ELVINGER
HOSS
LUXEMBOURG LAW

Regulatory update: CSSF guidance on virtual assets

On 29 November 2021, the CSSF provided guidance to the industry with respect to virtual assets, by publishing a *Communiqué* (the "**Statement**") and frequently asked questions for undertakings for collective investments (**FAQ - Virtual assets (UCIs**) (the "**FAQ**").[1]

Key takeaway points of the Statement

The CSSF identifies three main areas on which professionals wishing to get involved in virtual assets would need to focus:

- thorough due diligence and careful consideration of the risks and benefits associated with the proposed activity of virtual assets against the entity's existing business model and risk appetite;
- internal governance arrangements involving a specific business and risk strategy to be developed by the management body of the entity with a view to ensuring a sound and prudent management of all the activities of the entity;
- requirement to follow up any regulatory developments, in particular those concerning the prudential treatment of virtual assets, to anticipate the impact of incoming legislation[2] on their business and operational arrangement activities and to engage proactively with the CSSF when planning for any activity involving virtual assets.

Key takeaway points of the FAQ

The FAQ currently addresses four questions:

1. Can UCITS invest in virtual assets?

UCITS, UCI addressing non-professional customers and pension funds are not allowed to invest directly or indirectly in virtual assets within the meaning of Article 1 (20b) of the AML/CFT Law.[3]

The FAQ clarifies, however, that any virtual assets that fulfil the conditions of financial instruments within the meaning of the Financial Sector Law[4] (e.g. shares of companies active in the virtual asset ecosystem) are not subject to the foregoing exclusion and could potentially fall within the scope of eligible investments for UCITS.

2. Can an AIF invest in virtual assets?

Yes, such investments may be done directly or indirectly, under the cumulative condition that:

- it is an alternative investment fund (AIF) with an authorised alternative investment fund manager (AIFM); and
- the AIF markets its units only to professional investors; and
- the authorised AIFM obtains an extension of its authorisation from the CSSF for the new investment strategy (see below).

Furthermore, any such activity requires investment managers to carry out a case-by-case assessment of the specific risks and their impact on the investment fund's risk profile, to put in place adequate internal controls and to update the investment fund's documentation with a view to ensuring a transparent information towards its investors.

3. Authorisation for the management of virtual assets
Before choosing to invest in virtual assets, the FAQ highlights the following:

- For every AIF (whether regulated or not) investing in virtual assets, the investment fund manager is required to obtain prior CSSF authorisation by extending its current licence for the strategy "Other-Other Fund-Virtual assets". The FAQ provides a non-exhaustive list of information/documents to be filed with the CSSF in the context of this authorisation (e.g. a description of the project including target investors, distribution, delegation arrangements, specific experience of portfolio manager, depositary arrangements, access/control over cryptographic keys, etc.);
- initiators of AIFs are invited to present their projects to the CSSF before investing in such assets;
- if the IFM (or any other participant) provides virtual assets services in the meaning of Article 1 (20c) of the AML/CTF Law, a complete **application file for registration as a virtual asset service provider (VASP)** needs to be submitted to the CSSF before commencing the activity.

4. Mitigation of the Money Laundering and Terrorist Financing risks
The CSSF stresses that the mitigating measures must correspond to the increased money laundering, terrorist financing and proliferation financing risks posed and that the anti-money laundering and terrorist financing responsible functions (the *Responsable du Contrôle* and *Responsable du Respect*) would have to demonstrate adequate understanding in this respect.

→ 1. According to the CSSF's website, a separate FAQ on virtual assets for credit institutions is to be published in the second half of December 2021.

→ 2. Such as the upcoming **European Markets in Cryptoassets Regulation**.

→ 3. Law of 12 November 2004 on the fight against money laundering and terrorist financing, as amended.

→ 4. Law of 5 April 1993 on the financial sector, as amended.

For any further information please contact us or visit our website at **www.elvingerhoss.lu**.

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.

We undertake no responsibility to notify any change in law or practice after the date of this newsletter.