

## STATEMENT

### **ESMA alerts firms involved in *Initial Coin Offerings (ICOs)* to the need to meet relevant regulatory requirements**

The European Securities and Markets Authority (ESMA) is issuing this Statement to draw the attention of firms involved in ICOs to the fact that they must give careful consideration as to whether their activities constitute regulated activities. This Statement is published alongside a Statement alerting [investors](#) to the high risks of investing in ICOs.

ESMA has observed a rapid growth of ICOs, which raise capital for enterprises, and is concerned that firms involved in ICOs may conduct their activities without complying with relevant applicable EU legislation.

### **ESMA reminds firms involved in ICOs of their obligations under EU regulation**

Firms involved in ICOs must give careful consideration as to whether their activities constitute regulated activities. If their activities constitute a regulated activity, firms have to comply with the relevant legislation and any failure to comply with the applicable rules would constitute a breach.

Depending on how they are structured, ICOs may fall outside of the scope of the existing rules and hence outside of the regulated space. However, where the coins or tokens qualify as financial instruments it is likely that the firms involved in ICOs conduct regulated investment activities, such as placing, dealing in or advising on financial instruments or managing or marketing collective investment schemes. Moreover, they may be involved in offering transferable securities to the public. The key EU rules listed below are then likely to apply.

Please note that what follows is a high-level summary of the key applicable EU legislation. It is not intended to be an exhaustive account of the applicable rules nor of the requirements laid down in these legislations. In addition, national rules may apply.

It is the duty of the firms themselves to consider the regulatory framework, seeking the necessary permissions and meeting the applicable requirements.

#### *Prospectus Directive*

The Prospectus Directive (PD) aims to ensure that adequate information is provided to investors by companies when raising capital in the EU. It requires publication of a prospectus before the offer of transferable securities to the public or the admission to trading of such securities on a regulated market situated or operating within a Member State, unless certain exclusions or exemptions apply. In particular, the PD specifies that the prospectus shall

contain the necessary information which is material to an investor for making an informed assessment of the facts and that the information shall be presented in an easily analysable and comprehensible form. The PD does not directly specify who should draw up the prospectus but requires that the party responsible for the information (being at least the issuer, the offeror, the party seeking admission to trading or the guarantor) is specified in the prospectus. Depending on how the ICO is structured, the coins or tokens could, potentially, fall within the definition of a transferable security, and could therefore necessitate the publication of a prospectus which will be subject to approval by a Competent Authority.

#### *The Markets in Financial Instruments Directive*

The Markets in Financial Instruments Directive (MiFID) aims to create a single market for investment services and activities and to ensure a high degree of harmonised protection for investors in financial instruments. A firm that provides investment services/activities in relation to financial instruments as defined by MiFID needs to comply with MiFID requirements. In the case of ICOs, where the coin or token qualifies as a financial instrument, the process by which a coin or token is created, distributed or traded is likely to involve some MiFID activities/services, such as placing, dealing in or advising on financial instruments. The organisational requirements, the conduct of business rules and the transparency requirements laid down in MiFID would then apply, depending in some cases on the services provided.

#### *Alternative Investment Fund Managers Directive*

The Alternative Investment Fund Managers Directive (AIFMD) lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union. Depending on how it is structured, an ICO scheme could qualify as an AIF, to the extent that it is used to raise capital from a number of investors, with a view to investing it in accordance with a *defined investment policy*. Firms involved in ICOs may therefore need to comply with AIFMD rules. In particular, AIFMD provides for capital, operational and organisational rules and transparency requirements.

#### *Fourth Anti-Money Laundering Directive*

The Fourth Anti-Money Laundering Directive prohibits money laundering and terrorist financing. It applies to firms including credit institutions and financial institutions, the latter including MiFID investment firms, collective investment undertakings marketing their units or shares and firms providing certain services offered by credit institutions without being one.

The Directive requires firms to carry out due diligence on customers and to have in place appropriate record-keeping and other internal procedures. Firms have an obligation to report any suspicious activity and to co-operate with any investigations by relevant public authorities.