



EDUARDO SILVA DE FREITAS

# Cryptocurrency Regulation in the EU AML Regime: the path towards effective harmonization?

2nd Crypto Asset Lab Conference

# CONTEXT AND RESEARCH PROBLEM

**WHAT ARE THE SHORTCOMINGS OF AMLD5 IN PROMOTING EFFECTIVE HARMONIZATION OF AML POLICIES TARGETING CC TRANSACTIONS ACROSS THE EU?**

## ***Financial Accountant, UK, 2019***

"EU members adopt tougher crypto rules than AML directive requires"

## **Why is this a problem?**

- Goals of the EU AML regulatory regime (AG Saggio in Case C-290/98 *Commission v Austria*):
  - Avoid the E[U] from becoming "a field of activity for organised crime";
  - Promote, "in a manner compatible with [Union] interests [...] an internal market founded on clear-cut and transparent rules".

# CRYPTOCURRENCIES

**AN INTERSECTION BETWEEN THE NOTIONS OF "VIRTUAL CURRENCIES WITH BIDIRECTIONAL FLOW" AND "CURRENCY TOKENS"**



## Tokens

- Currency tokens
  - Means of payment
- Utility tokens
  - Purpose-specific
- Investment tokens
  - Fundraising facility in exchange for return on investment

## VC Schemes

- Closed
  - In-game money
- Unilateral
  - Purpose-specific
- Bilateral
  - Means of payment

# MONEY LAUNDERING RISKS POSED BY CRYPTOCURRENCIES

## ANONIMITY/PSEUDONIMITY

- Only information regarding the public keys of the persons and the amount involved in the transactions is provided on the blockchain;
- Public keys are easily available, a different one can be used for each transaction

## REAL-TIME TRANSACTIONS

- Intermediaries are only necessary when Cryptocurrencies are exchanged for fiat currency, so the traditional AML approach focused on the role of intermediaries fall short



# CRYPTOCURRENCIES UNDER THE EU AML REGIME

## AMLD3

2nd Crypto Asset Lab Conference

### Personal scope

- Financial institutions
  - Bureau of exchange
    - Not in line with the FATF's understanding

### Material scope

- Property
  - Assets of every kind, incorporeal and intangible assets



# CRYPTOCURRENCIES UNDER THE EU AML REGIME

## AMLD4

- Post-Charlie Hebdo era
- CCs not expressly included in the final text

### Personal scope

- Financial institutions
  - Credit institution
    - Administering payment services

### Material scope

- Property
  - Assets of every kind, incorporeal and intangible assets



# CRYPTOCURRENCIES UNDER THE EU AML REGIME

## AMLD5

"virtual currencies' means 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 natural or legal persons as a ***means of exchange*** and which can be transferred, stored and traded electronically"



## CRYPTOCURRENCIES UNDER THE EU AML REGIME

### AML5

Are out of the scope of AMLD5

- Closed VC schemes (Recital 10)
- Unilateral VC schemes (Recital 11)

An extra reason for harmonization expressed:

- Need to fill the gap of the previous directives in tackling the anonymity feature of CCs

The directive did not abandon the "gatekeeper approach" - focus on intermediaries





# INITIAL TOKEN/COIN OFFERINGS

## DEFINITION OF VIRTUAL CURRENCIES

- "Means of exchange"
- Recital 10 refers to "investment"
- However, not only the recital should not be interpreted as being more far-reaching than the legislation itself, but also recitals are not binding
- Assymetrical harmonization: France, Italy and the UK included issuers. Bulgaria did not.



# INITIAL TOKEN/COIN OFFERINGS

## DEFINITION OF EXCHANGE SERVICES

- Only entails fiat-to-crypto trade
- Thus, ICOs would not be covered since issuers can receive any type of asset as consideration
- ESMA recommends the explicit inclusion of ICOs under the EU AML regime
- Assymetrical harmonisation: UK, Italy and Germany included investment in their definition. Bulgaria, for example, did not.

# CRYPTO-TO-CRYPTO EXCHANGES AND TUMBLERS

AML5 only entails fiat-to-crypto trade

- Including "investment" in AML5 would not by itself cover ICOs that receive other CCs as consideration
- Tumbler services also not included
- Assymetrical harmonization: Italy, France and UK included crypto-to-crypto. Bulgaria did not.





## JURISDICTION

- Article 22(2) AMLD3 and Article 33(2) AMLD4 stated that FIUs of host Member States should request information from FIUs of home Member States and not take the initiative themselves;
- In Case C-212/11 *Jyske*, ruled in a different direction saying that this would go against the goal of tackling ML;
- This ruling was overridden by Article 53(2) AMLD4



# JURISDICTION

## Impact on Cryptocurrencies

- If a host Member State has included a specific type of entity under their AML regime (e.g. crypto-to-crypto exchanges) but a home Member State did not, the host Member State will not be able to request that the entity operating in its territory submit STRs.
- And, even if it requests information from the home Member State's FIU, the latter is not obliged to request them from the entity, due to Article 53(2) AMLD4.



## **JURISDICTION**

- My proposal: extend the possibility of Article 45(9) – appointment of CCPs – to exchange CC-related obliged entities.

## **ENFORCEMENT**

- Decentralized exchanges were not included, so ECB recommends that they be submitted to a number of principles such as transparency, security standards, etc.
- The use privacy coins is entirely prohibited.

# MICA PROPOSAL

## IMPACTS

### Withdrawal of authorisation

- Article 20 (issuers)
- Article 56 (service providers)

### Assessment of intended acquisition

- Article 38 (issuers)
- Article 75 (service providers)

# THANK YOU!

COMMENTS AND QUESTIONS  
ARE WELCOME

**EDUARDO SILVA DE FREITAS**

PhD Researcher at Erasmus School of Law



[silvadefreitas@law.eur.nl](mailto:silvadefreitas@law.eur.nl)

[@Eduardo60696582](https://twitter.com/@Eduardo60696582)



[eduardo-silva-de-freitas-5aa21619](https://www.linkedin.com/in/eduardo-silva-de-freitas-5aa21619)

