# The Virtual Currency Regulation Review

Fourth Edition

**Editors**
Michael S Sackheim and Nathan A Howell

The Law Reviews

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# THE VIRTUAL CURRENCY REGULATION REVIEW

Fourth Edition

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This article was first published in August 2021
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**Editors**
Michael S Sackheim and Nathan A Howell

THE LAWREVIEWS

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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
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ISBN 978-1-83862-839-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ANDERSON MŌRI & TOMOTSUNE

ARTHUR COX

BECH-BRUUN

CLIFFORD CHANCE LLP

DENTONS

DETAIL COMMERCIAL SOLICITORS

GERNANDT & DANIELSSON ADVOKATBYRÅ

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# PREFACE

Tulips arrived in Holland in the late 16th century and quickly became popular. By 1633, novice florists flooded the lucrative tulip trade, starting what has since become popularly known as 'tulip mania'. Tulip mania was, in part, a response to the outbreak of the bubonic plague, which resulted in a lockdown that caused massive unemployment. People had to look for other sources of income and turned to speculative trading in tulip bulbs. Demand for bulbs increased so much that florists started buying and selling still-buried tulip bulbs with promissory notes, using the farmers' bulbs as collateral. Delivery of the tulip bulbs was deferred to a future date, encouraging speculation in the promissory notes, which were resold, creating an unregulated highly leveraged speculative futures market in the tulip bulb promissory notes, in which people with no interest in the underlying tulip bulbs could participate. As tulip prices rose, ordinary people caught speculative fever, spending their salaries and selling their possessions so they could buy tulip bulbs in hopes of making a profit. New and inexperienced florists began to mortgage their homes and businesses to purchase bulbs to sell at auctions, resulting in many of the growers becoming wealthy beyond their wildest dreams. But tulip bulbs proved to be a very unstable market. By January 1637, many florists began to sell off their bulbs and did not purchase more. By February 1637, there was a domino effect. At a Dutch auction the tulip bulbs did not receive any bids and prices were lowered. There were still no bids, resulting in speculative liquidity drying up. Speculators who had purchased bulbs on margin (i.e., with borrowed money) were forced to sell to pay back their lenders, and in the ensuing panic the price of tulip bulbs decreased by 95 per cent or more. Florists who had paid only small amounts of margin to the growers still owed the full purchase price to the growers. The tulip market collapsed. There were no bankruptcy or regulatory laws to help resolve disputes.

Some commentators have drawn parallels between tulip mania and the current speculative fever around virtual currency. It took only a handful of years for the speculative tulip bubble to pop. Nearly 400 years later, in a time when the speed of commerce is measured in milliseconds, virtual currency shows no signs of suffering a similar fate. As the editors of this treatise, we are somewhat ambivalent on the issue. We are not economists. We are lawyers. And with that, let us dispense with the history lesson and fast forward to 2021 and the slightly boring (to others) but utterly fascinating (to us) global regulatory schemes being put into place that are the subject of this treatise.

The fourth edition of *The Virtual Currency Regulation Review* is a country-by-country analysis of developing regulatory initiatives aimed at fostering innovation, while at the same time protecting the public and mitigating systemic risk concerning trading and transacting



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in virtual currencies and other digital assets. The increased acceptance and use of virtual currencies by businesses and the exponential growth of investment opportunities for speculators marked late 2020 and early 2021.

In 2020, the International Organization of Securities Commissions (IOSCO) published a report titled *Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms*, describing specific areas that jurisdictions could consider in the context of the regulation of crypto trading platforms.

In the country-by-country chapters in the *Review*, the contributing authors provide a guide to the evolving regulation of digital asset transactions in their jurisdictions.

In 2020, the global outbreak of covid-19 had severe effects on every major economy. Echos perhaps of the bubonic plague and tulip mania? At the time of writing, the covid-19 pandemic is ongoing and, while some locations seem to be pushing past their respective peaks of infection, cities that are central to the global financial markets remain under various degrees of lockdown, with many workers in the financial services sector working remotely. Since mid-March 2020, when the pandemic hit the United States in earnest (it had already been raging in China, Italy, Iran and other countries), the price of Bitcoin has gone up in essentially a straight line – from approximately US$5,000 to US$63,000 in April 2021. Virtual currencies are borderless: they exist on global and interconnected computer systems. The virus is also borderless. Virtual currencies are generally decentralised, meaning that the records relating to a virtual currency and transactions therein may be maintained in a number of separate jurisdictions simultaneously. The borderless nature of this technology was the core inspiration for the *Review*. As practitioners, we cannot afford to focus solely on our own jurisdictional silos. For example, a US banking lawyer advising clients on matters related to virtual currency must not only have a working understanding of US securities and derivatives regulation, he or she must also have a broad view of the regulatory treatment of virtual currency in other major commercial jurisdictions.

Global regulators have taken a range of approaches to responding to virtual currencies. In some countries, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money; in other countries, virtual currency may be regulated similarly to securities or commodities. We make one general observation at the outset: there is little consistency (so far) across jurisdictions in their approach to regulating virtual currencies. Perhaps the efforts of IOSCO will help to change that going forward, but there is currently no widely accepted global regulatory standard. That is what makes a publication such as the *Review* both so interesting and so challenging.

It is perhaps ironic that the principal source of strength of virtual currencies – decentralisation – is the same characteristic that the regulators themselves seem to be displaying. There is no central authority over virtual currencies, either within or across jurisdictions, and each regulator takes an approach that seems appropriate to that regulator based on its own narrow view of the markets and legacy regulations. Again, we are hopeful that IOSCO's efforts will help to encourage the emergence of optimal regulatory structures over time. The fourth edition of the *Review* provides a practical analysis of recent legal and regulatory changes and developments, and of their effects, and is not an exhaustive guide to the regulation of virtual currencies globally or in any of the included jurisdictions. Instead, for each jurisdiction, the authors have endeavoured to provide a sufficient overview for the reader to understand the current legal and regulatory environment at a high level. Virtual currency is the broad term that is used in the *Review* to refer to Bitcoin, Ether, Tethers and other stablecoins, cryptocurrencies, altcoins, ERC20 tokens, digital, virtual and cryptoassets,



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and other digital and virtual tokens and coins, including coins issued in initial coin offerings. We recognise that in many instances the term 'virtual currency' will not be appropriate, and other related terms are used throughout as needed. In the law, the words we use matter a great deal, so, where necessary, the authors of each chapter provide clarity around the terminology used in their jurisdiction and the legal meaning given to that terminology.

We are confident that attorneys advising clients in the cryptocurrency and digital assets space will find the updated fourth edition of the *Review* to be an excellent resource in their own practices.

**Michael S Sackheim and Nathan A Howell**
Sidley Austin LLP
New York and Chicago
August 2021



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**Chapter 12**

# ITALY

*Raffaele Lener, Salvatore L Furnari, Niccolò Lorenzotti, Antonio Di Ciommo and Roberto A Lener*[1]

## I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

The first attempt to regulate distributed ledger technology (DLT) and cryptoassets by the Italian legislator was through Article 8 *ter* of Law Decree No. 135 of 14 December 2018, which provides the definition of smart contracts and DLT.

Paragraphs 1 and 3 of Article 8 *ter* of Law Decree No. 135 state that:

> *1. [DLTs] are defined as 'technologies based on distributed register' technologies and computer protocols that use shared, distributed, replicable ledgers, simultaneously accessible and architecturally decentralised on a cryptographic base such as to allow registration, validation, updating and archiving of data both in clear text and further protected by cryptography verifiable by each participant, but which is not alterable and not editable.*
> . . .
> *3. The storage of an IT document through the use of technologies based on distributed registers produces the legal effects of electronic timestamps referred to in Article 41 of Regulation (EU) No. 910/2014.*

Furthermore, Paragraph 2 of Article 8 *ter* of Law Decree No. 135 defines a smart contract as:

> *a computer program that operates on technologies based on distributed registers and whose execution automatically binds two or more parties and produces effects predefined by the parties prior to execution. Smart contracts are deemed to satisfy the written form requirement provided that users are identified through an identification process that is compliant with the guidelines issued by the Agency for Digital Italy.*

The Italian legislature instructed the Agency for Digital Italy (AgID) to issue a regulation implementing this definition, to identify the specific standards that DLTs must adopt to produce the effects of an electronic timestamp and to set out the identification process smart contracts should adopt to fall within the scope of Article 8 *ter* of Law Decree No. 135. Nonetheless, at present, no such regulation has yet been issued by AgID.

1 Raffaele Lener is the name partner, Salvatore L Furnari is a lawyer and a chartered accountant, Niccolò Lorenzotti is an associate and Antonio Di Ciommo is a trainee lawyer at Lener and Partners. Roberto A Lener is an investment analyst at Verteq Capital.



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The most important categories of cryptoassets that have been identified are investment tokens (which include equity, debt and security tokens), utility tokens and cryptocurrencies (which also include stablecoins).[2]

Investment tokens are cryptoassets that assign to their holders economic or governance rights over the issuing company. Investment tokens confer on their holder a direct right in relation to the company. Those rights are usually divided into economic rights (i.e., the right to dividends) and administrative rights (i.e., the right to vote in the general assembly). From this point of view, investment tokens could be properly considered tokenised versions of securities. Furthermore, they can be sub-classified as equity tokens, if the owners are entitled to rights similar to those usually assigned to shareholders; debt tokens, if they resemble debt securities; and security tokens, a residual category that includes all the other tokens that have been officially offered to the public as a tokenised version of a financial security, in compliance with the relevant regulatory framework.

Utility tokens are cryptoassets that provide the holder with a functional utility, such as the right to obtain a product or, more commonly, the right to access a specific service or even a simple discount on a product or service. From a legal perspective, utility tokens can be seen as the DLT representation of a 'consumer right' with regard to a product offered by the issuer.

Finally, cryptocurrencies are cryptoassets whose function is to be used to pay for services or to acquire other tokens. Benefiting from decentralisation, these currencies differ from fiat currencies as they are neither certified nor supported by central financial institutions.

Cryptocurrencies are usually used as payment instruments to the extent that they are recognised as such by the parties to a transaction. For this reason, cryptocurrencies are commonly depicted as 'private payment instruments' or, better, as 'private currencies' whose value depends only on the laws of offering and demand within their relevant markets. Stablecoins are a sub-category of cryptocurrency and are 'programmed' to maintain a 'stable' price, which is linked to a specific fiat currency.

After a public consultation conducted between 2019 and 2020, CONSOB stated in its final report of January 2020 that the use of DLTs is not an element that per se defines the category of cryptoassets, since some types (e.g., investment tokens) may fall within the scope of other existing regulations.[3]

For instance, as specifically emphasised by CONSOB, investment tokens could be deemed to be financial instruments, with the consequence that Italian regulations on financial instruments and financial products would be triggered. Therefore, the offering of cryptoassets that constitute financial products would entail advance publication of a corresponding authorised prospectus.

Furthermore, it has to be ascertained whether cryptocurrencies and stablecoins may constitute an issuance of electronic money or of payment instruments under banking and electronic money laws and regulations.

Finally, it is worth anticipating that utility tokens generally fall outside the scope of both financial and banking law regulations, since they represent neither a payment

2 See Hacker, P and Thomale, C, Crypto-Securities Regulation: ICOs, 'Token Sales and Cryptocurrencies under EU Financial Law' in *European Company and Financial Law Review*, 2018, p. 12 and also Furnari, SL and Lener, RA, 'Contributo alla qualificazione giuridica dell'offerta al pubblico di utility token (anche) alla luce della proposta di regolamento europeo sulle cripto-attività' (forthcoming), in *Bocconi Legal Paper*, 16, 2021.

3 CONSOB, Final Report on Initial Coin Offerings and Crypto-Assets Exchanges, 2 January 2020, p. 2.



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instrument nor a form of financial investment. The issuance of utility tokens in Italy can be carried out without either the publication of a prospectus or the need to comply with specific requirements (which are lacking at present). However, this does not exempt cryptoassets (and their holders) from the scope of the anti-money laundering (AML) regime.

## II SECURITIES AND INVESTMENT LAWS

### i Overview of applicable Italian securities and investment laws

As a preliminary remark, no definition and no specific rules on cryptoassets have been provided under Italian securities and investment laws. Their 'versatility' implies the need to qualify each of them in light of the general definitions of financial instruments and financial products provided under Legislative Decree No. 58 of 24 February 1998 (the Consolidated Financial Act).[4]

Financial instruments are defined under Article 1, Paragraph 2, of the Consolidated Financial Act as 'the list of instruments specified under its Annex I, Section C'.[5]

Within this list, the definition of transferable securities has a particular relevance. As provided in Article 1, Paragraph 1 *bis* of the Consolidated Financial Act, transferable securities are defined as securities that may be negotiated in a trading venue, such as:

*a* shares and other comparable instruments issued by corporations, partnerships or similar entities, including their deposit certificates;

*b* bonds and other debt instruments, including their deposit certificates; and

*c* any other transferable security that allows the purchase or sale of securities under (a) and (b) or that permits a prompt settlement of transactions that are benchmarked on currencies, interest rates, earnings, commodities or other indexes or measurements.

Furthermore, as regards the qualification of cryptoassets under the security and investment regulations, an important role is also played by the domestic definition of the term 'financial product' provided under Article 1, Paragraph 1, letter (u) of the Consolidated Financial Act. Here, in fact, financial products are broadly defined as 'financial instruments and any other form of investment characterised by a financial nature'.

### ii Qualification of cryptoasset as financial instruments

To be qualified as financial instruments, cryptoassets may more easily fall under the definition of transferable securities. In particular, to be qualified as transferable securities, cryptoassets should:

*a* be negotiable on capital markets;

*b* be standardised; and

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4 https://www.consob.it/web/consob-and-its-activities/laws-and-regulations/documenti/english/laws/fr_decree58_1998.htm.

5 This article implements MiFID II and the list of Annex I, Section C of the Consolidated Financial Act is the same as that provided by MiFID II in its Annex I, Section C. In particular, financial instruments are '(1) Transferable securities; (2) Money-market instruments; (3) Units in collective investment undertakings; . . . (11) Emission allowances consisting of any units recognised for compliance with the requirements of Directive 2003/87/EC' and various types of derivative contracts (listed under Nos. 4–10 of Annex I, Section C).



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*c* incorporate the rights conferred on the holder by 'traditional' shares, bonds or other similar contracts.[6]

This is consistent with CONSOB's statement in its final report of January 2020.[7] In this document, CONSOB pointed out that the Italian definition of financial instruments cannot be amended to include cryptoassets, since the definition is provided at the EU level under MiFID II. Nonetheless, CONSOB pointed also out that:

> *the interpretative criteria for applying the required distinction may be found in the European legislation, where a catalogue of categories of financial instruments is codified that enables a judgment of comparability to identify the hypothesis in which the characteristics of a cryptoasset (as well as of the associated operations) lead us to consider the existence of elements of strict analogy with regard to those that commonly characterise the categories of financial instruments listed in the European legislation.*[8]

According to the classification of cryptoassets set out above, investment tokens (and in particular security, equity and debt tokens) usually possess the characteristics specified and so may fall within the definition of a transferable security. In contrast, this is not the case for cryptocurrencies and utility tokens.

However, a case-by-case analysis is always required (or is, at least, the best approach to adopt). Indeed, to the extent that utility tokens may also confer governance rights on their holders (e.g., the right to vote on the governance of the undertakings that lead the project), such tokens might also be considered financial instruments, if they function in a similar way to traditional shares of a company.

### iii Qualification of cryptoassets as financial products

If a cryptoasset does not meet the definition of a financial instrument, it is necessary to verify whether it falls under the definition of a financial product before excluding the application of securities and investments laws. In this regard, the Supreme Court of Cassation, in decision No. 26807 of 2020, specifically clarified that the offering of cryptoassets may be considered

6 The characteristics are those described by the definition of transferable securities under Article 1, Paragraph 1 *bis* of the Consolidated Financial Act, which provides that transferable securities are categories of securities that can be traded in capital markets, such as:

> *a) scompany shares and other titles equivalent to company shares, of partnership or of other parties and share deposit receipts;*
> *b) bonds and other debt titles including the deposit receipts relative to said shares;*
> *c) any other transferable security that permits buying or selling transferable securities indicated in letters a) and b) or that involve spot settlement determined with reference to transferable securities, foreign exchange, interest rates or rates of return, commodities or other indices or measurements.*

On this opinion, see Hacker, P, Thomale, C, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law', in *European Company and Financial Law Review*, 2018; Annunziata, F, 'Speak, If You Can: What Are You? An Alternative Approach to the Qualification of Tokens and Initial Coin Offerings', in *Bocconi Legal Studies Research Paper No. 2636561*, 2019; and Boreiko, D, Ferrarini, G, Giudici, P, 'Blockchain Startups and Prospectus Regulation', in *European Business Organization Law Review*, 20, 2019.

7 CONSOB, Final Report on Initial Coin Offerings and Crypto-Assets Exchanges, 2 January 2020, pp. 1-2.

8 CONSOB, Final Report on Initial Coin Offerings and Crypto-Assets Exchanges, 2 January 2020, p. 2.



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an offering of financial products falling under the scope of Article 1, Paragraph 1, letter (u) of the Consolidated Financial Act if it is accompanied by a promise or expectation of financial returns.

To be more precise, as has been highlighted by legal scholars, the definition of financial products under Italian law is an 'open' definition. Indeed, the concept of 'financial nature' is not specified. To help define this concept and therefore clarify the interpretation of the concept of the 'promise of financial returns', it is worth referring to Supreme Court of Cassation decision No. 2736 of 2013. In this decision, the Court stated that:

> *the agreement has a financial nature when the reason for entering into the agreement – and not simply the motive behind it (which is not relevant for regulatory purposes) – consists precisely in the investment of capital (the commitment of the invested money) in view of an increase in the invested amount, with the investor only providing money as his or her contribution.*[9]

Financial products can be defined as agreements, the parties to which pursue an investment purpose, whereby the subscriber (i.e., the client) gives the provider cash or other assets and, on the other side, the provider receives and uses the assets to carry out all the activities stipulated under the contract, promising the client that he or she will receive the financial returns eventually generated by carrying out those activities.

In other words, the financial nature of financial products consists in the fact that the client expects to increase the capital invested with the returns eventually generated by the activities carried out by the provider; this expectation is not just an internal reason to 'invest' but is created in the clients by specific promises of the provider.

In light of the above, to qualify a cryptoasset as a financial product, a case-by-case analysis is necessary. For instance, utility tokens or cryptocurrencies that are offered to the public accompanied by promises of financial returns may constitute financial products.

### iv Obligations under Italian securities and investment law

In this context, entities offering tokens qualifying as financial instruments or as financial products are required to file with CONSOB (and to all the other relevant EU supervisory authorities) a request for authorisation to publish a prospectus for such tokens, pursuant to Article 94 et seq. of the Consolidated Financial Act, implementing Article 3 of Regulation EU 1129/2017.

Notably, however, this requirement shall not apply provided that:

*a* the total value of the capital raised with the offering of the tokens is less than €8 million in a 12-month period;

*b* the tokens are offered only to qualified investors; or

*c* the minimum investment per investor is at least equal to €100,000.

9 Furthermore, the above principle has been confirmed by CONSOB in its discussion document on ICOs of March 2019, where it clarified that:

> *so called investments of a financial nature part of the financial product category consist of investment schemes involving the three following elements: (i) the investment of capital; (ii) the promise/expectation of a financial return; and (iii) the assumption of a risk directly connected and related to the investment of capital.*



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Conversely, if cryptoassets do not meet any of these criteria for exemption (thereby qualifying as financial products), their issuer is required to file with CONSOB a request for authorisation to publish a prospectus in compliance with Articles 94 and 94 *bis* of the Consolidated Financial Act. The request for authorisation must include the draft prospectus.

Apart from the information specified under the applicable regulation, a prospectus shall contain:

> *in an easily analysable and comprehensible form, all the information that, depending on the characteristics of the financial products and the issuer, is necessary for investors to make an informed assessment of the assets and liabilities, profits and losses, financial position and prospects and of the issuer and any guarantors thereof, as well as of the related rights, reasons for issue and related impact on the issuer. The prospectus also contains a securities note, which briefly gives key information, in non-technical jargon. The format and content of the securities note, together with the prospectus, give adequate information on the fundamental features of the financial products in order to aid the investors to decide whether or not to invest in such products.*[10]

Subject to the condition that there is no existing regulatory provision specifically applicable (or issued) in connection with the product that is being offered, Article 94 *bis* of the Consolidated Financial Act allows the issuer or the offeror of the 'new' product to request CONSOB to provide specific indications on the information they must provide.[11] CONSOB will approve and authorise the publication of the prospectus in no more than 20 days, provided that it has received a complete request. If the request is incomplete or it is necessary to include any further information or clarification, CONSOB may request the issuer to include any relevant additions or clarifications it deems necessary.[12] The approval of the prospectus is effective for 12 months.

The issuer or the offeror must ask CONSOB to approve a supplement to a previously approved prospectus if there have been any changes to any of the information provided with the original prospectus and the offering period has not yet elapsed.[13]

## III BANKING AND MONEY TRANSMISSION

At present, no specific provisions concerning banking or electronic money profiles have been issued by the Italian legislator.

Similarly to the qualification of cryptoassets as financial instruments or financial products, it is necessary to adopt a case-by-case approach to verify whether a cryptoasset falls

10 Article 94 *bis*, Paragraph 1, Consolidated Financial Act.

11 Article 94 *bis*, Paragraph 2, Consolidated Financial Act and Article 5 of CONSOB Regulation 14 May 1999, No. 11971 (the Regulation on Issuers).

12 Under Article 8 of the CONSOB Regulation on Issuers, in such a case, the 20-day term for approval is interrupted and starts running from the moment that CONSOB receives the information it has requested from the issuer (or the offeror, if relevant). If the request for approval is incomplete, the issuer or the offeror must comply with the CONSOB request within 10 days of the request; conversely, if CONSOB requests the inclusion of further information or clarification, the issuer or the offeror must comply within 20 days of the request.

13 Article 94 *bis*, Paragraph 4 of the Consolidated Financial Act.



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under the definition of electronic money provided by Article 1, Paragraph 2, letter (h) *ter* of Legislative Decree No. 385 of 1 September 1993 (the Italian Consolidated Banking Act), implementing Directive 2009/110/EC.

Under Article 1, Paragraph 2, letter (h) *ter* of the Italian Consolidated Banking Act, electronic money 'means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions', whereby payment transactions are defined under Article 1, Paragraph 1, letter (c), of Legislative Decree No. 11 as 'an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee' and funds are defined under Article 1, Paragraph 1, letter (m), of Legislative Decree No. 11 as 'banknotes and coins, scriptural money or electronic money'.

According to the definitions discussed, it is rather unlikely that crypto activities and, in particular, 'traditional' cryptocurrencies (such as Bitcoin), will fall under the definition of electronic money.

Indeed, under both the Consolidated Banking Act and Legislative Decree No. 11 of 27 January 2010 (Legislative Decree No. 11/2010) (implementing Directive (EU) 2015/2366[14]), cryptoassets and cryptocurrencies may not qualify as funds. Therefore, transactions in cryptocurrencies or in other comparable cryptoassets may not qualify as payment transactions.

However, this might not be the case for some stablecoins.

To the extent that a specific stablecoin is issued in exchange for the deposit of fiat money and the client maintains the right to redeem the deposited funds, giving back the stablecoin received, their issuance may count as the issuance of electronic money.

In more detail, according to the European Banking Authority, to be qualified as electronic money, a specific cryptoasset shall:

*a* be electronically registered;
*b* have a monetary value;
*c* amount to a claim against the issuer;
*d* be issued at the receipt by the issuer of the relevant funds,
*e* be issued with the purpose of allowing the client to execute payment transactions; and
*f* be commonly accepted by the counterparties of the relevant transactions.[15]

As a consequence, issuers of stablecoins qualifying as electronic money are required to file a request to be authorised by the Bank of Italy as an electronic money institution. Failure to comply with this requirement constitutes, inter alia, a criminal offence under Article 131 *bis* of the Consolidated Banking Act.

Therefore, the issuance of fiat-backed stablecoins may be deemed to be an issuance of electronic money.

14 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market.

15 EBA, Report with advice for the European Commission on cryptoassets¸ 9 January 2019, pp. 12–13.



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On the other hand, non-fiat-backed stablecoins, such as crypto-collateralised[16] and algorithmic stablecoins,[17] should not fall under the definition of electronic money provided under the Consolidated Banking Act.

In particular, while it is evident that algorithmic stablecoins cannot be considered electronic money, some doubts may rise in connection with crypto-collateralised stablecoins that are issued in exchange for other cryptoassets.[18] However, it seems unlikely that those cryptoassets may be considered electronic money to the extent that the deposited cryptoasset should not entail the definition of funds provided by Legislative Decree No. 11/2010.

In addition, another aspect in favour of the exclusion of crypto-collateralised stablecoins from the scope of the definition of electronic money is the difficulty in identifying an issuer who must respect the provision set out by the applicable law, considering that their issuance is, in most cases, managed by a decentralised autonomous organisation (as it is the case for DAI, the stablecoin issued by MakerDAO) or by a computer protocol in the form of a smart contract (as is the case for VAI, the stablecoin issued by Venus).

## IV ANTI-MONEY LAUNDERING

While cryptoassets do not have a specific regulatory status in Italy, as highlighted in previous sections, the only Italian laws and regulations that provide a definition applicable to them are those concerning anti-money laundering regulations. Article 1, Paragraph 2, letter (qq) of Legislative Decree No. 231/2007, implementing, inter alia, the Fifth Anti-Money Laundering Directive (also known as the AML Regulation), provides the definition of a virtual currency.[19] Modifying the definition provided by the Fifth AML Directive (upon its implementation), virtual currencies are defined in the AML Regulation as 'the 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 accepted as a means of exchange to buy goods and services or for investment purposes; and which can be transferred, stored and traded electronically'.[20] The introduction of this definition implies that offering of services related to the use of cryptoassets will fall under the definition of 'providing services related to the use of cryptocurrencies' in accordance with Article 1, Paragraph 2, letter (ff) of the AML Regulation.

16 Crypto-collateralised stablecoins are stablecoins whose value is granted by the value of several cryptoassets deposited and used as collateral to permit their 'minting'. The collateralisation ratio is predetermined by their smart contract.

17 Algorithmic stablecoins are cryptoassets with no underlying collateral and whose issuance is governed by a smart contract, which is engineered to maintain their value at a constant level or pegs them to a specific fiat currency.

18 Indeed, algorithmic stablecoins are not usually issued in exchange for fiat money from clients and do not amount to a claim in relation to the issuer for the reimbursement of the purchased value.

19 Directive (EU) 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (the Fifth Anti-Money Laundering Directive).

20 Indeed, the Fifth Anti-Money Laundering Directive defines virtual currencies as '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'.



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The same regulation also regulates the offering of crypto custody activities, through the introduction of the definition of companies 'providing custodian wallet services' in accordance with Article 1, Paragraph 2, letter (ff) *bis* of the AML Regulation.

The Italian competent authorities are considering the introduction of authorisations or licensing requirements for the provision of these services such as those specified above, but no definitive proposals have been put forward. This is also because a parallel initiative has been considered at EU level (the proposed regulation on markets in cryptoassets, known as MiCA). This means that, at present, carrying out services relating to cryptoassets is only subject to registration requirements in accordance with procedures under the AML Regulation to be set out in a regulation to be issued by the Italian Ministry of Economy and Finance (MEF). (As the regulation has yet to be issued, the registration requirements are not yet applicable.)

In particular, according to Article 17 *bis* of Legislative Decree 13 August 2010, No. 141 (on loan brokerage services referred to by the AML Regulation, known as the Loan Broking Rules), to provide services related to the use of cryptocurrencies (as brokerage services), a company is required to establish a registered or administrative office or a permanent establishment in Italy, and enrol in a special section of the Register of Foreign Exchange Providers kept by the Association of Loan Agents and Credit Brokers in accordance with the procedures set out in the regulations to be issued by the MEF.

A draft of the above-mentioned regulation was published back in 2018 but the final version has not been made available yet. Therefore, no definitive details of the procedure for the registration, including timings, exceptions for passported activities, and supporting documentation, can be provided.

It is important to underline that Article 17 *bis* of the Loan Broking Rules specifies that the communication referred to above is 'an essential condition for the legal exercise of the activity'. However, considering the impossibility of complying with the regulation to be issued by the MEF, it is possible to affirm that the related activity might be provided by a company that will comply with the regulation as soon as it is released. This is the approach that some companies have adopted so far.

## V REGULATION OF EXCHANGES

Apart from the application of the AML Regulation, Italian laws do not provide a specific regime for exchanges or other cryptoasset service providers (e.g., wallet service providers). This implies that cryptoasset exchanges are subject to the rules applicable to regulated markets, multilateral trading facilities (MTFs) or organised trading facilities (OTFs) on the basis of the business model adopted by, and the type of cryptoasset traded on, the exchange.

With regard to the business model adopted by the exchange, it is first necessary to clarify that the recent decentralised finance developments have led to the rise of new protocols that could potentially revolutionise multiple areas of the traditional financial ecosystem. In the past two years we have witnessed, above all, a significant spread of decentralised exchanges (DEXs) functioning as automated market makers (AMMs). AMMs are computer protocols that allow users to trade cryptoassets in a permissionless and decentralised way, without the need for a central entity acting as market maker. The lack of a central entity is permitted by directing the liquidity supplied by users, according to specific mathematical formulas, to pools of cryptoassets, rather than deploying a traditional order book.

The decentralised nature of DEXs impedes the application of traditional rules regarding regulated markets, MTFs or OTFs. However, this does not mean that in the future specific



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regulations will be adopted to regulate them. Despite their differences from centralised business models, according to CONSOB the permissionless and decentralised business models shall not be excluded from the proposed regulation, as this would 'conflict with market developments'.[21]

Where exchanges, following different trading models (referred to as multilateral systems), deal with cryptoassets that qualify as financial instruments, they fall under the legal regime set out by the Consolidated Financial Act.[22] As a consequence, when exchanges operate as regulated markets (RMs), they fall within the scope of Articles 64 *quater* and 65 of the Consolidated Financial Act;[23] when they operate as MTFs, they are governed by Articles 65 *bis* and 65 *ter* of the Consolidated Financial Act; when they operate as OTFs, they are regulated by Articles 65 *quater* and 65 *quinquies* of the Consolidated Financial Act.[24] Finally, in the case of exchanges operating as systematic internalisers, Article 71 of FLCA applies.

Notwithstanding its decentralised nature, a cryptoasset exchange dealing with financial cryptoassets can be considered an RM, an MTF or an OTF, in which case, it needs to be managed by a market operator (MTFs and OTFs may also be managed by investment firms), which in turn must be authorised by CONSOB and muyst meet the requirements set out in Article 64 of the Consolidated Financial Act.

21 CONSOB, Final Report on Initial Coin Offerings and Crypto-Assets Exchanges, 2 January 2020, p. 11.

22 See Section II.ii on securities and investment laws for a description of cryptoassets qualifying as financial instruments.

23 Under Article 1, Paragraph 1, letter (w) *ter* of the Consolidated Financial Act, a regulated market is defined as:

> *a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Part III* [of the Consolidated Financial Act]

24 Under Article 1, Paragraph 5 *octies*, letters (a) and (b) of the Consolidated Financial Act: (1) 'multilateral trading facility' is defined as:

> *a multilateral system, operated by an investment firm or a market operator, which brings together multiple third-party buying and selling interests in financial instruments – in the system and in accordance with non-discretionary rules – in a way that results in a contract in accordance with Part II and III* [of the Consolidated Financial Act]

and (2) 'organised trading facility' is defined as:

> *a multilateral system which is not a regulated market or an MTF and in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Part II and III* [of the Consolidated Financial Act]



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Where exchanges deal with non-financial cryptoassets, there is currently no legal framework envisaged in Italy.[25] However, in its discussion document on ICOs of March 2019, CONSOB provided some guidance and proposals on how these types of exchanges should be regulated in the absence of any measure adopted by the legislator.

In particular, the framework envisaged by CONSOB is an opt-in mechanism and cryptoasset trading systems that intend to fall under CONSOB's proposed regulation must comply with certain requirements. First, the cryptoassets exchanged should have been offered through one or more dedicated cryptoasset offering platforms that meet the requirements set out by CONSOB in its discussion document on ICOs. In addition, the cryptoasset trading system's operator shall register the system on a register kept by CONSOB. With regard to the operator's system requirements, the operator should adopt a set of transparent and non-discriminatory rules and procedures for trading, selecting cryptoassets and detecting who can access the system. Moreover, the system operator should verify that the information on cryptoassets provided by the issuers and made available to the investors, is updated and comprehensive; should set up effective risk identification and risk management procedures; should be able to facilitate the flawless settlement of transactions and have organisational and operational safeguards, such as operational continuity and IT security; and system operators should lay down procedures to manage conflicts of interest and have appropriate rules and procedures for the investment of financial resources and the safekeeping of cryptocurrencies and cryptoassets.

CONSOB specifies that the type of system operators that may file a request for registration are trading venue operators, managers of crowdfunding portals aimed at funding small- and medium-sized enterprises, social enterprises and managers of cryptoasset offering platforms.

As far as service providers separate from exchanges are concerned, there is currently no legal framework envisaged in Italy, nor did CONSOB set out any proposed regulation in its discussion document on ICOs.

## VI REGULATION OF MINERS

Miners of cryptocurrencies in Italy are not subject to any specific regulatory regime. In addition, the particular nature of the mining activity does not subject miners to any other existing regulation.

## VII REGULATION OF ISSUERS AND SPONSORS

The legal framework applicable to issuers depends on the cryptoasset issued. Where the issuance concerns cryptoassets that qualify as financial instruments (i.e., investment tokens and, in rare cases, utility tokens), Article 94 et seq. of the Consolidated Financial Act may apply.

25 These are types of assets other than the financial instruments referred to in Article 1, Paragraph 2 of the Consolidated Financial Act and the investment products referred to in Paragraph 1, letter (w) *bis*.1, (w) *bis*.2 and (w) *bis*.3 of the Consolidated Financial Act, consisting of the digital representation of rights associated with investments in business projects, issued, kept and transferred through distributed ledger-based technologies, as well as traded or intended to be traded in one or more trading platforms, as highlighted by CONSOB in its final report of January 2020.



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In contrast, where the issuance concerns cryptoassets that are not of a financial nature (i.e., assets other than financial instruments or financial products), no specific regulation applies.

To date, CONSOB has only proposed implementing a specific regime in its discussion document of March 2019 on ICOs.[26] According to these rules, which are not in force yet, issuers of non-financial cryptoassets would be exempt from the rules set out in the Consolidated Financial Act and an opt-in regime could apply.

Under CONSOB's proposed regime, issuers could be companies, natural persons or networks of computer protocol developers. If the issuer were established as a corporate vehicle, it would arrange for administration and management control tools and would publish accounting reports, which would then be audited in accordance with Article 2409 *bis* of the Civil Code. Conversely, if the issuer were a natural person or a network of developers, it would be exempt from these provisions.

To protect investors' interests, CONSOB's rationale is not to impose strict organisational or capital requirements, but rather to stress the importance of transparency requirements. Following this approach, CONSOB formulated a list of minimum requirements that issuers shall meet. Issuers are required to publish and update annually a document showing information about transactions, general information on cryptoassets such as their number and valuation, and the exchange platform chosen to start trading. Issuers shall also update this initial document if there are exceptional events that may alter the offer.

Furthermore, according to this framework, there should be an indirect control mechanism whereby cryptoasset-offering platform managers may establish additional requirements for issuers that are necessary for investors to assess the investment, as well as to make sure that issuers comply with their obligations.

Nevertheless, when implementing the above-mentioned requirements, the principle of proportionality (i.e., the magnitude of the token issuance) should be taken into account.

## VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

To date, major criminal or civil enforcement actions on cryptoassets have concerned the way cryptoasset services have been offered to the public. As noted above, the offering and distribution of cryptoassets under Italian law is still not regulated. This means that an issuer is free to distribute those cryptoassets to the public and need only respect the AML requirements.

However, we have also seen that the way in which a cryptoasset is offered to the market may change its nature. A non-financial cryptoasset (e.g., a cryptocurrency such as Bitcoin) may became a financial product and so acquire a financial nature.

According to the definition of a financial product provided above, the activity of distributing non-financial cryptoassets together with the promise of specific financial returns amounts to an offering of a financial product. This offering constitutes a criminal offence under Article 166, Paragraph 1, letter (c) of the Consolidated Financial Act.

In this context, it is worth mentioning Supreme Court of Cassation criminal law decision No. 26807 of 2020, which concerned the selling of Bitcoin to the public through a website. Notwithstanding the fact that Bitcoin does not have a financial nature, in its judgment the Supreme Court held that there had been a violation of Article 166, Paragraph 1, letter (c) of

26 It has been argued that implementation of the proposed regime has been slowed down by the EU proposal for a Regulation on Markets in Crypto-assets (MiCA).



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the Consolidated Financial Act on abusive financial activity (which is punishable with one to eight years' imprisonment and a fine ranging from €4,000 to €10,000). The reason for this judgment was that Bitcoin was offered to the public with advertisements promising a specific return from that form of 'investment'.

## IX TAX

Given the absence of specific rules, the Italian fiscal authority, also in light of what was stated by the European Court of Justice in decision No. C-264/14 of 22 October 2015 (*Skatteverket v. Hedqvist*), has chosen to liken the fiscal treatment of cryptoassets to that of foreign currencies.[27] This approach seems reasonable overall, though some uncertainties remain as cryptocurrencies have been forced into a specific category of assets to which they belong only partially.

### i Income tax treatment of individual investors

As of today, Italy is one of the most favourable European jurisdictions for small individual investors in cryptocurrencies. Indeed, capital gains are deemed fiscally relevant only if the total value of crypto activities held by an individual investor has exceeded the threshold of €51,645.69 for at least seven consecutive business days over a calendar year.[28]

In addition, as has been clarified by the fiscal authority, the exchange rate to be considered to evaluate the entity of crypto deposits in a given moment is the one provided as of 1 January of the relevant year by the exchange used to acquire the cryptocurrency or, if not available, by the exchange where the investor has performed the majority of his or her transactions during the course of the year.[29]

Moreover, although the Italian fiscal authority has not clarified its position on the matter, it is generally accepted that crypto-to-crypto transactions should not be considered fiscally relevant, so capital gains should be realised only when cryptocurrencies are exchanged back to fiat money.

As it is the case for foreign currencies, relevant capital gains are subject to a substitutive tax at a flat rate of 26 per cent and, therefore, do not contribute to the determination of taxable income for individual investors.

Finally, it is worth noting that the Italian fiscal authority has stated that cryptoassets acquired in ICOs should be treated as foreign currencies as well, so the fiscal treatment applied to them should correspond to that of cryptocurrencies acquired through the use of exchanges.

### ii Corporate income tax

From the perspective of an enterprise, the income generated by operating in cryptoassets is subject to taxation as with any other corporate income. However, the specific nature of these assets may give rise to doubts as to the accounting rules applicable for an accurate preparation of the company balance sheets, with a number of potential fiscal implications.

27 Agenzia delle Entrate, Resolution 72/E – 12 September 2016.
28 Article 67, Paragraph 1 *ter*, of the Italian Consolidated Law on Income Tax.
29 Agenzia delle Entrate, Interpello No. 956-39/2018 and Interpello 903-47/2018.



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### iii Value added tax regime

The Italian fiscal authority, recalling the *Skatteverket v. Hedqvist* decision of 2015, has confirmed that the purchase and sale of cryptoassets is generally exempt from value added tax (VAT).[30]

However, the Italian fiscal authority has emphasised that the issuance of utility tokens after an ICO is subject to ordinary VAT rules,[31] provided that the issued tokens assign to their holders the right to a determined service offered by the issuer, and do not perform the function of a digital currency or of an investment product.

## X LOOKING AHEAD

Unlike other European countries, Italy does not have a complete legal framework for cryptoasset issuers and intermediaries. As indicated above, CONSOB's legal framework proposal may be stopped by the proposed European Regulation on Markets in Crypto-assets.

At present, this means that Italy could become a potential hub for cryptoasset start-ups, as there is no specific regulation that might block or impair a development of this kind.

However, this will only be the case to the extent that the absence of regulatory provision is seen by investors as representing an opportunity, rather than as a source of uncertainty (which is usually not appreciated by some market operators).

To prevent any uncertainty of this kind, the Italian regulator may resolve the position by using soft law, such as specific public opinions from relevant authorities on how existing rules will apply to cryptoasset services.

30 At the European level see Court of Justice of the European Union, 22 October 2015, C-264/14, Case *Skatteverket v. David Hedqvist*, confirmed by Italia authority in Agenzia delle Entrate, Resolution 72/E – 12 September 2016.

31 Agenzia delle Entrate, Answer No. 110/2020.



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**Appendix 1**

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ISBN 978-1-83862-839-0

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