

## THE EUROPEAN FINANCIAL SUPERVISORY AUTHORITIES PUBLISH THEIR ADVICE ON HOW TO REGULATE CRYPTO-ASSETS: HIGHLIGHTS

### 1. REGULATION OF CRYPTO-ASSETS HAS BECOME A EUROPEAN PRIORITY

The publication, in March 2018, of the action plan for financial technologies (Fintech) by the European Commission was effectively a signal for work to commence on crypto-assets at European level. This action plan included a call to European Supervisory Authorities (ESAs) to (i) draw up a situational analysis of national practices observed as regards financial innovation, and (ii) provide the European Commission with technical advice on the need for legislative improvements<sup>1</sup>.

The assessments were completed, and three reports were published in January 2019.

- The first, dated 7 January 2019, is a joint publication by the ESMA<sup>2</sup>, EBA<sup>3</sup> and EIOPA<sup>4</sup> entitled "*FinTech: Regulatory sandboxes and innovation hubs*"<sup>5</sup>. The report covers the national approaches applied by the various competent authorities *vis-à-vis* financial innovation. It highlights two major trends: regulatory sandboxes and innovation hubs. The former is a UK-inspired approach that involves testing and observing innovative projects over a limited period of time, using pre-defined criteria, occasionally integrating regulatory exemptions on an exceptional basis. For its part, the latter is an approach for project owners to establish a point of contact with the national regulator in order to facilitate the development of innovation while avoiding the creation of a two-speed regulatory regime. The report does not favour one approach over the other. It does, however, highlight the need for coordination and cooperation between the various approaches put in place within the Member States.
- Two other reports were published on 9 January 2019, one by the ESMA ("*Advice, Initial Coin Offerings and Crypto-Assets*"<sup>6</sup>) and the other by the EBA ("*Report with advice for the European Commission*"<sup>7</sup>). Both documents are of high importance given that they are the first detailed analyses and public position statements by European authorities on the topic of crypto-asset regulation. They define a number of structuring concepts pertaining to the crypto environment, which are vital for the next regulatory steps (DLT with or without access conditions; custody; etc.). The conclusions of both these reports are balanced. For the ESMA, it is a question of working on potential adaptations of the applicable European law<sup>8</sup>

<sup>1</sup> [https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC\\_1&format=PDF](https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF)

<sup>2</sup> European Securities and Markets Authority (ESMA).

<sup>3</sup> European Banking Authority (EBA).

<sup>4</sup> European Insurance and Occupational Pensions Authority (EIOPA).

<sup>5</sup> <https://eba.europa.eu/documents/10180/2545547/JC+2018+74+Joint+Report+on+Regulatory+Sandboxes+and+Innovation+Hubs.pdf>

<sup>6</sup> [https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391\\_crypto\\_advice.pdf](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf)

<sup>7</sup> <https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf>

<sup>8</sup> MiFID II directive and MiFIR regulation, prospectus directive and regulation, transparency directive, regulation on market abuses and regulation on short selling, regulation on central securities depositories and regulation on settlement finality in payment and securities.

for crypto-assets that can be likened to transferable securities<sup>9</sup>, while at the same time reflecting on the relevance of an *ad hoc* regime for the other types of crypto-assets (in the manner of France's approach in the PACTE<sup>10</sup> draft bill). For the EBA, the analysis bears on the applicability of certain provisions of directives applicable to electronic money<sup>11</sup> and payment service providers<sup>12</sup>, and to crypto-assets that could be deemed as "electronic money" under European law.

## 2. PRIORITY IS GIVEN TO ANTI-MONEY LAUNDERING AND COMBATING THE FINANCING OF TERRORISM (AML/CFT)

In line with the recent adaptations made to the 5th European directive on anti-money laundering<sup>13</sup> as regards crypto-assets, the ESMA and EBA insist on the need to broaden once more the demands applicable in terms of AML/CFT to providers of exchange services between crypto-assets and crypto-assets and to providers of financial services for Initial Coin Offerings (ICOs). This recommendation derives from the recent changes of October 2018 made to the recommendations and glossary of the Financial Action Task Force (FATF)<sup>14</sup>.

## 3. REGULATORY CHANGES NECESSARY TO MEET THE SPECIFICS OF CRYPTO-ASSETS DEEMED AS TRANSFERABLE SECURITIES

For those crypto-assets that could be deemed as transferable securities under European law, the ESMA identifies a series of gaps and issues for consideration in connection with the applicable European regulation. These include, in particular:

- (i) the need to clarify what crypto services/activities consist of that could be qualified as custody or safekeeping under European law;
- (ii) issues of governance and liability for permissionless DLTs;
- (iii) the need to ensure the security and reliability of smart contracts; and
- (iv) the need to adapt to crypto-assets' specificities the MiFID II-based requirements as regards reporting and pre- and post-negotiation transparency.

## 4. TOWARDS AN AD HOC REGIME FOR CRYPTO-ASSETS THAT CANNOT BE DEEMED AS TRANSFERABLE SECURITIES

For those crypto-assets that cannot be deemed as transferable securities in the terms of MiFID II the ESMA is considering the possibility of implementing an *ad hoc* regime similar to those that have already been rolled out in various Member States, France in particular. An initiative of this kind would look to limit regulatory arbitrages within the EU, and could make the Single Market attractive and competitive as regards crypto-assets in relation to the rest of the world.

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<sup>9</sup> Transferable securities in the terms of Section C, Appendix 1 of the MiFID II directive.

<sup>10</sup> France's corporate reform law to create collective interest companies, or "*Plan d'action pour la croissance et la transformation des entreprises*" (PACTE, Action plan for the growth and transformation of companies).

<sup>11</sup> 2009/110/EC directive.

<sup>12</sup> 2015/2366/EU directive.

<sup>13</sup> The EU directive 2018/843 extends AML/CFT obligations to providers of exchanges between virtual currencies and legal currencies, and custody service providers.

<sup>14</sup> <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/Recommandations%20du%20GAFI%202012.pdf>

This is clearly an important time for crypto-asset players, who must continue to educate and make advancement suggestions to European and public policy-makers. It is also essential to federate all crypto-asset players on a national and European level to guarantee the clarity and readability of messages. In this regard, Gide 255 works hand-in-hand with its clients to prepare and design their regulatory strategy on national, community and international levels.

Bearing in mind the analyses conducted by the ESMA and EBA, it seems vital to structure sector suggestions in order to quickly implement the necessary adjustments that are in line with European rules. These regulatory adaptations must serve the development of players on a European level by enabling them to broaden their business model while ensuring the technological and legal safety that are so crucial to the sustainability of their activities.

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