

European Commission

Directorate-General for Financial Stability,
Financial Services and Capital Markets Union
1049 Bruxelles/Brussel
Belgium

(Submitted via an online questionnaire)

18 March 2020

Dear Sir, Madam,

Response to European Commission Consultation on an EU framework for markets in crypto-assets

The International Capital Market Association (ICMA)¹ has submitted a response to certain aspects of the [European Commission Consultation Document on an EU framework for markets in crypto-assets](#) via the European Commission's online questionnaire. A copy of those responses is set out in the Appendices to this letter.

Background to ICMA

ICMA is a not-for-profit membership association, headquartered in Switzerland, that serves the needs of its wide range of member firms in global capital markets. Among its members are private and public sector issuers, banks and securities houses, asset managers and other investors, capital market infrastructure providers, central banks, law firms and others. ICMA currently has 587 members located in 62 countries. See: www.icmagroup.org.

General remarks related to ICMA's response

The ICMA response was prepared with comments expressed by ICMA's stakeholders, notably the ICMA Legal & Documentation Committee² and associated ICMA members, solely in relation to selected aspects of EU legislation applying to "security tokens", defined by the European Commission as "crypto-assets issued on a DLT and that qualify as transferable securities or other types of MiFID financial instruments".

ICMA represents the cross-border debt securities (Eurobonds) market, which is generally regulated. ICMA notes that definitions and interpretations of what constitutes a "security token" may vary given the lack of standardised terminology. For clarity, it may be useful to distinguish between "tokens" as a reference

¹ European Transparency Register #0223480577-59

² <https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/Primary-Markets/primary-market-committees/icma-legal-and-documentation-committee/>

to an underlying security such as an immobilised, conventional security, represented in digital form in a DLT-based system, and financial instruments recorded on a DLT-based system which are securities in their own right (sometimes also referred to as “native digital assets”).

Generally, Eurobonds represented in physical, book-entry or other digital form in a conventional or DLT-based system are expected to be covered equally by, and comply with, requirements in existing regulations irrespective of the underlying technology. Potential exceptions might arise under regulations that explicitly only allow for legacy formats such as physical certificates or that do not have general conceptual tests³.

It appears that “security tokens” are potentially an alternative source of early-stage funding used by start-ups and SMEs.⁴ From ICMA’s perspective, there has been a growing number of DLT applications at different stages of the securities lifecycle in bond markets, most of which are of experimental nature. An overview of selected DLT-based applications in bond markets is available on ICMA’s dedicated [FinTech Hub](#). However, in light of the embryonic nature of these applications in the Eurobond market, there is limited scope for industry-wide views or consensus on most aspects of this consultation.

ICMA’s response therefore covers only some specific details of laws and regulation with which ICMA has been particularly involved from a Eurobond market perspective and so is able to provide some initial, technical feedback on.

We remain at your disposal should you wish to discuss further.

Yours faithfully,



Gabriel Callsen
Director, Market Practice & Regulatory Policy
International Capital Market Association (ICMA)

E-mail: Gabriel.Callsen@icmagroup.org

Tel : +44 20 7213 0334

³ An example of a general conceptual test would be the requirement under Article 6 of the Prospectus Regulation, which (broadly) requires disclosure of all ‘material’ information.

⁴ Based on existing security token prospectuses approved by BaFin in 2019, for example.

APPENDIX 1

MiFID II QUESTIONS

Set out below is a copy of certain of the European Commission's questions related to MiFID II (in grey text) and ICMA's responses (in black text).

1. Market in Financial Instruments Directive framework (MiFID II)

The Market in Financial Instruments Directive framework consists of a directive (MiFID)⁵ and a regulation (MiFIR)⁶ and their delegated and implementing acts. MiFID II is a cornerstone of the EU's regulation of financial markets seeking to improve their competitiveness by creating a single market for investment services and activities and to ensure a high degree of harmonised protection for investors in financial instruments. In a nutshell, MiFID II sets out: (i) conduct of business and organisational requirements for investment firms; (ii) authorisation requirements for regulated markets, multilateral trading facilities, organised trading facilities and broker/dealers; (iii) regulatory reporting to avoid market abuse; (iv) trade transparency obligations for equity and non-equity financial instruments; and (v) rules on the admission of financial instruments to trading. MiFID also contains the harmonised EU rulebook on investor protection, retail distribution and investment advice.

1.1. Financial instruments

Under MiFID, financial instruments are specified in Section C of Annex I. These are inter alia 'transferable securities', 'money market instruments', 'units in collective investment undertakings' and various derivative instruments. Under Article 4(1)(15), 'transferable securities' notably means those classes of securities which are negotiable on the capital market, with the exception of instruments of payment.

There is currently no legal definition of security tokens in the EU financial services legislation. Indeed, in line with a functional and technologically neutral approach to different categories of financial instruments in MiFID, where security tokens meet necessary conditions to qualify as a specific type of financial instruments, they should be regulated as such. However, the actual classification of a security token as a financial instrument is undertaken by National Competent Authorities (NCAs) on a case-by-case basis.

In its Advice, ESMA⁷ indicated that in transposing MiFID into their national laws, the Member States have defined specific categories of financial instruments differently (i.e. some employ a restrictive list to define transferable securities, others use broader interpretations). As a result, while assessing the legal classification of a security token on a case by case basis, Member States might reach diverging conclusions. This might create further challenges to adopting a common regulatory and supervisory approach to security tokens in the EU.

Furthermore, some 'hybrid' crypto-assets can have 'investment-type' features combined with 'payment-type' or 'utility-type' characteristics. In such cases, the question is whether the qualification of 'financial instruments' must prevail or a different notion should be considered. 59) Do you think that the absence of a common approach on when a security token constitutes a financial instrument is an impediment to

⁵ [Market in Financial Instruments Directive \(2014/65/EU\)](#).

⁶ [Markets in Financial Instruments Regulation \(600/2014/EU\)](#)

⁷ ESMA, '[Advice on Initial Coin Offerings and Crypto-Assets](#)', January 2019

the effective development of security tokens?

59) Do you think that the absence of a common approach on when a security token constitutes a financial instrument is an impediment to the effective development of security tokens?

Completely agree	
Rather agree	
Neutral	
Rather disagree	X
Completely disagree	
Don't know / No opinion	

Please explain your reasoning (if needed).

ICMA RESPONSE: Member States defining some specific categories of financial instruments differently has not adversely impacted the conventional debt security (bond) space historically, so it is not obvious why debt security tokens would be so impacted.

APPENDIX 2

MARKET ABUSE REGULATION QUESTIONS

Set out below is a copy of the European Commission's questions related to the Market Abuse Regulation (in grey text) and ICMA's responses (in black text).

2. Market Abuse Regulation (MAR)

MAR establishes a comprehensive legislative framework at EU level aimed at protecting market integrity. It does so by establishing rules around prevention, detection and reporting of market abuse. The types of market abuse prohibited in MAR are insider dealing, unlawful disclosure of inside information and market manipulation. The proper application of the MAR framework is very important for guaranteeing an appropriate level of integrity and investor protection in the context of trading in security tokens.

Security tokens are covered by the MAR framework where they fall within the scope of that regulation, as determined by its Article 2. Broadly speaking, this means that all transactions in security tokens admitted to trading or traded on a trading venue⁸ are captured by its provisions, regardless of whether transactions or orders in those tokens take place on a trading venue or are conducted over-the-counter (OTC).

2.1. Insider dealing

Pursuant to Article 8 of MAR, insider dealing arises where a person possesses inside information and uses that information by acquiring or disposing of, for its own account or for the account of a third party, directly or indirectly, financial instruments to which that information relates. In the context of security tokens, it might be the case that new actors, such as miners or wallet providers, hold new forms of inside information and use it to commit market abuse. In this regard, it should be noted that Article 8(4) of MAR contains a catch-all provision applying the notion of insider dealing to all persons who possess inside information other than in circumstances specified elsewhere in the provision.

77) Do you think that the current scope of Article 8 of MAR on insider dealing is appropriate to cover all cases of insider dealing for security tokens?

ICMA RESPONSE: MAR's product coverage scope is very wide: MiFID instruments (and see further response to Q59 in this respect) (i) for which admission has been requested, that have been admitted to, or that are traded on an RM, MTF or OTF 'trading venue' or (ii) that impact / depend on such 'trading venue' instruments. This means that debt security tokens would seem no less likely, in light of their digital format, to be out of MAR scope than conventional debt securities. Consequently Article 8 of MAR on insider dealing would seem to cover equally cases of insider dealing in the context of debt security tokens and of conventional debt securities.

2.2. Market manipulation

In its Article 12(1)(a), MAR defines market manipulation primarily as covering those transactions and

⁸ Under MiFID Article 4(1)(24) 'trading venue' means a regulated market (RM), a Multilateral Trading Facility (MTF) or an Organised Trading Facility (OTF)

orders which (i) give false or misleading signals about the volume or price of financial instruments or (ii) secure the price of a financial instrument at an abnormal or artificial level. Additional instances of market manipulation are described in paragraphs (b) to (d) of Article 12(1) of MAR.

Since security tokens and blockchain technology used for transacting in security tokens differ from how trading of traditional financial instruments on existing trading infrastructure is conducted, it might be possible for novel types of market manipulation to arise that MAR does not currently address. Finally, there could be cases where a certain financial instrument is covered by MAR but a related unregulated crypto-asset is not in scope of the market abuse framework. Where there would be a correlation in values of such two instruments, it would also be conceivable to influence the price or value of one through manipulative trading activity of the other.

78) Do you think that the notion of market manipulation as defined in Article 12 of MAR is sufficiently wide to cover instances of market manipulation of security tokens?

ICMA RESPONSE: Given MAR's expansive scope (see response to Q77), Article 12 of MAR on market manipulation would seem to cover equally cases of market manipulation in the context of debt security token and conventional debt securities.

79) Do you think that there is a particular risk that manipulative trading in cryptoassets which are not in the scope of MAR could affect the price or value of financial instruments covered by MAR?

ICMA RESPONSE: Crypto-assets remain in their infancy. So consequently one might suspect the risk of manipulative trading in financial instrument crypto-assets to be less than the equivalent risk concerning conventional-form financial instruments, though both would be equally covered under MAR existing provisions as noted in the response to Q78. ICMA is not aware of concerns that Eurobonds might be at particular risk of manipulative trading in non-financial instrument crypto-assets.

APPENDIX 3

PROSPECTUS REGULATION QUESTIONS

Set out below is a copy of the European Commission’s questions related to the Prospectus Regulation (in grey text) and ICMA’s responses (in black text).

4. Prospectus Regulation (PR)

The Prospectus Regulation⁹ establishes a harmonised set of rules at EU level about the drawing up, structure and oversight of the prospectus, which is a legal document accompanying an offer of securities to the public and/or an admission to trading on a regulated market. The prospectus describes a company's main line of business, its finances, its shareholding structure and the securities that are being offered and/or admitted to trading on a regulated market. It contains the information an investor needs before making a decision whether to invest in the company's securities.

4.1. Scope and exemptions

With the exception of out of scope situations and exemptions (Article 1(2) and (3)), the PR requires the publication of a prospectus before an offer to the public or an admission to trading on a regulated market (situated or operating within a Member State) of transferable securities as defined in MiFID II. The definition of ‘offer of securities to the public’ laid down in Article 2(d) of the PR is very broad and should encompass offers (e.g. STOs) and advertisement relating to security tokens. If security tokens are offered to the public or admitted to trading on a regulated market, a prospectus would always be required unless one of the exemptions for offers to the public under Article 1(4) or for admission to trading on a RM under Article 1(5) applies.

82) Do you consider that different or additional exemptions should apply to security tokens other than the ones laid down in Article 1(4) and Article 1(5) of PR?

Completely agree	
Rather agree	
Neutral	
Rather disagree	
Completely disagree	X
Don't know / No opinion	

Please explain your reasoning (if needed).

ICMA RESPONSE: Security tokens are defined by the European Commission as “crypto-assets issued on a DLT and that qualify as transferable securities or other types of MiFID financial instruments”. Based on this definition, it would seem that security tokens are fundamentally the same as traditional securities in terms of the rights and obligations attaching to them,

⁹ Prospectus Regulation (2017/1129/EU)

but are simply issued in a different form. On this basis, there should be no need for additional Prospectus Regulation exemptions for issuance of security tokens.

In practice, the limited number of issuance of debt security token issues to date have fallen outside the scope of the Prospectus Regulation. This is because they have fallen within one of the exemptions in Article 1(4) of the Prospectus Regulation and they have not been admitted to trading on an EEA regulated market.

4.2. The drawing up of the prospectus

Delegated Regulation (EU) 2019/980, which lays down the format and content of all the prospectuses and its related documents, does not include schedules for security tokens. However, Recital 24 clarifies that, due to the rapid evolution of securities markets, where securities are not covered by the schedules to that Regulation, national competent authorities should decide in consultation with the issuer which information should be included in the prospectus. Such approach is meant to be a temporary solution. A long term solution would be to either (i) introduce additional and specific schedules for security tokens, or (ii) lay down 'building blocks' to be added as a complement to existing schedules when drawing up a prospectus for security tokens.

The level 2 provisions of prospectus also defines the specific information to be included in a prospectus, including Legal Entity Identifiers (LEIs) and ISIN. It is therefore important that there is no obstacle in obtaining these identifiers for security tokens.

The eligibility for specific types of prospectuses or relating documents (such as the secondary issuance prospectus, the EU Growth prospectus, the base prospectus for non- equity securities or the universal registration document) will depend on the specific types of transferable securities to which security tokens correspond, as well as on the type of the issuer of those securities (i.e. SME, mid-cap company, secondary issuer, frequent issuer).

Article 16 of PR requires issuers to disclose risk factors that are material and specific to the issuer or the security, and corroborated by the content of the prospectus. ESMA's guidelines on risk factors under the PR¹⁰ assist national competent authorities in their review of the materiality and specificity of risk factors and of the presentation of risk factors across categories depending on their nature. The prospectus could include pertinent risks associated with the underlying technology (e.g. risks relating to technology, IT infrastructure, cyber security, etc...). ESMA's guidelines on risk factors could be expanded to address the issue of materiality and specificity of risk factors relating to security tokens.

83) Do you agree that Delegated Regulation (EU) 2019/980 should include specific schedules about security tokens?

- Yes

¹⁰ ESMA, [Guidelines on Risks factors under the prospectus regulation](#) (31-62-1293)

- No
- Don't know/no opinion

If yes, please indicate the most effective approach: a 'building block approach' (i.e. additional information about the issuer and/or security tokens to be added as a complement to existing schedules) or a 'full prospectus approach' (i.e. completely new prospectus schedules for security tokens). Please explain your reasoning (if needed).

ICMA RESPONSE: No.

As noted in our response to Q82, a Prospectus Regulation-compliant prospectus would not be required for many issues of debt security tokens at the moment (and this is also true of certain issues of non-tokenised debt securities). However, if an issuance of debt security tokens were to fall within the scope of the Prospectus Regulation, we assume that the relevant Commission Delegated Regulation 2019/980 schedules to use would be the schedules for non-equity securities (on the basis that non-equity securities are defined in Article 2 of the Prospectus Regulation as "all securities that are not equity securities"). We are not aware that there would be significant difficulties in applying the disclosure requirements set out in the existing schedules for non-equity securities in the case of an issuance of debt security tokens.

More generally, the concept enshrined in Article 6 of the Prospectus Regulation (that potential investors should be informed of the necessary information in order to make an informed investment decision) seems to us to apply equally to security tokens ("crypto-assets issued on a DLT and that qualify as transferable securities or other types of MiFID financial instruments") as it does to other types of securities, and this should be sufficient to ensure that prospectuses for security tokens contain the information that investors need.

84) Do you identify any issues in obtaining an ISIN for the purpose of issuing a security token?

No ICMA response.

85) Have you identified any difficulties in applying special types of prospectuses or related documents (i.e. simplified prospectus for secondary issuances, the EU Growth prospectus, the base prospectus for non-equity securities, the universal registration document) to security tokens that would require amending these types of prospectuses or related documents? Please explain your reasoning (if needed).

ICMA RESPONSE: We are not aware of any difficulties in applying special types of prospectuses or related documents to security tokens. As noted in our response to various questions (including Q82) above, security tokens ("crypto-assets issued on a DLT and that qualify as transferable securities or other types of MiFID financial instruments") would seem to be fundamentally the same as traditional securities in terms of the rights and obligations attaching to them, but are simply issued in a different form. A difference in the form of the product should not impact upon the availability and application of special types of prospectus.

86) Do you believe that an *ad hoc* alleviated prospectus type or regime (taking as example the approach used for the EU Growth prospectus or for the simplified regime for secondary issuances) should be introduced for security tokens?

- Yes
- No
- Don't know/no opinion

Please explain your reasoning (if needed).

ICMA RESPONSE: No.

As noted in our response to various questions (including Q82) above, security tokens are defined by the European Commission as “crypto-assets issued on a DLT and that qualify as transferable securities or other types of MiFID financial instruments”. It would therefore seem that security tokens are fundamentally the same as traditional securities in terms of the rights and obligations attaching to them, but are simply issued in a different form. On this basis, there is no need for an alleviated prospectus disclosure regime for security tokens. It is possible that existing alleviated regimes (e.g. the EU Growth Prospectus) might be available in any event.

87) Do you agree that issuers of security tokens should disclose specific risk factors relating to the use of DLT?

Completely agree	
Rather agree	X
Neutral	
Rather disagree	
Completely disagree	
Don't know / No opinion	

If you agree, please indicate if ESMA’s guidelines on risks factors should be amended accordingly. Please explain your reasoning (if needed).

ICMA RESPONSE: We agree that there may be specific risks for investors related to the use of DLT that an issuer of security tokens may wish to disclose in its prospectus. However, we do not think that ESMA’s guidelines on risk factors need to be amended. The Prospectus Regulation regime already requires disclosure of material risks that are specific to the securities being offered (see Article 16 of the Prospectus Regulation and Item 2.1, Annex 14 and Item 2.1, Annex 15 of Commission Delegated Regulation 2019/980). It would not seem that additional clarification or specific provisions are required for security tokens.