Crypto-monnaies et crypto-actifs
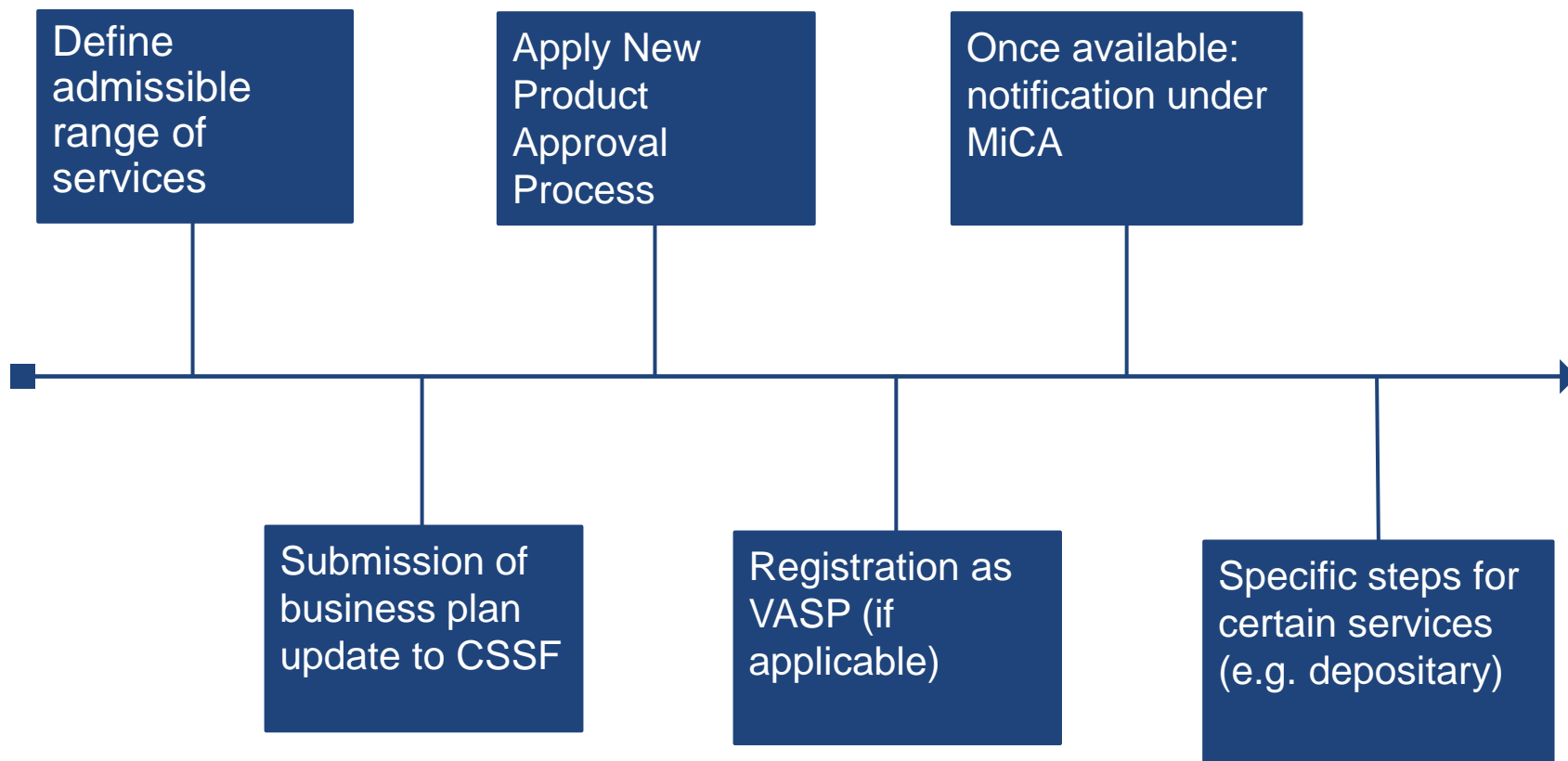
Principaux concepts et Règlement MiCA

Marc Mouton

Provision of services in relation to crypto-assets

Concrete steps

Key steps for credit institutions to engage in crypto services

Define admissible range of services

Apply New Product Approval Process

Once available: notification under MiCA

Submission of business plan update to CSSF

Registration as VASP (if applicable)

Specific steps for certain services (e.g. depositary)

Definition of range of services (pre-MiCA)

Admissible	Non admissible
▪ Custody of virtual assets admissible (e.g. via accounts) ▪ With use of (sub-) custodian or not	▪ Deposit-taking / current accounts on balance sheet ▪ Facilitating or executing the settlement of payments in virtual currencies (e.g. direct transfer of virtual currency from payer to payee)

In the future: full range of MiCA services

Business plan update

- Detailed description of proposed activities

- Risk-benefit assessment

- Adaptations to governance

- Adaptations to risk management framework

- Handling of counterparty and concentration risk

- Investor protection approach

- Indication if safeguarding performed "inhouse"

Registration as VASP

- Also required for regulated entities already subject to AML/CTF duties!

- Specific form to be used

Key contents:
- Identification details
- Program of operations / business plan
- Suitability of shareholder structure and management
- AML/CTF internal control mechanisms

Key annexes:
- Articles of association (to be updated)
- Shareholder structure chart
- Internal org chart
- Terms and conditions of services
- Annual accounts
- Documentation on shareholders and board members
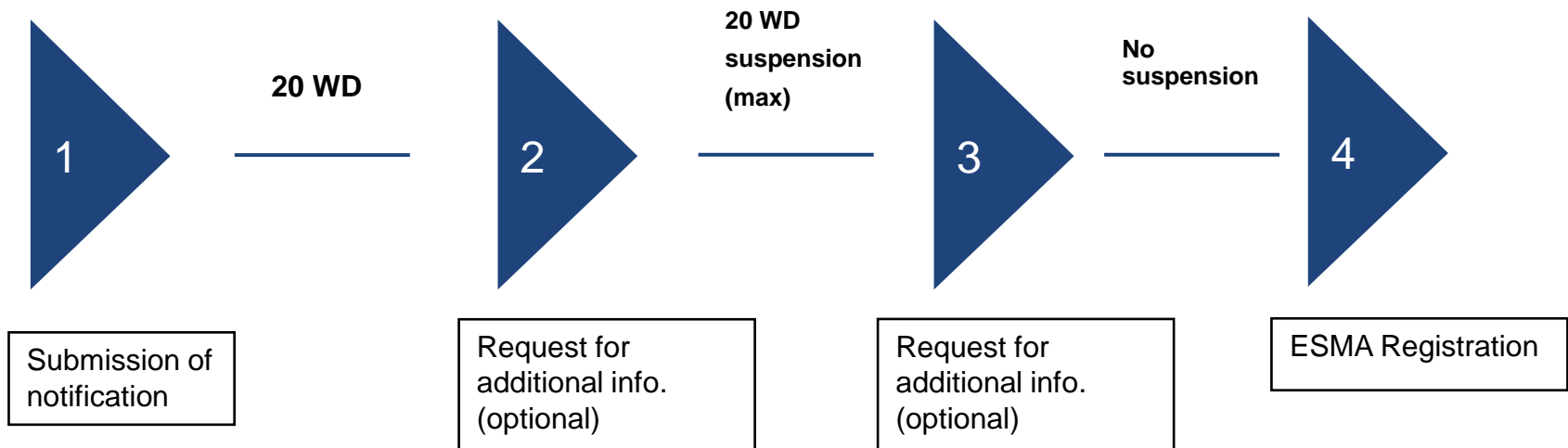- Copy of outsourcing agreements

Notification under MiCA

- Notification to CSSF 40 working days in advance
    - Banks : possible for all crypto asset services
    - Inv. firms: possible for equivalent of investment service
    - EMI: restricted to custody and transfer

- Contents:

    - **Programme of operations: type of service, where and how it will be marketed**
    - **Type of crypto assets in relation to which services will be provided**
    - **Internal control mechanisms in AML/CTF area**
    - **Technical description of IT set-up**
    - **Procedure for segregating client crypto-assets and funds**
    - **In case of sub-custody: custody policy**
    - **In case of trading platform: operating rules**
    - **In case of exchange: non-discriminatory commercial policy, methodology for pricing**
    - **In case of execution: execution policy**
    - **In case of advice: knowledge and expertise of advisors**

Notification under MiCA

arendt

20 WD

20 WD suspension (max)

No suspension

1 ➤   **2** ➤   **3** ➤   **4** ➤

| Submission of notification | Request for additional info. (optional) | Request for additional info. (optional) | ESMA Registration |

No requirement to provide information which was previously submitted and which would be identical

Cross border passport can be activated within two weeks:

- **10 working days assessment period for home State authority**

- **If home State authority does not inform about transmission to host State authority: 15 calendar days**

Rules of conduct 1/2

- **Act honestly, fairly and professionally** in accordance with best interests of clients

- Provide clients with fair, clear and not misleading **information**

- **Warn** clients about risks

- Provide clients with **hyperlinks to white papers**

- Make pricing, costs and **fee policies publicly available** on website

- Make **information related to principal adverse environmental and climate-related impact** of the consensus mechanism used to issue each crypto-asset in relation to which services are being provided publicly available on website (can be taken from white papers)

- **RTS** to provide further details

Rules of conduct 2/2

- **Safeguarding of client assets**:
  - ☐ make arrangements to safeguard ownership rights of clients in case of insolvency and prevent use for own account
  - ☐ safeguard funds to be placed with central bank or credit institution in segregated client money account

- **Complaints handling**:
  - ☐ procedure to be published & client information duty
  - ☐ complaints to be handled free of charge,
  - ☐ templates for submission of complaints to be provided

- **Conflicts of interests**:
  - ☐ policy
  - ☐ disclosure

Rules of conduct for custody 1/2

- Mandatory contents of **custody agreements** with clients

- **Register of positions** in the name of each client, corresponding to its rights to the crypto-assets

- **Custody policy**, incl. rules and procedures to ensure safekeeping and minimize risks of loss due to fraud, cyber-threats and negligence

- Facilitate exercise of client rights – **events creating or modifying client rights to be recorded** in client position register

- Facilitate exercise of client rights – **clients benefit from new rights automatically** unless otherwise explicitly agreed

- **Statement of positions** to be issued at least every 3 months

Rules of conduct for custody 2/2

- Procedure to **return** crypto-assets as soon as possible

- **Segregation** from own assets and ensure that means of access to crypto-assets of clients are identified as such – client assets to be held on separate addresses

- **Liability for losses** as a result of incident attributable to CASP but cap at market value of asset at time of loss

- Use only of **authorized CASPs as subcustodians**, unless customer informed of use of other providers

- Client crypto-assets held in custody **insulated from estate**, no recourse from creditors including in case of insolvency

- **Operational segregation** of client assets from estate of CASP

Ongoing requirements (pre-MiCA)

- Assets to be **booked off-balance sheet** and segregated from own assets

- Effective **investor protection framework similar to MiFID** expected by CSSF (i.a. best execution, suitability and appropriateness, risk information, reporting on holdings)

- **Knowledge, competence and expertise, infrastructure and human resources**, at the operational, control (2nd and 3rd lines of defence) and management (authorised management and supervisory body) levels to be ensured

Use of DLT in the securities area

Overview of Luxembourg "blockchain laws"

Law of 1st August 2001 on the circulation of securities

Allows banks to keep securities accounts on a DLT platform

Assimilates successive transfers registered on a DLT platform to transfers (*virements*) between securities accounts (with transfer of property effect)

Confirms that fungibility of securities and location of securities accounts remain unaffected

Blockchain law I

Law of 6 April 2013 on dematerialised securities

Allows for securities issuance accounts to be kept on a DLT platform

Allows foreign EU credit institutions and investment firms to act as central account keeper in relation to non-listed debt securities

Blockchain law II

Draft Bill n°8055

➡️ Explicit reference in the law of 5 August 2005 on financial collateral arrangements to financial instruments booked in securities accounts held on a DLT platform

➡️ Explicit references in MiFID transposition legislation to financial instruments issued via DLT (for the purpose of the DLT pilot regime)

Blockchain law III

Outlook

➡️ Registered securities ?

➡️ Comprehensive civil law framework ?

Next blockchain laws ?

Any questions?

Contact us

Marc Mouton, Partner

marc.mouton@arendt.com
+352 40 78 78 336
+352 621 257 971