

THE DIGITAL FINANCE PACKAGE

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Introduction

- Four proposals: 3 regulations and 1 directive
- EU consultation 19 December 2019-19 March 2020
- The key distinction :
 - assets qualified as financial instruments and classified as crypto-assets because they are based on the DLT
 - assets which are crypto—assets without being financial instruments
- The DLT has no effect on the substance of rights attached to crypto-assets

I – The market in crypto-assets

- *Objectives of the proposal*
 - “(a)transparency and disclosure requirements for the issuance and admission to trading of crypto-assets;
 - (b)the authorization and supervision of crypto-asset service providers and issuers of asset-referenced tokens and issuers of electronic money tokens;
 - (c)the operation, organization and governance of issuers of asset-referenced tokens, issuers of electronic money tokens and crypto-asset service providers;
 - (d)consumer protection rules for the issuance, trading, exchange and custody of crypto-assets;
 - (e)measures to prevent market abuse to ensure the integrity of crypto-asset markets”.

- *A – Categories of crypto-assets and regime of offers on these assets*
 - Three sub-categories based on the potential functions of crypto-assets (digital access to goods or services, means of payment, means of exchange)
- **Crypto-assets other than ART and E-MT** : utility tokens ; no prior authorisation for the offers, white paper
- **Asset-referenced tokens (ART)**: prior authorisation, duties of issuers, reserve of assets, threshold crossing, Significant asset-referenced tokens (SART)
- **E-money tokens (e-MT)**: general requirements and specific provisions applicable to Significant e-money tokens (Se-MT)

- *B – Crypto-assets service providers*
- **List crypto-asset services** : (a) the custody and administration of crypto assets on behalf of third parties
- (b) the operation of a trading platform for crypto assets.
- (c) the exchange of crypto assets for fiat currency that is legal tender;
- (d) the exchange of crypto-assets for other crypto-assets;
- (e) the execution of orders for crypto-assets on behalf of third parties;
- (f) placing of crypto-assets;
- (g) the reception and transmission of orders for crypto-assets on behalf of third parties
- (h) providing advice on crypto-assets".

- **Definitions :**

- ‘the custody and administration of crypto-assets on behalf of third parties’ means safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys;
- the operation of a trading platform for crypto-assets’ means managing one or more trading platforms for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat currency that is legal tender;

- **Chapter 1 : Authorization of competent Authorities and register established by ESMA**

- **Chapter 2 and 3** : Obligations for crypto-assets service providers
 - Obligations for all crypto-assets service providers
 - Obligations specific to some services
- **Chapter 4** : Threshold crossing
- *C – The prevention of market abuses involving crypto-assets*
- *D – The competent authorities, the EBA and the ESMA*
 - Competent Authorities : supervisory and investigative powers, power of sanction
 - EBA : its powers vis-à-vis issuers of SART and Se-MT

II – The market infrastructures based on DLT

- “**DLT multilateral trading facility**’ or ‘**DLT MTF**’, which means a ‘multilateral trading facility’, operated by an investment firm or a market operator, that only admits to trading DLT transferable securities and that may be permitted, on the basis of transparent, non-discretionary, uniform rules and procedures, to:
 - (a) ensure the initial recording of DLT transferable securities;
 - (b) settle transactions in DLT transferable securities against payment; and
 - (c) provide safekeeping services in relation to DLT transferable securities, or where applicable, to related payments and collateral, provided using the DLT MTF “

- **DLT securities settlement system**, that is to say a securities settlement system, operated by a ‘central securities depository’, that settles transactions in DLT transferable securities against payment” .
- *Pilot regime* for crypto-assets considered as financial instruments: *optional* regime and temporary derogations to provisions laid down in MIFIF2 and CSD regulation
- Proposal covering non-liquid securities and whose market capitalisation is not too big
- Compensatory measures

III – The digital operational resilience for the financial sector

- Proposal constituting *lex specialis* to Directive of 6 July 2016
- Objectives of the proposal : “This Regulation lays down the following uniform requirements concerning the security of network and information systems supporting the business processes of financial entities needed to achieve a high common level of digital operational resilience, as follows :
 - requirements applicable to financial entities in relation to:
 - – Information and Communication Technology (ICT) risk management;
 - – reporting of major ICT-related incidents to the competent authorities;
 - – digital operational resilience testing;

- – information and intelligence sharing in relation to cyber threats and vulnerabilities;
 - – measures for a sound management by financial entities of the ICT third-party risk
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- requirements in relation to the contractual arrangements concluded between ICT third-party service providers and financial entities;
 - the oversight framework for critical ICT third-party service providers when providing services to financial entities;
 - rules on cooperation among competent authorities and rules on supervision and enforcement by competent authorities in relation to all matters covered by this Regulation".

- "‘digital operational resilience’ means the ability of a financial entity to build, assure and review its operational integrity from a technological perspective by ensuring, either directly or indirectly, through the use of services of ICT third-party providers, the full range of ICT-related capabilities needed to address the security of the network and information systems which a financial entity makes use of, and which support the continued provision of financial services and their quality"

- "‘ICT risk’ means any reasonably identifiable circumstance in relation to the use of network and information systems, - including a malfunction, capacity overrun, failure, disruption, impairment, misuse, loss or other type of malicious or no malicious event - which, if materialized, may compromise the security of the network and information systems, of any technology-dependent tool or process, of the operation and process’ running, or of the provision of services, thereby compromising the integrity or availability of data, software or any other component of ICT services and infrastructures, or causing a breach of confidentiality, a damage to physical ICT infrastructure or other adverse effects"

IV – The adjustments of existing legislations to “Digital finance package

- CRD4, SEPA2, UCITs, FIA, MIFID2
- Main modifications affect MIFID2
- For instance, the definition of financial instruments, mentioned in article 4, §1, point 15, of MIFID 2, is amended so as to indicate that the financial instruments listed in section C of annex 1 include the instruments issued by means of DLT