

ESMA Publishes Stakeholder Group Advice on Containing Risks of ICOs and Crypto Assets

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On October 19, the European Securities and Markets Authority (ESMA) published an own-initiative report, produced by its Securities and Markets Stakeholder Group (SMSG), on initial coin offerings (ICOs) and crypto assets. The report gives advice to ESMA on steps it can take to contain the risks of ICOs and crypto assets, on top of existing regulation.

The SMSG advises ESMA on producing level 3 guidelines or aiming at supervisory convergence on:

1. the interpretation of the definitions of “transferable securities” and “commodities” contained in the revised Markets in Financial Instruments Directive (MiFID II), clarifying whether transferable crypto asset tokens that have features of transferable securities are subject to MiFID II and the Prospectus Regulation;
2. the interpretation of the concepts of multilateral trading facilities (MTF) and organized trading facilities (OTF), clarifying whether the organization of a secondary market in crypto asset tokens that qualify as MiFID II financial instruments is an MTF or OTF;
3. the application of the Market Abuse Regulation to MTFs and OTFs organized by issuers of crypto asset tokens; and
4. the fact that if a crypto asset token is considered to be a MiFID II financial instrument, persons giving investment advice on those crypto asset tokens, or executing orders in those crypto asset tokens, should be considered investment firms requiring a license as such under MiFID II (unless they qualify for an exemption).

As ESMA is not able to amend the level 1 MiFID II text defining financial instruments, the SMSG urges it to consider sending a letter to the European Commission asking the latter to consider adding second, transferable payment and utility tokens to the MiFID II list of financial instruments.

Finally, the SMSG is opposed to the over-regulation of regulatory sandboxes and innovation hubs (offering testing environments for technology start-ups), but that some coordination is necessary. It advises ESMA to provide guidelines with minimum criteria for national authorities that operate or want to operate a regulatory sandbox or innovation hub.

The report is available [here](#).

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