

## **INFORMATIVE NOTE**

### **INITIAL COIN OFFERINGS AND CRYPTO-ASSETS – REGULATORY UPDATE**

On the 9<sup>th</sup> January 2019, the European Securities and Markets Authority (ESMA) published a set of documents<sup>1</sup> with its advice to European Union Institutions and with information about Initial Coin Offerings (ICOs) and crypto-assets.

ESMA advice relates to the survey made in the summer of 2018 to National Competent Authorities where they were asked to issue their opinion on the qualification of certain crypto assets as “financial instruments” under its respective national laws. Following such survey, ESMA assess now the regulatory environment and its applicability to crypto assets. In that sense, the advice issued on the 9<sup>th</sup> January (Advice) aims to clarify the existing EU rules applicable to crypto-assets that qualify as financial instruments and outlines ESMA’s position on gaps and issues that exist in the current EU financial regulatory framework for consideration by EU policymakers.

So far, crypto-asset activities have not been deemed regulated services within the scope of EU banking, payments and electronic money law. Notwithstanding, ESMA identifies risks arising from these activities such as fraud, cyber-attacks, money laundering and market manipulation. A key issue of the legal qualification of crypto-assets is whether they may qualify as MiFID II financial instruments. Following consultation with the National Competent Authorities, ESMA identified certain concerns in the current financial regulatory framework within the EU:

- EU financial rules are likely to apply to crypto-assets that qualify as transferable securities or other types of financial instruments under MiFID, although these may require potential interpretation or re-consideration of specific requirements to allow an effective application of existing regulations;

---

<sup>1</sup> Advice on Initial Coin Offerings and Crypto-Assets, Annex - Legal qualification of crypto-assets – survey to NCAs and Crypto-assets need common EU-wide approach to ensure investor protection.

- Where regulation does not apply to crypto-assets and related activities, as they do not qualify as financial instruments, the absence of applicable financial rules leaves investors exposed to substantial risks. In this respect, ESMA believes that at least AML provisions should apply to all crypto-assets and activities linked to them.

Although the views of ESMA are not definitive, the results of its survey already provides a fairly good perspective of the requirements and criteria that a crypto asset should meet to fall under EU securities laws, shedding some light on the matter to crypto assets stakeholders of what is ESMA and EU national authorities position on the matter.

Referred ESMA documentation issued on the 9<sup>th</sup> January may be found [here](#).

Please address any questions you may have to:

[Márcio Carreira Nobre](#)

[Sofia Rosário](#)