



FINANCIAL SERVICES

Crypto: Legal Certainty Forthcoming

by **Adrian Mulryan**

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On 24 September 2020, the European Commission [published](#) a proposal for a regulation on markets in crypto-assets (the “Proposal”).

The Proposal seeks to regulate issuers of crypto assets and crypto-asset service providers by harmonising the law in this area at EU level. This article sets out key information about the Proposal.

Background

A harmonised EU crypto-asset Proposal has been a long time in the making. Ever since crypto-assets entered onto the EU’s legislative radar back in 2015, after the Paris Charlie Hebdo terrorist attacks, the EU has sought to regulate this esoteric asset class. Regulation first started with bringing crypto-assets within the scope of the 5th Anti-Money Laundering Directive. The aim was never to stop there, however, as the Commission mandated the EBA and ESMA to assess the applicability and suitability of the existing EU financial services regulatory framework to crypto-assets.

What came from that assessment was the conclusion that most crypto-assets fell outside the scope of EU financial services legislation and that crypto-assets were not subject to provisions on consumer and investor protection and market integrity. The EBA and ESMA also identified that some Member States had legislated in this area which led to a fragmented market.

These findings fed into the European Commission’s policy to create a Digital Finance package: a suite of measures to further enable and support the potential of digital finance in the EU in terms of innovation and competition while at the same minimising risks. The package consists of the Proposal and three other proposed pieces of EU legislation.

In respect of the Proposal, the European Commission sought to support a holistic approach to blockchain and DLT, with the overall objective of positioning Europe at the front of blockchain innovation and uptake. The Commission also commented that the proposal was consistent with the EU’s policy aimed at creating a Capital Markets Union.

Aim and Scope

The Proposal aims to provide legal certainty for crypto-assets not covered by existing EU financial services legislation and establish harmonised rules for crypto-asset issuers and service providers at EU level. The Proposal also seeks to replace existing national frameworks applicable to crypto-assets not covered by existing EU financial services legislation.

The Proposal would apply to persons that are engaged in the issuance of crypto-assets or provide services related to crypto-assets in the EU. A crypto-asset has a wide definition as: “a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology”. More specifically, the Proposal seeks to regulate the issuance of three types of crypto-assets in the EU:

1. Asset-referenced tokens: a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets;
2. Electronic money tokens: a type of crypto-asset the main purpose of which is to be used as a means

of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender; and

3. Crypto-assets that are neither asset-referenced tokens nor electronic money tokens. This is a catch all category not covered by the previous two types of tokens.

The Proposal does not however seek to regulate crypto-assets that qualify as financial instruments, electronic money (except where they qualify as electronic money tokens), deposits, structured deposits, and securitisations as defined within the respective EU laws applicable to the foregoing.

The Proposal would also apply to “crypto-asset service providers”: those persons whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis. Services within scope range from: custody, administration, trading platforms, exchanges, and to providing advice on crypto-assets.

Key Provisions

The Proposal is far reaching and imposes a suite of rules on issuers of crypto-assets and crypto-asset service providers as mentioned above. Below we set out some of the key provisions under the Proposal applicable to crypto-asset issuers and crypto-asset service providers.

Authorisation

Subject to certain exemptions, issuers of asset-referenced tokens and electronic money tokens must seek authorisation from their local competent authority before they can offer such tokens to the public or seek an admission of such assets to trading on a trading platform for crypto-assets.

Further requirements will apply to issuers of significant asset-referenced tokens and electronic money tokens. In contrast, issuers of crypto-assets that do not fit into either category do not need to be authorised. All issuers can avail of an EU passport to distribute their crypto-assets across the EU.

Crypto-asset service providers must also seek authorisation from a competent authority in respect of the crypto-services they want to undertake. They too can avail of a pan EU passport to provide their crypto-asset services in more than one Member State.

Whitepaper

Issuers of electronic money tokens and issuers of crypto-assets that fall into the catch all category must create a whitepaper (a disclosure document) in accordance with the requirements of the Proposal and notify their whitepaper to their competent authority of their Member State at least 20 working days before publication on their website.

Issuers of asset-referenced tokens must have their whitepaper approved by a competent authority during the authorisation process as mentioned above.

Importantly, a holder of a crypto-asset may bring a claim for damages against the issuer of a crypto-asset where a whitepaper is found to be not complete, fair or clear or by providing information that is misleading.

Ongoing Obligations

The Proposal seeks to impose varying degrees of ongoing obligations on crypto-asset issuers and crypto-asset service providers as follows:

1. Issuers of Asset-referenced Tokens will have to, amongst other things, comply with conduct, disclosure, complaint handling, conflict of interest, governance, and capital requirements;
2. Issuers of Electronic Money Tokens will have to comply with the requirements applicable to electronic money institutions as set out under the E-Money Directive, as amended;
3. Issuers of Other Tokens will have to comply with, amongst other things, conduct, disclosure, conflicts of interest, and cyber-security requirements; and

4. Crypto-asset service providers will have to comply with, amongst other things, conduct, prudential, organisational, custody, complaints handling, conflicts of interest, and outsourcing requirements. They will also have to comply with the specific requirements set out for each crypto-asset service they intend to provide.

Market Abuse

The Proposal also seeks to establish market abuse requirements for acts carried out by any person and that concern crypto-assets that are admitted to trading on a trading platform or for which a request for admission to trading on such trading platform has been made. This includes requirements on the disclosure of inside information, insider dealing, unlawful disclosures of inside information, and market manipulation.

What's Next

The Proposal is now headed for review by the European Parliament and the Council of Ministers as part of the EU's ordinary legislative procedures. This process can take upwards of 18 – 24 months before the final text is published in the Official Journal of the EU.

In Ireland, the Proposal will be a welcome addition to the financial services landscape and will provide much needed legal certainty in this area.

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