

CRYPTOASSETS

A UK and European perspective
on the regulation of cryptoassets



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Introduction

Last year saw cryptoassets brought under the commercial and regulatory spotlight in the UK and EU. In the UK, the Financial Conduct Authority (FCA), took steps to impose direct regulations for these relatively novel instruments, following on from the final report of the FCA's Cryptoasset Taskforce released in late 2018. The report explored in detail the elements that make up what cryptoassets are and looked more generally at their underlying technology, Distributed Ledger Technology (DLT)¹.

2019 began with the launch of an FCA consultation on how, and if, certain types of cryptoassets interact with the current regulatory regime. The consultation closed on 5 April 2019 and the FCA published its final findings in a policy statement on 31 July 2019. Most recently, the UK Jurisdictional Taskforce issued a statement on cryptoassets and blockchain² whereby it concluded that cryptoassets could be treated as property under UK law, while smart contracts can be treated as legally enforceable contracts where they satisfy the general principles of contract law.

In parallel, in mainland Europe both the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued advice to the European Commission on how to best deal with cryptoassets. While the EBA's advice focuses on anti-money laundering practices and looks at cryptoassets with a focus on monetary regulations, ESMA looks at cryptoassets through the lens of regulations governing financial instruments.

The UK has always been at the heart of both financial and technological innovation, but traction has also been seen in some EU member states, such as France and Malta, which have implemented specific legislations dealing with cryptoasset activities. Luxembourg has also implemented rules that permit the storage of securities on a blockchain and it is considering introducing the concept of a 'token' into the legal system as a next step. In a similar vein,

Poland has deployed regulation which allows for joint-stock companies to have their shares stored on DLT software. Lastly, some jurisdictions, such as Finland and Croatia, have gone further in their implementation of the Fifth Anti-Money Laundering Directive (AMLD5) by taking it as an opportunity to expand financial regulation of cryptoasset in one consolidated act³.

In the private sector, Facebook's unveiling of 'Libra' in collaboration with major technology, payment, and financial entities has shown the potential application of cryptoassets in real-world scenarios, and has mobilised regulators across the globe to consider how such monumental moves can interact with the current regime⁴. Other major projects involving DLT that do not necessarily hinge on underlying cryptoassets, such as R3's Corda, the UK Land Registry's Project 'Maison' or JPMorgan's Interbank Information Network, have shown that one way or another DLT is here to stay. The question is whether cryptoassets are here to stay too.

While a technologically agnostic approach towards filtering cryptoassets through the financial regulatory fabric at this stage could provide a solution, an issue arises as a result of the differing stance member states across the EU have taken in implementing the notion of 'investment activities' in their domestic rules as well as the fact that prior regulations were not drafted with technological innovations, such as cryptoassets, in mind. This can present complications for multijurisdictional projects involving cryptoassets.

Against this backdrop, we have undertaken an exercise to consolidate information from our network of Preferred Firms across the EU, presenting a snapshot of how cryptoassets are regulated in their respective jurisdictions. In this interactive document, we present a high-level overview of the financial regulatory framework in the UK and EU as of the date of publication of this report.

Burges Salmon

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Fintech

Burges Salmon works with a wide range of clients in the Fintech sector, from start-ups through to large financial institutions, global consortia, regulators and policymakers. Our Fintech industry expertise is widely recognised by legislators and regulators, and we are unusual in our work for public sector and pseudo-governmental bodies on key payments infrastructure-related matters.

Our team of Fintech lawyers specialise in business models involving innovative technologies – from ebanking and cryptoassets, to crowdfunding, regtech, data analytics, payment platforms and automation. We have a deep understanding of the regulations affecting the sector and are experts at helping businesses ensure they are compliant with Fintech law.

What really differentiates our practice from others in this area, however, is our strength in advising on innovative products throughout the Fintech sector. In particular, our extensive work at policy-level gives us a unique ability to advise our clients on their most innovative work.

The key to our strength in this area is our relationship with our Preferred Firm Network. We work with Tier 1 firms in each jurisdiction to create a truly international offering for our clients – including by providing advice on any marketing restrictions in place in each jurisdiction as well as favourable jurisdictions from which to launch new tokens/assets.



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Sarah heads the firm's Fintech team and has particular expertise in helping technology providers in the payments space to commercialise their propositions.

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Foreword

I am delighted to have been invited by Burges Salmon to provide the foreword to this comprehensive paper on the regulatory treatment of cryptoassets in different jurisdictions. The technical, commercial and regulatory landscape relating to cryptoassets continues to move so rapidly that a guide of this nature is essential reading for those seeking to navigate this brave new world.

We all think that we can recognise a cryptoasset when we see one, but the use of the phrase 'cryptoasset' is itself instructive. Until recently we referred simply to a 'cryptocurrency'. That word is now inadequate properly to describe the smorgasbord of virtual currency coins, tokens, contractual rights, participative rights to profit and capital, security instruments and derivative products with cryptocurrency tokens as the underlying asset or reference point, that now proliferate.

Whilst one may point to the frequent classification of crypto-tokens as 'payment', 'utility' or 'security' tokens, no uniform definition of these concepts subsists and it is important to verify the position from jurisdiction to jurisdiction. For example, the UK Financial Conduct Authority does not view the labelling of a crypto-token as a 'payment', 'utility' or 'security' coin as being determinative of whether the coin is within or without the regulatory perimeter. The question is one of substance over form.

A fundamental point to appreciate is that cryptoassets are truly multijurisdictional. The DLT that facilitates the creation of cryptocurrencies and connected cryptoassets often means that issuance of the relevant cryptoasset is wholly decentralised. Of course, the extra-regulatory, permissionless nature of many cryptoasset products is precisely the attraction: value can be moved around from jurisdiction to jurisdiction and person to person anonymously, without utilising regulated payment systems.

The potential, perceived or real, for a cryptoasset to impact globally is illustrated by the furore surrounding the announcement by Facebook of its plan to launch its own global digital coin, 'Libra'. The project has met with a cold response from French and German financial services regulators and several of Facebook's commercial partners have subsequently withdrawn from the Libra project. The French finance minister, Bruno Le Maire, branded⁵ Libra "*unacceptable*" because it would mean "*a private company controlling a common good and taking over tasks normally discharged by states*". No amount of regulation could fix that, he said.

The controversy surrounding 'Libra' means that it is vital to recognise the different approaches taken by regulators in different jurisdictions. As this paper illustrates, the regulatory approach is by no means consistent and the responses to key questions such as what comprises a cryptoasset; how are cryptoassets classified for regulatory purposes; what activity will anchor cryptoasset activity in a particular jurisdiction; and what types of activity and asset fall within the relevant regulatory perimeter, will vary.

Of course, the real game-changer is the distributed ledger technology that facilitates cryptoassets. This technology has transformative potential to revolutionise the way in which we create contracts, process and transfer data and effect payment systems. In my view, once key jurisdictions bring cryptoassets into the regulatory fold their attraction may dissipate. However, this underlines the importance of understanding the different regulatory approaches and technological developments as we progress towards widespread regulation of cryptoassets. In the meantime, regulators need to keep up!

Lucy Walker
Guildhall Chambers
November 2019



a guide of this nature is essential reading for those seeking to navigate this brave new world.

Cryptomap



The UK approach



In the UK, the FCA outlined its view on cryptoassets through Policy Statement 19/22 dated 31 July 2019 (PS 19/22)⁶ which aimed to provide the market with guidance on when cryptoasset-oriented activities will fall within the regulatory perimeter.

In its original consultation, and in line with the Cryptoasset Taskforce's final report, the FCA created a broad taxonomy for cryptoassets with three categories: **security**, **exchange** and **utility tokens**. By contrast, in PS 19/22 the FCA improved the clarity and accuracy of its guidance by setting out two broad categories of cryptoassets, those being **regulated** and **unregulated tokens**. Going forward, the former includes **security** and **e-money** tokens, while the latter includes all other tokens not covered by those two sub-categories i.e. utility tokens and exchange tokens that are not security or e-money tokens.

Taking each in turn:

a. Security tokens are tokens *"that provide rights and obligations akin to specified investments as set out in the RAO (defined below), including those that are financial instruments under MiFID II"*.

For the purposes of the UK financial regulatory framework it is necessary to consider the list of specified investments contained in the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO)⁷ to see if the token satisfies the test for being a specified investment and, therefore, a security token. Consequently whether a cryptoasset will be treated as a security token will depend on its characteristics, such as: (i) the contractual rights and obligations the token-holder has by virtue of holding or owning that cryptoasset, (ii) any contractual entitlement to profit-share or (iii) whether the token is transferable and tradeable on cryptoasset exchanges⁸.

The categories of specified investments that are likely to be relevant to this analysis under the RAO include shares, debt instruments, warrants, units in collective investments, certificates representing certain securities, and rights and interests in investments.

b. E-money tokens: this new category of cryptoasset is based on the definition of e-money under the Electronic Money Regulations 2011 (EMR), i.e. electronically 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
- accepted by a person other than the electronic money issuer, and
- not excluded by regulation 3 of the EMR.

(The FCA avoids referring to these tokens as 'hybrid', or 'dual' tokens, in PS 19/22 (terms which have been expressly referred to by both ESMA and EBA in their reports to the European Commission).

It is important to look at the intrinsic characteristics of a cryptoasset throughout its lifecycle using both a substance over form and case-by-case approach. The FCA expressly states on several occasions in PS 19/22 that a cryptoasset could potentially fall within the regulated category even if it started its digital life as an unregulated token: *"if the token at a point in time reaches the definition of an e-money token or a security token, then it will fall under regulation"⁹.*

At this stage, the FCA has not found it necessary to develop a bespoke regulatory regime for cryptoassets, despite a third of its respondents thinking it appropriate to develop one at least for exchange tokens. However PS 19/22 does give some guidance on certain cryptoasset activities such as the issue of **stablecoins**, **airdrops**, **payment services**, **prospectus** and **listing rules**, as well as the operation of exchange platforms.

In conclusion, the UK regulatory regime takes a **technologically neutral** approach to cryptoassets without proposing the deployment of any specific regulatory provisions at this stage. The key question for natural and legal persons to consider before engaging in cryptoasset activities in the UK is whether the cryptoassets in question should be treated as **regulated cryptoassets** such as security or e-money tokens, and if so what implications will have on their activities e.g. as a payment institution, provider of securities to the public or in setting up trading facilities.

the UK regulatory regime takes a technologically neutral approach to cryptoassets without proposing the deployment of any specific regulatory provisions at this stage.

Brexit

As it stands, the UK no longer be part of the EU from 31 January 2020, Exit Day¹⁰. That does not necessarily affect the regulatory impact of EU law in the immediate term and until the expiration of the transition period on 31 December 2020. Beyond that point, the UK will be able to either set its own agenda or to retain rules that have been implemented in the UK prior to exit.

This is on account of the European Union (Withdrawal) Act 2008 which purports to incorporate in the UK all EU

existing law that granted rights and obligations in the UK pre-Exit day.¹¹ Also relevant is the FSMA (EU Exit) Amendment Regulations 2019 which, among other things, plugs residual regulatory holes in terminology to create a stand-alone UK regulatory perimeter.

However, until the end of the transition period, references to MiFID II and other EU rules in PS19/22, must continue to be borne in mind when considering cryptoassets.



Member State



**fellner
wratzfeld
partner**

Austria

**Specific laws - No
Guidance - Yes**



Dr Florian Kranebitter



Veronika Seronova



Dr Gregor Schett

Existing regulation and guidance

There are currently no statutory provisions or other regulations governing cryptoassets in Austria. As such, cryptocurrencies are, for the most part, not subject to the supervision of the Austrian Financial Market Authority (Finanzmarktaufsicht; 'FMA'). The main reason is that cryptoassets are generally not issued by any central bank or authority, which checks or manages the transactions and are generally based upon peer-to-peer networks¹².

However, consistently with the European Authorities, the FMA does give a preliminary classification to cryptoassets broadly in the three categories as payment, security and utility crypto tokens¹³.

Payment tokens are used for paying for goods and services and may be classified as payment instruments or e-money. **Security tokens** provide claims for a payout; dependent on their form they may be qualified as transferable securities pursuant to Austrian Securities Supervision Act 2018 (Wertpapieraufsichtsgesetz, WAG) or as investment pursuant to Austrian Capital Market Act 2019 (Kapitalmarktgesetz 2019, KMG). **Utility tokens** provide a benefit connected to a specific product or service. They may be designed in many different ways so, dependent on their specific form, they may simultaneously be classified as payment or security tokens. Each token has to be assessed on a case-by-case basis.

Business models based on cryptoassets **may require a licence** under Austrian law and according to the FMA some examples of which include the following¹⁴:

- **Accepting funds for cryptoasset investments:** funds accepted from third parties in order to invest in cryptoassets would require a banking licence under the Austrian Banking Act (Bankwesengesetz, BWG) since the acceptance of funds from other parties for the purpose of administration or as deposits constitutes a deposit business (Einlagengeschäft).
- **Safekeeping and administration:** safekeeping and administration of security tokens that qualify as transferable securities is considered custody business (Depotgeschäft) which also requires a banking licence under BWG.

- **Issuing payment tokens:** issuing payment tokens may require a licence for the issuance (and administration) of payment instruments pursuant to BWG, the Austrian Payment Services Act 2018 (Zahlungsdienstegesetz 2018, ZaDiG) or the Austrian E-Money Act 2010 (E-Geldgesetz 2010) when they are accepted for payments by third parties or can be purchased or exchanged against money. These licence requirements, however, do not apply if the payment function exists only within a **limited network**.
- **Online platforms that process payments:** operating online platforms for the purchase of cryptoassets that also process payments might require a licence according to ZaDiG. Emptying of Bitcoin machines and subsequent transferring of the funds to a third party may also require a licence according to ZaDiG.
- **Mining:** in relation to the mining of cryptoassets the FMA takes the view that mining in one's own name and on one's own account does not require a licence. However, the FMA highlights that business models that include participation in the mining process of cryptoassets like Bitcoin, depending on the specific design in the case in question, could constitute an activity that requires a licence, in particular if such business models involve the mining of cryptocurrencies, where they otherwise fulfil the criteria of an alternative investment fund, may fall within the scope of application of AIFMG.

Other examples of activities given by the FMA include the development of **alternative investment funds investing in cryptoassets, issuing digitised securities as cryptoassets** and other general rules that may apply to **ancillary activities involving security tokens that are treated as transferable securities** by virtue of their characteristics. Whether a company needs to obtain a licence must be assessed on a case-by-case basis and the FMA provides a developing set of Q&As which provides guidance on certain topics in this area.



Future regulations and consultations (apart from AMLD5 regulations)

While no similar consultations have taken place akin to that of the FCA, the FinTech Advisory Council was founded within the Austrian Ministry of Finance in 2018 with the aim of developing proposals for regulations¹⁵.

A spin-off from the FinTech advisory board has already been established – Digital Assets Association Austria (DAAA) – which represents the interests of start-ups and companies in the field of digital assets¹⁶.

Late in April 2019, the FinTech Advisory Council proposed establishing a regulatory sandbox to test and train innovative ideas, including cryptocurrencies and related initial coin offerings (ICOs)¹⁷. A respective ministerial draft has been submitted for legislative evaluation¹⁸.

The competent authority for drafting legislative acts and for regulating the field of cryptoassets is the Ministry of Finance. The former Minister of Finance Löger made statements about regulating ICOs against the backdrop of the FinTech Advisory Council's work¹⁹. He was considering a regulation for funding using cryptoassets (ICOs) which

would be subject to approval by a supervisory authority. Löger also intended to penalise misuses in connection with cryptoassets such as insider trading, market manipulation and front running, and wanted to regulate customers' and consumers' rights in this field without the subject of cryptoassets being over-regulated in order to maintain Austria as an attractive business location²⁰.

Due to the premature end of government in June 2019, the new election in September 2019 and the ongoing negotiations to build a new government there are no further developments worthy of mentioning in the field of cryptoassets in Austria. The proposed plan of establishing a regulatory sandbox has also been temporarily suspended.

Member State



Belgium

Specific laws - No
Guidance - Yes



Jonathan De Landsheere



Yves Brosens

Existing regulation and guidance

Currently, no Specific laws or regulations regarding cryptoassets have been issued by the Belgian legislators. However, the Belgian financial regulator (the Financial Services and Markets Authority, 'FSMA') has published a communication on ICOs in 2017²¹, which provides an overview of the legislation and regulations that may apply to ICOs as well as cryptoassets. According to the FSMA, the **characteristics** of cryptoassets may be similar to:

- investment instruments, given that they may provide rights to revenues or returns;
- a means of storage, calculation and exchange, given their convertibility into other cryptoassets, tokens or fiat money; and/or
- a utility token, if they provide access to certain products or services.

Taking into account the above, the FSMA has determined that depending on the characteristics of the cryptoassets or the structure of ICOs, various financial regulations may apply to them (as also stated by the ESMA in its communication regarding ICOs of 13 November 2017), such as: the Prospectus Directive, Markets in Financial Instruments Directive (MiFID), Alternative Investment Fund Managers Directive (AIFMD), Market Abuse Regulation (MAR), Fourth Anti-Money Laundering Directive (AMLD4), etc. In addition to the above-mentioned European legislation, the FSMA has also stated that the following national laws and regulations may apply to cryptoassets in Belgium:

- FSMA Regulation of 3 April 2014²² on the ban on distribution of certain financial products to retail clients.
This regulation forbids the professional distribution in Belgium to one or more retail clients of financial products of which the return is directly or indirectly dependent on a virtual currency.
- Law of 16 June 2006 on public offers of investment instruments and on the admission of investment instruments to trading on regulated markets.

This law requires the preparation of a prospectus to be approved by the FSMA in the event of a public offering of investment instruments within the territory of Belgium, establishes a monopoly on intermediation for the placement of investment instruments within the territory of Belgium and determines that advertisements used in connection with the public offering must receive prior approval from the FSMA.

- Law of 18 December 2016 regulating the recognition and definition of crowdfunding and containing various provisions on finance.
This law sets out the conditions for authorisation as a recognised alternative finance platform (that is, the financial form of crowdfunding) and the rules that apply to the providers of alternative finance service.

Future regulations and consultations (apart from AMLD5 regulations)

Apart from this guidance, to-date the FSMA has not issued any consultations or made any public statements to the effect that it is looking at furthering the regulatory perimeter to expressly cover cryptoassets.

Member State

KINSTELLAR

Bulgaria

Specific laws - No
Guidance - No



Svilen Issaev

Existing regulation and guidance

There has been no explicit guidance by the Financial Supervision Commission ('FSC') in Bulgaria. That being said, the FSC has outlined its Monitoring strategy for financial technologies (Fintech) in the non-banking financial sector for 2018-2020²³. In that it hinted on the possibility that tokens can be classified as MiFID II financial instruments although it has not gone further to attempt at classifying tokens²⁴. Interestingly enough, a Civil Court in Bulgaria concluded that Bitcoin is not treated as e-money and not recognised as legal tender or a financial instrument under the Act on Markets and Financial instruments. The Court also concluded that whereby such firm issues financial instruments with underlying cryptoassets such as contracts for difference, such activity will require prior authorisation²⁵.

Future regulations and consultations (apart from AMLD5 regulations)

No current steps are currently undertaken at a regulatory level, although the FSC is looking at setting up an internal departmental working group in relation to Fintech and is currently participating in discussions at a European level to provide for a unified framework of classification²⁶.

Member State

WOLF THEISS

Croatia

Specific laws - No
Guidance - No



Luka Tadic-Colic



Benjamin Sadric

Existing regulation and guidance

Currently there is no legislation regulating cryptoassets of any kind in Croatia. AMLD5 is already implemented and entered into force on January 1st 2020. Local implementation of AMLD5 covers *“virtual assets, virtual currency and custodian wallet providers.”*

The Croatian Financial Services Supervisory Agency ('HANFA') has published three warnings in the last two years alerting to the risks of investing in virtual currencies or ICOs and fraudulent actions that occur in those markets²⁷.

Neither HANFA nor any other official authority has published any guidance or opinion on cryptoassets, its consequences or possible relatedness with legal terms in Croatian laws.

As far as we are aware, the only publicly available opinion of Croatian authorities regarding cryptoassets was made by the Tax Authority on taxation of trading with cryptocurrencies in which cryptocurrencies were characterised as financial asset subject to the personal income tax²⁸.

Future regulations and consultations (apart from AMLD5 regulations)

There are no future legislative changes that were announced. Generally, when it comes to novel financial instruments, Croatian authorities are inclined to wait for regulation at EU level and then pass the implementing local legislation.

Member State

EROTOCRITOU

ADVOCATES - LEGAL CONSULTANTS

Cyprus

Specific laws - No
Guidance - Yes



Alexis Erotocritou

Existing regulation and guidance

Cryptoassets are not, per se, regulated in Cyprus unless such assets are structured in a manner to constitute a “*financial instrument*” as defined in Part III of the First Appendix of the Investment Services Law 87(I)/2017, as amended, that transposed MiFID II (Directive 2014/65/EU) into local law. Indicatively, cryptoassets may fall under the following categories of financial instrument: (i) “... any other derivative contracts relating to securities ... which may be settled physically or in cash”; (ii) “financial contracts for differences”; or (iii) “... any other derivative contracts relating to assets ... not otherwise mentioned in this Section, which have the characteristics of other derivative financial instruments”.

In case a cryptoasset constitutes a financial instrument, any activity in connection therewith, including any promotion, offer, placement or sale thereof to persons in Cyprus, will have to comply with the local implementation of, inter alia, MiFID II (Directive 2014/65/EU), the Prospectus Regulation (EU) 2017/1129, local prospectus law, and anti-money laws and regulations.

The guidance and announcements that have been published by the local regulators, i.e. Cyprus Securities and Exchange Commission (“CySec”) and Central Bank of Cyprus (“CBC”), have, to date, stressed that (i) cryptoassets/virtual currencies (such as Bitcoin) are not a regulated product unless they constitute a financial instrument, as mentioned above; (ii) there are no specific regulations for the protection of persons who transact in cryptoassets/virtual currencies, and hence the public should be cautious when transacting in cryptoassets/virtual currencies; and (iii) cryptoassets/virtual currencies are not legal tender as they are not issued by the Central Bank of Cyprus and can only be used as a medium for exchange of products in a limited trading network.

In summary, whilst cryptoassets are not specifically regulated in Cyprus, relevant activities in connection therewith may constitute regulated activities and necessitate compliance with local laws and regulations, as set out above. Further, unless there is a uniform EU position adopted on the issue (i.e. by way of a Directive or Regulation), we do not expect any development on this issue in the jurisdiction.

Future regulations and consultations (apart from AMLD5 regulations)

In September 2018, CySec also launched the “Innovation Hub”. This provides a platform for entities operating in Cyprus to have insight on CySec announcements and updates on the regulatory front. Through Innovation Hub, CySec notes that it is currently participating in Blockchain Technology for Algorithmic Regulation and Compliance (BARAC) project, which is run by the University College London (UCL) Blockchain Technologies.

Although this is DLT oriented and not cryptoasset focused, it is an important indication of CySec’s approach to be involved in technological developments and the law. CySec has not, however, undertaken any consultations in classifying cryptotokens. On this front CySec and the CBC usually adopts Guidelines or Recommendations issued by the European Supervisory Authorities so one could potentially expect the ESMA/EBA classifications to be adopted by CySec. That being said, CySec in a consultation paper on the 19 February 2019 had identified the unregulated cryptoassets activities, including the emergence of new products that utilise DLT, as matters posing significant risks to consumer protection and market integrity²⁹.

Member State

KINSTELLAR

Czech Republic

Specific laws - No
Guidance - No



Martina Brezinova



Petr Měšťánek

Existing regulation and guidance

No specific guidance has been issued by the Czech National Bank ('CNB') on how to classify cryptoassets, although the CNB has issued prior guidance on specific situations such as "trading in so-called exchange tokens"³⁰. In this guidance, the CNB recognises that "exchange tokens are a subset of cryptoassets" although it does not expand on other subsets. In this guidance the CNB does, however, note that although broadly speaking activities relating to exchange tokens do not fall under the regulatory perimeter e.g. buying or selling exchange tokens as principal, or exchanging said tokens for fiat currency, certain activities will. Such activities include trading with exchange token derivatives or managing assets of investors who do invest in exchange tokens and lastly, transferring funds in connection with the organisation of trades with exchange tokens.

Future regulations and consultations (apart from AMLD5 regulations)

The CNB has not, itself, issued any consultations and does not appear to be looking to regulate cryptoassets specifically in the near future. In a recent conference statement, a CNB board member reminded firms that the "CNB adheres to the principle of technological neutrality" and expanded by saying that "sandboxes, incubators and other brand-new initiatives should not breach the principles of equal treatment and technological neutrality". Lastly, he mentioned that as CNB's mandate is to ensure financial stability, and since non-banking Fintech companies' effect on financial stability is negligible, promoting regulation would not necessarily be legitimate. Another reason being that "such regulation could potentially create the risk of legalisation and legitimisation of gambling [as most cryptoassets investors are more like speculators who like to take risks, but instead of a casino they prefer betting on cryptoassets], thereby encouraging consumers to expose themselves to risks which regulatory bodies cannot mitigate."³¹

That being said, the Czech Ministry of Finance published the results³² of the public consultation on *Blockchain, virtual currencies and assets* at the end of March 2019. The consultation covered the following topics: (i) legal definition of virtual currencies and assets, (ii) suitable legal regulatory framework for virtual currencies and assets, and (iii) issuance of tokens as securities. The providers of services relating to virtual currencies are likely to be subject to stricter regulations from January 2020 because of the implementation of the AMLD5 regulations.

The current proposed wording of the implementing legislation is available in Czech³³ and it is expected that the new legislation will introduce requirements which go further than the AMLD5 regulations require (e.g. set out a wider definition of virtual currencies, potentially catching ICO investment tokens, and prescribe mandatory registration in the new register of providers of services connected to virtual currencies maintained by the Financial Analytical Unit of the Czech Republic for all such providers).

Member State



Denmark

Specific laws - No
Guidance - No



Morten Nybom Bethé

Existing regulation and guidance

Two years ago, the Financial Supervisory Authority ('FSA') issued a press release considering the interaction between ICOs and current rules³⁴. In it, the FSA expressly stated that cryptoassets that are only usable as a means of payment remain unregulated. However, where such tokens resemble financial instruments they may fall within regulation. Interestingly, the FSA noted that even though the underlying cryptoasset may *not be* a financial instrument, the way an ICO is structured may bring the ICO within the spectrum of regulated activities. Late last year, the FSA put this approach to the test with an assessment of an ICO³⁵ and considered whether the ICO was covered by the prospectus rules and whether the token in question was covered by e-money rules. In particular the FSA found that since the cryptoasset did not bear characteristics akin to transferable securities as they did not instil economic or decision-making rights against their issuer.

Future regulations and consultations (apart from AMLD5 regulations)

There currently do not appear to be any consultations in relation to further regulation in Denmark by the FSA. That being said, the FSA has already launched Fintech sandbox initiatives³⁶.

Member State



MAGNUSSON

Estonia

Specific laws - No
Guidance - Yes



Mait Valberg



Elvira Tulvik

Existing regulation and guidance

Cryptocurrencies, services related to virtual currencies and ICOs are legal in Estonia. The existing regulation is quite liberal and relies strongly on analogy to the rules on classical assets and securities. Virtual currency exchange and wallet services are subject to licencing and supervision by the Financial Intelligence Unit.

'Cryptocurrency' or 'token' or 'coin' are not legally defined terms in Estonia, however, the term 'virtual currency' is defined in the Money Laundering and Terrorist Financing Prevention Act. The Estonian Financial Supervision Authority ('EFSA') describes virtual currency as a payment instrument based on digital representation of value and using blockchain technology, not issued by a central bank or credit institution/e-money institution, that can in some circumstances be used as an alternative to money.

The ICO is not defined in the Estonian law, although the EFSA has provided a definition. The definition is the same as the one offered by European Securities and Markets Authority: *"An ICO is an innovative way of raising money from the public, using so-called coins or tokens and can also be called an initial token offering or token sale. In an ICO, a business or individual issues coins or tokens and puts them for sale in exchange for fiat currencies, such as the Euro, or more often virtual currencies, e.g. Bitcoin or Ether."*

The EFSA has also issued a general guidance regarding conducting the ICO and for entities engaged with virtual currencies on its website³⁷. The EFSA has confirmed that securities regulation is applicable when virtual currency represents the rights related to securities, e.g. provides its holder a reasonable expectation for profit or governance rights, and would be subject to rules concerning public offering of securities that is overseen by the EFSA. If virtual currencies offered through the ICO are of the utility kind, then common Law of Obligations norms apply and there is no requirement for registrations or licences.

For tax and accounting purposes, virtual currencies are considered either intangible assets or inventory.

Future regulations and consultations (apart from AMLD5 regulations)

Currently, there is draft legislation in the Parliament according to which the requirements for virtual currency exchange and wallet service licences could get stricter, e.g. the state fee for a licence would be raised and requirements of a financial institution would be also made applicable to the providers of virtual currency exchange and wallet services. It is currently unknown in which timeframe the draft legislation will be adopted, however, it foresees a transition period for the companies already holding a licence.

While not specific to virtual currencies, a company that uses or plans to use innovative technologies in its financial services or products has a possibility to turn to the EFSA for guidance regarding relevant legal framework and qualification of the service. However, the EFSA does not provide legal advice.

Member State

HANNES SNELLMAN

Finland

Specific laws - Yes
Guidance - Yes



Pauliina Sutinen



Sanna Boow

Existing regulation and guidance

In implementing AMLD5, the Finnish regulatory regime took the opportunity to establish a stand-alone regime for virtual currency service providers.

Any entity that offers 'virtual currency services' must register with the Finnish Financial Supervisory Authority and comply with certain obligations set out in the Finnish Act on Virtual Currency Providers (572/2019) (*in Finnish: Laki virtuaalivaluutan tarjoajista*) ('Act'), subject to certain exemptions.

The Act implements in part AMLD5, which requires that services related to virtual currencies must be brought within the scope of anti-money laundering legislation. The Act goes beyond the requirements of the AMLD5 as it also applies to issuers of virtual currency.

Under the Act, the definition of 'virtual currency' follows the definition used in the AMLD5. 'Virtual currency' means a value that is in digital form and which:

- is not issued or guaranteed by a central bank or other public authority
- is not a legal means of payment, but which can be used as means of payment, and
- can be transferred, stored, and traded electronically.

The Act does not draw any distinctions between different types of virtual currency and it applies if the virtual currency in question falls within the above definition. Under the Act, anyone who offers 'virtual currency services' must register with the Finnish Financial Supervisory Authority. 'Virtual currency services' are defined as:

- issue of virtual currency
- provision of virtual currency exchange services, and
- provision of custodian wallet services.

The Act does not specify its territorial scope, but it applies when virtual currency services are provided to a Finnish customer. The

applicability of the Act should therefore be carefully considered when virtual currency services are provided into Finland on a cross border basis.

The Act includes various obligations regarding, for example:

- virtual currency service provider's reliability
- safekeeping and protection of client assets
- separation of client assets from the provider's own assets
- marketing
- prevention of money laundering and financing of terrorism.

The Finnish Financial Supervisory Authority has also issued Regulations and Guidelines (4/2019) for virtual currency providers on the holding of client assets, customer due diligence and risk management systems.

Future regulations and consultations (apart from AMLD5 regulations)

There are no plans to further regulate virtual currencies in Finland at this stage.

Interest groups were consulted on the new legislation during the legislative process of the Act in Autumn 2018 and Spring 2019. The Finnish Financial Supervisory Authority has not currently indicated that there would be any other local public consultations.

Member State



France

Specific laws - Yes
Guidance - Yes



Philippe Lorentz



Jerome Brosset



Alice Barbet Massin

Existing regulation and guidance

In December 2017, the French Financial Markets Authority ('AMF') issued a joint statement with the French National Bank warning consumers of the risks associated with investments in cryptoassets³⁸. However, later in the same month, France updated its legal regime to allow for securities to be stored on distributed ledger technology ('DLT')³⁹, followed by an implementing decree in late 2018⁴⁰ giving rise to what AFM terms as a 'Security Token Offering'. This effectively allows for what otherwise would have been regulated securities to be offered on DLT and be subject to the same standards of rules and obligations as traditional securities. This development does not contradict the AMF statement as it recognises the benefits that DLT could have as a technology for businesses.

Additionally, in a guidance in February 2018, AMF also considered that **cryptoasset derivatives** can constitute regulated instruments that require AMF authorisation⁴¹.

Most recently, on 11 April 2019⁴², the Action Plan for Business Growth and Transformation Bill n°2019-486 of May 22, 2019⁴³ was enacted ('PACTE'). The law is not specific to cryptoassets although it does have rules that are indeed specific to cryptoassets in Articles 85-87. An important element of PACTE is that it relates **solely to utility** tokens and **not** to security tokens⁴⁴.

The purpose of the section relating to cryptoassets is to create a clear and complete legal framework for cryptoassets and to encourage ICOs in France by putting in place a dual optional regime for ICOs (either a process requiring the drafting of a prospectus submitted to the visa of the AMF or a free one).

In the context of cryptoassets, PACTE creates an optional regime for (i) ICO licensing; and (ii) Digital Assets Service Providers ('DASP') as explained by the AMF⁴⁵. From the relevant DASP services, however, those who provide custodian services e.g. store public/private keys and trading platforms which allow for trading between fiat and digital assets will be subject to **mandatory** registration, as provided for by article L 54-10-1 of the French monetary code.

Clarifications have been given recently by the French tax administration as regards (i) the possible submission to VAT of the funds received by a company having initiated an ICO process⁴⁶ and (ii) the fact that for French residents the proceeds stemming from the sale of tokens are subject to a flat tax of 30% (if performed on an occasional basis)⁴⁷.

Future regulations and consultations (apart from AMLD5 regulations)

At this stage, and given the coming into force of PACTE, there are no more updates in relation to France and cryptoasset regulation.

Member State

SATELL
RECHTSANWÄLTE
STEUERBERATER

Germany

Specific laws - No
Guidance - Yes



Ronny Rosse



Clemens Zacher

Existing regulation and guidance

The German Federal Financial Supervisory Authority ('BaFin') has been very vocal on cryptoassets and has released various press releases on the topic⁴⁸. Although there are currently no specific regulations that regulate cryptoassets in Germany, BaFin has extended current rules to apply to cryptoassets in certain circumstances. BaFin classifies⁴⁹ cryptoassets consistently with some other regulators across the EU as:

Payment tokens (*like Bitcoin*): *these are generally used exclusively, or among other things, as a personal means of payment and they tend not to have any intrinsic value. They have no other function, or only limited functions, beyond this.*

Securities tokens (*equity and other investment tokens*): *users have membership rights or contractual claims involving assets, as with equities and debt instruments.*

Utility tokens (*app tokens, usage or consumption tokens*): *can only be used in the issuer's network to purchase goods or services. Very complex legal structures generally apply to utility tokens.*

In relation to payment tokens, BaFin extended the notion of financial instruments to include such tokens in 2011 by classifying them as 'units of account' and hence bringing them directly within the regulatory perimeter⁵⁰ insofar as one purports to engage in business activities with them such as providing an exchange platform. Quite interestingly, the 4th Criminal Senate of the Berlin Court of Appeals reversed this classification late last year, whilst stating in paragraph 15 of its judgment that, "*it is not the task of the federal authorities to intervene legally (in particular) in criminal laws*". In this case the court referred to the fact that extending the notion of unit of account to refer to payment tokens could render one criminally liable if they did not procure the relevant prior authorisation from BaFin⁵¹. This is an interesting eventuality as BaFin has, in the past, issued orders of cessation on activities involving bitcoin⁵².

Securities tokens can trigger various licencing requirements depending on whether they fall within regulatory definitions. Utility tokens, by contrast, will usually fall outside the regulatory perimeter, and will not be classified as units of account as long as they are not designed as means of payment⁵³.

Future regulations and consultations (apart from AMLD5 regulations)

There do not appear to be any further steps to directly regulate cryptoassets at this stage in Germany. However BaFin has been vocal in the last months stating that cryptoassets remain a risk for consumers⁵⁴, and issued further guidance on how 'tokenisation' of assets can effectively alter their characteristics and bring them within separate definitions of regulated instruments⁵⁵. An example given is where a financial instrument structured as a capital investment is converted into a freely transferable and negotiable digital token, this will no longer be a capital investment but ultimately a security.

Member State

POLITIS & PARTNERS *Law Firm*

Greece

Specific laws - No
Guidance - No



Zoi Velaeti

Existing regulation and guidance

There are currently no laws relating to cryptoassets in Greece. The Greek Capital Markets Authority ('CMA') has not made any publications or relevant warnings on its website.

Apart from the Bank of Greece adopting the EBA warnings on the use of cryptoassets on two occasions in 2014⁵⁶ and 2018⁵⁷ there do not appear to be further actions taken at this stage.

Future regulations and consultations (apart from AMLD5 regulations)

The CMA and other national bodies have not announced any future intention to consult on the topic.

Member State

KINSTELLAR

Hungary

Specific laws - No
Guidance - No



Nagy Dániel Attila

Existing regulation and guidance

The Central Bank of Hungary ('MNB') has issued stand-alone warnings to customers⁵⁸ regarding the high risk of cryptoassets in the past, although it has not made any specific guidance or regulatory reference to cryptoassets apart from the fact that it does not possess authority to act as a regulator for cryptoassets.

Future regulations and consultations (apart from AMLD5 regulations)

At this stage there do not appear to be any public plans on cryptoasset regulation. There is a Ministry of Finance working group regarding cryptoasset regulation but any information has yet to be published⁵⁹.

Member State

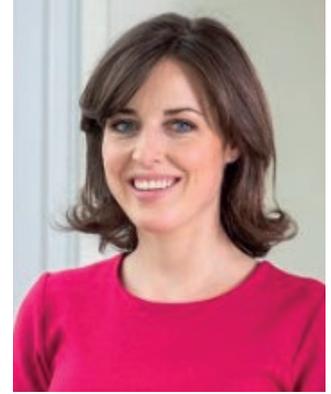
Matheson

Ireland

Specific laws - No
Guidance - No



Joe Beashel



Louise Dobbyn

Existing regulation and guidance

The Central Bank of Ireland ('CBI') has posted a few publications on its website on cryptocurrencies but none allude to a financial regulatory regime specific to cryptoassets. For example, it explains why cryptoassets (such as Bitcoin) do not constitute currencies due to their lack of the key characteristics of value currencies – store of value, medium of exchange, unit of account – but are rather high-risk, speculative assets⁶⁰. However this does not seem to differentiate between different classes of cryptoassets. CBI has also issued warnings on ICOs and cryptoassets⁶¹.

At this stage, in Ireland a case-by-case approach applies. If cryptoassets qualify under MiFID II as financial instruments then authorisation under Irish law is likely to be required. However, there is no guidance on this position but an analysis should be used to see the legal position of each cryptoasset.

Future regulations and consultations (apart from AMLD5 regulations)

No public consultation announced or further intended guidance issued at this stage.

The Minister of Finance and Public Expenditure and Reform announced, on 22 March 2018, the creation of an internal working group to monitor developments of virtual currencies and blockchain technology⁶². This group has published a paper called 'Virtual Currencies and Blockchain Technology'⁶³. The paper discusses the benefits and risks of cryptoassets and concludes by noting that no one governmental agency in Ireland can address cryptoassets holistically. That is why the intra-governmental working group was set up to address developments in cryptoassets across different departments⁶⁴. The paper does not attempt to classify cryptoassets.

Ireland will likely await EU level regulation to ensure a uniform regulatory regime is implemented.

Member State

Legance
AVVOCATI ASSOCIATI

Italy

Specific laws - No
Guidance - Yes



Marzio Ciani

Existing regulation and guidance

Cryptoassets are not explicitly regulated in Italy, except in the context of anti-money laundering and counter-terrorist financing provisions. Currently in Italy there is no official definition of “crypto-assets” while there is a legal definition “distributed ledger technology” further to that, the Law Decree no. 135 of 14 December 2018, converted into law on 12 February 2019, codified the definition of “distributed ledger technology” although it has not made similar definitions in relation cryptoassets. The definition given is as follows:

“[DLT means] IT technologies and protocols that use a ledger that is shared, distributed, replicable, simultaneously accessible and with an architecture decentralised on cryptographic bases; these IT technologies and protocols allow the recording, validation, updating and storage of data in a non-encrypted form as well as in an encrypted form for additional protection, allowing verification of data by every participant, with data remaining non-alterable and non-editable.”⁶⁵

Future regulations and consultations (apart from AMLD5 regulations)

On March 19 2019, Consob published a document for discussion on “Initial Coin Offerings and Crypto-Assets”. On 21 May 2019, a public hearing was held at Bocconi University in Milan, attended by over 200 participants. The consultation ended on June 5 2019, with 61 replies received. On January 2 2020, Consob published its final report providing responses to the issues raised by the participants to the consultation (“Consob’s Final Report”).

Consob’s Final Report is addressed solely to offers of tokens other than financial instruments. On this point, Consob’s Final Report further notes that “The regulatory approach proposed by Consob is not intended to encompass cryptoassets that are payment instruments, nor cryptoassets that, by their very nature, fall into categories governed by legislation of EU origin”. Consob also adds that “EU legislation on financial instruments is not amenable to be integrated at national level, even indirectly, with additional criteria”. Consob applies a similar approach also to the MiFID II financial instrument category.

Consob concludes that tokens belonging to this specific “new” class, subject to Consob’s Final Report, bear the following minimum requirements:

- **reference to business project:** i.e. consist of digital representation of rights associated with investments in business projects (i.e. transactions involving a promise of goods/services to be carried out);
- **DLT technology:** i.e. are issued, kept and transferred through distributed ledger-based technologies and
- **trading element:** i.e. are traded (or intended to be traded) in one or more trading platforms (the aim of Consob’s regulations is, in fact, to offer protection to those who purchase tokens, including when their goal is to obtain a revenue from the resale of such tokens on a trading/exchange platform).

Consob decided to expunge the identifiability of the holders of the rights incorporated in the cryptoassets as a defining element of cryptoassets. In such context, Consob also envisages the implementation of two separate registers “a register for cryptoassets trading platforms and a register for digital portfolio services provider”. The adoption by Consob of a communication or regulation on these matters is still pending.

Recently, the Italian Ministry of the Economy and Finance, on February 3 2020, implementing the provisions of Italian Law Decree No. 34/2019, converted into Italian Law n. 58/2019, published a draft of the ministerial decree (the “Draft Ministerial Decree”) to provide for a “sandbox” for certain fintech start-ups. The draft proposes the introduction of a system based on an application to be made by each fintech start-up, a review of specific requirements by an *ad hoc* committee, the admission of qualified participants to a maximum 18 month period of experimentation during which such qualified participants would be exempt from certain regulatory authorities restrictions and limitations.

On February 3 2020, the Ministry of Economy and Finance launched a public consultation process on the Draft Ministerial Decree. The period for the submission of observations on a series of queries formulated in the draft ends on March 19 2020.

Member State



Latvia

Specific laws - No
Guidance - Yes



Matiss Rostoks

Existing regulation and guidance

A few statements can be found on the Latvian Financial Capital Market Commission ('FKTK') although none offer extensive guidance in relation to cryptoassets. The latest statement from FKTK's website giving guidance on the legal framework for cryptoassets dates back to 2014, with amendments made to it in 2017, stating that cryptoassets do not fall within the regulatory perimeter nor form legal tender⁶⁶. However, a statement made by FKTK on ICOs (Initial Coin Offering), does note that the FKTK will take a case-by-case approach when assessing whether cryptoassets about to be issued correspond to financial instruments and hence fall within its remit⁶⁷. In particular, certain rules in the current regime in Latvia could interact with cryptoassets.

The Law on Payment Services and Electronic Money defines cryptocurrency as the digital representation of a value, which may be digitally transmitted, stored or traded and act as a medium of exchange, but not recognised as legal tender, and is not to be considered as a banknote or coin, non-cash or electronic money. Article 3 of the Law on the Prevention of Money Laundering and Terrorism and Proliferation Financing states that, as of 1 July 2019, virtual currency service providers are subject to this law and are herein after supervised by the State Revenue Service. However, since virtual currency is not considered as a financial instrument, the regulations of the Financial and Capital Market Commission do not apply to them.

From a tax perspective, according to a judgement of the European Court of Justice (C-264/14), the purchase/sale of cryptocurrency is a transaction which is exempt from the VAT. However, since the supply of services for consideration within the framework of an economic activity shall be subject to VAT, the standard commission rate of 21% is applied to the commission received by a registered taxpayer within the meaning of the VAT Law for the provided cryptocurrency exchange service. Individuals' income from a cryptocurrency transaction is a specific type of income that, within the meaning of the Law on Personal Income Tax, could be treated as income from capital gains subject to a personal income tax rate

of 20%. The income from the sale of cryptocurrency shall be declared by submitting a declaration.

As for legal entities, all transactions with virtual currency must be reflected in the company accounts, according to Section 2 of the Law on Accounting. As the euro is used as a measure of value in accounting, the virtual currency must also be valued at the acquisition cost and accounted for in euro.

Future regulations and consultations (apart from AMLD5 regulations)

We do not believe that there any current consultations or proposed regulatory changes.

Member State



Lithuania

Specific laws - No
Guidance - Yes



Kestutis Baranauskas

Existing regulation and guidance

Over the last year, the Bank of Lithuania ('BoL') has stepped up its involvement in providing more clarity on cryptoassets for market participants. Firstly, on 21 January 2019, BoL issued both an official statement on its position regarding cryptoassets and ICOs⁶⁸ as well as a FAQ document on the same⁶⁹. The position is highly comprehensive and some key points to note include:

- Financial Market Participants providing financial services should not participate in or provide services associated with virtual assets.
- The same should ensure separation between the two activities i.e. not link financial services they provide with third party providers of virtual assets.
- Apply AML/TF provisions when performing services for clients involved in virtual assets.

In relation to ICOs, BoL's position appears to take a case-by-case approach and focuses on the characteristics of the cryptoassets at hand e.g. *"[i]n those cases where coins released through an ICO have characteristics of securities [...] and may be transferred to other persons as well as traded in the secondary market or at organised trading venues, their offering is subject to the provisions of the Republic of Lithuania Law on Securities [and subject to an approved prospectus]"*.

Interestingly, BoL also notes in FAQ 2 that holding of cryptoassets for the purpose of using the underlying technology (this would be pertinent for utility tokens) will not constitute a virtual asset-related activity. In its FAQ, BoL also pays considerable attention to 'security tokens' (see II – Questions concerning the issue of security tokens).

On 17th October 2019 BoL also issued the Guidelines on Security Token Offering (STO) which provide greater regulatory clarity and aim at higher investor protection⁷⁰. Setting forth the regulatory approach of the BoL to tokens as a financial instrument, the new Guidelines focus on their classification (what tokens should be categorised as having features of securities or other financial

instruments), assess specific cases, provide recommendations related to the issue of security tokens and clarify applicable legal regulation. Companies planning to use the STO method for issuing tokens qualified as transferable securities or other financial instruments will have to comply with EU and national legislation regulating capital-raising activities. BoL has decided to take a technology-neutral regulatory approach, which means that if a certain product will have features of a financial instrument (e.g. securities), it will apply relevant regulation and supervision regardless of the technology used in its creation. Given the unique nature of this product, each case will be considered individually, while taking into account the substance over the form. In particular the Guidelines note that they *"do not create a regulatory regime specific to STOs, but provide regulatory certainty that they are subject to certain financial markets regulations and certain supervisory requirements depending on their characteristics"* (para.7).

Through the guidelines, BoL adopts the broad classification of the three four types cryptoassets (Payment-type tokens; Utility-type tokens; Investment-type' tokens, Hybrids of 'investment-type' and/or 'utility-type' and/or 'payment-type' tokens) as endorsed by other regulators for purposes of "clarity" while it recognises there is "no recognized unique classification of token" (para.26 - 31).

Future regulations and consultations (apart from AMLD5 regulations)

As of the date of this publication there are no future legislative changes that were announced.

Member State



Luxembourg

Specific laws - No
Guidance - No



Carolina Vasselli

Existing regulation and guidance

Cryptoassets are not explicitly regulated in Luxembourg. However, over the past five years, there have been a number of publications which illustrate the attitude of the national regulator towards regulation of cryptoasset activities .

In particular, the Commission de Surveillance du Secteur Financier ('CSSF') has published the following papers:

- **'Bitcoin Communiqué 2014'** dated 14 February 2014: this paper stated that even though there is no specific legal framework for the regulation of cryptoassets, they may fall under the category of scriptural money and therefore be subject to financial regulation as outlined in the E-Money Directive⁷¹.
- **'Warning on Virtual Currencies'** dated 14 March 2018: the CSSF issued a warning on virtual currencies drawing the attention of market participants to the risks related to virtual currencies and advising that virtual currencies will only be suitable for sophisticated investors who appreciate such risks⁷².
- **'ICO Warning 2018'** the CSSF stated that ICOs are subject to all current and existing laws. The CSSF has not yet put forward a comprehensive regulatory proposal for such offerings. However, the CSSF is opening its doors to dialogue, and encourages ICO promoters to contact the authority prior to publicising their cryptotokens in order to assess their project and identify which regulatory framework is relevant for their circumstances. The CSSF will apply an objective standard in assessing the objectives pursued by each ICO in order to assess whether it attempts to circumvent any rules such as prospectus obligations and other relevant financial rules. The CSSF does emphasise that AML and Terrorist Financing rules must be abided by in any event during ICOs⁷³. Therefore, ICOs can fall under different types of regulatory frameworks, depending on the project. They may fall within the scope of securities regulations, or the prospectus law, the collective investment laws and the money laundering legislation.

Notably the CSSF has clearly stated that these warnings do not apply to blockchain technologies used by cryptocurrencies, which indeed bring advantages in the innovation of the financial sector⁷⁴.

Future regulations and consultations (apart from AMLD5 regulations)

The CSSF has not undertaken a public consultation regarding cryptoassets. That being said, the CSSF is currently working on a FAQ document to address questions relating to cryptoassets and provide more clarity in the market⁷⁵.

Member State

GANADO
ADVOCATES

Malta

Specific laws - Yes
Guidance - Yes



Max Ganado



Leonard Bonello

Existing regulation and guidance

Malta is the most developed member state when it comes to cryptoasset regulation. To date it has implemented three regulatory instruments that provide a framework from innovative technologies to cryptoassets. The instruments also establish the "Malta Digital Innovation Authority" ('MDIA'), which works in parallel to the Malta Financial Services Authority ('MFSA'), and oversees the development of innovative technologies in Malta:

- **Malta Digital Innovation Authority Act 2018**⁷⁶: this is the Act that established the MDIA. It also outlines the remit of MDIA, which is to address the development of all innovative technology arrangements⁷⁷ and innovative technology in accordance with guiding principles⁷⁸ including keeping up-to-date rules in a manner that ensures the protection of consumers and investors and general market integrity.
- **The Innovative Technology Arrangements and Services Act 2018**⁷⁹: this Act codifies the need for certification of 'Innovative Technology Arrangements' ('ITA') and 'Innovative Technology Services Providers' ('ITSP'). The former include smart contracts, software used for DLT development, while the latter refer to systems auditors and technical administrators⁸⁰. This Act also solidifies MDIA's authority as a regulator in innovative technologies by granting it the regulatory and supervisory powers to issue the relevant certifications. Interestingly, a certificate issued to ITA will be unique for the purpose and quality issued and cannot be used as a blanket certificate for a different ITA⁸¹. In making its application for certification, an ITA must appoint both a Systems Auditor, as well as a Technical Administrator⁸² who themselves must also be certified with the MDIA.
- **Virtual Financial Assets Act 2018**⁸³: this Act codifies activities relating to cryptoassets that are not financial instruments or pure utility tokens. The Act provides for four distinct categories of 'DLT Asset'⁸⁴ those being:
 - virtual token
 - a virtual financial asset ('VFA')
 - electronic money or
 - a financial instrument.

That are intrinsically dependent on, or utilise, DLT.

Virtual tokens are ones that are solely used for purchasing goods or services from specific platforms⁸⁵. This category, as the MFSA explains, remain unregulated⁸⁶. By contrast if a DLT asset falls within the financial instrument definition as outlined in Schedule 2 of the Investment Services Act⁸⁷, which effectively incorporates the MiFID II criteria for financial instruments, such a DLT asset will be subject to the normal financial regulations in Malta. Likewise, where a DLT asset complies with all the criteria of e-money as outlined in the Financial Institutions Act, then the respective rules will apply.

VFA is defined as "*digital medium of exchange, unit of account, or store of value*" which is not any of the other three categories of DLT asset. As such this Act closes the lacuna left by residual types of cryptoassets that would not otherwise be caught by regulation and bring regulatory certainty.

The Test: the MFSA has issued a test⁸⁸ with an accompanying guidance note to determine whether a DLT asset is a VFA.

Licensing Requirements⁸⁹: a person may not carry VFA services⁹⁰ such as executing orders on behalf of other persons, or deal on their own account in VFA as well as operating an exchange without a prior MFSA licence approval.

Issue of VFA: issuing VFAs is also subject to prospectus style obligations as outlined in Articles 3 and 4 of the Act including white papers approved by the board of administration of the issuer.

Future regulations and consultations (apart from AMLD5 regulations)

As Malta's regulatory regime is now in place with regards to cryptoassets, consultations that took place are now in force as legislative instruments. For example, the Virtual Financial Assets Act 2018 resulted from a discussion paper issued by MFSA in November 2017 and a further consultation papers between July 2018 and September 2018.

Member State



Netherlands

Specific laws - No
Guidance - Yes



Sandy van der Schaaf

Existing regulation and guidance

Cryptoassets are not specifically regulated in the Netherlands. Generally, cryptoassets do not qualify as financial instruments within the meaning of the Financial Supervision Act. The Netherlands Authority for the Financial Markets ('AFM') has issued a comprehensive ICO guidance on its website⁹¹. Through this guidance it explains that one needs to look at the characteristics and features of the cryptoasset to properly legally qualify as a cryptoasset. For example if the cryptoasset is comparable to a transferable share or bond or unit in a collective investment scheme, financial regulation will apply. Furthermore, other activities regarding cryptoassets can be regulated, for example if it concerns the exchange of fiat currencies into cryptocurrencies, the trade in cryptoassets which qualify as financial instruments (in accordance with MiFID II (Directive 2014/65/EU), or an investment institution investing in cryptoassets (in accordance with the Alternative Investment Fund Managers Directive (Directive 2011/61/EU).

Future regulations and consultations (apart from AMLD5 regulations)

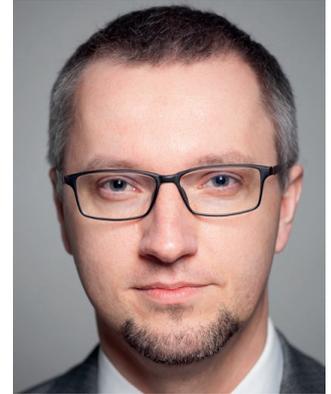
There are currently no specific plans in the Netherlands to regulate cryptoassets in general or related activities, other than implementation of the AMLD5 in the Dutch Prevention of Money Laundering and Terrorist Financing Act. However, the supervisory authorities in the Netherlands (i.e. the Dutch Central Bank and the Netherlands Authority for the Financial Markets) have stated early in 2019 that they would prefer an international approach regarding regulation of cryptoassets and they have published certain recommendations regarding regulation of cryptoassets in the future⁹². These recommendations include advocating for amendments to the European regulatory framework for corporate funding, to create opportunities for SME funding using blockchain technology. That being said, there are no public consultations specifically addressing cryptoassets in the Netherlands at this stage.

Member State

30lat **WAR WSP
DYŃ ÓLN
SKI+ ICY.**

Poland

Specific laws - No
Guidance - Yes



Krzysztof Wojdyło

Existing regulation and guidance

There is no explicit regulation regarding crypto assets in Poland. A statement made by the Polish National Bank (“NBP”) and the Polish Financial Supervision Authority (KNF) note that virtual currencies are not considered legal tender and outlined risks in investments in cryptoassets⁹³. KNF has also issued a statement on ICOs and noted that:

“[a]ctivities concerning ICOs may potentially be subject to numerous legal requirements, including drawing up a prospectus and a public offer, establishing and managing alternative investment funds and investor protection. However, each case shall be **assessed on an individual basis**.”⁹⁴

No further guidance appears to exist at this stage.

However, recent amendment of the Polish Commercial Companies Code which introduces new kind of a company - simple joint-stock company (in Polish: prosta spółka akcyjna), refers expressly to application of blockchain technology. In accordance with this regulation register of shareholders of the simple joint-stock company can be kept in a dispersed and decentralised database. Such database must ensure security and integrity of the data keep within it. Regulation will most likely come into force as of 1 March 2021.

Future regulations and consultations (apart from AMLD5 regulations)

Regulations:

There is draft of another regulation amending the Polish Commercial Companies Code that introduces obligation of dematerialization of shares for every non-public joint-stock company. The draft includes provisions that allow keeping a register of shareholders of joint-stock company in a dispersed and decentralised database. This regulation has the same wording as the aforementioned provisions on the simple joint-stock company. Provisions on decentralised database of shareholder will come into force as of 1 January 2021.

Consultations:

The most advanced research concerning the FinTech sector has been carried out by KNF. In 2018, the KNF set up a special Fintech Working Group, whose main task is to prepare a draft regulation on crypto assets and virtual currency trading. The current state of the Group’s work can be seen on the Commission’s website⁹⁵.

The KNF has also launched a so-called Innovation Hub⁹⁶ that aims to bring together entities from the FinTech sector and help them identify regulations that currently apply to their activities. Also, the Polish Ministry of Digitalisation has launched a project, among others, concerning cryptocurrencies and blockchain consultations.

Furthermore, at the beginning of 2019, on the KNF’s initiative, government and financial institution representatives took part in the first meeting of the Interministerial Steering Committee for FinTech. There, KNF presented an initial, preliminary draft of a bill amending certain legal acts to adapt Polish laws to activities undertaken by companies from the FinTech sector, which could also possibly affect companies that undertake activities in the cryptoassets industry.

The KNF has not yet published a consultation paper specifically addressing cryptoassets. However, in a report⁹⁷ published by the KNF’s Fintech Working Group, the Group identifies and answers questions related to possible regulatory barriers concerning FinTech matters, including cryptoassets ranging from AML to the possibility of NBP issuing virtual currencies using DLT.

In December 2019 KNF issued a plan of its surveillance activities towards new technologies, innovations and cybersecurity⁹⁸. Therein KNF underlines necessity of undertaking activities, including legislative ones, related to cryptoassets, concerning 1) their classification as one of the financial instruments or others economic goods, and 2) analysis of whether and to what extent to regulate trading in digital assets that are not easily classifiable in the light of the provisions concerning property rights.

Member State

G A _ P

Gómez-Acebo & Pombo

Portugal

Specific laws - No
Guidance - Yes



Miguel de Avillez



Beatriz Carvalho

Existing regulation and guidance

Cryptoassets are not currently regulated or subject to supervision in Portugal. Up to now, neither the Government nor any other regulatory authority, such as the Bank of Portugal (the Portuguese banking authority) or the Portuguese securities authority, Comissão do Mercado de Valores Mobiliários ('CMVM'), have issued Specific laws or regulations regarding cryptoassets. However, the CMVM has issued guidance on when cryptoassets will fall under the regulatory perimeter in the context of ICOs. It notes in a Q&A document addressed to entities that cryptoassets will be caught under the current regulations when they qualify as securities for the purposes of the Securities Code⁹⁹. CMVM goes on to say that not all cryptoassets qualify as securities since their classification is assessed on a case-by-case basis, but does not offer any other classification. It considers that cryptoassets will be securities when both of the following criteria are met – the cryptoasset is:

- a document **representing one or more legal situations** of a private and asset nature (that is, rights and duties); and
- **comparable** with typical securities, taking into account the legal situation(s) represented.

On comparability CMVM also notes that matters considered include assigning rights to income, or acts by the issuer that can increase the asset's value. Interestingly, CMVM guides ICO issuers to avoid using confusing language such as words like 'investor', 'admission to trading' etc., when the cryptoasset is not a security so as not to be misconstrued as a security offering when it is not.

CMVM also touches upon investment funds in cryptoassets, as well as the need for exchange platforms that deal with cryptoassets that are classed as securities to receive the relevant licences

Future regulations and consultations (apart from AMLD5 regulations)

The Bank of Portugal has clarified that no regulation on cryptocurrency is being developed at the moment¹⁰⁰. There is no public consultation specifically regarding cryptoassets.

However, both the Bank of Portugal and CMVM provide in their official webpages specific spaces for Fintech, to provide information and facilitate the dialogue between these regulators and developers of new financial technologies. In addition, the Bank of Portugal, CMVM, Portuguese insurance and pension funds authority and Associação Portugal Fintech have recently developed a platform, named Portugal FinLab, which aims to bring together these regulators and companies related to the financial field in order to implement innovative technological projects¹⁰¹.

Member State

KINSTELLAR

Romania

Specific laws - No
Guidance - No



Oana Grigore

Existing regulation and guidance

Apart from some tax legislations that also include cryptoassets as part of assets that attract taxable gains (not revenues)¹⁰² there do not appear to be any other cryptoasset-related regulations or specific guidance issued by the Romanian Financial Market Authority ('ASF').

Future regulations and consultations (apart from AMLD5 regulations)

There is currently no consultation or other information available in relation to intended regulatory intervention on cryptoassets at the time of writing. A recent statement by the Romanian Central Bank noted that "*cryptocurrencies will not replace the national currency*".¹⁰³

Member State

KINSTELLAR

Slovakia

Specific laws - No
Guidance - Yes



Dominika Bajzathova

Existing regulation and guidance

Cryptoassets are not explicitly regulated under Slovak law. The Slovak National Bank ('NBS') has, on its webpage, the notice that in its view cryptoassets are not subject to local regulations, but that some of their features may be covered.

Under its Fintech section the NBS issued a non-binding guidance section on cryptoassets and ICOs¹⁰⁴. Interestingly it classifies cryptoassets as:

- **Virtual assets** – no rights are attached to them; they can only be used as a means of exchange for fiat currencies and other virtual assets or as a means of payment for goods and services;
- **Utility tokens** – may be used, for example, for a future purchase of services or products provided by the entity that 'issues' the tokens; and
- **Investment tokens** – may give an investor the right to participate in the management or assets (future profits) of the entity that 'issues' the tokens.

NBS goes on to note that:

"Legal acts within Národná banka Slovenska's remit neither regulate cryptoassets, their mining and trading, nor define them. These acts do not lay down any obligation to obtain authorisation to issue or trade in cryptoassets, nor do they impose any requirements in relation to the conduct of such activities."

NBS concludes unequivocally that:

"In Slovak law, cryptoassets are not considered financial instruments under Act No 566/2001 on securities and investment services. Nor do they qualify as securities since they do not fit the definition of securities, particularly the requirement for a record made in a form stipulated by law" (second emphasis added).

Conversely to most other jurisdictions there appears to be a form over substance approach in relation to cryptoassets in Slovakia, at least for the time being.

Future regulations and consultations (apart from AMLD5 regulations)

In August 2019, a public consultation process for the amendment of the Slovak ALM Act (the 'Amendment') implementing the AMLD5 has been initiated. Pursuant to the draft of the Amendment, the definition of obliged person pursuant to the Slovak ALM Act shall include:

- provider of services of virtual assets wallet; and
- provider of services of virtual assets exchange.

The Amendment is proposed to enter into force as of 10 January 2020, where the above persons shall have time until 30 March 2020 to adopt/adapt the Own Activity Programme.

As at the time of writing, and with the exception of the above, there are no other public consultations specifically addressing cryptoassets in Slovakia and we are not aware of any intention to specifically regulate cryptoassets in Slovakia.

Member State

G A _ P

Gómez-Acebo & Pombo

Spain

Specific laws - No
Guidance - Yes



Jose Francisco Canalejas

Existing regulation and guidance

Cryptoassets are not explicitly regulated in Spain to date. The Bank of Spain (*Banco de España*) ('BdE') and the Spanish Markets Securities Commission (*Comisión Nacional del Mercado de Valores*, *CNMV*) have not approved specific regulations, but the Spanish authorities have issued certain statements.

On 8 February 2018, the BdE and the CNMV issued a joint statement warning consumers of the inherent risks of purchasing these types of digital assets¹⁰⁵. On the same day the CNMV also issued a statement addressed to market professionals in order to clarify several issues in relation to the marketing of tokens. According to the CNMV, certain ICOs should be treated as IPOs of transferable securities, and as such the related national or European regulations will be applicable to them. Among other reasons, this is based on the broad concept of transferable security as defined in the Spanish Securities Market Law¹⁰⁶.

On 20 September 2018 the CNMV issued a document on the initial criteria that it is applying in relation to ICOs, subject to review in light of the experience accumulated and the debate that is currently taking place at international level, in particular, within ESMA¹⁰⁷. In this document the Spanish securities regulator clarified the concept of a security token and considered it appropriate to exclude from consideration of transferable assets those cases in which it is not reasonable to establish a correlation between the revaluation or profitability expectations of the instrument and the evaluation of the underlying business.

Furthermore, CNMV explained that it does not seem possible (i) to trade tokens on Spanish regulated markets, MTFs or OTFs and (ii) to generate an internal market on an unregulated platform or for tokens to be traded on an exchange platform located in Spain. The main reason behind this is that tokens need to be represented in book-entry form to be traded and the records be kept by a central securities depository. CNMV does not consider however, the possibility of off-chain/on-chain representations of the cryptoassets and how they could potentially work around the regulatory needs for book-entry for exchange platforms.

More recently, CNMV issued a FAQ, Section 6 of which relates to cryptoassets. It re-addresses all the information it published previously, while also answering more questions such as the possibility of creating a closed-ended collective investment scheme aimed at offering services to professional investors that invest in cryptoassets¹⁰⁸. CNMV considers, however, some difficulties in such funds such as the safeguard requirements and the need for valuation and liquidity provision that may be hard to be achieved given the volatility of cryptoassets.

Future regulations and consultations (apart from AMLD5 regulations)

At the time of writing, there are currently no plans to regulate cryptoassets in Spain in the near future, but the matter has been brought to the regulatory authorities' attention, mainly from the perspective of consumer/investor's rights and protection. There are also no public consultations specifically addressing cyrptoassets in Spain.

Nonetheless, the CNMV provides in its official webpage a space for Fintechs to assist promoters and financial corporations with aspects of securities market rules and regulations that have a bearing on their projects and create an informal space for exchanging information with promoters and financial entities on their initiatives¹⁰⁹.

Member State

Lindahl 

Sweden

Specific laws - No
Guidance - No



Staffan Seger

Existing regulation and guidance

The Financial Supervisory Authority ('FSA') has announced public warnings on the risks of ICOs, although there are no regulatory steps taken to directly address cryptoassets to date.

Future regulations and consultations (apart from AMLD5 regulations)

There do not appear to be immediate plans to regulate cryptoassets in the future. Riksbank, the Swedish central bank, however, is closely monitoring the status of cryptoassets and their development and has published commentary that they do not consider Bitcoin and other cryptoassets as money¹¹⁰. In the commentary it also explains that the e-krona – a project by Riksbank that seeks to issue a digital currency version of the Swedish krona – the main difference is that e-krona is actively managed by a central bank. It will be interesting to see whether the recognition of a cryptoasset as currency requires a governmental oversight as opposed to a centralised oversight.

Endnotes

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- 3 For more information on these developments please see the respective sections of each jurisdiction below.
- 4 To insert comments from US Congress, France, BoE, Sweden.
- 5 In an opinion piece for the Financial Times.
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- 17 For more information see "Regulatory Sandbox" for FinTechs is under review" available at https://www.ots.at/presseaussendung/OTS_20190425_OTS0006/regulatory-sandbox-fuer-fintechs-geht-in-begutachtung.
- 18 See https://english.bmf.gv.at/ministry/press/Regulatory_sandbox_for_fintechs.html; the ministerial draft is available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00142/ (in German).
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- 23 See FSC "FinTech Monitoring Strategy", available at <https://www.fsc.bg/d.php?id=24698>.
- 24 Ibid, page 14.
- 25 Resolution No 834 dated 24 April 2015 of the Sofia Court of Appeal under civil case No 984/2015.
- 26 Ibid.
- 27 <https://www.hanfa.hr/vijesti/izra%C5%BEeni-rizici-na-kripto-tr%C5%BEi%C5%A1tu-zahitjevaju-poja%C4%8Dan-oprez/> / <https://www.hanfa.hr/vijesti/informacija-o-virtualnim-valutama-i-rizicima-ulaganja-u-virtualne-valute/> / <https://www.hanfa.hr/vijesti/informacija-o-rizicima-ulaganja-u-kriptovalute-i-ico/>.
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- 64 Pages 28 and 29 of paper.
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- 88 See here for links to the Test and the Guidance Note https://mfsa.com.mt/pages/readfile.aspx?f=/files/LegislationRegulation/regulation/VF%20Framework/20180724_PressRelease_FITest.pdf. This is pursuant to Article 47 of the VFA Act that grants the MFSA the power to issue such a test and guidelines.
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