

CSSF guidance on virtual assets for undertakings for collective investment – update

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On 4 January 2022, the CSSF updated their FAQ for undertakings for collective investment with respect to virtual assets (“**Updated FAQ**”) ¹ by clarifying the scope of AIFs entitled to invest directly or indirectly in virtual assets (I.) and adding a fifth question relating to depositaries of virtual assets (II.).

1. Clarification of Question 2. on whether AIFs can invest in virtual assets

The Initial FAQ solely addressed AIFs which are managed by an authorized AIFM, which led to some uncertainty regarding the possibility for AIFs which are managed by so-called “below-threshold AIFMs” to invest in virtual assets. The Updated FAQ now expressly mention that such AIFs can invest directly or indirectly in virtual assets, provided that their units are marketed to professional investors only.

For AIFs managed by an authorized AIFM, the conditions set forth in the Updated FAQ remain identical to the ones established in the Initial FAQ i.e. in addition to ensuring that such AIFs’ units are limited to professional investors, the AIFM will need to obtain an extension of authorization from the CSSF for the virtual assets strategy.

2. Can Luxembourg depositaries be mandated to act as depositary for investment funds investing directly in virtual assets?

The Updated FAQ confirm that this is possible subject to the following conditions:

- adequate organizational requirements and an appropriate operational model considering the

specific risks relating to the safekeeping of virtual assets must be put in place;

- prior notification to the CSSF before taking up such mandates;
- as more fully set out in the FAQ on virtual assets for credit institutions to which the Updated FAQ cross-refers, depositaries must avoid that operational disruptions and failures of virtual asset service providers spread to their regulated financial activities and ultimately result in financial losses harming their stakeholders. They shall also manage their concentration risk on such providers;
- requirement for the depositary to register as a virtual asset service provider (“**VASP**”) within the meaning of the AML/CFT law², if it directly provides services related to the safekeeping or the administration of virtual assets, including the custodian wallet service, to its clients.

With respect to the latter item, the Updated FAQ clarify that where the depositary directly offers safekeeping or administration type of services for the virtual assets to its clients, virtual assets are recognised in the off-balance sheet of the depositary, which consequently has an obligation of restitution for the loss or theft of said assets within the meaning of the civil law.

However, if the investment fund directly appoints a VASP other than the depositary (which thus does not directly offer safekeeping or administration type of services), the virtual assets are not recognised in the off-balance sheet of the depositary and the depositary is consequently not liable for the restitution of the assets. In such case, the liability is directly incumbent on the VASP. Accordingly, the AIFM/investment fund is required to have a direct contractual relationship with the VASP.

Finally, the Updated FAQ provide that for virtual assets that qualify as “other assets”, the depositaries’ liability in its depositary function is limited to safekeeping duties regarding ownership verification and record keeping in line with article 19 (8) (b) of the AIFM law³ and article 90 of the Commission Delegated Regulation no 231/2013 of 19 December 2012.

- 1 As a reminder, the CSSF published a *Communiqué* on virtual assets and the first version of its FAQ with respect to undertakings for collective investment on 29 November 2021 (the “**Initial FAQ**”). Please refer to our initial Newsflash in case you missed this previous publication.
- 2 Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.
- 3 Law of 12 July 2013 relating on alternative investment fund managers, as amended.

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The information contained herein is not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific legal advice concerning particular situations.

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