQ, the CSSF expects credit institutions facilitating investments in virtual assets to set up an effective investor protection framework including best execution, suitability, and appropriateness of the investments as well as expecting them to provide adequate information to their clients on the underlying risks (even in case where the virtual assets do not qualify as financial instruments and consequently investor protection rules under MiFID do not apply from a legal perspective), which may be considered as implicit recognition that non-professional clients may invest in virtual assets.

7. Does any existing or proposed national law impose requirements on issuers of stablecoin?

There is no existing or proposed national law that defines "stablecoin" and consequently no law that imposes requirements on issuers of stablecoins.

However, where a stablecoin could be classified as a virtual asset, the considerations set out above would apply.

[Complaints Procedure](#)

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