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Classification of crypto-assets as securities, investment instruments or financial instruments

Scope:

This Communication applies to crypto-assets that are offered to the public.

Summary/Objectives:

The FSMA wishes, by means of this Communication, to provide explanations of the most common cases where crypto-assets may fall within the scope of the prospectus rules and/or the MiFID conduct of business rules.

Structure:

In the first part, the FSMA sets out the objective of the Communication. In the second part, it clarifies the various steps that may help with the classification of crypto-assets. In the third part, the consequences of that classification are briefly addressed. In annex to this Communication, a stepwise plan is provided.

1. Guidelines on classification as a security, investment instrument or financial instrument

At European level, there are discussions currently under way regarding a proposal for a regulation on markets in crypto-assets¹. While awaiting a harmonized European approach, the FSMA wishes to provide clarity about when crypto-assets may be considered to be securities, investment instruments or financial instruments and may therefore fall within the scope of the prospectus legislation and/or the MiFID conduct of business rules.

The FSMA receives more and more questions about the application of financial rules to crypto-assets. It seems people are mainly in search of clarity about when crypto-assets may be classified as a security² within the meaning of the Prospectus Regulation³ or as an investment instrument⁴ within the meaning of the Prospectus Law⁵. Depending on how the asset is classified, other legislation may

¹ Proposal by the European Commission of 24 September 2020 for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937.

² Article 2, a) of the Prospectus Regulation.

³ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.

⁴ Article 3, § 1 of the Prospectus Law.

⁵ Law of 11 July 2018 on public offers of investment instruments and the admission of investment instruments to trading on a regulated market.

also apply, such as the rules established by the MiFID Directive⁶ if the crypto-assets are financial instruments⁷, the rules governing virtual asset service providers⁸ or other legislation⁹. Via its stepwise plan, the FSMA seeks to provide assistance to this process by presenting schematically the most frequently occurring situations.

The purpose of the stepwise plan is to offer a series of guidelines for the exercise of classifying crypto-assets. The FSMA focuses to this end on the basic questions and the situations which it has encountered most frequently to date. It does not, however, address all potential classifications¹⁰. The stepwise plan is not intended to replace a thorough analysis, in the light of the applicable rules, of all specific characteristics of the product or the way it is presented. Moreover, it is best not to rely solely on the name of a product when deciding how to classify it. The label does not always match the content.

The stepwise plan is likely to evolve over time. If situations require further clarification, or if they are not mentioned or are mentioned only in passing in the stepwise plan, the FSMA can update it.

2. Explanations of the stepwise plan

The starting point for the stepwise plan, in annex to this Communication, is the question whether the assets one plans to issue or create are incorporated into what are called ‘instruments’. This will generally be the case if the assets are exchangeable or fungible. If an asset is not incorporated into an instrument, then it cannot be classified as a security or an investment instrument, and the Prospectus Regulation and the Prospectus Law do not apply. In that case, the asset is not a financial instrument either, and the MiFID rules of conduct do not apply.

If the assets are incorporated into an instrument, then it is possible to distinguish between a situation in which an instrument represents a right in respect of an issuer and/or another person (such as a guarantor) and a situation where this is not the case. If there is no issuer, as in cases where instruments are created by a computer code that does not give rise to a legal relationship between two persons (e.g. Bitcoin or Ether), then in principle the Prospectus Regulation, the Prospectus Law and the MiFID rules of conduct do not apply. Nevertheless, if the instruments have a payment or exchange function, other regulations may apply to the instruments or the persons who provide certain services relating to those instruments. Without claiming to be exhaustive, we draw your attention to

⁶ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU. See also Article 26 and following of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

⁷ As referred to in Article 2, paragraph 1, 1° of the Law of 2 August 2002 on the supervision of the financial sector and on financial services.

⁸ Law of 1 February 2022 amending the Law of 18 September 2017 on the prevention of money laundering and the financing of terrorism and on the restriction of the use of cash to introduce provisions on the status and supervision of providers of exchange services between virtual and fiat currencies and of custody wallet providers. Royal Decree of 8 February 2022 on the legal status and supervision of providers of exchange services between virtual and fiat currencies and of custody wallet providers. See in this regard the [FAQs](#) published by the FSMA on its website.

⁹ See for example the FSMA Regulation of 3 April 2014 on the ban on the marketing of certain financial products to retail clients.

¹⁰ Thus, we do not go into the question of when assets may be classified as investment instruments within the meaning of Article 3, § 1, 3° or 4° of the Prospectus Law. See in this regard the FSMA’s Communication of 13 November 2014 to firms that distribute investments in movable and immovable goods.

the rules governing virtual asset service providers, which have been in force since 1 May 2022¹¹. In the case of financial products with such instruments as their underlyings, one must first carry out the exercise of determining the classification of the financial product. Moreover, the FSMA Regulation of 3 April 2014 on the ban on the marketing of certain financial products to retail clients¹² can also apply.

If there is an issuer of assets incorporated into instruments, then one of the following situations often presents itself:

- the instruments represent a right to a share in the profits or losses of a project and potentially a voting right, or a right to payment of a sum of money, or they are the equivalent thereto:
 - if the instruments are transferable, then these are, as a rule, securities within the meaning of the Prospectus Regulation, and the obligation to publish a prospectus or an information note may apply based on that Regulation or the Prospectus Law if the conditions for application are met; they are in that case also financial instruments and the MiFID rules of conduct apply to them;
 - if they are not transferable, then the instruments are classified in principle as investment instruments within the meaning of the Prospectus Law and there may thus be an obligation to draw up an information note or a prospectus.
- the instruments represent a right to the delivery of a service or a product by the issuer:
 - if an overall analysis of the specific characteristics of the product and the way in which the instruments are brought to market indicates that the instruments have an investment objective, even if secondary, then the instruments are classified, as a rule, as investment instruments within the meaning of the Prospectus Law and there may thus be an obligation to draw up an information note or a prospectus;
 - if the overall analysis indicates that there is no investment objective, then these instruments do not fall within the scope of the Prospectus Law.

In order to determine whether the instruments have an investment objective, the following aspects, among others, are important: the instruments are transferable to persons other than the issuer; the issuer issues a limited number of instruments; the issuer plans to trade them on a market and has an expectation of profit; the funds gathered are used for the general financing of the issuer and the service or the project have yet to be developed: the instruments are used to pay staff; the issuer organizes several rounds of sales at different prices.

This analysis is to be carried out on a case-by-case basis. It is not necessary for all the above-mentioned characteristics to be present in order to be able to conclude that the instrument is classified as an investment instrument. Conversely, the presence of a single characteristic does not mean that the instrument is classified automatically as an investment instrument.

3. Consequences of the classification

¹¹ See footnote 8.

¹² That Regulation includes, among other things, a ban on the marketing to retail clients of financial products based on virtual money.

If, after a thorough analysis, one concludes that the assets are not securities, investment instruments or financial instruments, one must nevertheless be attentive to any other legislation that may apply. As already mentioned, there are other rules that may apply, such as the rules governing virtual asset service providers.

If one concludes that the assets should be considered to be securities or investment instruments within the meaning of the Prospectus Regulation or the Prospectus Law respectively, or as a financial instrument within the meaning of the MiFID rules of conduct, then in addition to the consequences set out in the Prospectus Regulation, the Prospectus Law¹³ or the MiFID rules, one must also be attentive to any other legislation that may apply, such as the rules governing market abuse and the rules governing crowdfunding.

¹³ Please see the FSMA Communication of 9 July 2019 on [the procedures for the submission and handling of dossiers](#) relating to public offers and the FSMA Communication of 20 July 2018 on [the procedures for filing the information note](#).