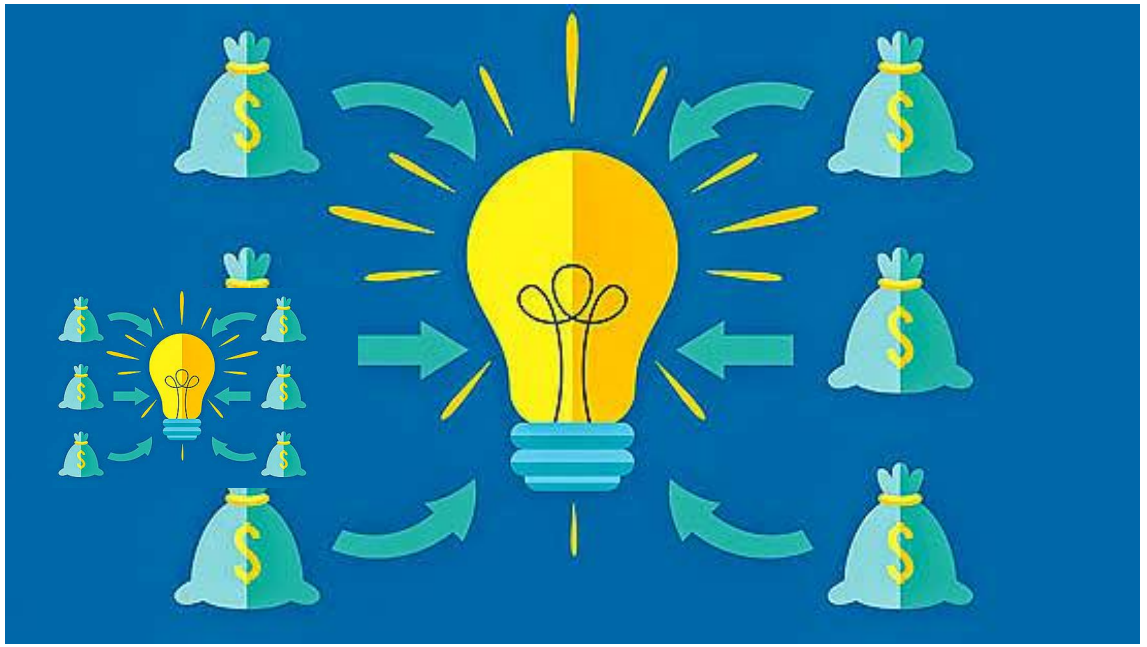
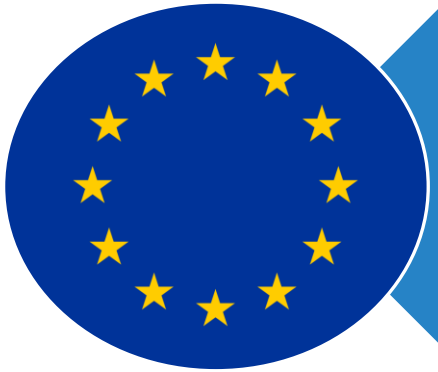
EUROPEAN CROWDFUNDING SERVICE PROVIDERS FOR BUSINESSES

Maxime LLERENA
Avocat à la Cour
at
Schiltz & Schiltz S.A.





European regulation on crowdfunding service providers for businesses

Adopted : 5 October 2020

1. PURPOSE

2. SCOPE

3. APPLICATION

4. SERVICES

5. OPPORTUNITIES

1. PURPOSE

Uniform requirements

- Provision of crowdfunding services
- Authorisation and supervision of crowdfunding service providers
- Operation of crowdfunding platforms
- Transparency and marketing communications

= Harmonised rules

= European passport

2. SCOPE

Crowdfunding = match of funding interest of prospective investors and project owners seeking for funding throughout the use of a crowdfunding platform, i.e a publicly accessible internet-based information system operated or managed by a crowdfunding service provider.

- sophisticated or not

Prospective investors

- intermediary organisation

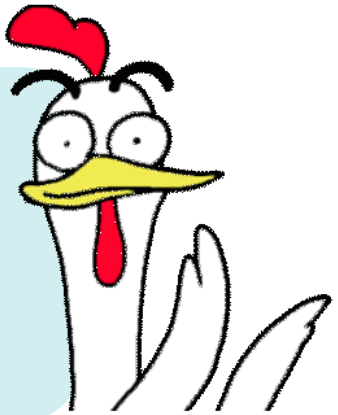
Crowdfunding service provider

Project owners

- start-up and SMEs

Crowdfunding types covered by the regulation

- Lending-based crowdfunding
- Investment-based crowdfunding



Crowdfunding types NOT covered by the regulation

- Donation-based crowdfunding
- Reward-based crowdfunding
- Crowdfunding that facilitates initial coin offering (ICO)

Are also excluded :

- crowdfunding services to **consumers**

- crowdfunding offers with a consideration of more than **EUR 5 millions** (calculated over 12 months)

3. APPLICATION

Application to the national regulator

+

Complying with legal requirements

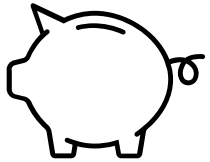
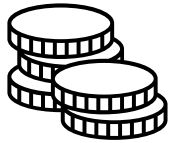
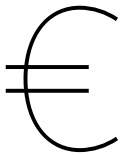
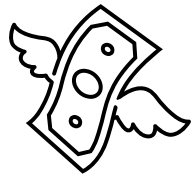
REQUIREMENTS

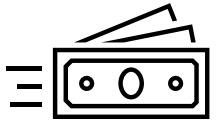
Operational and organisational requirements

- effective and prudent management
- appropriate systems and controls to assess the risks
- minimum level of due diligence
- effective procedure for handling complaints
- internal rules to prevent conflict of interests
- prudential requirements

Investors protection (reflection period, entry knowledge test, key investment information sheet)

Marketing communication

Payment service providers

Credit institutions

Investment firms

Simplified authorisation procedure

E-money institutions

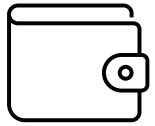
Crowdfunding service providers authorised under national law

4. SERVICES

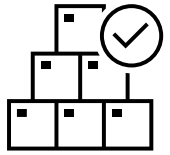
Services included under a standard authorisation

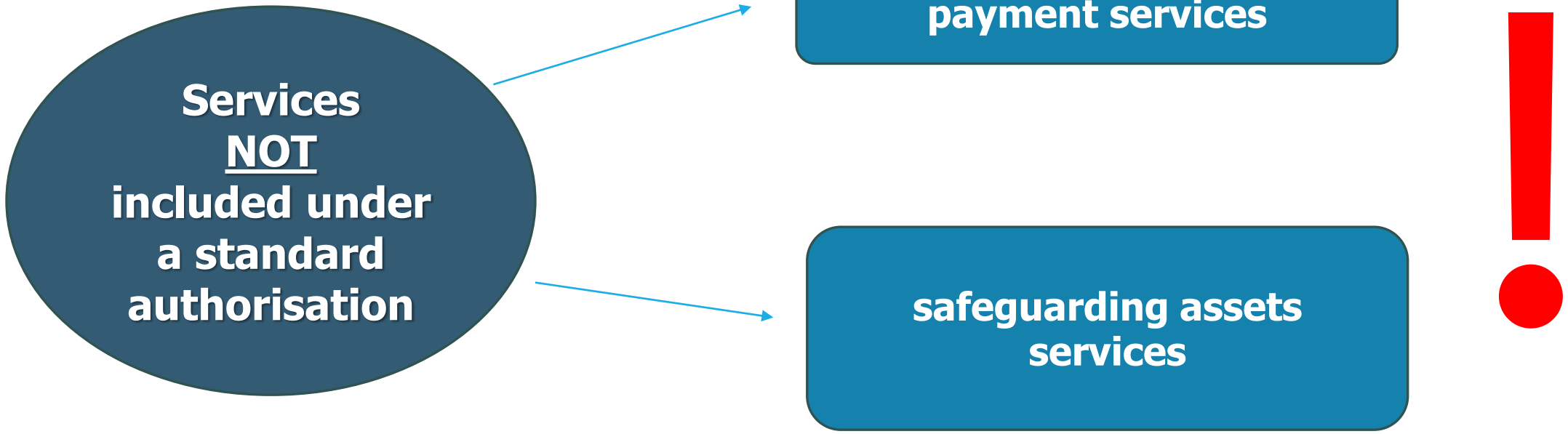
- facilitating the granting of loans

- managing of individual portfolio of loans for an investor



- reception and transmission of clients orders
- placement of transferable securities for crowdfunding purpose




Services
NOT
included under
a standard
authorisation
payment services
safeguarding assets
services

5. OPPORTUNITIES

CROWDFUNDING SERVICE PROVIDERS

- financial actor of the EU
- passport

START-UP AND SMEs

- facilitate access to finance
- validate a business idea

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INVESTORS

- more investment opportunities
- protection

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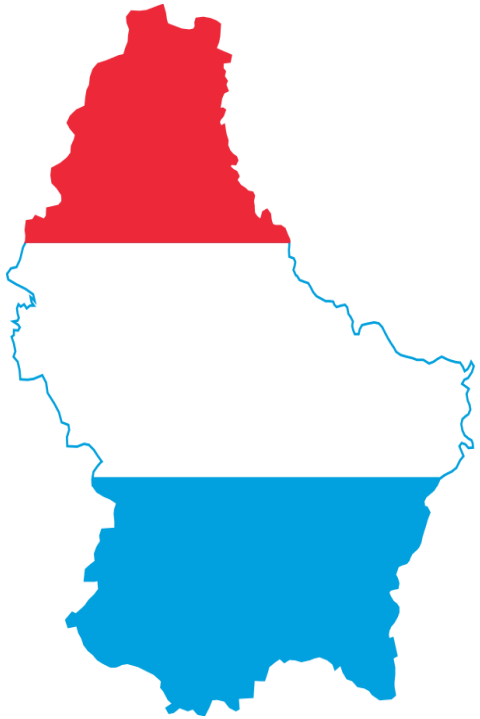
EMI, PI, BANKS, INVESTMENT FIRMS, …

- possibility to expand activities => hybrid licenses
- new clients

Why Luxembourg ?



STABILITY	• Growth consistently above the EU's average
INNOVATION	• Innovative environment for start-ups • First in finance • Strong ICT Ecosystem • Access to talent

THANK YOU
FOR YOUR ATTENTION

EU Proposal for a pilot regime for Market Infrastructures based on DLT

ZOE WAGNER (ZOE.WAGNER@SCHILTZ.LU)

TMT AND DATA PROTECTION / REGULATORY AND COMPLIANCE / FINANCIAL SERVICES AND FINTECH

SCHILTZ & SCHILTZ S.A.

EU Proposal for a pilot regime for Market Infrastructures based on DLT

What are the problems?

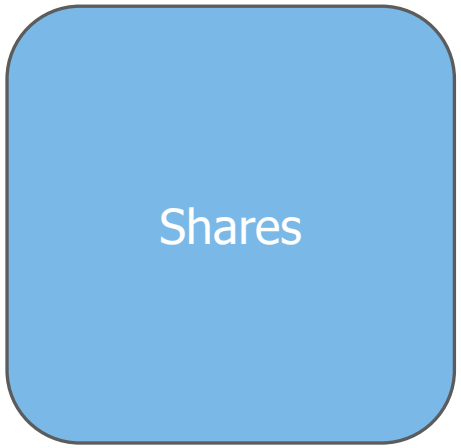
Regulatory obstacles!

Some EU rules cannot be applied to DLT and security tokens.
Some regulatory gaps exist due to legal, technological and operational specificities related to the use of DLT that are not addressed by existing requirements.
Current EU rules prevent the development of financial market infrastructures based on decentralised exchanges and permissionless DLT networks where activities are not entrusted to a central body.
Current EU rules prevent the widespread testing of DLT capabilities.
Current rules hamper the development of financial market infrastructures that could merge certain activities.

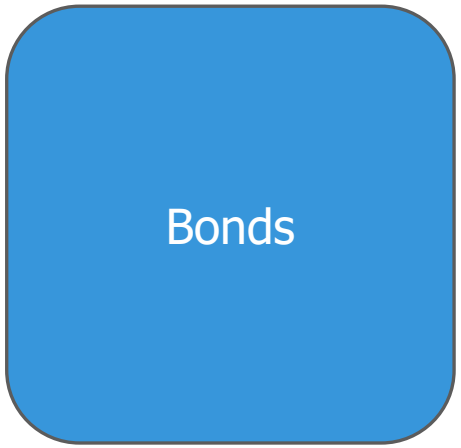
The pilot regime

- Facilitate a more reliable and safe secondary market for security tokens.
- Allow EU financial services firms to retain global competitiveness.
- Allow for real use cases and help build the necessary experience and evidence on which a permanent EU regulatory regime could be inspired.
- Experimentation through derogations.

Scope

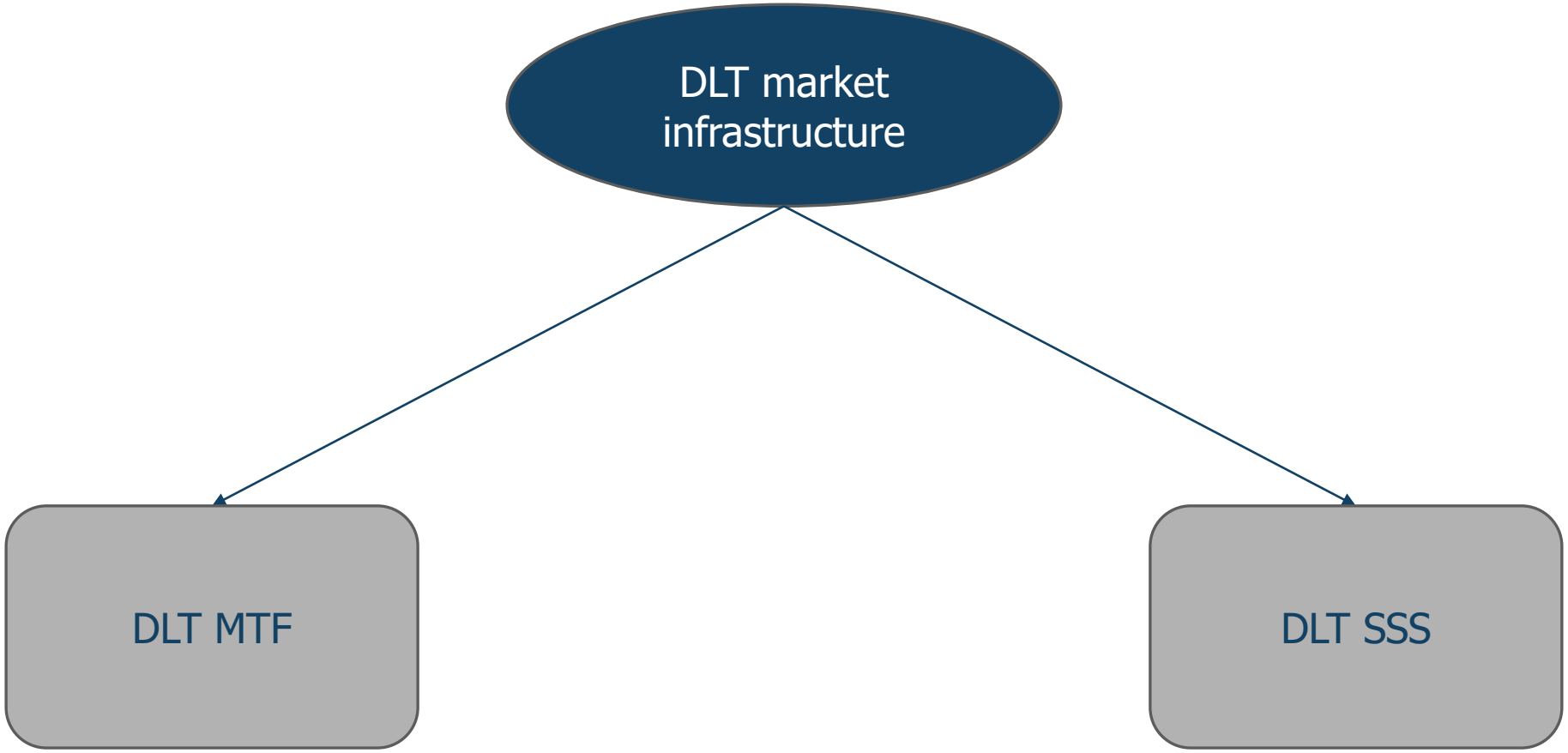


< EUR 200 million



< EUR 500 million

TOTAL MARKET VALUE < EUR 2.5 billion


DLT market infrastructure
DLT MTF
DLT SSS

DLT MTFs

REQUIREMENTS

DIRECTIVE 2014/65/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 15 May 2014
on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
(recast)
(Text with EEA relevance)

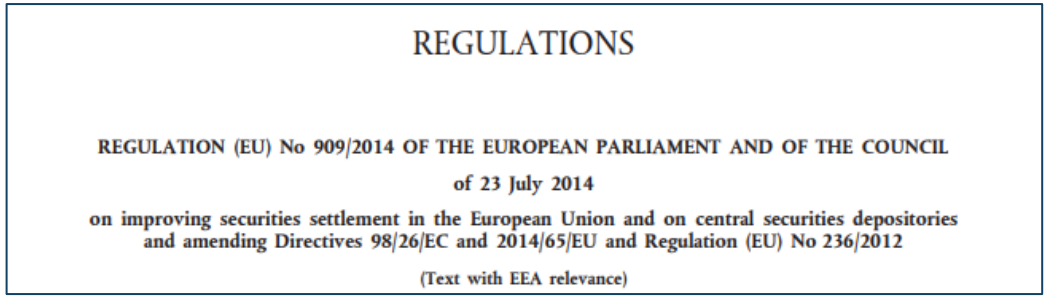
REGULATION (EU) No 600/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 15 May 2014
on markets in financial instruments and amending Regulation (EU) No 648/2012
(Text with EEA relevance)

EXEMPTIONS

- be permitted to admit to trading DLT transferable securities that are not recorded in a CSD but on the DLT MTF's distributed ledger.

DLT securities settlement systems

REQUIREMENTS



REGULATIONS

REGULATION (EU) No 909/2014 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 23 July 2014

on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

(Text with EEA relevance)

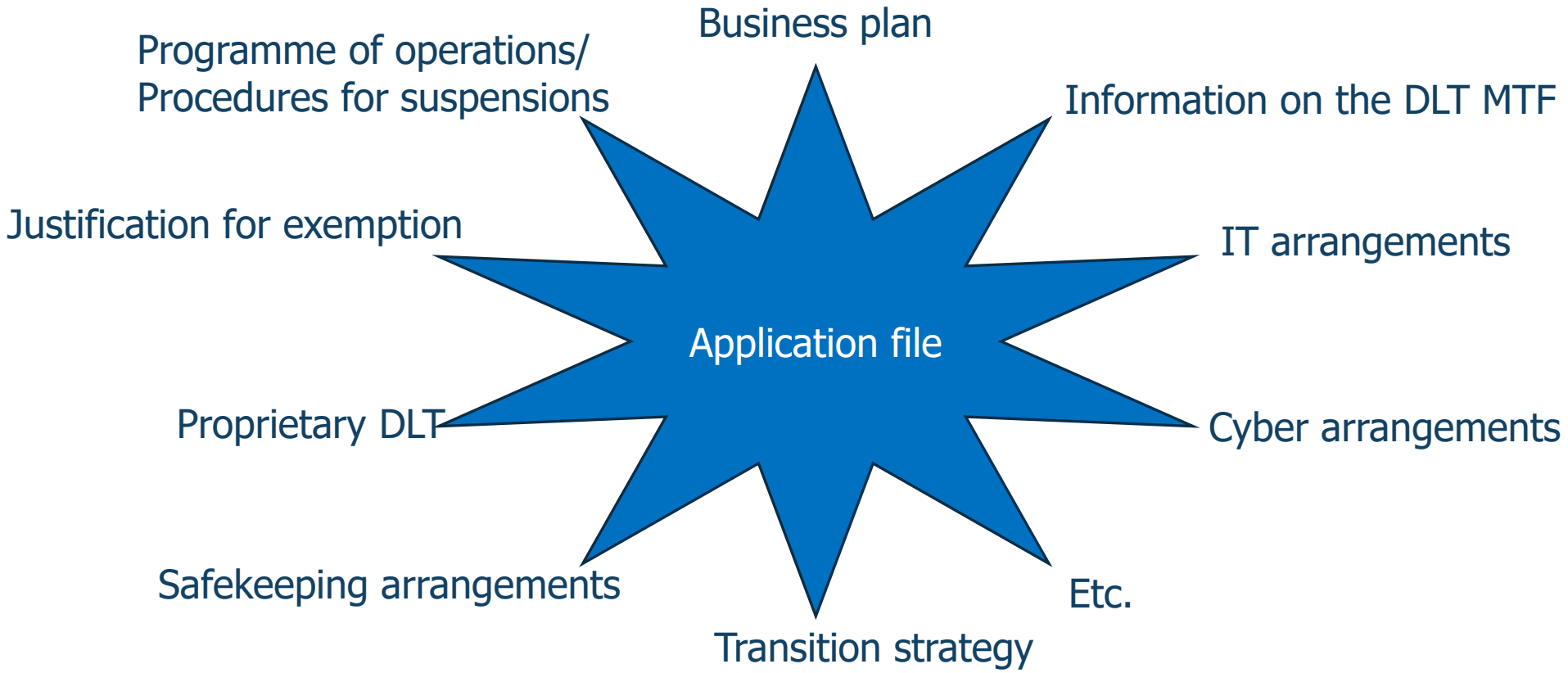
EXEMPTIONS

- Article 2(4) of CSDR on dematerialized form
- Article 2(9) of CSDR on transfer of orders
- Article 2(28) of CSDR on securities accounts
- Article 3 of CSDR on the recording of securities
- Article 37 of CSDR on the integrity of issue
- Article 38 of CSDR on the segregation of assets
- Article 19 of CSDR on extension and outsourcing of activities and services
- Article 30 of CSDR on outsourcing
- Article 2(19) of CSDR on participants
- Article 40 of CSDR on cash settlement
- Article 50 of CSDR on standard link access
- Article 53 of CSDR on access between a CSD and another market infrastructure

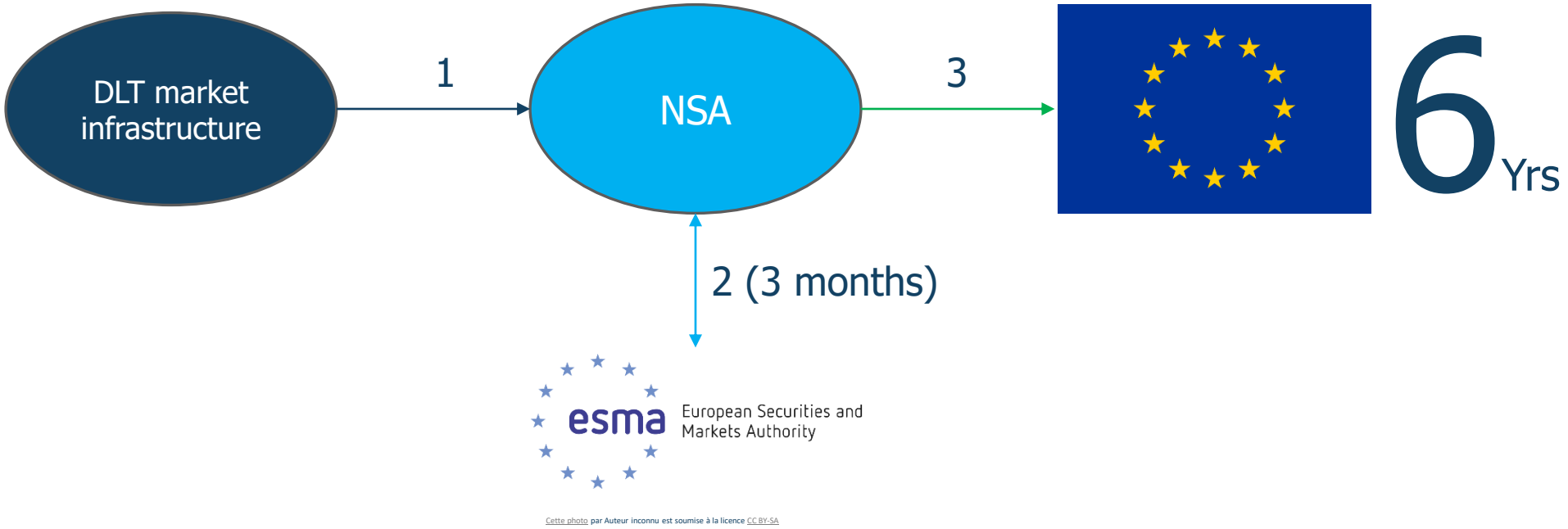
Additional requirements

- Provide all members, participants, clients and investors with clear and unambiguous information on how the functions, services and activities are carried out and how these are different from a traditional MTF or CSD;
- Ensure that overall IT and cyber arrangements related to the use of DLT are adequate;
- Have adequate arrangements to safeguard clients' funds or DLT transferable securities;
- etc.

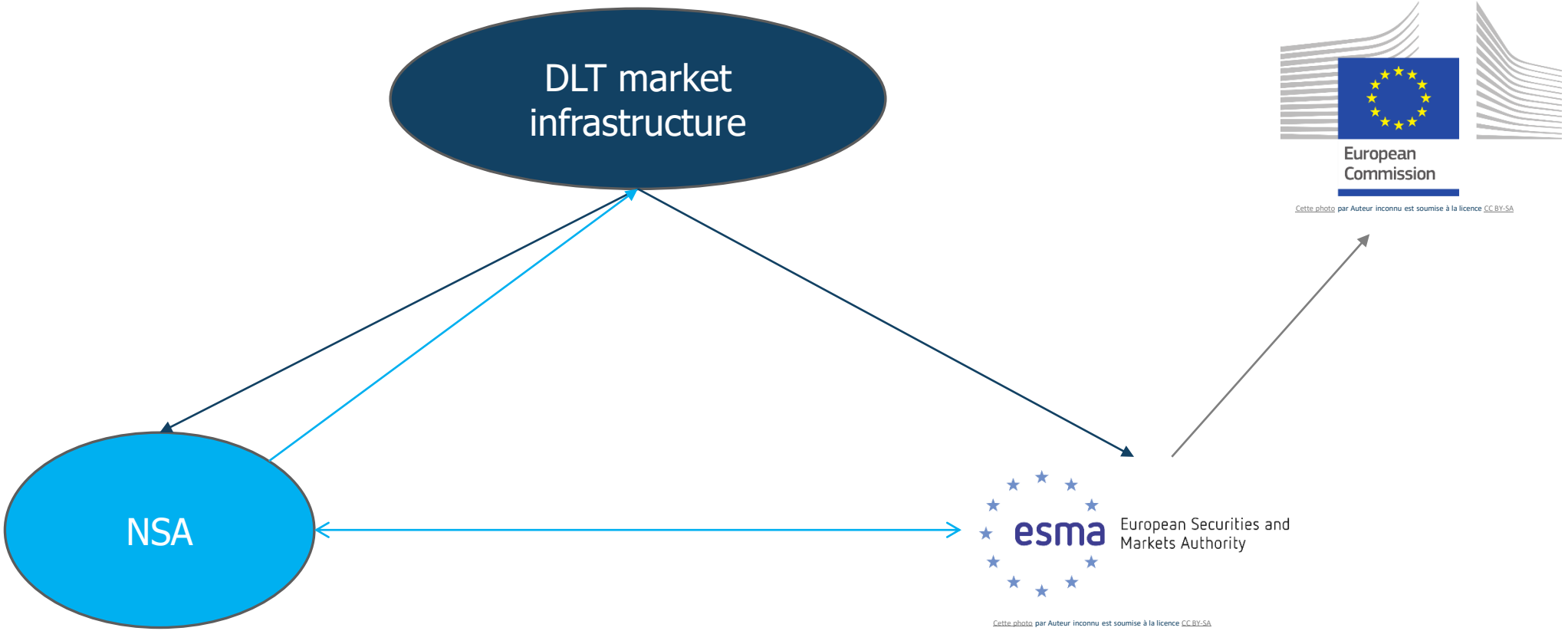
Specific permission to operate a DLT MTF/DLT SSS



Specific permission procedure



Cooperation



Next steps

PROPOSAL FOR A REGULATION ON MARKETS IN CRYPTO-ASSETS

NADIA MANZARI

AVOCAT A LA COUR

PROPOSAL FOR REGULATING CRYPTO ASSETS

LEGAL FRAMEWORK

TABLE OF CONTENTS

I. Scope of MiCAR

All types of crypto-assets which currently fall outside the scope of existing EU legislation on financial services.

→ Crypto assets in general (other than asset-referenced token and e-money token)

→ Asset-referenced tokens (= global stable coins)

→ E-money tokens (= payment tokens – 1:1: stable coins)

Crypto-assets issuers

Asset-referenced token issuers

E-money token issuers

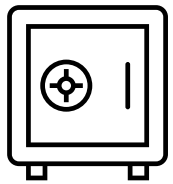
Crypto-asset services providers

Credit institutions

Investment firms

E-money institutions

Exemptions for credit institutions



When issuing asset-referenced tokens, including significant tokens

- **No authorisation is needed**
- **No specific own fund requirements**

When providing one or more crypto-asset services

- **No authorisation is needed**

Exemptions for investment firms

No authorization of crypto-asset service provider is needed, if they are authorised to provide one or several investment services similar to the crypto-asset services

Crypto-asset services equivalent to the investment services and activities :

- Operation of an MTF + operation of an OTF → operation of a trading platform for crypto-assets ;

- Dealing on own account → exchange of crypto-assets for fiat currency or for other crypto-assets ;

- Execution of orders on behalf of clients → execution of orders for crypto-assets on behalf of third parties ;

- Underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis + placing of financial instruments without a firm commitment basis → placing of crypto-assets ;

- Reception and transmission of orders in relation to one or more financial instruments → the reception and transmission of orders for crypto-assets on behalf of third parties ;

- Investment advice → providing advice on crypto-assets.

Supervision

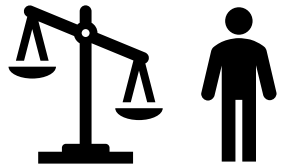
Compliance with all the requirements will be supervised by national competent authorities (NCAs).

II. FRAMEWORK FOR CRYPTO-ASSETS

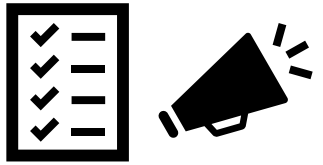
CRYPTO-ASSET MEANS "A DIGITAL REPRESENTATION OF VALUE OR RIGHTS WHICH MAY BE TRANSFERRED AND STORED ELECTRONICALLY, USING DISTRIBUTED LEDGER TECHNOLOGY OR SIMILAR TECHNOLOGY".

Requirements to be fulfilled by all crypto-assets issuers (≠ asset-referenced tokens and e-money tokens)

- **Legal entity**



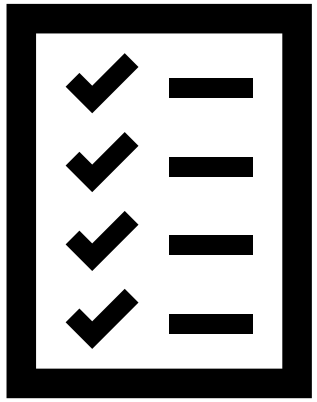
- **Draft, notify and publish a crypto asset-white paper**



Content and form of the crypto-asset white paper

Detailed description of :
- the issuer,
- the project and planned use of funds,
- the conditions, rights, obligations and risks attached to the crypto-assets.
- …..

Information on the underlying technology and standards applied by the issuer of the crypto-assets allowing for the holding, storing and transfer of those crypto-assets.



Notification & publication of the crypto-asset white paper

No ex ante approval by the authorities

→ Undue administrative burdens should be avoided. Competent authorities should, however, after publication, have the power to request that additional information is included in the crypto-asset white paper, and, where applicable, in the marketing communications

Notification of the crypto-asset white paper shall explain why the crypto- asset described in the crypto-asset white paper is not to be considered: a financial instrument, electronic money, a deposit, a structured deposit.

Publication of the crypto asset white paper on the website of the issuer & should remain available for as long as the crypto-assets are held by the public.

Summery of the crypto-asset white paper

- Key information in brief and non-technical language
- Should help potential purchasers of the asset-referenced tokens to make an informed decision;
- Shall contain a **warning**, in particular, that:

→ The crypto-asset white paper **does not constitute a prospectus.**

→ The offer to the public of crypto-assets **does not constitute an offer or solicitation to sell financial instruments** – which can be made only by means of a prospectus or other offering documents pursuant to national laws.

Consumer protection

- Issuers of crypto-assets shall **act honestly, fairly and professionally** in the **best interest** of the holders of crypto-assets
- **Liability rules for issuers** - upon evidence provided by the holders of crypto-assets
- **Right of withdrawal for consumers** (within a period of 14 days, starting from the day of the consumers' agreement to purchase those crypto-assets)

EXEMPTED

- Crypto-assets that are offered for **free (except: Data!)**
- Crypto-assets that are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions
- Crypto-assets that are **unique and not fungible** with other crypto-assets
- Crypto-assets are **offered to fewer than 150 natural or legal persons** per Member State where such persons are acting on their own account
- Over a **period of 12 months**, the total consideration of an offer to the public of crypto-assets in the Union does **not exceed EUR 1 000 000**, or the equivalent amount in another currency or in crypto-assets
- The offer to the public of the crypto-assets is solely addressed to qualified investors and the crypto-assets **can only be held by such qualified investors**

NO WHITE PAPER

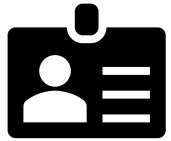
III. FRAMEWORK FOR ASSET-REFERENCED TOKENS

ASSET-REFERENCED TOKEN MEANS "TYPE OF CRYPTO ASSET THAT PURPORTS TO MAINTAIN A STABLE VALUE BY REFERRING TO ONE OR SEVERAL CURRENCIES BEING LEGAL TENDER, COMMODITIES OR OTHER CRYPTO-ASSETS, OR A COMBINATION OF SUCH ASSETS".

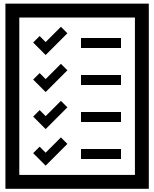
Requirements to be fulfilled by asset-referenced token issuers

- **Obligation to be based in the EU**

- **Obligation to be authorised**



- **Obligation to draft a white paper and to notify it to the competent authority**



Application for authorisation

Information

- governance arrangements;
- a crypto-asset white paper;
- **legal opinion that the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits;**
- etc.

Additional white paper requirements

- a detailed description of the issuer's governance arrangements
- a detailed description of **the reserve of assets**, of the **custody arrangements** for the reserve assets, including **the segregation of the assets**;
- in case of an investment of the reserve assets, a detailed description of the investment policy for those reserve assets;
- a detailed information on the nature and enforceability of rights, <u>including any direct **redemption right** or any claims, that holders of asset-referenced tokens and any legal or natural person may have on the reserve assets or against the issuer</u>, including how such rights may be treated in insolvency procedures.

<u>If such rights haven't been granted</u> : the crypto-asset white paper shall contain a clear and unambiguous statement that all the holders of the crypto-assets do not have a claim on the reserve assets or cannot redeem those reserve assets with the issuer at any time.

Special obligations for all issuers of asset-referenced tokens

- Complaint handling procedure
- Prevention, identification, management and disclosure of conflicts of interest
- White Paper publication
- Governance arrangements
- Own funds requirements
- **Wind down plan**

Obligations related to the reserve of assets

- Obligation to have reserve assets, and composition and management of such reserve of assets
- Custody of reserve assets
- Investment of the reserve assets
- Rights on issuers of asset-referenced tokens or on the reserve assets (including direct claim or redemption rights for the holders), CAN be granted.

Consumer protection

- Issuers of asset-referenced tokens shall **act honestly, fairly and professionally** in the **best interest** of the holders of asset-referenced tokens
- **Liability rules for issuers** - upon evidence provided by the holders of crypto-assets
- **Ongoing information** to holders of asset-referenced tokens

NO AUTHORISATION

EXEMPTED

- Over a **period of 12 months**, the average outstanding amount of asset-referenced tokens **does not exceed EUR 5.000.000** (or equivalent amount in another currency)
- The offer to the public of the asset-referenced tokens is solely addressed to qualified investors and the asset-referenced tokens **can only be held by such qualified investors**
- The issuer is a **credit institution**

IMPORTANT : The issuers are NOT exempted from the obligation to draft a white paper and to notify it to the competent authority and if the issuer is a credit institution, the white paper also needs to be approved by the competent authority of their home Member State

Significant asset-referenced tokens

Classified as such by the EBA on the basis of a set of **criteria** (at least 3 must be met) :

- the size of the customer base of the promoters of the asset-referenced tokens, the shareholders of the issuer of asset-referenced tokens or of any of the third-party entities;
- the value of the asset-referenced tokens issued or, where applicable, their market capitalisation;
- the number and value of transactions in those asset-referenced tokens;
- the size of the reserve of assets of the issuer of the asset-referenced tokens;
- the significance of the cross-border activities of the issuer of the asset-referenced tokens;
- the interconnectedness with the financial system.

Specific requirements

Supervision by a college of supervisors established by the EBA

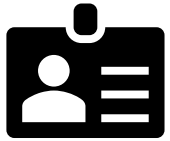
III. FRAMEWORK FOR E-MONEY TOKENS

E-MONEY TOKEN MEANS "A TYPE OF CRYPTO-ASSET THE MAIN PURPOSE OF WHICH IS TO BE USED AS A MEANS OF EXCHANGE AND THAT PURPORTS TO MAINTAIN A STABLE VALUE BY REFERRING TO THE VALUE OF A FIAT CURRENCY THAT IS LEGAL TENDER".

N.B. : PRINCIPLE EMI DIRECTIVE APPLIES, BUT THERE ARE SOME DEROGATIONS.

Requirements to be fulfilled by all e-money token issuers

- **Obligation to be authorised as a credit institution or as an electronic money institution**



- **Obligation to comply with requirements applying to electronic money institutions**

- **Obligation to draft a white paper and to notify it to the competent authority**

- **<u>Content of the crypto-asset white paper</u>** : There are no additional white paper requirements (but it should explicitly indicate that holders are provided with a claim in the form of a right to redeem).

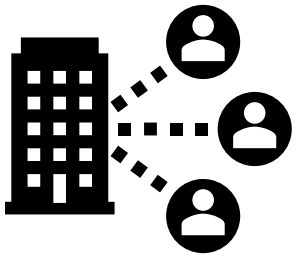
- **<u>Content of the crypto-asset white paper summary</u>** : It should contain a warning that :

  - the holders of e-money tokens have a redemption right at any moment and at par value;

  - the conditions of redemption, including any fees relating thereto.

Specific redemption obligation

- All holders of e-money tokens shall be provided with a claim on the issuer of such e-money tokens
- Issuers of such e-money tokens shall issue e-money tokens at par value and on the receipt of funds
- Upon request by the holder of e-money tokens, the respective issuer must redeem, at any moment and at par value, the monetary value of the e-money tokens held to the holders of e-money tokens (in cash or by credit transfer)
- Redemption can not just only in limited cases be subject to a fee, but it must be stated in the crypto-asset white paper



In principle article 11 of EMI directive applies, but there are some derogations

Consumer protection

Issuers of asset-referenced tokens shall **act honestly, fairly and professionally** in the **best interest** of the holders of asset-referenced tokens

Liability rules for issuers - upon evidence provided by the holders of crypto-assets

Funds received by issuers of e-money tokens in exchange of e-money tokens and that are invested in secure, low-risk assets **shall be invested in assets denominated in the same currency as the one referenced by the e-money token**

EXEMPTED

E-money tokens marketed, distributed, held by qualified investor and can only be **held by qualified investors**

If the average outstanding amount of e-money tokens **does not exceed EUR 5 000 000**, or the corresponding equivalent in another currency, over a **period of 12 months**, calculated at the end of each calendar day.

IMPORTANT : The issuers are NOT exempted from the obligation to draft a white paper and to notify it to the competent authority.

Significant e-money tokens

Classified as such by the EBA on the basis of the **following criteria** (at least 3 must be met) :

- the size of the customer base of the promoters of the asset-referenced tokens, the shareholders of the issuer of asset-referenced tokens or of any of the third-party entities;
- the value of the asset-referenced tokens issued or, where applicable, their market capitalisation;
- the number and value of transactions in those asset-referenced tokens;
- the size of the reserve of assets of the issuer of the asset-referenced tokens;
- the significance of the cross-border activities of the issuer of the asset-referenced tokens;
- the interconnectedness with the financial system.

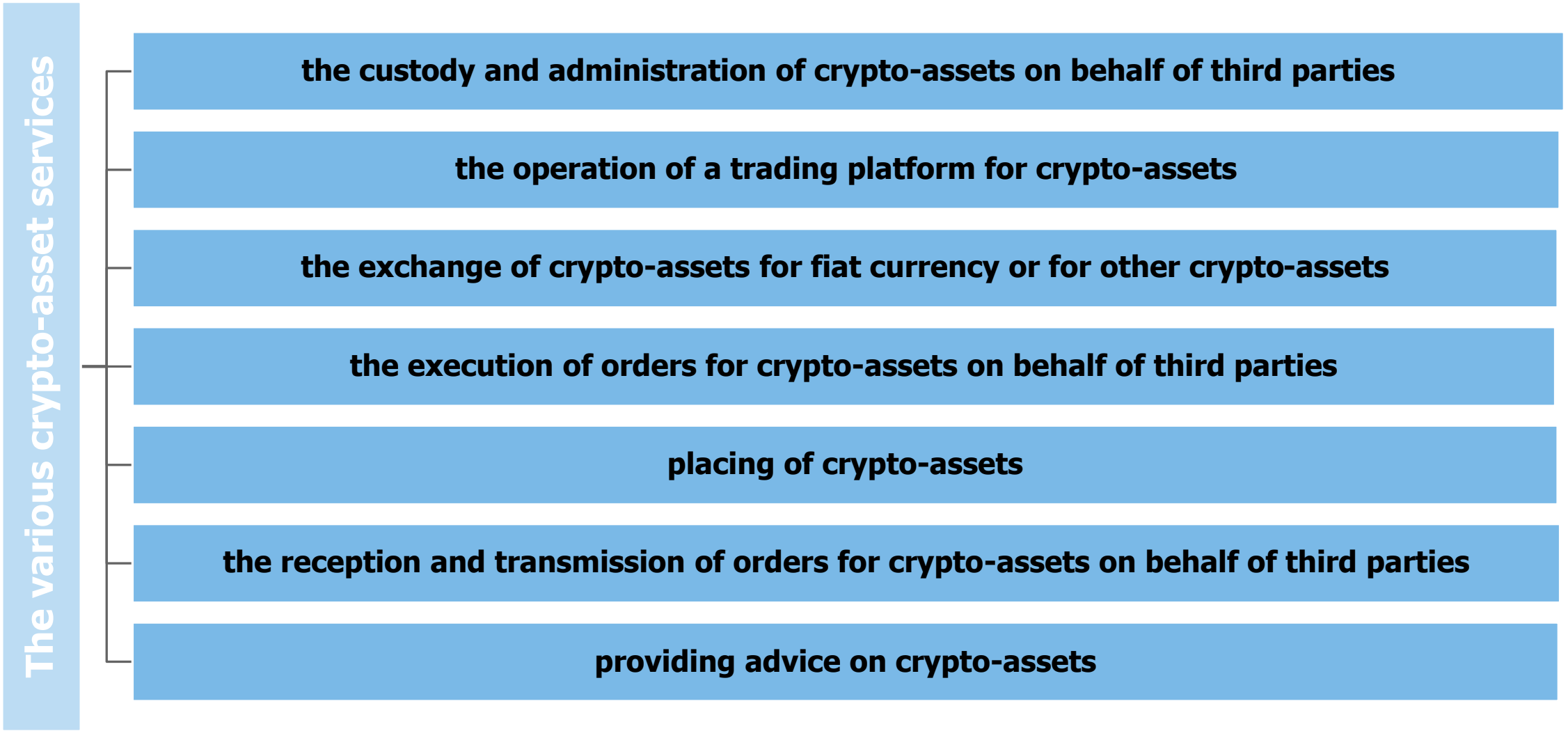
Specific requirements

Compliance with certain requirements applying to issuers of asset-referenced tokens

- Custody requirements for reserve assets
- Investment rules for the reserve assets
- Wind-down plan

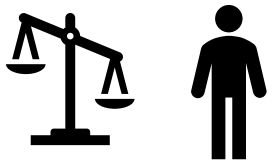
IV. FRAMEWORK FOR CRYPTO-ASSET SERVICE PROVIDERS

CRYPTO-ASSET SERVICE PROVIDER MEANS "ANY PERSON WHOSE OCCUPATION OR BUSINESS IS THE PROVISION OF ONE OR MORE CRYPTO-ASSET SERVICES TO THIRD PARTIES ON A PROFESSIONAL BASIS".


The various crypto-asset services
the custody and administration of crypto-assets on behalf of third parties
the operation of a trading platform for crypto-assets
the exchange of crypto-assets for fiat currency or for other crypto-assets
the execution of orders for crypto-assets on behalf of third parties
placing of crypto-assets
the reception and transmission of orders for crypto-assets on behalf of third parties
providing advice on crypto-assets

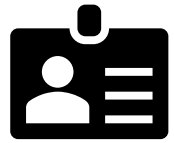
Requirements to be fulfilled by all crypto-asset service providers

- **Obligation to be a legal person**



- **Obligation to be authorised**

→ **EU PASSPORT**



⇨ Register of all crypto-asset service provider established by the EBA

Obligations for all crypto-asset service providers

- Organisational requirements
- Rules on mandatory complaint handling procedures and on conflicts of interest
- Rules on outsourcing
- Specific requirements dependent on the type of crypto-asset service provider

Consumer protection

Issuers of asset-referenced tokens shall **act honestly, fairly and professionally** in the **best interest** of the holders of asset-referenced tokens

Prudential requirements

Rules on safekeeping of clients' funds

THANK YOU
FOR YOUR ATTENTION

A new DLT era for dematerialized securities

PROF. JEAN-LOUIS SCHILTZ

SCHILTZ & SCHILTZ S.A.

HONORARY PROFESSOR AT

THE UNIVERSITY OF LUXEMBOURG

No comprehensive framework for DLT/blockchain

=> Do we need one?

☐ YES

☐ NO

(tick the box)

The historic actors

Bitstamp

bitFlyer

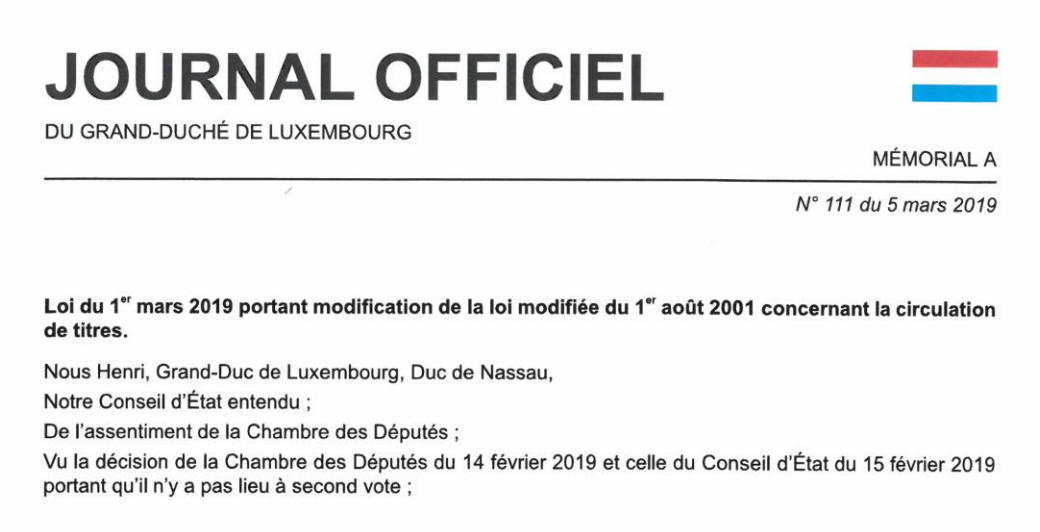
Press release of Chambre des députés, 14 February 2019

Bill 7363 (blockchain I law):

- to provide investors with legal certainty
- to make the transfer of securities more efficient by reducing the number of intermediaries

Law of 1 March 2019 amending Law of 1 August 2001 on the circulation of securities, as amended

- Blockchain I law passed on 14 February 2019
- 58 votes in favour and 2 against



JOURNAL OFFICIEL

DU GRAND-DUCHÉ DE LUXEMBOURG

MÉMORIAL A

N° 111 du 5 mars 2019

Loi du 1er mars 2019 portant modification de la loi modifiée du 1er août 2001 concernant la circulation de titres.

Nous Henri, Grand-Duc de Luxembourg, Duc de Nassau,

Notre Conseil d'État entendu ;

De l'assentiment de la Chambre des Députés ;

Vu la décision de la Chambre des Députés du 14 février 2019 et celle du Conseil d'État du 15 février 2019 portant qu'il n'y a pas lieu à second vote ;

The passing into law of bill 7363 (blockchain I law) was welcomed by large parts of the blockchain community

Luxembourg Passes Bill to Give Blockchain Securities Legal Status

Daniel Palmer
Feb 15, 2019 at 12:00 UTC Updated Feb 15, 2019 at 12:04 UTC

The European nation of Luxembourg has just passed a bill providing a legal framework for securities issued over blockchains.

According to a notice published Thursday, the country's Chamber of Deputies, the county's parliament, passed the bill on Feb. 14 with 58 members supporting the legislation and only two voting against.

Titled Bill 7363, the legislation is intended to provide financial market participants with legal certainty for issuing securities using blockchain technology.

"The bill should provide greater certainty for investors and make the transfer of securities more efficient by reducing the number of intermediaries," the chamber said.

Luxembourg, an EU member nation, passed a bill making it possible to legally issue "dematerialized securities" in April 2013 via an amendment of a securities law passed in 2001.

Taking into account technological developments in recent years, the chamber said the new bill further amends the 2001 law to also include the registration and distribution of securities using secure electronic registration, "such as distributed ledger technology and in particular blockchain technology."

Single Article

A new Article 18a (18bis in French) shall be inserted after Article 18 of the Law of 1 August 2001 on the circulation of securities, as amended, and shall read as follows:

"Article 18a. (1) The account keeper may maintain securities accounts and credit securities on securities accounts within or through secured electronic registration mechanisms, including distributed electronic ledgers or databases. Successive transfers registered within such a secured electronic registration mechanism shall be considered as book transfers between securities accounts. Maintaining securities accounts within such a secured electronic registration mechanism or crediting securities on securities accounts through such a secured electronic registration mechanism does not affect the relevant securities' fungibility.

(2) The application of this law, the situation of the securities that are still held with the relevant account keeper, the validity or effectiveness of the collateral set up in accordance with the Law of 5 August 2005 on financial collateral arrangements, as amended, shall not be affected by the maintaining of securities accounts within such a secured electronic registration mechanism or by the credit of securities on securities accounts through such a secured electronic registration mechanism."

Key features

- blockchain securities = the same legal status as traditionally issued securities
- blockchain-issued securities = tokens that perform as digital assets "legally bound by the same rights as classic dematerialized securities"
- companies must register their securities offerings on a blockchain => before distribution to investors

Account keeper = regulated profession

➢continues to be the key actor

Fund industry

Securities held/maintained on the blockchain 

Securities transferred through the blockchain 

- The law is simple

- It builds on the existing system and regulations

Definition – scope

secured electronic registration mechanisms, including distributed electronic ledgers or databases

- neutral

Securities on the blockchain

- does not affect « fungibility »* of the securities

  = important for the fund industry

* 1 security equals another: I am buying share 0001 but can be reimbursed share 0002 (simplified description).

Collateral arrangements

≠ affected

Law of 5 August 2005 on financial collateral arrangements

- **transposing Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements;**
- **amending the Commercial Code;**
- **amending the Law of 1 August 2001 on the circulation of securities and other fungible instruments;**
- **amending the Law of 5 April 1993 on the financial sector;**
- **amending the Grand-ducal Regulation of 18 December 1981 on fungible deposits of precious metals and amending Article 1 of the Grand-ducal Regulation of 17 February 1971 on the circulation of securities;**
- **repealing the Law of 21 December 1994 concerning repurchase agreements;**
- **repealing the Law of 1 August 2001 on the transfer of ownership for security purposes**

(Mémorial A 2005, No 128)

2 features

- legal security and certainty
- tech neutrality

Circulation on the blockchain ≠ issuing on the blockchain

- law of 6 April 2013 on dematerialised securities

↓

2nd step!

Issuing on the blockchain: 27 July 2020 => draft bill n°7637 introduced (blockchain II draft law)

15.9.2020

N° 7637

CHAMBRE DES DEPUTES

Session ordinaire 2019-2020

PROJET DE LOI

portant modification :

1° de la loi modifiée du 5 avril 1993 relative au secteur financier ;

2° de la loi du 6 avril 2013 relative aux titres dématérialisés

* * *

(Dépôt: le 27.7.2020)

The key objective of the draft bill

- recognise the possibility to issue dematerialised securities through distributed electronic registers or databases

EXPOSE DES MOTIFS

La loi du 6 avril 2013 relative aux titres dématérialisés (ci-après « loi du 6 avril 2013 ») permet à tout émetteur d'émettre des titres de capital ou des titres de créance directement sous forme dématérialisée.

L'objet principal du présent projet de loi consiste à moderniser la loi du 6 avril 2013 en reconnaissant expressément la faculté d'utiliser des mécanismes d'enregistrement électroniques sécurisés, y compris des registres ou bases de données électroniques distribués, à des fins d'émission de titres dématérialisés.

Tant l'émission de titres dématérialisés que la conversion de titres émis en titres dématérialisés se font exclusivement et obligatoirement par voie d'inscription des titres dans un compte d'émission tenu auprès d'un organisme de liquidation ou d'un teneur de compte central. Par souci de clarté et de sécurité juridique, la loi en projet vise à définir le compte d'émission tout en énonçant que ce compte peut être tenu et les inscriptions de titres peuvent y être effectuées au sein ou par le biais de dispositifs d'enregistrement électroniques sécurisés.

Le projet de loi s'inscrit dans la continuité de la loi du 1er mars 2019 ayant modifié la loi modifiée du 1er août 2001 concernant la circulation de titres dans le but de reconnaître, de manière expresse, la possibilité de recourir à des dispositifs d'enregistrement électroniques sécurisés, y compris des registres ou grands livres distribués, dans le contexte de la circulation de titres. Dans la suite de la loi du 1er mars 2019, le projet de loi participe aux efforts du Luxembourg de promouvoir l'innovation dans le secteur financier.

La reconnaissance explicite en droit de la réalité de la technologie des registres ou bases de données électroniques distribués permet de mettre à niveau le cadre légal existant au regard de l'évolution technologique et des réalités économiques. La loi en projet vise ainsi à mettre les acteurs concernés en mesure de profiter pleinement, et en toute sécurité juridique, des opportunités offertes par les nouvelles technologies en matière d'émission de titres dématérialisés.

Par ailleurs, le projet de loi vise à élargir le champ d'application de la loi du 6 avril 2013 en accordant la faculté aux entreprises d'investissement et aux établissements de crédit, tels que définis dans la loi modifiée du 5 avril 1993 relative au secteur financier, d'agir en tant que teneur de compte central pour des titres de créance non cotés. L'élargissement de l'accès à l'activité de teneur de compte central vise à permettre auxdites entités la tenue de comptes centraux pour des titres de créance non cotés conformément aux dispositions de la loi du 6 avril 2013, et ainsi de fournir une gamme plus large de prestations en matière de titres dématérialisés, et aux émetteurs de recourir à un nombre plus important d'acteurs pour façonner l'émission de titres de créance non cotés.

Le projet de loi contribue à consolider et renforcer le rayonnement et l'attractivité du cadre légal luxembourgeois en matière d'émission de titres.

Key features

Article 1 introduces a definition of what constitutes an « issuance account »

TEXTE DU PROJET DE LOI

Art. 1er. A la suite de l'article 1er, point 1), de la loi du 6 avril 2013 relative aux titres dématérialisés, il est inséré un nouveau point 1*bis*), libellé comme suit :

«1*bis*) « compte d'émission » : compte tenu auprès d'un organisme de liquidation ou d'un teneur de compte central dans lequel les titres dématérialisés d'un émetteur doivent exclusivement être inscrits. Ce compte peut être tenu et les inscriptions de titres peuvent y être effectuées au sein ou par le biais de dispositifs d'enregistrement électroniques sécurisés, y compris de registres ou bases de données électroniques distribués ; ».

Key features

- an account held with a settlement provider or central account keeper recording the dematerialised securities issued by an issuer.
- Issuance accounts may be held within or through secured electronic registration devices, including distributed electronic ledgers or databases.

COMMENTAIRE DES ARTICLES

Article 1er :

Dans un souci de clarté et de sécurité juridique, l'article 1er du projet de loi introduit dans l'article 1er de la loi du 6 avril 2013 relative aux titres dématérialisés (ci-après « loi du 6 avril 2013 ») un nouveau point 1*bis*) dont l'objet consiste à définir la notion de « compte d'émission » et à préciser que l'émission de titres dématérialisés, qui se fait conformément à l'article 1er, point 13) de ladite loi par voie d'inscription des titres dans un compte d'émission, et la conversion de titres matérialisés en titres dématérialisés peuvent se faire par l'utilisation de dispositifs d'enregistrement électroniques distribués, y compris par l'utilisation de registres ou bases de données électroniques distribués.

La clarification apportée à la loi du 6 avril 2013 vise à reconnaitre expressément la faculté d'utiliser les nouvelles technologies d'enregistrement électroniques sécurisées, comme la technologie des registres distribués ou des bases de données électroniques distribuées, dans le cadre de l'émission de titres dématérialisés cotés et non cotés et s'inscrit dans la suite de la loi du 1er mars 2019 qui a modifié la loi modifiée du 1er août 2001 concernant la circulation de titres afin de reconnaitre, de manière expresse, le recours à ces technologies à des fins de circulation de titres.

L'émission de titres dématérialisés se fait de manière exclusive et obligatoire par voie d'inscription des titres dans un compte d'émission. Le compte d'émission fait office de compte créateur des titres et sert à la réconciliation avec les titres inscrits dans les comptes-titres des clients de l'organisme de liquidation ou du teneur de compte central. Les titres dématérialisés ne sont représentés que par une inscription en compte-titres et se transmettent par virement de compte à compte. La circulation des titres dématérialisés est régie par la loi modifiée du 1er août 2001 concernant la circulation des titres. Il découle de la loi précitée que la tenue de comptes-titres comprenant des titres dématérialisés et l'inscription de titres dématérialisés dans des comptes-titres peuvent être réalisés au sein ou par le biais de dispositifs d'enregistrement électroniques sécurisés, y compris de registres ou bases de données électroniques distribués.

Le compte d'émission, au vu de ses fonctionnalités décrites dans la loi du 6 avril 2013, n'est pas un compte au sens du droit bancaire ou du droit comptable, mais plutôt un registre dans lequel l'organisme de liquidation ou le teneur de compte central inscrit la totalité des titres dématérialisés de même genre d'un émetteur ensemble avec les caractéristiques de ces titres. En tant que registre, le compte d'émission se prête particulièrement bien à l'utilisation de dispositifs d'enregistrement électroniques sécurisés. D'un point de vue juridique, l'inscription des titres dématérialisés en compte d'émission est une étape nécessaire et obligatoire entre la décision de l'émetteur d'émettre ou de convertir le titre et en parallèle la représentation du titre en tant que tel en compte-titres et sa circulation par la suite conformément aux dispositions de la loi modifiée du 1er août 2001 concernant la circulation de titres.

Le libellé du point 1*bis*) est inspiré de près de l'article 18*bis* de la loi modifiée du 1er août 2001 concernant la circulation de titres. Le texte prend le soin de veiller, en se référant aux dispositifs d'enregistrement électroniques sécurisés, à une neutralité technologique au regard des différentes technologies susceptibles d'être utilisées. L'objet de la loi en projet étant de valider par principe, et à condition que les dispositions de la loi soient respectées, le recours à des nouvelles technologies.

Article 2

Art. 2. L'article 1er de la même loi est complété par un nouvel alinéa 2, libellé comme suit :

« Sont considérés comme teneurs de compte central au sens de la présente loi, pour les titres de créance, tels que visés à l'alinéa 1er, point 11), lettre (b), non cotés, les entreprises d'investissement visées à l'article 1er, point 9), de la loi modifiée du 5 avril 1993 relative au secteur financier et les établissements de crédit visés à l'article 1er, point 12), de ladite loi. Ces entreprises d'investissement et établissements de crédit disposent de mécanismes de contrôle et de sécurité des systèmes informatiques adaptés pour la tenue de comptes centraux permettant l'enregistrement dans un compte d'émission de l'intégralité des titres composant chaque émission admise à leurs opérations, d'assurer la circulation des titres par virement de compte à compte, de vérifier que le montant total de chaque émission admise à leurs opérations et enregistrée dans un compte d'émission est égal à la somme des titres enregistrés aux comptes-titres de leurs titulaires de compte et l'exercice des droits attachés aux titres inscrits en compte-titres. ».

= extends the scope of entities that can act as central account keepers to credit institutions and investment firms*

*to the extent that they meet the appropriate technical and organisational requirements to carry out such activities

Commentaire des articles

Article 2 :

L'article 2 du projet de loi vise à élargir le champ d'application de la loi du 6 avril 2013 en accordant la faculté aux entreprises d'investissement et aux établissements de crédit, tels que visés à l'article 1er, points 9 et 12, de la loi modifiée du 5 avril 1993 relative au secteur financier d'agir, aux fins de la loi du 6 avril 2013, en tant que teneur de compte central pour des titres de créance non cotés, définis à l'article 1er, point 11, lettre b), de ladite loi.

L'activité de teneur de compte central n'est pas harmonisée au niveau européen et elle est réservée en droit luxembourgeois aux teneurs de compte central agréés conformément à l'article 28-11 de la loi modifiée du 5 avril 1993 relative au secteur financier.

Au vu des nouvelles réalités économiques, il paraît opportun d'ouvrir l'accès à cette activité de manière ciblée en matière de titres de créances non cotés, et ce à des entreprises d'investissement et à des établissements de crédit de droit européen. Le texte proposé introduisant un nouvel alinéa 2 dans l'article 1er de la loi du 6 avril 2013 prend soin de renvoyer aux définitions figurant dans la loi modifiée du 5 avril 1993 relative au secteur financier par souci de sécurité juridique.

Les entreprises d'investissement et établissements de crédit visés agissant en tant que teneur de compte central doivent disposer de mécanismes et procédures spécifiques pour exercer leur activité de teneur de compte central. Le texte prévoit que ces entités disposent de capacités opérationnelles et techniques pour l'exercice de leur activité équivalentes à celles requises pour un teneur de compte central nécessitant un agrément spécifique, et ce par souci de maintenir des règles de jeu équitables (level playing field). Ces exigences sont introduites par le nouvel alinéa 2 et sont inspirées de près des conditions posées à l'article 28-12, paragraphe 2, de la loi modifiée du 5 avril 1993 relative au secteur financier.

Other possible developments?

Registered shares

Art. 430-3.

A register of the registered shares shall be maintained at the registered office and every shareholder may examine it; the register shall specify:

1° the precise designation of each shareholder and the number of shares or fractional shares held by him;

2° the payments made on the shares;

3° (*Law of 6 April 2013*) «transfers and the dates thereof or the conversion of shares into shares in bearer or dematerialised form, if the articles allow therefor.»

Law of 10 August 1915 on commercial companies

Other possible developments?

Registered shares

Art. 430-4.

Ownership of registered shares shall be established by an entry in the register prescribed in the foregoing Article.

(*Law of 6 April 2013*) «The company must satisfy the request of a person inscribed in the register to issue a certificate relating to the shares registered under that person's name.»

Transfers shall be carried out by means of a declaration of transfer entered in the said register, dated and signed by the transferor and the transferee or by their duly authorised representatives, and in accordance with the rules on the assignment of claims laid down in Article 1690 of the Civil Code. The company may accept and enter in the register a transfer on the basis of correspondence or other documents recording the agreement between the transferor and the transferee.

Subject to any contrary provisions of the articles, transmission, in the case of death, shall be validly established vis-à-vis the company, provided that no objection is filed, on production of a death certificate, the certificate of registration and an affidavit (*acte de notoriété*) attested by a *juge de paix* or a notary.

Law of 10 August 1915 on commercial companies

Other possible developments?

- amend?

Fol. _____

Inscriptions nominatives { d'actions / de parts sociales } de _____

Nom de l'actionnaire : _____

LIBELLE DES TRANSACTIONS						NUMEROS DES { ACTIONS / PARTS SOCIALES }	NOMBRE { D'ACTIONS / DE PARTS SOCIALES }			DECLARATIONS
Dates d'entrée				Dates de Sortie						
Année	Mois	Jour		Année	Mois	Jour	Entrée	Sortie	En Dépôt	

- can be issued, held and transferred on the blockchain
  = all registered shares

Other possible developments?

Bearer shares (need to be registered today)*

- Token = security?
- Token = title?

- Droit des biens

* Law of 28 July 2014 - Loi du 28 juillet 2014 relative à l'immobilisation des actions et parts au porteur et à la tenue du registre des actions nominatives et du registre des actions au porteur.

Need for some centrality

- who is liable?
  - Transfer agent?
  - Company issuing the securities?
- Regime unchanged (so far)

Disintermediation means re-intermediation

New actors?

- Fund industry => regulated
- Existing actors reinvent themselves?

Towards a semi-decentralized world?

By analogy with a recent BIS-Paper:

> « towards a world of semi-decentralized exchange »?
> (about cryptocurrencies)

BIS Working Papers, n°765, Beyond the doomsday economics of « proof-of-work » in cryptocurrencies, by Raphael Auer, Monetary and Economic Department, January 2019, Bank for International Settlements

Towards a semi-decentralized world?

- « complement and improve »
  (analogy with the same paper)
- not necessarily replace and abolish

Towards a semi-decentralized world?