



# Payments, E-Money and Crypto-Assets Quarterly Legal and Regulatory Update

Period covered: 1 April 2020 – 30 June 2020

## TABLE OF CONTENTS

<u>PAYMENTS</u>	<u>CRYPTO-ASSETS</u>	<u>CENTRAL BANK OF IRELAND</u>	<u>ANTI-MONEY LAUNDERING (AML) AND COUNTERING THE FINANCING OF TERRORISM (CFT)</u>
<u>COVID-19</u>			

## 1. PAYMENTS

### 1.1 European Commission launches consultations on digital finance and retail payments

On 3 April 2020, the European Commission launched a consultation on Digital Finance. The current COVID-19 pandemic has shown that consumers and businesses are becoming increasingly reliant on digital financial services, e.g. contactless payments. The purpose of this consultation is to take the views of interested parties into account in relation to more innovative digital finance strategies and will feed into the Commission's new Digital Finance Strategy.

On the same day the Commission launched a second consultation seeking feedback in relation to its Retail Payments Strategy for the European Union. The aim of this strategy is to create an innovative, integrated and competitive retail payments sector for European consumers, providing them with access to fast and secure pan-European payments services.

Both consultations will run until 15 July 2020.

The Digital Finance consultation can be accessed [here](#) and the Retail Payments consultation can be accessed [here](#).

### 1.2 Financial Stability Board publish report on enhancing cross-border payments

On 9 April 2020, the Financial Stability Board (FSB) published a Stage 1 Report as part of an initiative to enhance cross-border payments. The G20 has made enhancing cross-border payments a priority during the Saudi Arabian presidency and has asked the FSB to consult with relevant stakeholders and develop a roadmap to achieve this goal.

This first stage of the report was submitted to G20 finance ministers and central bank governors before their virtual meeting on 15 April 2020. A technical background report was also provided. Among other things, the report highlights the following:

- Cross-border payments often face challenges of high costs, low speed, limited access and insufficient transparency. To enhance cross-border payments, it is vital to address these shortcomings;
- Technological innovation is having an impact on financial services and enabling more efficient cross-border payments. The report warns that such technology also comes with risks that must be assessed and adequately addressed; and
- Public authorities have an important role to play, working with the private sector to leverage opportunities and address challenges.

The FSB advises that a roadmap for enhancing cross-border payments will need to encompass a variety of approaches and time horizons. The roadmap may present different routes for the development of cross-border payments but it is vital that all meet minimum safety standards. The roadmap will also need to include a variety of actors in the public and private sectors.

Although the Covid-19 pandemic has forced organisations to prioritise different strategies, the FSB is committed to ensuring that the strategy on cross-border payments progresses as planned.

The report can be accessed [here](#) and an outline of the rest of the process is available [here](#).

### 1.3 Advocate General's opinion on application of PSD2 to contactless payment cards

On 30 April 2020, the Court of Justice of the European Union published an opinion by Advocate General Campos Sánchez-Bordona on the application of the revised Payment Services Directive (2015/2366/EU) (PSD2) to contactless payment cards. In the Advocate General's opinion:

- The near field communication (**NFC**) functionality of a personalised multifunctional payment card should be classified as a payment instrument within the meaning of Article 4(14) of PSD2 and users of such cards should therefore benefit from the protections of PSD2;
- A banking institution issuing a personalised multifunctional payment card to which NFC functionality has been added may make use of the derogation provided for in Article 63(1)(a) of PSD2 only if it can demonstrate that it is not technically feasible to block that card or prevent its further use in the event of loss, theft, misappropriation or unauthorised use;
- The making of low-value contactless payments using the NFC functionality of a personalised multifunctional payment card constitutes an instance of that card being used anonymously within the meaning of Article 63(1)(b) of PSD2; and
- The scope for making tacit changes to the terms of a framework contract must be strictly interpreted. It may not be applied to changes to the essential elements of that framework contract, such as ones relating to the addition of NFC functionality to a payment card.

The Advocate General concludes that these cards comprise two separate payment instruments (one personalised and one anonymous) which are subject to different legal regimes, even though they have the same physical medium. Whilst the Advocate General's opinion still has to be accepted by the court, this is an important legal analysis of the application of PSD2 to contactless payment cards.

The Advocate General's opinion can be accessed [here](#).

#### 1.4 European Banking Federation publish implementation guidance on Cross-Border Payments Regulation

On 13 May 2020, the European Banking Federation (**EBF**) published implementation guidance on the Cross-Border Payments Regulation ((EU) 2019/518) (**Cross-Border Payments Regulation**).

The guidance aims to assist EBF members in their implementation of the Cross-Border Payments Regulation, in particular the new obligations concerning transparency requirements relating to currency conversions for card-based payments and credit transfers. The guidance also sets out questions the EBF received from its members relating to the implementation of the Cross-Border Payments Regulation and is accompanied by responses developed by the EBF Payment Systems Committee.

The guidance can be accessed [here](#).

#### 1.5 European Payments Council launches consultation on mobile initiated SEPA credit transfers

On 28 May 2020, the European Payments Council (**EPC**) launched a public consultation on the technical interoperability of mobile initiated SEPA credit transfers (**MSCT**). Following the publication of Mobile Initiated SEPA (Instant) Credit Transfer Interoperability Guidance, the multi-stakeholder group has conducted a more in-depth analysis of the technical interoperability of MSCTs based on payer-presented data.

The document describes new MSCT cases for the Customer-To-Business payment context and defines the minimum data set to be exchanged between payer and payee.

The EPC notes that feedback from industry stakeholders is vital to ensuring the development of a successful MSCT ecosystem. The dedicated feedback questionnaire is available [here](#).

Responses should be submitted by email to <mailto:mp.consultation@epc-cep.eu> by 24 July 2020.

The technical interoperability of MSCTs analysis document can be accessed [here](#).

## 1.6 European Banking Authority issues opinion on obstacles to the provision of third party provider services under PSD2

On 4 June 2020, the European Banking Authority (**EBA**) published an opinion on obstacles to the provision of third party provider (**TPP**) services under the regulatory technical standards (**RTS**) on strong customer authentication (**SCA**) and common and secure communication (**CSC**) supplementing PSD2.

The opinion addresses issues regarding the interfaces provided by account servicing payment service providers (**ASPSPs**) to TPPs by clarifying when mandatory redirection is an obstacle to the provision of TPP services and the authentication procedures that ASPSPs' interfaces are required to support. It also clarifies a number of obstacles identified in the market, including requiring multiple SCAs, the manual entry of the International Bank Account Number (**IBAN**) in the ASPSP's domain, or imposing additional checks on the consent given by the customer to the TPP. The opinion explains that requiring re-authentication every 90 days for account information services in accordance with the RTS on SCA and CSC is not an obstacle.

The EBA expects national competent authorities to take the necessary action to ensure compliance of the interfaces offered by ASPSPs with the PSD2 and the RTS and to ensure that ASPSPs quickly remove obstacles once identified. The EBA will monitor the manner in which the clarifications provided in the opinion are taken into account and will take remedial action where it identifies inconsistencies.

A copy of the opinion can be accessed [here](#).

## 1.7 EPC launches consultation on SEPA request-to-pay scheme rulebook

The EPC launched a consultation on 10 June 2020 on a proposed rulebook for the new SEPA Request-To-Pay (**SRTP**) scheme. This will provide a new way to request payment initiation.

This began with the EPC Request-To-Pay Multi-Stakeholder Group's (**RTP MSG**) publication of the RTP Specifications for a standardisation framework document. The next step was the establishment of an ad-hoc taskforce to develop a SEPA RTP rulebook with a mandate to ensure broad stakeholder involvement in the process.

The aim of the scheme is to facilitate digital payment requests and to allow payees express their payment preferences as part of streamlining the end-to-end payments experience. The publication of the rulebook is expected in November 2020 with a second release of a revised rulebook planned for November 2021.

Responses from interested parties should be submitted via email to <mailto:SRTP@epc-cep.eu> by 30 August 2020. The response template is available to access [here](#).

## 2. CRYPTO-ASSETS

### 2.1 FSB consultation on global stablecoins

On 14 April 2020, the FSB published a consultation paper on addressing the regulatory, supervisory and oversight challenges raised by global stablecoin arrangements. A global stablecoin is a stablecoin with a potential reach and adoption across multiple jurisdictions and the potential to achieve substantial volume. A stablecoin arrangement is an arrangement that combines a range of functions to provide an instrument that can be used as a means of payment or store of value, or both.

The FSB's consultation paper analyses the characteristics of global stablecoins, how they may differ from other crypto-assets and other stablecoins, and the potential risks posed by them. It also considers existing regulatory, supervisory and oversight approaches to global stablecoins and identifies issues that authorities may need to address, as well as specific challenges arising in a cross-border context.

The FSB seeks views on ten recommendations aimed at authorities and intended to advance consistent and effective regulation, supervision and oversight of global stablecoin arrangements.

The deadline for responses to the consultation is 15 July 2020 and the FSB intends to publish its final recommendations in October 2020.

The consultation can be accessed [here](#).

## 2.2 ECON draft report sets out recommendations on digital finance

On 4 June 2020, the European Parliament's Economic and Monetary Affairs Committee (**ECON**) published a draft report setting out recommendations to the European Commission on digital finance in the EU, in particular in relation to developing a regulatory framework for crypto-assets, cyber and operational resilience and regulatory and supervisory challenges in the area of financial services, institutions and markets.

The draft report, contains a motion for a European Parliament legislative resolution and specific recommendations on the content of the legislative proposals requested. In an explanatory statement, by the Rapporteur, the report's priorities are to target the main areas that demand a pan-EU regulatory response to digital finance to address the existing fragmented regulatory regimes and provide industry participants with a complete and stable regulatory framework to expand their activities and operate with legal certainty. The principal recommendations in the report are:

- To put forward a proposal for a crypto-assets framework that addresses their potential impact for financial markets. The development of a taxonomy and any initiatives should be balanced and flexible, providing room for innovation so that the regulatory framework can evolve. Existing regulations should be applied to previously unregulated crypto-assets and bespoke regulatory regimes created for evolving crypto-asset activities, such as initial coin offerings;
- To make a proposal for a legislative change relating to information and communications technology and cybersecurity (**ICT**) requirements for the financial sector, addressing inconsistencies, gaps and loopholes in relevant law. These should focus on modernisation, alignment of reporting of ICT incidents, a common framework for penetration and operational resilience testing across financial sectors and oversight of critical ICT third-party providers; and
- To propose a framework for digital onboarding and the use of digital identities with the aim of ensuring a common understanding of digital identities across the EU.

A copy of the draft report can be accessed [here](#).

## 2.3 European Commission speech on legislative proposals for crypto-assets and digital operational resilience

On 24 June 2020, the European Commission published a speech by the European Commissioner for Financial Stability, Financial Services and Capital Markets Union, Mr. Valdis Dombrovskis, on digital finance.

Mr. Dombrovskis confirms the European Commission's intention to adopt legislative proposals for crypto-assets and digital operational resilience later in 2020 and goes on to set out details of the European Commission's current thinking on these proposals, including:

- adjusting existing rules for crypto-assets that are currently covered by European Union legislation to ensure that they remain fit for purpose;
- proposing a pilot scheme to allow some regulatory flexibility for experimentation in the area of distributed ledger technology;

- creating a bespoke regime and a passport for markets in crypto-assets for those assets that are not covered by European Union legislation; and
- the adoption of a legislative proposal on digital operational resilience that will require all financial institutions to comply with operational resilience standards. This will set out channels for reporting cyber incidents and identify tools for testing the cyber-resilience of financial institutions. The Commission also intends to create a financial oversight mechanism for third-party ICT providers, such as cloud service providers.

The full speech can be accessed [here](#).

### 3. THE CENTRAL BANK OF IRELAND

#### 3.1 Central Bank of Ireland responds to the European Commission Consultation on the market in crypto-assets

On 30 April 2020, the Central Bank of Ireland (the **Central Bank**) issued a letter in response to the European Commission's public consultation for markets in crypto-assets. In its response, the Central Bank advised that it is supportive of the initiative and welcomes the development of a more harmonised approach to crypto-assets. The Central Bank highlights some areas that are of relevance to its mandate and provides the following perspective on crypto-assets:

- There should be a harmonised taxonomy of crypto-assets which would facilitate a feature driven, case-by-case assessment by market participants and National Competent Authorities;
- Security tokens are most likely to be transferable securities, or at least exhibit similar characteristics;
- The five crypto-asset services specified by the Financial Action Task Force (**FATF**) should be covered by the European Union AML/CFT legal framework and definitions should be brought as closely as possible into line with those used by FAFT;
- The risks of stablecoins for financial stability, monetary policy, consumer and investor protection, legal certainty and compliance with AML/CFT requirements are a key concern and the issuing of currency should remain under the relevant public authorities; and
- It is not readily apparent to the Central Bank that most utility tokens are, or should, be treated as financial products or that they should be regulated as such. However, the Central Bank recognises that a utility token may become a financial instrument (transferable security or e-money) and in that case it should be clear that it should fall within the regulatory perimeter. Cases where crypto-assets start as, or claim to be, one thing but morph into the provision of financial services directly or indirectly should be closely monitored.

The Central Bank urges caution in imposing regulatory changes which may have any unintended consequences such as diminishing security or consumer protections. The Central Bank also notes the lack of verifiable regulatory data with respect to the activities outside of its regulatory remit. Regulatory changes should be supported by data and meet an effectiveness and proportionality test. The Central Bank recommends the carrying out of a cost/benefit analysis in respect of regulatory reforms in this context.

The letter can be accessed [here](#).

#### 3.2 Central Bank speech on the European Commission's consultation on digital finance

On 14 May 2020, the Director of Financial Regulation, Policy and Risk at the Central Bank, Gerry Cross, delivered a speech to the Department of Finance and the European Commission addressing the European Commission's consultation on digital finance. Mr.

Cross's speech shared the Central Bank's thinking on a number of issues in the area. Some of Mr Cross's key points can be summarised as follows:

- The promotion and protection of consumer interests through technology as it has the potential to significantly improve but also weaken, how firms engage with and treat their customers. The new Digital Strategy / Fintech Action plan by the European Commission should seek to drive forward the positive aspects and aim to have technological developments harnessed to benefit consumers in their engagement with financial services providers, while ensuring such developments are not deployed to the disadvantage of consumers;
- While innovation and advances in digital finance opens opportunities for new products, services and ways of interacting with consumers and the market and for enhancing the fight against financial crime, it also has potential for additional money laundering and terrorist financing risks. The new European Union Digital Strategy / Fintech Action plan should seek to ensure that technological innovation considers money laundering and terrorist financing risks at a design stage, so to mitigate money laundering and terrorist financing prior to their launch;
- Advances in technology resulting in material changes to business models, applications, processes and products challenge regulators in their maintenance and surveillance of the regulatory perimeter;
- It will be important to pay attention to the role of new types of participants in the financial system and the increased participation of large global non-financial participants in the financial sector such as the area of cloud outsourcing;
- The area of analytic technologies and big data analytics are enabling and serving as a foundation for artificial intelligence and such advances can bring significant benefits to assessment processes, such as for creditworthiness and underwriting, pricing processes and fraud detection; and
- The increased embedding of technology in financial services presents heightened ICT security issues, with the potential for significantly increased impact from the crystallisation of ICT risks. It is important that the increased digitalisation of financial services is accompanied by associated enhancement in risk management and resilience.

The full speech can be accessed [here](#).

## 4. ANTI-MONEY LAUNDERING (AML) AND COUNTERING THE FINANCING OF TERRORISM (CFT)

### 4.1 European Commission adopts new Delegated Regulation amending list of high-risk third countries under MLD4

On 7 May 2020, the European Commission adopted a Delegated Regulation, amending the list of high-risk third countries that are deemed to have strategic deficiencies in their AML/CFT regimes.

This Regulation adds the following countries to the list of high-risk countries - Bahamas, Barbados, Botswana, Cambodia, Ghana, Jamaica, Mauritius, Mongolia, Myanmar/Burma, Nicaragua, Panama and Zimbabwe. It also removes the following nations from that list in light of improvements – Bosnia-Herzegovina, Ethiopia, Guyana, Lao People's Democratic Republic, Sri Lanka and Tunisia.

Notable omissions from the list include Saudi Arabia, Puerto Rico and the US Virgin Islands. (All were included on the draft list issued by the Commission in February 2019, which was rejected by the Council).

The Delegated Regulation was submitted to the Council of the EU and the Parliament to consider for approval. It shall apply from 1 October 2020. The Commission has provided a later application date for this Article because of the COVID-19 pandemic. This Regulation was published in the Official Journal of the European Union on 19 June.

The Commission explains, in a related [press release](#), that this update is necessary as its list of high-risk third countries has not reflected the latest FATF lists since October 2018.

The text of the Regulation can be accessed [here](#).

#### **4.2 European Commission staff working document on new methodology for identifying high-risk third countries under MLD4**

On 7 May 2020, the European Commission published a staff working document setting out a new methodology for identifying high-risk third countries under the Fourth Money Laundering Directive ((EU) 2015/849) (**MLD4**).

The new methodology updates and replaces the Commission's June 2018 staff working document.

The new staff working document can be accessed [here](#).

#### **4.3 European Commission publishes an action plan designed to strengthen the EU's framework for preventing money laundering and terrorist financing**

On 7 May 2020, the European Commission published an action plan designed to strengthen the EU's framework for preventing money laundering and terrorist financing.

Please see the Dillon Eustace briefing paper entitled "Towards a common AML framework for the EU" which can be accessed [here](#).

## **5. COVID – 19**

### **5.1 Central Bank industry letter to regulated firms and PCF vacancies due to COVID-19**

In the Central Bank's industry [letter](#) of 30 April 2020, a number of issues are addressed arising from the coronavirus pandemic. One of these relates to the role of Pre-Approved Controlled Functions (**PCFs**) and the possibility that a PCF may become incapacitated due to COVID-19.

To avoid any detriment to firms in such an instance, the Central Bank has permitted that once authorisation is sought, companies may appoint a suitable individual to a PCF role for a limited period of time where a vacancy arises due to illness. The Central Bank details the steps that should be taken when opting for this course of action in its [COVID-19 Regulated Firms – FAQ](#).

On 6 May, Dillon Eustace prepared an overview of the Central Bank requirements and the approach that firms should take in relation to temporary PCF appointments. This overview can be accessed [here](#).

If you have any questions in relation to the content of this update, to request copies of our most recent newsletters, briefings or articles, or if you wish to be included on our mailing list going forward, please contact any of the team members below.

**Keith Waine**

E-mail: [keith.waine@dilloneustace.ie](mailto:keith.waine@dilloneustace.ie)

Tel : + 353 1 673 1822

Fax: + 353 1 667 0042

**Karen Jennings**

E-mail: [karen.jennings@dilloneustace.ie](mailto:karen.jennings@dilloneustace.ie)

Tel : + 353 1 673 1810

Fax: + 353 1 667 0042

**Enda McGeever**

E-mail: [enda.mcgeever@dilloneustace.ie](mailto:enda.mcgeever@dilloneustace.ie)

Tel : + 353 1 673 1751

Fax: + 353 1 667 0042

**Seán Mahon**

E-mail: [sean.mahon@dilloneustace.ie](mailto:sean.mahon@dilloneustace.ie)

Tel : + 353 1 673 1707

Fax: + 353 1 667 0042

**DISCLAIMER:**

This document is for information purposes only and does not purport to represent legal advice. If you have any queries or would like further information relating to any of the above matters, please refer to the contacts above or your usual contact in Dillon Eustace.