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IRELAND UPDATE: European Commission consults on an EU framework for markets in crypto-assets

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Summary and Background

On 19 December 2019 the European Commission (the "Commission") issued a [consultation document](#) on an EU framework for markets in crypto-assets (the "Consultation"). The Consultation is open until **18 March 2020** and is an important opportunity for stakeholders to contribute to the future regulatory framework in the EU for crypto-assets, including stablecoins.

The task of identifying the extent of existing EU financial services legislation that might apply to crypto-assets was aided in January 2019 by the publication of the European Securities and Markets Authority ("ESMA") 'Advice on Initial Coin Offerings and Crypto-Assets' and the European Banking Authority ("EBA") 'report with advice for the European Commission on crypto-assets'.

ESMA and the EBA identified a number of issues – for example: (1) certain crypto-assets are not covered by existing regulation and therefore fall outside consumer and investor protection and market integrity provisions; and (2) where crypto-assets are covered by existing regulation, applying such regulation is not always straightforward. Divergences in the approaches of Member States to the application of existing regulation were also noted.

Purpose of Consultation

The Consultation is described as a first step in preparing potential initiatives in the context of a new Digital Finance Strategy for the EU.

Key areas in relation to the strategy include *"deepening the Single Market for digital financial services, promoting a data-driven financial sector in the EU while addressing its risks and ensuring a true level playing field, making the EU financial services regulatory framework more innovation-friendly, and enhancing the digital operational resilience of the financial system."*

The Commission and European Council have jointly declared that they are *"are committed to put in place the framework that will harness the potential opportunities that some crypto-assets may offer"*.

For crypto-assets within the scope of the existing EU rules, Commission services have screened existing EU legislation to assess whether they can be applied effectively. For crypto-assets currently not covered by the EU rules, the Commission services are considering a proportionate common regulatory approach to address, amongst other things, potential consumer/investor protection and market integrity concerns.

The Consultation is described as an opportunity for stakeholders to express their views on the best way to enable the development of a sustainable ecosystem for crypto-assets while addressing the major risks they raise. The Commission expressly welcomes views from, amongst others, market participants from the crypto-asset sector and from the financial services sector, EU businesses, FinTech organisations, technology experts (e.g. blockchain developers), academics and EU citizens.



See also - digital operational resilience consultation

The Commission has published a parallel [consultation](#) on digital operational resilience, which is also part of the first step to prepare potential initiatives in the context of the new Digital Finance Strategy for the EU. Responses are requested by 16 March 2020.

The European Parliament has previously called on the Commission *“to make cybersecurity the number one priority”* in progressing its FinTech Action Plan and the consultation follows the publication of advice from the EBA, ESMA, and the European Insurance and Occupational Pensions Authority in April 2019.

Content of Consultation

In broad terms, the Consultation seeks views on the following:

- » Section I: General questions for EU citizens aimed at gaining feedback on the use or potential use of crypto-assets.
- » Section II: Whether and how to classify crypto-assets.

- » This short section is described as concerning both crypto-assets that fall under existing EU legislation (those that qualify as ‘financial instruments’ under MiFID II (Directive 2014/65/EU) and those qualifying as ‘e-money’ under the Electronic Money Directive (Directive 2009/110/EC)) and those that do not.
- » Questions include whether it would be useful to have an EU classification of crypto-assets, the potential features thereof and whether such a classification should distinguish between payment tokens, investment tokens, utility tokens and hybrid tokens. Comments are also sought in relation to the applicability of the Deposit Guarantee Scheme Directive (Directive 2014/49/EU).
- » A definition for crypto-assets is offered: *“a digital asset that may depend on cryptography and exists on a distributed ledger”*.

- » Section III: Crypto-assets that currently fall outside the scope of the EU financial services legislation.

- » This section provides for a detailed assessment of crypto-assets currently unregulated at an EU level.
- » The questions are designed to determine whether a bespoke EU regulatory framework for certain crypto-assets is needed. The replies will also help to identify the main risks raised by unregulated crypto-assets and specific services relating to those assets, as well as the priorities for policy actions.
- » Views are sought in relation to opportunities and challenges of crypto-assets (including those applicable to payment tokens, stablecoins, initial coin offerings, tokenisation of tangible assets).
- » Specific questions are included on crypto-assets service providers, including in relation to issuance of crypto-assets, trading platforms, exchanges, and custodial wallet services.



» Section IV: Crypto-assets that currently fall within the scope of EU legislation, i.e. those that qualify as 'financial instruments' under MiFID II and those qualifying as 'e-money' under the Electronic Money Directive.

» This section provides for general questions on security tokens as well as a detailed assessment of legislation applying to security tokens and e-money tokens and possible changes thereto.

» The legislation considered includes MiFID II, the Market Abuse Regulation, the Short Selling Regulation, the Prospectus Regulation, the UCITS Directive, the Alternative Investment Fund Managers Directive and the Electronic Money Directive, amongst others.

Next steps

The Commission notes that the outcome of the Consultation should provide a basis for concrete and coherent action, by way of a legislative action if required. The Commission has indicated that a proposal for an EU regulation may be adopted in the third quarter of 2020.

It is possible to participate in the Consultation by completing the online questionnaire, available [here](#).

Walkers has established a multi-jurisdictional FinTech group with a focus on crypto-assets and other FinTech developments, further details are available [here](#).

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