



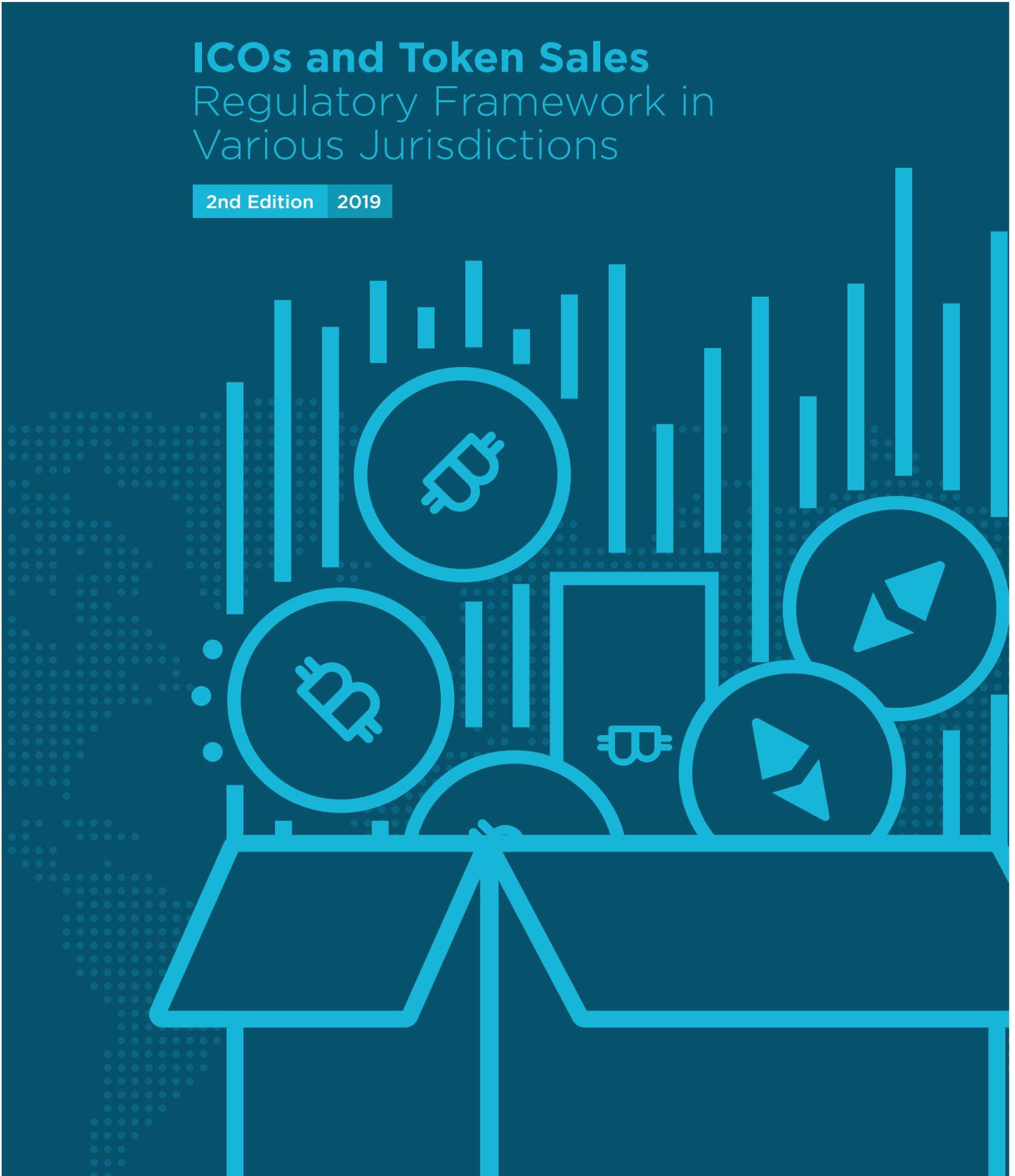
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INTERNATIONAL BUT PERSONAL

ICOs and Token Sales

Regulatory Framework in Various Jurisdictions

2nd Edition 2019



INDEX

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Belgium [IUSTICA.BE](#)

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Sweden [Hellstrom Law](#)

Switzerland [Bratschi Ltd.](#)

Turkey [Gun + Partners](#)

Ukraine [Asters Law](#)

United Kingdom [Mishcon de Reya](#)

United States of America
[Bell Nunnally](#)

Uruguay [Hughes & Hughes](#)

Vietnam [Indochina Legal](#)

THE **13** QUESTIONS WE ASKED

- 1 Does your country allow or prohibit ICOs and Token Sales?
- 2 Does your country regulate ICOs and Token Sales?
- 3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?
- 4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.
- 5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.
- 6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.
- 7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?
- 8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating your country's laws? If so, please provide an executive summary of the most significant prosecution(s).
- 9 In your country, are there any significant commercial disputes or civil cases (non- government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).
- 10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.
- 11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.
- 12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/ important benefit.
- 13 Please identify a point of contact at your firm for cryptocurrency- related matters.

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1 Does your country allow or prohibit ICOs and Token Sales?

ICOs and token sales are allowed in Luxembourg.

2 Does your country regulate ICOs and Token Sales?

A draft bill regarding the use of distributed ledger technologies for the issuance and circulation of securities has been submitted to the Luxembourg House of Representatives (Chambre des Députés) on 27th September 2018 (Draft Luxembourg Law 7363), and expressly foresees the use of blockchain-related technologies under Luxembourg law.

Moreover, it should be emphasized that Luxembourg's financial regulator, the Commission de Surveillance du Secteur Financier (CSSF) issued several communiqués and press releases based on the published European Securities and Markets Authority (ESMA) recommendations, in particular the 'Bitcoin Communiqué 2014', the 'CSSF Warning on virtual currencies (2018)' and the 'CSSF Warning on initial coin offerings ('ICOs') and tokens (2018)'. The latter two may be found on the CSSF's website (<http://www.cssf.lu/en/supervision/fintech/>).

These press releases and communiqués illustrate the constant will and work of the Luxembourg financial regulator to regulate ICOs and token sales in Luxembourg. In fact, the CSSF explains that, considering that ICOs are highly speculative investments, depending on how they are structured, they may fall outside of any regulated legal framework, in which case investors do not benefit from any protection. Therefore, in order to guarantee investors' protection, ESMA has determined that, depending on ICOs' structure, different UE financial regulations may apply (and their corresponding national laws) such as (i) the Prospectus Directive, (ii) the Markets in Financial Instruments Directive, (iii) the Alternative Investment Fund Managers Directive, (iv)

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the Market Abuse Regulation, (v) the Fourth Anti-Money Laundering Directive etc.

Finally, other national rules or regulations may also apply in addition to the aforementioned UE legislation, depending on the ICO's structure, which must be examined on a case-by-case basis.

3 If your country regulates ICOs and Token Sales, what are the names of the government agencies responsible for regulating them?

The CSSF. In fact, the CSSF even invites ICO promoters to contact it before a potential launch in order to check the different legal frameworks that might apply. This discussion-based approach aligns with the CSSF's usual behaviour with respect to new technologies and innovation

4 If your country regulates ICOs and Token Sales, please provide a short summary of the regulatory framework. For example, do ICOs and Token Sales need to be registered or comply with any rules; or can they only be sold to certain types of purchasers/investors.

The above-mentioned draft Bill aims to enable the stakeholders of the financial marketplace to benefit, within a secured legal framework, from the new opportunities offered by technology.

In fact, this draft Bill would amend the methods available for recording the issuance and circulation of securities for Luxembourg entities whose securities are held or maintained by a financial actor. There is one article which would allow for the use of blockchain-type technologies for a decentralised management. According to this draft Bill, transfers would be considered equivalent to transfer between accounts, and securities would remain fungible.

The analysis of this draft Bill shows that the Luxembourg legislator embraces the token concept, stating that a token is 'essentially a digital asset stored in a blockchain which, like a paper security or a conventional dematerialized security, represents the 'security'. This is from a technological point of view new type of dematerialized security, but one that legally has attached to it the same rights as conventional dematerialized securities'.

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Finally, in order to have a broader analysis of the CSSF's view of ICOs and token sales, one can turn to the communiqués and press releases mentioned under question 2, which are available on the CSSF's website (<http://www.cssf.lu/en/supervision/fintech/>).

5 Please provide any additional information you feel is important to understanding ICO and Token Sale regulation in your country.

N/A

6 If a foreign entity conducts an ICO and offers tokens to residents of your country, will your government require the foreign entity to comply with any rules and regulations? If so, please provide an overview of how ICOs conducted by foreign entities are regulated by the government of your jurisdiction.

Foreign entity conducting ICOs and token sales in Luxembourg

First of all, as explained under question 2, and further to the CSSF communiqués and press releases and the ESMA recommendations, the main question for issuers is to determine whether the coins or tokens offered in the course of an ICO shall be qualified as financial instruments. In such a case, it is likely that the issuer conducts regulated investment activities that could fall under the scope of UE financial regulations (and their corresponding national laws). Issuers themselves have a duty to analyse the regulatory framework, seeking the necessary permissions and meeting the applicable requirements when conducting their activities, and in particular when contemplating launching an ICO.

Moreover, we would like to point out that the CSSF stated that ICOs are subject to all current, existing laws, notably to AML/CTF regulation. The CSSF further emphasised that it does not wish to impede blockchain, acknowledging the benefits of distributed ledger technologies for innovation and increased transparency in financial markets.

It is important to note that the CSSF is known for its rigorous vetting process and will only authorise and

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license companies which wish to proceed to ICOs of token sales and related activities that have proven their potential and commitment to strong KYC policies and AML/CTF checks.

Creating a Luxembourg entity to conduct ICOs and token sales in Luxembourg

(i) Payment institution licences:

Moreover, the CSSF foresees specific criteria and conditions which, if met, may lead to licensing as a payment institution under Luxembourg law:

a) Crypto trading platforms:

It should in fact be stressed that the CSSF licensed the first ever EU-licensed crypto firm, Bitstamp, the oldest crypto trading platform in the world. In fact, as one can see on the CSSF's website, Bitstamp is listed as a payment institution and is put into the register of payment institutions authorised in accordance with the law of 10th November 2009 relating to payment services. This step was highly innovative from a regulatory perspective, as the CSSF opted to grant a payment institution licence under the EU Payment Services Directive (EU 2015/2366) to Bitstamp.

Another well-known company, bitFlyer, originally from Japan, was granted the same license by the CSSF in 2018. Much like Bitstamp, bitFlyer is listed as a payment institution and is put into the register of payment institutions authorised in accordance with the law of 10th November 2009 relating to payment services.

As a result, bitFlyer is licensed in Japan, in the EEA (via Luxembourg) and in 43 out of 50 US states.

What advantages does such a licence offer? This licence gives recipients an EU passport for the whole European Economic Area (currently, all EU member states plus Iceland, Liechtenstein and Norway) and is highly attractive to global crypto players due to its broad territorial compliance coverage.

It should also be pointed out that the draft of the Fifth Anti-Money Laundering Directive (AMLD5)

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specifies that providers of exchange services between cryptocurrencies and wallet providers offering custodial services of private keys may need to be registered or licensed in the European Union countries where they are established.

Finally, we need to stress that, as of today, being approved by the CSSF is not a mandatory requirement. This explains why, in August 2018, our law firm Brucher Thieltgen & Partners could incorporate a special limited partnership company (*société en commandite spéciale*) investing in and trading cryptocurrencies without having to apply for such an explicit CSSF approval. The corporate object of that company is ‘the holding of investments of any kind, the acquisition by purchase, subscription or in any other manner, as well as the transfer by sale, exchange or otherwise of investments of any kind, and the ownership, administration, development and management of its portfolio’.

b) Electronic money platforms:

Besides the two aforementioned EU payment institution licences, a third licence, namely an EU-compliant electronic money institution directive license (E-money Directive 2009/110/EC) was granted to Luxembourg-based firm Snapswap, which has a platform built on blockchain technology and which mirrors legal tender currencies, allowing for instant money transfers in daily life. On the CSSF website one may read that Snapswap is an electronic money institution.

c) CSSF’s regulatory approach:

The contrasting treatments of crypto trading platforms and of electronic money platforms might indicate that the CSSF has a different regulatory approach for each. This could also be a reason why the CSSF took the ‘Bitcoin Communiqué 2014’ offline around mid-February 2018 without officially cancelling it. We may deduce that the ‘Bitcoin Communiqué 2014’ is still valid and that the CSSF still considers Bitcoin as scrip money.

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On 14th March 2018, four years after the release of its 'Bitcoin Communiqué 2014,' the CSSF issued two new press releases, as mentioned under question 2. The 'CSSF Warning on virtual currencies (2018)' warned cryptocurrency investors and token-holders about virtual currencies (i.e. cryptocurrencies), and the 'CSSF Warning on initial coin offerings (ICOs) and tokens (2018)' warned about ICOs and tokens, while highlighting associated risks for investors. The CSSF mainly based its warnings on the lack of specific investor protection regulation and the fact that these transactions were not counter-guaranteed by a government or a central bank.

d) Contacting Luxembourg's financial regulator beforehand:

As set out under question 3, the CSSF invites ICO promoters to contact it before a potential launch in order to check the different legal frameworks that might apply. This discussion-based approach aligns with the CSSF's usual behaviour with respect to new technologies and innovation.

7 What is the legal nature of crypto in your country (for example, is crypto considered a security, commodity, currency etc.)?

The CSSF states in its above-mentioned 'VC Warning 2018' (and the Luxembourg direct tax administration (Administration des contributions directes) confirmed, in its circular dated 26th July 2018, 'Circulaire du directeur des contributions L.I.R. n°14/5-99/3-99bis/3 du 26 juillet 2018') that cryptocurrencies are actually not currencies but rather a means of exchange. Bitcoin specifically, however, has been considered as a type of scrip money, according to the definition provided in the CSSF 'Bitcoin Communiqué 2014' four years ago.

8 Has the government of your country prosecuted, civilly or criminally, any ICO issuers, token developers or crypto exchanges for violating

N/A

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your country's laws? If so, please provide an executive summary of the most significant prosecution(s).

9 In your country, are there any significant commercial disputes or civil cases (non-government) involving crypto? If so, please provide an executive summary of the most significant dispute(s)/ case(s).

N/A

10 Does your jurisdiction tax crypto transactions? If so, please provide a basic explanation of how and at what rate they are taxed.

Yes, but certain nuances shall be underlined. While Luxembourg is among the first European countries to have recognised cryptocurrencies as means of exchange, the ACD underlines, in its above-mentioned circular dated 26th July 2018, that they 'do not constitute currencies' and further explains that 'unlike currencies, virtual currencies have no legal tender status and do not represent means of exchange whose value is guaranteed by a central bank'. As a consequence, Luxembourg taxpayers cannot prepare their annual accounts in Bitcoins, Ethers and other XRP. All income obtained through cryptocurrencies must therefore be determined in euros or another currency recognised by the European Central Bank before being declared.

On this basis, the ACD distinguishes two situations:

- A commercial income: in the case of the mining of a virtual currency, the ACD considers that the income obtained comes from a commercial activity and is taxed as such. An identical scenario is used for the management of a virtual currency exchange platform, such as bitFlyer or Bitstamp.

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- Speculation: on the other hand, the purchase and sale of virtual currencies in a recognised currency or the use of a virtual currency to purchase a good or service are considered transactions. 'Any profit or loss realized in such an exchange constitutes a speculative profit or loss' and therefore falls into the category of miscellaneous net income.

In these cases, the taxpayer must therefore have consistent and continuous documentation on transactions and related costs when filing his return.

Finally, the ACD also reiterates that, like all capital gains related to speculation, this type of transaction will only be taxed if the interval in which it was carried out does not exceed six months and the amount is greater than €500. Otherwise, no taxation will be levied.

11 Separate from ICOs, does your jurisdiction regulate crypto trading or crypto exchanges? If so, please provide an overview of the regulation.

In progress: while the European Commission, European Parliament and European Court of Justice lean toward cryptocurrencies being interpreted as a means of payment, national governments - such as Luxembourg, through the CSSF and the ACD - advocate, on the other hand, for a legal definition that favours a means of exchange.

The difference in interpretations may seem trivial, but this distinction is crucial, as it will determine the tax treatment of cryptocurrencies. If cryptographic assets were defined legally as a means of payment, then cryptocurrencies would be treated the same as foreign currencies and thus be exempt from VAT. If, however, they were defined as a means of exchange, national VAT rates would apply.

We currently ascertain that no specific regulation in Luxembourg is in place. This might, however, change in view of the draft Bill 7363, the AMLD5, the communiqués and the press releases.

For further details, please refer to our answer to questions 2, 7 and 11.

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12 Does your country offer any unique or important benefit to crypto-focused companies (for example, clear regulatory guidance)? If so, please describe the unique/important benefit.

As already mentioned above, in order to incorporate a company acting in the cryptocurrency field in Luxembourg, a specific licence might need to be acquired/granted by the CSSF (for further details thereon, please refer to our answer to question 7).

If such a licence has been acquired, (i) the company will have an EU passport for the whole European Economic Area, granting a broad territorial compliance coverage, and (ii) the company will be subject to the Luxembourg law of 10th November 2009 on payment services. This ensures that the CSSF will have a homogeneous view of whoever wishes to create a company with a financial activity, whether tangible, electronic or virtual.

13 Please identify a point of contact at your firm for cryptocurrency-related matters.

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