

ESMA and EBA Publish Advice on Cryptoassets

Friday, January 11, 2019

On January 9, the European Securities and Markets Authority (ESMA) published advice addressed to the European Commission, the European Parliament and the Council of the EU on initial coin offerings (ICOs) and cryptoassets. On the same day, the European Banking Authority (EBA) also published advice on cryptoassets addressed to the European Commission.

ESMA Advice

The ESMA advice clarifies the existing EU rules applicable to cryptoassets that qualify as financial instruments under the revised Markets in Financial Instruments Directive (MiFID II), and sets out its position on gaps and issues in the current regulatory framework.

ESMA notes that it has been working with national competent authorities on analyzing the different cryptoasset business models, risks and potential benefits they may introduce, and how they fit within the existing framework. Based on such work, ESMA has identified a number of concerns with the existing framework regarding cryptoassets. The gaps and issues identified by ESMA fall into two categories:

- for cryptoassets that qualify as financial instruments, as the existing rules were not designed with cryptoassets in mind, there are areas that require potential interpretation or reconsideration of specific requirements to allow for an effective application of existing regulations; and
- where assets do not qualify as financial instruments, the absence of applicable financial requirements leaves investors exposed to substantial risks. At a minimum, ESMA believes that anti-money laundering requirements should apply to all cryptoassets and activities involving cryptoassets and that there should also be appropriate risk disclosures in place so that consumers can be made aware of the potential risks prior to committing funds to cryptoassets.

As a number of the issues identified are beyond ESMA's scope, it believes that its advice allows the law-making EU institutions to consider possible ways in which the gaps and issues may be addressed and subjected to further analysis.

EBA Advice

In its report, the EBA sets out the results of its assessment of the applicability and suitability of EU law to cryptoassets.

The EBA notes that the relatively low level of cryptoasset activity currently observed in the EU does not appear to give rise to implications for financial stability. However, activities involving cryptoassets typically fall outside the scope of EU banking, payments and electronic money regulation, and risks exist for consumers that are not addressed at the EU level. As a result of the development of national regulatory responses, divergences between Member States are starting to emerge, which presents risks to a level playing field between legal regimes. The EBA also believes that market developments point to the need for a further review of EU anti-money laundering legislation.

For these reasons, the EBA advises the Commission to carry out a comprehensive cost-benefit analysis, taking

Katten
Katten Muchin Rosenman LLP

Article By [Carolyn H. Jackson](#)
[John Ahern](#)[Nathaniel W. Lalone](#)[Neil Robson](#)
[Katten Muchin Rosenman LLP](#)
[Corporate and Financial Weekly Digest](#)
[Communications, Media & Internet](#)
[Financial Institutions & Banking](#)
[Global](#)
[European Union](#)

account of issues inside and outside the financial sector, to determine what, if any, action is required at the EU level. The EBA also advises the Commission to take account of the October 2018 recommendations of the Financial Action Task Force (FATF) regarding what the FATF calls “virtual asset” activities.

ESMA’s advice is available [here](#) and the EBA’s advice is available [here](#).

© 2019 Katten Muchin Rosenman LLP

Source URL: <https://www.natlawreview.com/article/esma-and-eba-publish-advice-cryptoassets>