

**Money Laundering through
Cryptoassets: A Comparative Analysis
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by

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Money Laundering through Cryptoassets: A Comparative Analysis of the UK and EU Approach

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Abstract

This study examines the differences in the definitions of cryptoassets, provided in the 5th Anti-money Laundering Directive (“5AMLD”), and the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (“the Regulations”). It argues that these differences impact the effectiveness of the European Union’s (EU’s) and United Kingdom’s (UK’s) AML measures. It exemplifies that the Regulations’ more inclusive term of “cryptoasset” is more effective, compared to the 5AMLD’s “virtual currencies”. However, both still have room for improvement to keep up with this evolving sector.

Introduction

Cryptoassets’ introduction into the financial system and their ever-expanding popularity created a plethora of dangers. One example is their use to launder illegal proceeds. Cryptoassets, such as Bitcoin, are especially susceptible to money laundering, since transactions are facilitated by a peer-to-peer software that does not keep any identification information of its users, making it essentially anonymous.¹ The EU attempted to expand its AML measures to encapsulate cryptocurrencies through 5AMLD.² This Directive expands upon the scope of the previous AML Directives. However, as shown below, this was done poorly, since the definition provided in 5AMLD is too restrictive to have any significant impact. Contrastingly, it is argued that the UK’s Regulations³ have done a better job in defining those assets that should be subject to money-laundering measures.

This paper starts by providing an explanation of how money laundering works, and what cryptoassets are. It exemplifies the ways cryptoassets can facilitate money laundering and briefly describes the UK’s and EU’s regulatory attempts. It then

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¹ Norbert Michel and Gerald Dwyer, “Bits and Pieces: The Digital World of Bitcoin Currency” (*The Heritage Foundation*, 16 September 2015), <https://www.heritage.org/government-regulation/report/bits-and-pieces-the-digital-world-bitcoin-currency>; Edgar G. Sanchez, “Crypto-Currencies: The 21st Century’s Money Laundering and Tax Havens” (2017) 28 *University of Florida Journal of Law & Public Policy* 167, 180.

² Directive (EU) 2018/843 of the European Parliament and of the Council 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, and amending Directives 2009/138/EC and 2013/36/EU (5AMLD).

³ Money Laundering and Terrorist Financing (Amendment) Regulations 2019 (“the Regulations”).

moves on to compare the definitions used by the legislative instruments, showcasing why the Regulations' use of the term "cryptoassets" achieves its objectives more successfully than its counterpart term of "virtual assets". Naturally, these definitions also affect the class of service providers included in the two legislative perimeters. Understanding their scope is pivotal for regulators, but more importantly for market players who must know whether they are under any AML obligation. It is supported that the EU's restrictive approach hinders the 5AMLD's effectiveness and poses little trouble to launderers.

This study's last part demonstrates that both the Regulations and the 5AMLD are still falling behind current developments. The emergence of non-fungible tokens (NFTs) and the likely failure of both to include them in their scope is examined. The final development examined is the newly proposed Markets in Crypto Asset Regulation⁴ (MiCA), which could alter the way in which the EU approaches cryptoassets.

This paper aims to establish: (1) that currently, the EU falls behind, compared to the UK in its AML through cryptoassets framework; (2) that both jurisdictions are unlikely to be able to deal with the increasing use of NFTs; and (3) that new regulations could contribute positively for the EU.

Laundering money using cryptoassets

To appreciate the role cryptoassets can play in money laundering, it is first necessary to understand what money laundering is. This section provides an explanation of that crime, examining then what cryptoassets are, and their categorisation, to reach an understanding of the ways in which they can be used to launder proceeds of crime. Lastly, the regulatory attempts in the EU and the UK are mentioned.

What is money laundering?

Money laundering is the process of disguising the source of illegally obtained funds. It describes the "conduct that occurs after the commission of another, 'predicate', offence" to legitimise the resulting proceeds.⁵ This practice is usually divided into three stages: (1) "placement"—where illicit proceeds are first entered into the financial system; (2) "layering"—conducting multiple, complex transactions so that the tracing of the funds' original source becomes impossible to find; and (3) "integration"—incorporating the proceeds into the economic system as legitimate funds.⁶ The rationale behind its separate criminalisation stems from the many negative consequences it creates. These include,

"the re-financing of crime, the penetration of the licit economy, and the corruption of government, [or even] the destabilisation of the global financial system because of the rapid and unpredictable movement of enormous profits through the system."⁷

⁴ Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM/2020/593 final (MiCA Proposal).

⁵ Neil Boister, *An Introduction to Transnational Criminal Law* (Oxford: Oxford University Press, 2018), p.168.

⁶ Boister, *An Introduction to Transnational Criminal Law* (2018), pp.168–169.

⁷ Boister, *An Introduction to Transnational Criminal Law* (2018), p.171; Vito Tanzi, "Money Laundering and the International Financial System", (IMF Working Paper No.96/55, IMF 1996), pp.6–7.

Such is its extent that the United Nations estimate that around \$800 billion to \$2 trillion are laundered annually, amounting to 2–5% of the world's GDP.⁸ The placement of funds can happen through the use of cryptoassets. This enables for the conduct of a series of transactions quickly, due to their automated nature, and relatively anonymously, compared to other forms of transactions, hence allowing for sufficient layering to take place.

Defining cryptoassets

Understanding cryptoassets' operation is essential to appreciate the manners in which these can be used for money laundering. These assets lack any physical representation, being instead cryptographically created, relying on the "use of blockchain technology to record ownership and validate authenticity."⁹ Cryptography is a method of encrypting data through mathematical algorithms used to create and validate data structures.¹⁰ This happens by recording all assets and transactions on a decentralised electronic ledger (the blockchain) which is publicly visible, and where all entries must be verified by consensus among its users.¹¹ Thus, securing the validity of all assets and their ownership. Each cryptoasset usually belongs in one of three categories, according to its functions. These are: (1) payment tokens; (2) investment tokens; and (3) utility tokens. The first category essentially covers cryptocurrencies, which are meant to have the same function as fiat currencies,¹² meaning to act as a medium of exchange, store of value, and unit of account.¹³ Investment tokens, are used to provide those holding them with rights of ownership, and in some cases, with dividend-like entitlements.¹⁴ Lastly, utility tokens are used for accessing specific products, or services provided by the token-issuer.¹⁵ It must be noted that there are also hybrid tokens which combine these characteristics.¹⁶ Further, it is also possible for certain tokens not to fall within any of the established categories as these are only phenomenological rather than legal categorisations.¹⁷ Indeed these tokens' legal status is something currently discussed in multiple national parliaments and courtrooms.¹⁸

⁸ UNODC, "Money Laundering", <https://www.unodc.org/unodc/en/money-laundering/overview.html>.

⁹ Eirini Efstathiou, "The NFT Craze: A Quest to Define the Substance Behind the World's 'new art Form'" (*Law-Forward*, 16 April 2021), <https://www.law-forward.com/post/the-nft-craze-a-quest-to-define-the-substance-behind-the-world-s-new-art-form>.

¹⁰ Robby Houben and Alexander Snyers, "Cryptocurrencies and Blockchain: Legal Context and Implications for Financial Crime, Money Laundering and Tax Evasion" (*European Parliament's Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance*, June 2018), p.15.

¹¹ Peter Yeo, "Crypto-assets: regulators' dilemma" (2020) 4 *Journal of Business Law* 265.

¹² Robby Houben, and Alexander Snyers, "Crypto-assets: Key Developments, Regulatory Concerns and Responses" (*European Parliament's Committee on Economic and Monetary Affairs*, April 2020), p.18.

¹³ Claude Brown, Tim Dolan, and Karen Butler, "Cryptoassets and Initial Coin Offerings" in Jelena Madir (ed.) *Fintech—Law and Regulation* (Cheltenham: Edward Elgar Publishing, 2019), p.76.

¹⁴ European Banking Authority, "Report with Advice for the European Commission on Crypto-assets" (*EBA*, 2019), p.7.

¹⁵ Stéphane Blemus, and Dominique Guégan, "Initial Crypto-asset Offerings (ICOs), Tokenization and Corporate Governance" (2020) 15 *Capital Markets Law Journal* 191, 199; *EBA*, "Report with Advice for the European Commission on Crypto-assets" (*EBA*, 2019), p.7.

¹⁶ Philip Maume, and Mathias Fromberger, "Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws" (2019) 19(2) *Chicago Journal of International Law* 548, 558.

¹⁷ Maume, and Fromberger, "Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws" (2019) 19(2) *Chicago Journal of International Law* 548, 558.

¹⁸ Will Glover and Angharad Hughes, "Deciphering Crypto Part 2—AA Victory for Common Sense? (AA v Persons Unknown)" (*LexisNexis*, 4 June 2020), [https://www.lexisnexis.co.uk/blog/dispute-resolution/deciphering-crypto-part-2-aa-victory-for-common-sense-\(aa-v-persons-unknown\)](https://www.lexisnexis.co.uk/blog/dispute-resolution/deciphering-crypto-part-2-aa-victory-for-common-sense-(aa-v-persons-unknown)); Amy Held, "Does Situs Actually Matter in Disputes Concerning Bitcoin?" (2021) 4 *Journal of International Banking & Financial Law* 269.

Ownership of these tokens is facilitated through the use of virtual wallets, which provide a pair of cryptographic keys to each user. The public key is accessible to every other blockchain user, functioning as the address in which its holder can receive tokens.¹⁹ Further, the private key is secret and is meant to be used by its holder when signing blockchain transactions.²⁰ The purchase of cryptoassets happens through exchanges which facilitate the exchange of fiat currencies to cryptocurrencies or between different cryptocurrencies.²¹ To use them, users simply have to open an account in the exchange provider's platform.²² These exchanges allow users to purchase only certain types of cryptocurrencies, whilst most cryptoassets can be purchased through online crypto markets.²³

Money laundering through Cryptoassets

The link between money laundering and cryptoassets is an emerging one, which academics and practitioners alike are yet to grasp fully. If one applies the three previously mentioned stages of money laundering to cryptoassets, he would be able to extract the following conclusions. Placement of proceeds could happen by investing in cryptoassets just as it happens through investments in any other kind of assets, such as stocks, real estate, and artwork. Nonetheless, with cryptoassets, there is the benefit of an additional lack of transparency for launderers, since fiat-to-crypto exchanges were not as heavily AML regulated as those service providers trading in assets mentioned above. Additionally, moving on to layering, this is the stage where cryptoassets are the most useful for launderers. Due to their pseudo-anonymous nature and the ease with which huge numbers of transactions can be carried out, in a relatively quick manner, cryptoassets are becoming one of the most suitable methods for anyone to hide the origins of illicitly obtained funds. Regarding the last stage of laundering, integration, this can happen in two ways. At first, a launderer could convert his assets back into fiat currencies and then use them within the licit financial system. Alternatively, he could keep them in the form of cryptoassets, and simply use them for legal purposes in that form. Though this may prove harder since cryptoassets are less widely accepted than fiat currencies, this is slowly changing. The reason for that is that cryptoassets are constantly becoming more widely accepted for everyday transactions, thus allowing launderers to avoid converting their assets back into fiat currencies, risking raising suspicions, and instead allowing them to be used as cryptos within the mainstream economic system, one transaction at a time.

All types of tokens may be easily used for the purpose of laundering money. Even though tokens' transaction histories are publicly visible in most cases, these can be anonymised with the use of specialised tumbler services.²⁴ These services

¹⁹ Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Cambridge, MA: Harvard University Press, 2018), p.16.

²⁰ De Filippi and Wright, *Blockchain and the Law: The Rule of Code* (2018), p.16.

²¹ De Filippi and Wright, *Blockchain and the Law: The Rule of Code* (2018), p.27.

²² Lars Hafke, Mathias Fromberger, and Patrick Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 128.

²³ Hafke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 129.

²⁴ Hafke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 130–131.

operate by simulating large volumes of transactions, sending their users' tokens from one public key to another, all of which are held by the tumbler.²⁵ It then mingles all tokens, hence sending other tokens back to the user, or in certain cases even to a second public key maintained by the same person.²⁶ This makes the origin of those tokens almost completely untraceable,²⁷ thus allowing them to be integrated into the financial system as seemingly clean funds.

Practically, it is not hard for anyone to complete all three stages of money laundering with the use of cryptoassets only. Placement into the crypto market could happen using an exchange from a loosely regulated jurisdiction. Having entered the system, the origin of those proceeds could be disguised with the use of a tumbler service or by carrying out enough transactions manually. These should provide the launderer with enough layering to make their source untraceable. Then, these assets can be integrated into the financial system either by converting them back to fiat currencies, or even by using them as cryptos.

Though estimating this practice's extent is hard, it suffices to say that in a single incident in June 2021, London's Metropolitan Police confiscated £114 millions of an undisclosed cryptoasset during a money laundering investigation.²⁸ Compared with other jurisdictions, no court cases have been reported in the UK so far. Contrastingly, in the US, a man was convicted to a 15-year imprisonment in July 2021 for laundering using cryptocurrencies having first defrauded his victims of more than \$16 million.²⁹ This is not to say that there have not been cases of money laundering with the use of cryptocurrencies in the UK hitherto. Indeed, a number of persons have been convicted. One such case is that of Grant West, who was described as "a one-man cybercrime wave".³⁰ To achieve his objectives West carried out cyberattacks to more than 100 companies, selling the information he had stolen through the dark web.³¹ This is the area of the world wide web that is not indexed by regular search engines, thus allowing for the commission of illegal transactions without its users becoming traceable.³² Transactions in the dark web take place with the use of cryptocurrencies, hence placing the assets in the financial system. These can later on be hidden with the use of one of the layering techniques described above, and then integrated back into the financial system to be used as clean money. However, in the case of West, the Metropolitan Police's cybercrime unit and the FBI were able to track his activities and put an end to his crimes. In May 2018, he was convicted by the Southwark crown court to 10 years in prison

²⁵ Haffke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 130–131.

²⁶ Haffke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 130–131.

²⁷ Haffke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 130–131; Steven Goldfeder, Harry Kalodner, Dillon Reisman, Arvind Narayanan, "When the cookie meets the blockchain: Privacy risks of web payments via cryptocurrencies" (2018) 4 *Proceedings on Privacy Enhancing Technologies* 179.

²⁸ Robert Hart, "UK Police Seize \$160 Million in Cryptocurrency In Money Laundering Investigation" (*Forbes*, 25 June 2021), <https://www.forbes.com/sites/roberthart/2021/06/25/uk-police-seize-160-million-in-cryptocurrency-in-money-laundering-investigation/>.

²⁹ Office of Public Affairs, "Cryptocurrency Fraudster Sentenced for Money Laundering and Securities Fraud in Multi-Million Dollar Investment Scheme" (United States Department of Justice, 8 July 2021), <https://www.justice.gov/opa/pr/cryptocurrency-fraudster-sentenced-money-laundering-and-securities-fraud-multi-million-dollar>.

³⁰ Mattha Busby, "Bitcoin worth £900,000 Seized from Hacker to Compensate Victims" (*The Guardian*, 23 August 2019), <https://www.theguardian.com/technology/2019/aug/23/bitcoin-seized-hacker-grant-west-uk-compensate-victims>.

³¹ Busby, "Bitcoin worth £900,000 Seized from Hacker to Compensate Victims" (*The Guardian*, 23 August 2019).

³² Ahmed Ghappour, "Data Collection and the Regulatory State" (2017) 49(5) *Connecticut Law Review* 1733.

for charges including money laundering, with his proceeds, amounting to £915,305.77 in bitcoin, being seized with a court order.³³ Additional examples of launderers using cryptocurrencies include that of Seregis Teresko, “a convicted Latvian money-launderer with ties to organised crime”.³⁴ The importance of this case lies on the fact that it was the first time an English court ordered the seizure of a launderer’s assets, which were in the form of cryptoassets.³⁵ Specifically, Kingston crown court ordered the confiscation of £1.25 million worth of cryptocurrencies, which Teresko held in the form of 295 bitcoin tokens.³⁶ It is submitted that the likelihood of further prosecutions and hence, reported cases is increased if one considers that the Financial Conduct Authority (FCA) and Europol estimated that between £3–4 billions are laundered annually in the EU using of cryptoassets.³⁷ Indeed, the FCA has recognised since 2018 that “risks of cryptoassets being used in money laundering are expected to grow as cryptoassets become increasingly accessible.”³⁸ This will inevitably give rise to an increase in prosecutions which will make the need for regulatory tools that are sufficiently effective even more pressing.

Regulatory attempts

The starting point for any regulatory attempt on money laundering is the Financial Action Task Force (FATF), the leading international organisation when it comes to setting AML standards. The FATF first issued guidance on cryptoassets back in 2014,³⁹ and it has kept updating its recommendations ever since. In March 2021, another update was issued on the FATF’s guidance for virtual assets. Though this guidance has been issued after the creation of both the UK’s and EU’s rulesets, it is still useful to examine some of its aspects, in order to gain an understanding of the approach the FATF has in defining and regulating cryptoassets. For the purposes of this study, it is important to mention that the definitions of virtual assets (VA) and virtual assets service providers (VASP) are broadened through this proposed guidance to include, among others, NFTs, DeFi platforms used in crypto escrow and decentralised application operators and owners.⁴⁰ What should be noted about the FATF’s philosophy on defining VA is that this should be done broadly, while also prioritising an asset’s functional aspects, rather than its technological characteristics.⁴¹ It is submitted that this technologically neutral approach is the most suitable in order for regulations to have a preventative effect against new

³³ Busby, “Bitcoin worth £900,000 Seized from Hacker to Compensate Victims” (*The Guardian*, 23 August 2019).

³⁴ Caroline Binham, “Surrey Police get budget boost after £1.25m bitcoin seizure” (*Financial Times*, 19 July 2018), <https://www.ft.com/content/0a7782e8-8b6b-11e8-bf9e-8771d5404543>.

³⁵ Binham, “Surrey Police get budget boost after £1.25m bitcoin seizure” (*Financial Times*, 19 July 2018).

³⁶ Binham, “Surrey Police get budget boost after £1.25m bitcoin seizure” (*Financial Times*, 19 July 2018).

³⁷ Financial Conduct Authority, “Cryptoassets Taskforce: Final Report” (FCA, 2018), p.34; Shiroma Silva, “Criminals hide ‘billions’ in crypto-cash—Europol” (BBC, 12 February 2018), <https://www.bbc.com/news/technology-43025787>; Nicholas Ryder, “Cryptoassets, Social Media Platforms and Defence Against Terrorism Financing Suspicious Activity Reports: A Step into the Regulatory Unknown” (2020) 8 *Journal of Business Law* 668, 670.

³⁸ “Cryptoassets Taskforce: Final Report” (FCA, 2018), p.34; Shiroma Silva, “Criminals hide ‘billions’ in crypto-cash—Europol” (BBC, 12 February 2018), p.33.

³⁹ FATF, “Virtual Currencies: Key Definitions and potential AML/CFT Risks” (FATF, 2014).

⁴⁰ George Agathangelou, “Crypto-assets Regulation Around the World (part 2 of 3)” (Grant Thornton, 3 June 2021), <https://www.grantthornton.com.cy/insights/Distributedledgertechology/crypto-assets-regulation-around-the-world-part-2-of-3/>.

⁴¹ FATF, “Draft Updated Guidance for a Risk-based Approach to Virtual Assets and VASPs” (FATF, 2021), pp.19–20.

technologies, rather than simply reacting against already existing advancements. One must always bear in mind that guidance issued by the FATF has no binding effect, and its incorporation into national or EU legislation is largely dependent upon the intention of the legislator.

As mentioned, attempts to regulate the use of cryptoassets for money laundering have been made both by the UK and the EU. In the EU, this was done through the 5AMLD. The Directive's purpose was for "competent authorities [to] be able, through obliged entities, to monitor the use of virtual currencies."⁴² Whilst at the same time the 5AMLD should enable national Financial Intelligence Units (FIUs) to identify owners of virtual currency addresses associated with money laundering.⁴³ Through its definition of "virtual currencies", this Directive expanded the scope of the previous four AML Directives. This brought fiat-to-crypto exchange providers, and custodian wallet providers within the scope of the EU's AML measures.⁴⁴ By including them as "obliged entities", these service providers must adhere to practices, such as customer due diligence, and producing suspicious activity reports.⁴⁵ Member states had until the 10 January 2020 to incorporate the Directive.⁴⁶

In turn, the UK adopted the Regulations, amending the already-existing 2017 Regulations.⁴⁷ Though the Regulations are based on the 5AMLD, their scope, and effectiveness differ greatly. Indeed, the scope of the 5AMLD was seen as too restrictive, hence the UK regulators opted for a broader class of regulated assets.⁴⁸ This was achieved by adopting the term "cryptoassets" instead of "virtual currencies", which includes a wider class of service providers within the Regulations' perimeter. These two definitions and their effects are examined in the following section. Regarding the Regulations' content, it must be recognised that service providers are required to adhere to certain compliance rules, such as implementing customer due diligence, or in the case of high-risk transactions, using enhanced due diligence.⁴⁹ Further, for the purposes of these Regulations, cryptoasset service providers are required obtain prior authorisation from the FCA, in the form of a registration process. This process includes providing certain details about the provider and certain key individuals within its business. Such information includes among others, business and marketing plans, the business' structural organisation and its beneficial owners along with its AML and risk assessment frameworks.⁵⁰

It is worth noting that the current registration process has proven to be too arduous for most cryptoasset service providers. As of the time of this writing only

⁴² 5AMLD, Rec. 8.

⁴³ 5AMLD, Rec. 9.

⁴⁴ Andreas Dehio, Paloma Fierro, and Harry Eddis, "EU Opens Door for Cryptocurrency Exchanges to Apply AML Rules" (*Linklaters*, June 2018), <https://www.linklaters.com/en/insights/blogs/fintechlinks/2018/june/eu-opens-door-for-cryptocurrency-exchanges-to-apply-aml-rules>.

⁴⁵ Will Glover and Angharad Hughes, "Deciphering Crypto—Part 3—Taking Aim at Cryptoassets—the Fifth Money Laundering Directive of the EU and the UK AML Regulations 2019" (LexisNexis, 16 June 2020), <https://www.lexisnexis.co.uk/blog/dispute-resolution/deciphering-crypto-part-3-taking-aim-at-cryptoassets-the-fifth-money-laundering-directive-of-the-eu-and-the-uk-aml-regulations-2019>.

⁴⁶ 5AMLD, art.4.

⁴⁷ Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017.

⁴⁸ Explanatory Memorandum to the Money Laundering and Terrorist Financing Regulations, para.7.9.

⁴⁹ Neil Williams, "Cryptoassets: Temporary Registration Regime Extended" (Gherson, 8 June 2021), <https://www.gherson.com/cryptoassets-temporary-registration-regime-extended>.

⁵⁰ Robert Bell and George Kestel, "FCA Regulation of Cryptoassets" (Rosenblatt, 5 March 2021), <https://www.rosenblatt-law.co.uk/media/fca-regulation-of-cryptoassets-rosenblatts-tech-team/>.

five firms have received approval, with 167 other businesses having outstanding applications with the FCA, and another 77 new businesses pending full approval.⁵¹ This has caused the FCA to extend the registration deadline it had previously set, from July 2021 to the end of March 2022.⁵² Commentators have highlighted the FCA's inability to deal with the volume of applications received.⁵³ Arguably, this is an indicator that the FCA had miscalculated both the resources it had committed to this process and the complexity of the entire registration framework. This is also supported by an admission from John Glen, Economic Secretary to HM Treasury, who stated that "over 90% of the firms assessed withdrew their applications after intervention from the FCA".⁵⁴ Indeed, criticisms of the FCA's approach extend far beyond what has been mentioned here and have been made public by a letter from CryptoUK, the country's digital assets trade association, to the Chancellor of the Exchequer.⁵⁵ Without venturing outside the scope of this article, it is worth mentioning that delays in its implementation, and the resulting tensions between market players and the regulator, all serve as signs that the Regulations' effectiveness can come under question in the absence of a change in circumstances.

Comparing approaches

Having examined the wider context under which these regulatory attempts are taking place, this study moves on to compare the content of the Regulations and the 5AMLD. This section focuses on the two aforementioned definitions and their impact in expanding the scope of their respective AML rules. After an examination of their differences, it is demonstrated that the term "cryptoassets" includes a greater variety of tokens, compared to the term "virtual currencies". Further, the differences in the types of service providers falling within the respective legislative perimeters of the 5AMLD and the Regulations are scrutinised, to demonstrate that the present form of the European Directive leaves significant gaps.

Definitional differences

The term "virtual currencies", in art.1(2)(d) of the 5AMLD, defines them 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."⁵⁶

Contrastingly, "cryptoassets" are defined in reg.4(7) as,

⁵¹ Williams, "Cryptoassets: Temporary Registration Regime Extended" (Gherson, 8 June 2021).

⁵² Williams, "Cryptoassets: Temporary Registration Regime Extended" (Gherson, 8 June 2021).

⁵³ Williams, "Cryptoassets: Temporary Registration Regime Extended" (Gherson, 8 June 2021).

⁵⁴ Ellesheva Kissin, "FCA Extends Crypto Registration Deadline Amid Money Laundering Concerns" (*Global Banking Regulation Review*, 4 June 2021), <https://globalbankingregulationreview.com/bank-regulation/fca-extends-crypto-registration-deadline-amid-money-laundering-concerns>.

⁵⁵ Letter from CryptoUK to the Chancellor of the Exchequer (15 March 2021), https://drive.google.com/file/d/1iUt-Dc4EQnzHrpSxu3LLmwIT_b8QwSzU/view.

⁵⁶ 5AMLD, art.1(2)(d).

“a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically.”⁵⁷

The UK regulator included two qualifiers contained in the 5AMLD, (1) that the asset must be a digital representation of value; and (2) that they can be transferred, stored, or traded electronically. This piece focuses on the remaining elements of the definitions, where their differences lie.

As pointed by Glover and Hughes, the European legislator focuses on both the form and nature of the asset, whilst the UK definition focuses solely on the form.⁵⁸ Hence, the definition of “virtual currencies” while more verbose, is in fact narrower.⁵⁹ This is because the term “virtual currencies” includes three additional qualifiers which relate to the legal nature of the assets regulated. These are: (1) that the asset must not be regulated by any state authority; (2) that they must not hold the legal status of money or currency; and (3) that tokens need not be attached to any legally established currency. Though not the most restrictive aspect of this definition, their inclusion seems to be unwarranted.

Regarding the last of these three characteristics, this is set as a clarification, rather than a separate requirement.⁶⁰ Tokens whose value is attached to a legally established currency, or any other pool of assets, are referred to as “stablecoins” and are considered a subclass of payment tokens.⁶¹ Arguably, this clarification could have been omitted from the definition since its presence does not have any meaningful impact.

Where the two definitions take antithetical stances is upon the requirement for virtual currencies to be a “means of exchange”. Though it could be argued that all tokens could act as a means in an exchange, it has been suggested that this wide interpretation is not what the legislators intended as it would make the definition essentially limitless.⁶² According to Haffke et al., this phrase does not refer to assets that are traded for the purpose of consumption or use by the recipient, but to those assets that are used as “an intermediary object”.⁶³

Practically, this means that only one of the three types of tokens, namely payment tokens, fall within the definition of “virtual currencies”. The reason is that neither investment tokens, nor utility tokens have the intended purpose of acting as a medium of exchange, they are not usually used as a *means to facilitate trade*. This limitation has been recognised by the EU in several policy documents, which acknowledge the limited use of the 5AMLD. The restricted scope of the Directive is best summarised in the following schedule by the European Commission:⁶⁴

⁵⁷ Regulations, reg.4(7).

⁵⁸ Glover and Hughes (fn.45).

⁵⁹ *ibid.*

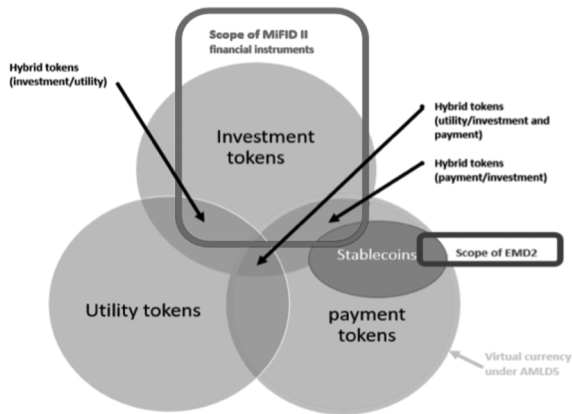
⁶⁰ Haffke, Fromberger, and Zimmermann, “Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them” (2020) 21 *Journal of Banking Regulation* 125, 134.

⁶¹ Houben, and Snyers, “Crypto-assets: Key Developments, Regulatory Concerns and Responses” (*European Parliament’s Committee on Economic and Monetary Affairs*, April 2020), p.20.

⁶² Haffke, Fromberger, and Zimmermann, “Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them” (2020) 21 *Journal of Banking Regulation* 125, 135.

⁶³ Haffke, Fromberger, and Zimmermann, “Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them” (2020) 21 *Journal of Banking Regulation* 125, 136 (emphasis added).

⁶⁴ Commission Staff Working Document Impact Assessment Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 SWD/2020/380 final, 7.

Figure 1: Interactions between EU financial services legislation and the different types of tokens

Contrastingly, the definition of “cryptoassets” has omitted the phrase “means of exchange”. Rather, it contains the additional descriptor that such assets could be “a digital representation of...contractual rights”. This should be interpreted as an indicator of the legislator’s intention to include both investment and utility tokens within the Regulations’ scope.⁶⁵ Regarding investment tokens, these assign their holders with rights of ownership or rights to dividends, just like investment contracts.⁶⁶ Similarly, the purpose of utility tokens is mainly to provide their holders with access to products or services. Presently, there is a growing consensus among practitioners that both types of tokens fall within the ambit of the Regulations, whilst this is not the case for the 5AMLD.⁶⁷

Nevertheless, the UK definition does not come without its problems. Though it is certainly more inclusive than its EU counterpart, it is also harder to draw the lines of the UK’s regulatory perimeter. While certain practitioners have gone as far as saying that all cryptoassets fall within its ambit,⁶⁸ others have been more reserved. As technology advances, and its crypto-related products keep diversifying, it will be hard to tell if every product will fall within the definition provided. Instead, it is submitted that as time progresses, certain cryptoassets may come closer to the UK’s regulatory borderline, therefore necessitating a more detailed scrutiny of their functions. This case-by-case approach is something that has already been pointed out as a possibility by legal practitioners.⁶⁹ It is easy to see why this

⁶⁵ Nina Moffatt, Arun Srivastava, and Lara Kaplan, “New UK Anti-Money Laundering and Counter Terrorist Financing Requirements for Cryptoasset Businesses—Are You Ready?” (Paul Hastings, 6 January 2020), <https://www.paulhastings.com/insights/client-alerts/new-uk-anti-money-laundering-and-counter-terrorist-financing-requirements-for-cryptoasset-businesses-are-you-ready>.

⁶⁶ Valeria Ferrari, “The Regulation of Crypto-assets in the EU—Investment and Payment Tokens Under the Radar” (2020) 27(3) *Maastricht Journal of European and Comparative Law* 325, 331.

⁶⁷ Helena Duong, “Financial Crime Update” (2020) 4 *Journal of International Banking & Financial Law* 271; Madeleine Yates, “Forget Winter, Regulation is Coming: UK Regulation and Cryptoassets” (2020) 4 *Journal of International Banking & Financial Law* 744, 745; Norton Rose Fulbright, “Regulation Update” (2020) 3 *Journal of International Banking & Financial Law* 207, 210.

⁶⁸ Mary Young, and Jill Lorimer, “Developments in the UK crypto-asset landscape” (2021) 2 *International Business Law Journal* 241, 243.

⁶⁹ Pascal Bine et al, “Regulatory Approaches to Nonfungible Tokens in the EU and UK” (Skadden, 15 June 2021), <https://www.skadden.com/insights/publications/2021/06/regulatory-approaches-to-nonfungible-tokens>.

approach is more prudent, since the final word on the question of what falls within the FCA's regulatory ambit, lies with the Authority itself and with the courts.

Yet, the FCA's position still requires further improvement in order to facilitate an easier transition for cryptoasset service providers. It is recommended that the issuance of additional guidance on how to interpret the definition of "cryptoassets" is warranted. This guidance could help reduce the time required for market players to apply and register with the Regulator. This is a process which has proven to be excruciatingly tedious, since as it has been mentioned, only five crypto firms have managed to comply with the FCA's requirements until June 2021.⁷⁰

Why the UK position is superior

For the purposes of this study, it is important to analyse the reasons why the inclusion of investment and utility tokens is the right path for financial regulators. As noted, all these tokens rely on the same technology, which allows them to be stored and traded electronically, regardless of their function.⁷¹ Specifically, payment, investment, and utility tokens, can all act as a means of transferring value, therefore being equally suitable as money laundering instruments.⁷² It is submitted that despite the tokens' differences, which mandate the use of taxonomy when studying them, these differences should not bar regulators from including them all within the ambit of national AML measures.

This argument is also supported by the current position of the FATF. In October 2018, FATF adopted its own definition of "virtual assets"⁷³ (which largely overlaps with what this study has referred to as cryptoassets). That definition is:

"a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations."⁷⁴

Evidently, the 5AMLD's scope is narrower than the standard set by FATF, which includes all three types of tokens in its own definition. The European stance has been characterised by some as lacking the risk awareness other legislators had.⁷⁵ This position needs to be contrasted with the definition set by the UK Regulations. One can conclude that the UK definition falls closer to the global standard, compared to its EU counterpart. This is also in line with the UK Government's policy of becoming a global leader in financial technologies and their regulation.⁷⁶

⁷⁰ Oliver Smith, "FCA Gives UK Crypto Eight Months to Get its Anti-money Laundering Measures In-order" (*AltFi*, 4 June 2021), https://www.altfi.com/article/7964_fca-gives-uk-crypto-eight-months-to-get-its-anti-money-laundering-measures-in-order.

⁷¹ Haffke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 137.

⁷² Houben, and Snyers, "Crypto-assets: Key Developments, Regulatory Concerns and Responses" (*European Parliament's Committee on Economic and Monetary Affairs*, April 2020), p.50.

⁷³ FATF, "FATF Report to G20 Leaders' Summit" (FATF, 2019).

⁷⁴ FATF, "FATF Report to G20 Leaders' Summit" (FATF, 2019).

⁷⁵ Houben, and Snyers, "Crypto-assets: Key Developments, Regulatory Concerns and Responses" (*European Parliament's Committee on Economic and Monetary Affairs*, April 2020), p.48.

⁷⁶ HM Treasury, "UK regulatory approach to cryptoassets and stablecoins: Consultation and call for evidence" (HM Treasury, January 2021), 2 11.

Moreover, if one considers the definitions adopted by other European nations, arguably the UK still maintains the lead. Analysis conducted by Buttigieg and Cuyle, regarding the Maltese and French regulatory framework concludes that both set higher standards compared to the 5AMLD.⁷⁷ However, both jurisdictions lag behind when compared to the UK. Concerning Malta, their legislation has failed to include utility tokens.⁷⁸ As for France, its regulatory position, compared with the mainstream cryptoasset taxonomy is somewhat convoluted. The relevant PACTE Act⁷⁹ creates two categories of assets, tokens (*jetons*) and digital assets (*actifs numériques*), with the former being a subcategory of the latter.⁸⁰ However, the definition of digital assets contains the requirement that they must be “a means of exchange”.⁸¹ It also creates some confusion regarding the reasons behind treating certain investment tokens solely as securities, instead of submitting them to the regulations of tokens, and digital assets.⁸² Consequently, one could argue that the UK approach does manage to adhere to higher standards by being more inclusive, and straightforward than the EU and some of its member states.

Impact on market players

Having examined the definitions, it is now useful to consider the ramifications these may have on fintech market players. Interestingly, the 5AMLD has omitted to include key players of the crypto market, into its definition of obliged entities. One such category is the providers of crypto-to-crypto exchange services, which do not fall within the definition of cryptocurrency exchanges.⁸³ Such persons are not subject to AML measures, unless they are also fiat-to-crypto exchanges, or they provide certain wallet services. This means that the 5AMLD only regulates the “gatekeepers” into the crypto market, while remaining indifferent as to what happens within. However, this approach fails to consider that cryptoassets can be integrated into the financial system without converting them into fiat currencies. This is because cryptoassets are an increasingly acceptable means of transaction, and in certain cases, where a tumbler is used, conversion could happen without the national FIU taking notice. Contrastingly, the Regulations have managed to seal this gap by including crypto-to-crypto exchanges.⁸⁴ This additional expansion of obliged entities will enable even more suspicious activities to be reported, thus further equipping the FCA to carry out its mandate.

⁷⁷ Christopher P. Buttigieg and Samantha Cuyle, “A Comparative Analysis of EU Homegrown Crypto-asset Regulatory Frameworks” (2020) 45(5) *European Law Review* 439, 455.

⁷⁸ Buttigieg and Cuyle, “A Comparative Analysis of EU Homegrown Crypto-asset Regulatory Frameworks” (2020) 45(5) *European Law Review* 439, 443; Virtual Financial Assets Act (Act XXX of 2018/ Cap. 590), art.2 (see definition of “virtual token”).

⁷⁹ The PACTE Act for the Business Growth and Transformation Action Plan, published in the Official Journal on May 23, 2019 (Law No. 2019-486 of May 22, 2019), found in Ch.X of Title IV of Book V of the Monetary and Financial Code.

⁸⁰ Hubert de Vauplane, and Victor Charpiat, “Blockchain 2021” (Chambers and Partners, 17 June 2021), <https://practiceguides.chambers.com/practice-guides/comparison/640/6885/11260-11264-11274-11280-11287-11292-11295-11299-11302>.

⁸¹ Buttigieg and Cuyle, “A Comparative Analysis of EU Homegrown Crypto-asset Regulatory Frameworks” (2020) 45(5) *European Law Review* 439, 443.

⁸² de Vauplane, and Charpiat (fn.80).

⁸³ 5AMLD, art.1(1)(c).

⁸⁴ Regulations, reg.4(7).

Regarding wallet providers, 5AMLD captures custodian wallet providers (those safeguarding users' private keys).⁸⁵ The Regulations, expand upon the European definition by including the additional term to administer, rather than simply safeguard, and requires them to deal with services relating to cryptoassets.⁸⁶ No reason is provided for the inclusion of these additional qualifiers, and it remains unclear how these differ from the European definition practically. Regarding non-custodian wallet providers (those only providing users with a means to store their keys), none of the two rulesets deals with them. Arguably there is little use in submitting them to AML requirements, as this would lead to overregulation without providing FIUs with additional information.⁸⁷ This is a position the author agrees with, since using non-custodian wallets can be parallelised with private cash transactions, which are not AML regulated. It would be interesting to contrast this with some of the FATF's most recent observations which indicate a potential increase in the number of peer-to-peer (P2P) transactions, meaning those transactions that happen without the use of a service provider-intermediary.⁸⁸ This has also led to the conclusion that a higher number of illicit transactions is taking place without the use of intermediaries, compared to those that do use crypto service providers.⁸⁹ Nevertheless, the FATF has chosen to maintain its focus on service providers-intermediaries for the time being,⁹⁰ hence adopting a position similar to this paper. Meanwhile, it has also stated that if the use of P2P transactions becomes more prominent in money laundering, its recommendations may be altered.⁹¹ It would be interesting to see how the FATF would attempt to regulate such transactions in the future, but for the time being it is submitted that such an attempt would be unwarranted as it would only distract national authorities from the effective implementation of already-existing standards.

Consequently, it has been established that the definition of "virtual currencies" in the 5AMLD is less inclusive than that of "cryptoassets" in the Regulations. Choosing to include utility and investment tokens in the term "cryptoassets" expands the regulatory scope of the FCA, making it more effective in combating money laundering, compared to those FIUs relying on the 5AMLD's definitions. Though the extent of the Regulations' perimeter remains unknown, it seems that these are *prima facie* more effective than some of their European corresponding legislations. Lastly, the UK legislator manages to define better the activities supervised, not only by adopting a sounder definition of the assets included, but also by closing gaps the Directive left concerning obliged entities. Nevertheless, the field of cryptoassets remains dynamic both technologically and legally. The following section examines two further developments, to interpret the way these will affect future AML stances in the UK and the EU.

⁸⁵ 5AMLD, art.1(2)(d).

⁸⁶ Regulations, reg.4(7).

⁸⁷ Haffke, Fromberger, and Zimmermann, "Cryptocurrencies and Anti-money Laundering: The Shortcomings of the Fifth AML Directive (EU) and How to Address Them" (2020) 21 *Journal of Banking Regulation* 125, 141.

⁸⁸ FATF, "Second 12-Month Review of Revised FATF Standards - Virtual Assets and Virtual Asset Service Providers" (FATF, 2021), p.25.

⁸⁹ FATF, "Second 12-Month Review of Revised FATF Standards - Virtual Assets and Virtual Asset Service Providers" (FATF, 2021), pp.26–27.

⁹⁰ FATF, "Second 12-Month Review of Revised FATF Standards - Virtual Assets and Virtual Asset Service Providers" (FATF, 2021), pp.34–36.

⁹¹ FATF, "Second 12-Month Review of Revised FATF Standards - Virtual Assets and Virtual Asset Service Providers" (FATF, 2021), pp.34–36.

Remaining gaps

The two developments examined here are the increasing use of NFTs, and the potential adoption of further EU legislation, which could not only affect the Union's stance, but also the UK's.

NFTs

These are digital tokens used to represent real-life assets, such as artworks or even real estate.⁹² NFTs mostly rely on the Ethereum blockchain, utilising digital signatures to guarantee their uniqueness, hence being non-fungible.⁹³ Though in existence since 2014, their notoriety has increased recently, driving their prices upwards.⁹⁴ In early 2021, an NFT artwork by Beeple was auctioned for \$69.3 million.⁹⁵

Presently, the purchase of artwork is seen as a classic method for laundering, due to the anonymity offered, the possibility to use shell companies, and the challenges of determining a fair market value for often over-priced artworks.⁹⁶ Indeed, buying an NFT from oneself, using any number of intermediaries, and then presenting the proceeds as legitimate profits from the sale of art, is easy to carry out and hard to trace for FIUs.⁹⁷ This is hardly surprising, just as with bitcoin a decade earlier, the first users of a new technology could be using it for crime.⁹⁸ This is until authorities take notice of the new practice and start regulating it.

Nevertheless, vis-a-vis current regulations, it seems that neither the 5AMLD nor the UK Regulations can include with certainty NFTs into their ambits. Regarding the EU, NFTs fall well outside the scope of "virtual currencies". By virtue of their non-fungible nature, these tokens are unsuitable to be used as a "means for exchange", as required by the Directive. Therefore, NFTs probably fall outside the 5AMLD's scope, and those trading them are unlikely to be "obliged entities".

Turning to the UK, again, the broader term used gives the FCA better chances of capturing NFTs within its AML scope. It is possible that NFTs would be considered as a digital representation of rights. However, an analysis of each NFT's specific characteristics will need to be undertaken to determine whether it falls in the definition.⁹⁹ It is submitted that the development of NFTs infringes the boundaries of the term "cryptoassets", which may soon require refinement to include this type of tokens. Though there are some examples of the FCA requiring

⁹² Robyn Conti and John Schmidt, "What You Need To Know About Non-Fungible Tokens (NFTs)" (*Forbes Advisor*, 14 May 2021), <https://www.forbes.com/advisor/investing/nft-non-fungible-token/>.

⁹³ Conti and Schmidt, "What You Need To Know About Non-Fungible Tokens (NFTs)" (*Forbes Advisor*, 14 May 2021).

⁹⁴ Conti and Schmidt, "What You Need To Know About Non-Fungible Tokens (NFTs)" (*Forbes Advisor*, 14 May 2021).

⁹⁵ Tim Copeland, "Beeple NFT Artwork Sells for \$69.3 Million in Christie's Auction" (*Decrypt*, 11 March 2021), <https://decrypt.co/60971/beeple-nft-artwork-sells-for-60-3-million-in-christies-auction>.

⁹⁶ Douglas A. King, "NFTs Raise Questions about Money Laundering" (Federal Reserve Bank of Atlanta, 12 April 2021), <https://www.atlantafed.org/blogs/take-on-payments/2021/04/12/nfts-raise-questions-about-money-laundering>.

⁹⁷ Isaiah McCall, "How to Launder Money With NFTs" (*Medium*, 1 April 2021), <https://medium.com/yardcouch-com/how-to-launder-money-with-nfts-56f1789e5591>.

⁹⁸ McCall, "How to Launder Money With NFTs" (*Medium*, 1 April 2021); Sanchez, "Crypto-Currencies: The 21st Century's Money Laundering and Tax Havens" (2017) 28 *University of Florida Journal of Law & Public Policy* 167, 183–184.

⁹⁹ Bine (fn.69); Charles Kerrigan, John Enser, Matthew Nyman, and Erika Federis, "The Guide to NFTs—Sold as an NFT" (CMS, no date), <https://cms.law/en/gbr/publication/the-guide-to-nfts-sold-as-an-nft>.

authorisation for NFT platforms,¹⁰⁰ there is still a much noticeable lack of a holistic approach on the matter. It is submitted that in the absence of further guidance by the UK Regulator, legal uncertainty will be proliferated, at the cost of market development. The discussion surrounding NFTs' regulation goes beyond this study's scope and is still ongoing.¹⁰¹

It must be also mentioned that it is likely that both regulatory instruments could fall below the most recent standards set by the FATF. As mentioned already in its March 2021 guidance, the FATF included NFTs in its definition of VA.¹⁰² This was done by replacing the previous phraseology which required assets to be fungible, with the phrase "assets that are convertible and interchangeable".¹⁰³ This could mean that NFTs that can be converted or exchanged with fiat or crypto currencies would fall within the guidance's ambit.

MiCA

Concerning MiCA, its aim is to provide a holistic approach on cryptoassets.¹⁰⁴ Though MiCA does not deal explicitly with AML, it states that any definition of cryptoassets adopted should contribute to combating money laundering.¹⁰⁵ Through the definition of cryptoassets provided, the EU aims harmonise the approaches of its member states, whilst bringing the entire block closer to the FATF standards.¹⁰⁶ Yet this is something that needs to be examined in the future as the Proposal is still in its first reading in the European Parliament, and is not expected to be implemented prior to 2024.¹⁰⁷ Even after its adoption, practitioners and academics will have to wait even further until they can draw any conclusions on the manner this proposed definition will interact with national and European AML frameworks.

This development is in the shadow of a proposed AML Package of measures, announced in July 2021.¹⁰⁸ The package includes three regulations and one directive that will largely substitute existing measures. For the purposes of this study, it is relevant to mention that the EU aims to implement a universal definition of regulated digital assets throughout its member states.¹⁰⁹ This will be the definition of "crypto-assets" as defined in the MiCA proposal.¹¹⁰ It is reasonable to assume that this definition will largely synch the EU with the UK and with FATF standards.

¹⁰⁰ Huw Jones, "UK financial watchdog warns consumers over CoinBurp crypto launch" (*Reuters*, 25 July 2021), <https://www.reuters.com/business/uk-financial-watchdog-warns-consumers-over-coinburp-crypto-launch-2021-07-25/>.

¹⁰¹ Jones, "UK financial watchdog warns consumers over CoinBurp crypto launch" (*Reuters*, 25 July 2021). Interestingly, it has also been proposed that NFTs could be regulated in both jurisdictions as works of art, rather than as tokens. In the author's opinion, this argument holds even less ground as neither of the two legal instruments provides a definition for artworks. Thus, considering them as such is even more uncertain than considering them as cryptoassets.

¹⁰² Agathangelou, "Crypto-assets Regulation Around the World (part 2 of 3)" (Grant Thornton, 3 June 2021).

¹⁰³ FATF, "Draft Updated Guidance for a Risk-based Approach to Virtual Assets and VASPs" (FATF, 2021), pp.26–27.

¹⁰⁴ MiCA Proposal, pp.1–4.

¹⁰⁵ MiCA Proposal, p.17.

¹⁰⁶ MiCA Proposal, p.17.

¹⁰⁷ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU, September 24, 2020, COM(2020) 591 final.

¹⁰⁸ Financial Stability, Financial Services, and Capital Markets Union, "Anti-money laundering and countering the financing of terrorism legislative package" (European Commission, 20 July 2021), https://ec.europa.eu/info/publications/210720-anti-money-laundering-countering-financing-terrorism_en#transfer.

¹⁰⁹ Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast), COM/2021/422 final, art.3(15).

¹¹⁰ MiCA Proposal, art.3.1(2).

However, one should not rush to any conclusions. Both proposed regulations still have a long way prior to their adoption and eventual implementation. As mentioned, MiCA will not come into force prior to 2024, and that is only if the legislative procedure runs as planned by the Commission. This is also the case for the legislation under the AML Package. Implementation may delay even further by the EU's intention to have these measures implemented by a new EU authority, that is not coming into operation until 2026.¹¹¹ Even if the timeframes remain as such, there is no guarantee that the content of the Regulations will not be altered in the process. The only thing certain is that in the meantime, the EU will be lagging behind the UK regarding the assets subjected to AML measures, leaving the Union as more prosperous grounds for laundering compared to the UK.

It was also pointed out that it will be interesting to see how the UK reacts to MiCA's adoption. Young and Lorimer argued that the UK would wish to replicate the standards adopted through MiCA, sacrificing any competitive investment advantage, to avoid a regulatory arbitrage.¹¹² Still it is too early to tell what the future holds. The only safe conclusion on the matter is that cryptoasset regulation will maintain its rapidly evolving nature in the years to come.

Overall, one can conclude that challenges lie on the horizon for regulators in both jurisdictions. The use of NFTs and their potential for money laundering hinders the effectiveness of the current legal definitions. Additionally, the adoption of further EU regulations will challenge the way member states have been implementing their AML measures so far, placing the UK before a dilemma on the position it should adopt. In any case, the field of money laundering through cryptoassets remains a dynamic one, challenging practitioners on both already existing rules and on those to come.

Conclusion

The current state of affairs leaves the EU exposed to money laundering through certain types of cryptoassets. In contrast the UK's Regulations have managed to be both more inclusive and simpler in terms of the assets regulated. Further, including investment and utility tokens, has been shown to be not only the reasonable thing to do, but also the route preferred in international standard-setting by FATF. This stance is bound to increase the effectiveness of the UK authorities in combating money laundering since they can supervise a more diverse pool of assets and a greater number of service providers. Overall, the UK has accounted better for the risks associated with the diverse types of cryptoassets, while also managing to close gaps the 5AMLD has left behind.

Nonetheless, current technological and legal developments pose a challenge for both regulatory regimes. The proliferation of NFTs and the increased risk they constitute challenge the efficacy of existing rules since current definitions of regulated assets may prove to be outdated. Furthermore, the possible adoption of further legislation by the EU has the potential to alter the way cryptoassets are regulated not only by its member states, but also by the UK, which will need to

¹¹¹ Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010, COM/2021/421 final, p.9.

¹¹² Young and Lorimer (fn.68), 243.

decide whether it should adapt its own position, to the standards set by MiCA, or risk lagging behind. Though MiCA could play a role in defining cryptoassets, it does not touch upon AML per se. In turn, there is too little information available regarding the new AML Regulation proposed. Therefore, academics and practitioners alike will have to wait and see how these new rules affect the current legal framework.