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Financial Conduct Authority
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Email: dp24-4@fca.org.uk

Dear Sir / Madam,

The City of London Law Society's Response to Discussion Paper DP 24/4 Regulating cryptoassets: Admissions & Disclosures and Market Abuse Regime for Cryptoassets

Introduction

1. The City of London Law Society ("**CLLS**") represents approximately 17,000 City lawyers through individual and corporate membership, including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its specialist committees.

2. This response has been prepared by the CLLS Regulatory Law Committee (the "**Committee**" or "**we**"), a list of whose members can be found on the CLLS website. The Committee not only responds to consultations but also proactively raises concerns where it becomes aware of issues which it considers to be of importance in a regulatory context.

3. We welcome the opportunity to present our views on the proposals contained in DP 24/4. In particular, we would like to respond to questions 3, 4, 6, 8, 11, 14, 21, 24, 25, 27, 36, 37 and 38.

General comments

Question 3: How do you anticipate our proposed approach to regulating market abuse and admissions and disclosures (see Chapters 2 and 3 for details) will impact competition in the UK cryptoasset market? What competitive implications do you foresee as a result of our regulatory proposals?

Question 14: Do you agree with the proposed approach to our rules on due diligence and disclosure of due diligence conducted? If not, please explain what changes you would suggest and why?

4. The role envisaged for CATPs in supporting (or effectively ensuring) the functioning of the admissions and disclosure and market abuse rules is, in our view, unlikely to be attractive for firms operating such platforms, or contemplating doing so. In terms of how this compares to a developing cryptoasset regime on the UK's doorstep, the EU MiCA Regulation (**MiCAR**) does not expressly require operators of trading platforms to due diligence all white papers but rather to:

- run AML checks before admitting cryptoassets to trading;

- assess the cryptoasset's technology and its potential association to illicit or fraudulent activities.

5. This is a different approach from the FCA's proposal that CATPs should diligence admission documents to establish a reasonable level of certainty that disclosures are true and not misleading. The FCA is also proposing that CATPs should include in admission documents (including those drawn up by others) a summary of their due diligence findings.

6. While CATPs will undoubtedly develop their own operating procedures and standards to assess applications for admission to trading, the FCA's proposals raise questions about CATPs' responsibility and liability for information about the cryptoassets trading on their platforms. In particular, the proposals raise the question of whether CATPs are in danger of having greater potential liability than, for example, operators of regulated markets and MTFs in traditional financial markets. While the proposed standard is that of a "reasonable level of certainty", CATPs may not have the best access to information on the cryptoasset, unless they have access to the issuer and the key individuals involved

7. The Committee thinks that it could make sense to hold a CATP to a higher standard when it is the CATP itself seeking admission to trading, but not in other cases. However, the advantages and disadvantages of this need to be explored further in our view. We also query how feasible it will be operationally for CATPs to diligence every admission document and prepare summaries in this way. An alternative approach may be allowing the industry to develop its own practices in reaction to the potential liability that issuers or persons seeking admission may have, in much the same way as in traditional finance working practices have developed around comfort letters and opinions. We also note that the financial promotion regime applicable to cryptoassets already in effect requires a level of diligence to be performed.

8. Please see our comments below on question 38 in relation to the obligations placed upon CATPs and intermediaries in relation to market abuse.

9. With the decentralised nature of cryptoassets, there is a danger that issuers or persons seeking admission to trading might look to offer the cryptoasset elsewhere, or that CATPs will set up elsewhere (in particular, the EU), should the UK regulatory regime prove to be a barrier. This would impede the growth of an effectively functioning cryptoasset market in the UK.

10. However, we would agree that competition might be encouraged where the proposed regime makes cryptoassets available to a wider population of investors. We note the research cited at paragraph 1.19 on the demographics of cryptoassets owners. Cryptoassets can be much less accessible or attractive to most retail investors for various reasons, such as the complexity of the underlying technology, a lack of accessible information on the cryptoasset as an investment, or simply that cryptoassets seem much less reliable as an investment than more established financial instruments. A new UK regime might change these perceptions, such as by making available accessible and relatively standardised information on cryptoassets.

Question 4: Do you agree with our view that while the Consumer Duty sets a clear baseline for expectations on firms, it is necessary to introduce specific A&D requirements (see Chapter 2 for details) to help support consumers?

11. We agree that specific A&D requirements should be introduced, as it will be in the interests of market participants and investors alike to have specific requirements setting standards

for A&D. The outcomes-based approach of the Consumer Duty could result in variations in approaches taken by CATPs and issuers that prevent investors from making useful comparisons between issuers and products. Issuers and CATPs might therefore welcome specific requirements that set consistent expectations across the market. Please see further our response to question 8 below.

Proposed admissions and disclosures regime

Question 6: Should an admission document always be required at the point of initial admission? If not, what would be the scenarios where it should not be required? Please provide your rationale.

12. While we agree that an admission document should be required at the point of initial admission to trading, there would have to be a transition / implementation period in respect of cryptoassets that are already available for trading on CATPs in order to avoid harmful disruption to investors who already own traded cryptoassets. While such cryptoassets have already been admitted for trading, disclosures could provide useful information for prospective new investors and might help existing investors to compare against information for other cryptoassets.

Question 8: Do you agree with our proposed approach to disclosures, particularly the balance between our rules and the flexibility given to CATPs in establishing more detailed requirements?

13. We generally agree that there should be a balance so that the disclosure requirements retain some degree of flexibility. Assuming that the FCA will have the purview to set out detailed requirements for admissions documents, the Committee's view is that the FCA should be prepared to adjust the disclosure requirements in response to feedback from the market in the initial stages of implementation.

14. The requirements should ensure that information is presented in a way that is actually accessible and useful for most investors. For instance, retail investors likely do not read through prospectuses for shares in listed companies. Technical information such as information on the cryptoasset's governance mechanisms, protocols or impact on sustainability, is important as it goes to the key features of a cryptoasset, but retail investors are unlikely to engage with the density of information provided. It would be worth exploring whether an industry-led solution could be found to create a single source of information, rather than multiple documents about the same cryptoasset prepared by different CATPs, or at least a single source of technical information.

15. We note that a practical result of Consumer Duty was that a number of market participants started creating "what you need to know" documents that provided brief, accessible summaries of information that retail customers actually need and understand. We would suggest that a similar approach would be helpful for retail investors in UK cryptoasset markets. It may not be necessary to mandate it in the FCA's A&D requirements because very arguably Consumer Duty already imposes the relevant requirements in relation to customer information. The Committee would incline against duplicative requirements, also noting the FCA's ongoing work to streamline the Handbook and remove existing requirements that are already duplicative of Consumer Duty.

Question 11: Do you think that CATPs should be required to ensure admission documents used for their CATPs are consistent with those already filed on the NSM for the relevant cryptoasset? If not, please explain why and suggest any alternative approaches that could help maintain admission documents' accuracy and consistency across CATPs.

16. We do not think that CATPs should be required to search the NSM and ensure consistency with documents already filed on the NSM. We would agree that this could risk perpetuating inaccuracies in existing disclosures. There is also a separate issue where CATPs seeking to admit to their platform a cryptoasset that is already being traded on another CATP may simply rely on the disclosures previously prepared, which raises the question of whether the first CATP could be at risk of greater liability or litigation than is appropriate.

17. We agree that industry-led standards would be far preferable. This would foster growth and competitiveness in the industry far more effectively than imposing rules around use of precedents. We also think that it is inevitable that people will look at previous admission documents in any event, but again that should be a choice in our view rather than a requirement.

18. However, there are tricky practical questions. If, during the admission of a cryptoasset to a new CATP, any inaccuracies are discovered in the existing admission document for another CATP, how this should be raised? This is also connected to the question of how information updates should be provided to the market because the first admission document may simply be out of date rather than having been inaccurate at the outset.

19. There is in our view also a risk that the same cryptoasset has different admission documents in the market which may be confusing for retail investors, especially if the disclosures are materially different. However, it may be preferable in the interests of competitiveness to allow CATPs with higher standards emerge as the industry leaders. Perhaps an optimal solution would be an industry-led one whereby a single document is created that different CATPs can stand by.

Proposed market abuse regime

Question 21: Do you agree with the risks, potential harms, and target outcomes we have identified for the market abuse regime? Are there any additional risks or outcomes you believe we should consider?

20. Yes, we agree. The DP notes in paragraph 3.4 that the absence of repercussion exacerbates risks and, as we note below, it will be important that the FCA is ready to take action in relation to instances of market manipulation that occur off-venue and which the trading venues therefore cannot control or halt. The territorial scope of the MARC regime is not discussed in the DP but perhaps it is implicit that it will relate to cryptoassets admitted to trading on UK CATPs.

Question 24: In the circumstances where there is no issuer, or the issuer is not involved with the application for the admission to trading, do you agree with our proposal that the person seeking admission to trading of the cryptoasset should be responsible for the disclosure of inside information?

Question 25: With regards to the second circumstance in question 24, do you agree that the person (say, 'Person A') seeking admission to trading of the cryptoasset should only be responsible for disclosure of inside information which relates to Person A and which Person A is aware of?

21. We think that these proposals need further thought. The challenge is how to identify and impose obligations to disclose inside information on persons who might have access to inside information, given the decentralised, anonymised and borderless nature of cryptoassets. In many cases, the person seeking to have the cryptoasset admitted to trading may have no access to any inside information about the cryptoasset itself going forwards.

22. Turning to the form of words used, paragraph 3.27 of the DP states that the disclosure obligation should be limited to inside information which directly concerns the relevant person and which the person is reasonably aware of. If cryptoasset trading venues are intended to be akin to MTFs, then market participants who have no involvement in the creation or maintenance of cryptoassets may seek admission to trading for cryptoassets. It is difficult to see what inside information they could be expected to be in a position to disclose and consequently it may not be appropriate to use the formulation which the Market Abuse Regulation applies to issuers. The drafting would also need to avoid inadvertently seeming to require public disclosure of such a person's own trading intent.

23. Where the obligation to disclose inside information falls on the CATP then it is again not entirely clear what types of inside information one might expect the CATP to have access to that it would need to make public (beyond information about whether the asset would be delisted or suspended).

Question 27: What are some examples of information that should be considered inside information? Do you think we should provide a non-exhaustive list of examples in guidance?

24. We agree with the suggestion in paragraph 3.28 that guidance on what inside information might consist of in the crypto space would be helpful. It may be worth considering how the nature of inside information could vary according to the type of cryptoasset. For example, guidance could address the comparative natures of:

    - Stablecoins
    - Coins
    - Utility tokens
    - Memecoins
    - Governance tokens

25. It is also worth considering the crossover between crypto and traditional finance, for example derivatives over crypto-assets or issuers with traded securities and traded cryptoassets.

26. As a more general comment, the Committee's view is that the DP has a great deal of focus on inside information and disclosure thereof, but insufficient discussion of market manipulation, which is arguably the greater issue in the crypto space. There is a lot more that could be said about the different types of market manipulation and the risks they pose, drawing on the learning in the traditional finance space (for example, Regulation 2016/522). We would welcome greater focus on this in the relevant consultation paper in due course, particularly as a great deal of market manipulation can occur away from trading platforms and therefore has implications for the extent to which CATPs can detect and respond to it and the extent to which the FCA should stand ready to enforce MARC and thereby create a deterrent effect. We also note that there are forms of market manipulation that are peculiar to the cryptoasset world and that if MAR drafting is re-purposed in the crypto space, attention should be paid to any (admittedly broad) drafting borrowed from MAR around market manipulation to ensure it does indeed also capture the idiosyncratic types of market manipulation in the crypto space.

Question 36: What, if any, amendments to the MAR formulation of these safe harbours should we make to them to ensure they align with the principles set out above and

ensure they are tailored to the cryptoasset market? Is there any additional clarity you would need us to provide over how they would apply in order to be able to rely on them?

Question 37: Are there other activities that we should be considering for safe harbours? Please explain your rationale including how these safe harbours would meet the principles set out.

27. We agree that a coin burning safe harbour akin to the share buyback safe harbour would be helpful. The safeguards needed around coin burning will need attention. For example, shares that are bought back can be cancelled or held in treasury. Either way, what happens to those shares is ultimately publicly observable. With coin burning, it will be important that market participants have comfort that the coins will actually be rendered irrecoverable. There are different ways in which one might achieve this, perhaps by technical disclosures or perhaps after the fact publication that proof of burn has been confirmed.

28. As with share buybacks, a set of legitimate purposes could be defined for which coin burning is permissible. Maintaining stable growth and value of a cryptoasset can be one such legitimate purpose, thereby preventing reduction in value caused by excessive supply. This in turn can encourage stability in ownership. However, coin burning could be used to manipulate the cryptoasset price.

29. The DP does not mention stabilisation, which may be a useful tool to help manage price in the aftermath of a ICO for example. The Committee's view is that it would be worth exploring stabilisation as a potential time-limited safe harbour to support market function and enhance consumer confidence in relation to ICOs and other large offerings.

Question 38: Do you agree with the approach to putting the onus on CATPs and intermediaries to both monitor and disrupt market abuse? If not, why not and what alternative do you think would better achieve the outcomes we are seeking?

30. We agree that it would be reasonable to require CATPs and cryptoasset intermediaries to implement sufficient systems and controls to monitor and disrupt market abuse occurring within their own platforms (in the case of CATPs) or in the context of their business activities (in the case of intermediaries). It is certainly in CATPs' and intermediaries' interests to ensure their business is free of crime or wrongdoing.

31. We agree that prescriptive rules around on-chain monitoring would not be helpful and that on-chain monitoring proportionate to a firm's activities is appropriate. Guidance in how "proportionality" can be determined would be helpful, in our view. A number of service providers offer on-chain monitoring tools and the cost will be linked to the extent of monitoring required. Firms will need some assurance that their chosen approach is not subsequently second-guessed by the FCA.

32. We note that EU MICAR appears to contemplate an active role for competent authorities in supervising and enforcing the cryptoasset market abuse regime. As noted above, given the fact that much market manipulation can occur off-venue, we think the FCA should consider taking a more active role in receiving reports and intervening to disrupt market abuse and to take enforcement action against perpetrators.

Question 46: Do you agree with our thinking, approach, and assessment of the potential cross-platform information sharing mechanisms discussed? Which of the options do you think is best? If none are suitable, why and what other alternatives would you suggest?

33. This is a complex area. Whilst the Committee understands the idea that sharing information about bad actors could help prevent the impact those bad actors have on the market, nevertheless there are data protection, defamation and commercial/competition issues associated with this. It makes more sense, in our view, for suspected market abuse to be reported to the FCA. This is one area where EU MICAR takes a different approach from the Discussion Paper in that it contemplates that EU competent authorities will be responsible for investigating and sanctioning instances of market abuse.

We hope the above feedback will be useful to you. If you would like to discuss any of these comments then we would be happy to do so. Please contact Hannah Meakin by telephone on +44 (0)20 7444 2102 or by email at hannah.meakin@nortonrosefulbright.com in the first instance.

Yours faithfully

Hannah Meakin
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