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Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on a pilot regime for market infrastructures based on distributed ledger technology**

(Text with EEA relevance)

{SEC(2020) 308 final} - {SWD(2020) 201 final} - {SWD(2020) 202 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### • Reasons for and objectives of the proposal

This proposal is part of a package of measures to further enable and support the potential of digital finance in terms of innovation and competition while mitigating the risks. It is in line with the Commission priorities to make Europe fit for the digital age and to build a future-ready economy that works for the people. The digital finance package includes a new Strategy on digital finance for the EU financial sector<sup>1</sup> with the aim to ensure that the EU embraces the digital revolution and drives it with innovative European firms in the lead, making the benefits of digital finance available to European consumers and businesses. In addition to this proposal, the package also includes a proposal for a regulation to build markets in crypto-assets<sup>2</sup>, a proposal for digital operational resilience<sup>3</sup>, and a proposal to clarify or amend certain related EU financial services rules<sup>4</sup>.

One of the strategy's identified priority areas is ensuring that the EU financial services regulatory framework is innovation-friendly and does not pose obstacles to the application of new technologies. This proposal, together with the proposal for a bespoke regime for crypto-assets, represents the first concrete actions within this area, seeking to provide appropriate levels of consumer and investor protection, legal certainty for crypto-assets, enable innovative firms to make use of blockchain, distributed ledger technology ('DLT') and crypto-assets and ensure financial stability.

Crypto-assets are one of the major applications of blockchain technology in finance. Since the publication of the Commission's FinTech Action plan<sup>5</sup>, in March 2018, the Commission has been examining the opportunities and challenges raised by crypto-assets. In the 2018 FinTech Action plan, the Commission mandated the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) to assess the applicability and suitability of the existing financial services regulatory framework to crypto-assets. The advice<sup>6</sup>, issued in January 2019, argued that while some crypto-assets could fall within the scope of EU legislation, effectively applying it to these assets is not always straightforward. Moreover, the advice noted that provisions in existing EU legislation may inhibit the use of DLT. At the same time, the EBA and ESMA underlined that – beyond EU legislation aimed at combating money laundering and terrorism financing – most crypto-assets fall outside the scope of EU

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<sup>1</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU COM(2020)591

<sup>2</sup> Proposal for a Regulation of the European Parliament and of the Council on markets in crypto-assets, and amending Directive (EU) 2019/1937 – COM(2020)593

<sup>3</sup> Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014 - COM(2020)595

<sup>4</sup> Proposal for a Directive of the European Parliament and of The Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020)596

<sup>5</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions on a , FinTech Action plan, COM/2018/109 final, 08.03.2018

<sup>6</sup> ESMA, Advice on 'Initial Coin Offerings and Crypto-Assets', 2019; EBA report with advice on crypto-assets, 2019.

financial services legislation and therefore are not subject to provisions on consumer and investor protection and market integrity, among others, although they give rise to these risks. In addition, a number of Member States have recently legislated on issues related to crypto-assets leading to market fragmentation.

Given these developments and as part of the Commission's broader digital agenda, President Ursula von der Leyen stressed the need for *"a common approach with Member States on cryptocurrencies to ensure we understand how to make the most of the opportunities they create and address the new risks they may pose"*<sup>7</sup>. While acknowledging the risks they may present, the Commission and the Council also jointly declared in December 2019 that they *"are committed to put in place a framework that will harness the potential opportunities that crypto-assets may offer"*<sup>8</sup>. More recently, the European Parliament is working on a report on digital finance, which has a particular focus on crypto assets.<sup>9</sup>

To respond to all of these issues and create an EU framework that both enables markets in crypto-assets as well as the tokenisation of traditional financial assets and wider use of DLT in financial services, this proposal will be accompanied by other legislative proposals. The Commission is proposing a clarification that the existing definition of 'financial instruments' – which defines the scope of the Markets in Financial Instruments Directive (MiFID II)<sup>10</sup> - includes financial instruments based on DLT,<sup>11</sup> and a bespoke regime for crypto-assets not covered by existing financial services legislation as well as e-money tokens<sup>12</sup>.

This proposal, which covers a pilot regime for DLT market infrastructures in the form of a Regulation, has four general and related objectives. The first objective is one of legal certainty. For secondary markets for crypto-assets that qualify as financial instruments to develop within the EU, we need to know exactly where the framework is no longer fit for purpose. The second objective is to support innovation. Removing obstacles to the application of new technologies in the financial sector underpins the Commission's digital finance strategy. To promote the uptake of technology and responsible innovation, a pilot regime is necessary, to ensure that more wide-ranging changes to existing financial services legislation are evidence based. The third objective is to instil consumer and investor protection and market integrity, the fourth is to ensure financial stability. The pilot regime will put in place appropriate safeguards, for example limiting the types of financial instruments that can be traded. Moreover, provisions specifically aimed at ensuring financial stability and consumer and investor protection will not be within scope of the provisions that a DLT market infrastructure could be exempted from.

- **Consistency with existing policy provisions in the policy area**

This proposal is part of a broader framework on crypto-assets and distributed ledger technology (DLT), as it is accompanied by proposals seeking to ensure that existing legislations do not present obstacles to the uptake of new technologies while reaching their

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<sup>7</sup> Mission letter of President-elect Von der Leyen to Vice-President Dombrovskis, 10 September 2019.

<sup>8</sup> Joint Statement of the European Commission and Council on 'stablecoins', 5 December 2019.

<sup>9</sup> [https://www.europarl.europa.eu/doceo/document/ECON-PR-650539\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/ECON-PR-650539_EN.pdf).

<sup>10</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

<sup>11</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020)596

<sup>12</sup> Proposal for a Regulation of the European Parliament and of the Council on markets in crypto assets and amending Directive (EU) 2019/1937 - COM(2020)593

objectives as well as a bespoke regime for crypto-assets not covered by existing financial services legislation and e-money tokens.

As part of the FinTech Action plan adopted in March 2018<sup>13</sup>, the Commission mandated the ESAs to produce advice on the applicability and suitability of the existing EU financial services regulatory framework on crypto-assets. This proposal takes into account the advice received from EBA and ESMA.<sup>14</sup> It is also aligned with the overarching ambition of the digital finance strategy of ensuring that the EU framework is innovation-friendly.

- **Consistency with other Union policies**

As stated by President von der Leyen in her Political Guidelines,<sup>15</sup> and set out in the Communication ‘Shaping Europe’s digital future’,<sup>16</sup> it is crucial for Europe to reap all the benefits of the digital age and to strengthen its industry and innovation capacity, within safe and ethical boundaries.

The proposal is also consistent with the Union policies aimed at creating a Capital Markets Union (CMU). It notably responds to the High-level Forum’s final report, which stressed the underused potential of crypto-assets and called on the Commission to increase legal certainty and establish clear rules for the use of crypto-assets.<sup>17</sup>

Finally, the proposal is fully in line with the recommendation in the Security Union Strategy for the development of a legislative framework in crypto-assets given the growing effect of these new technologies on how financial assets are issued, exchanged, shared and accessed.<sup>18</sup>

## **2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY**

- **Legal basis**

The proposal is based on Article 114 TFEU, which confers to the European institutions the competence to lay down appropriate provisions for the approximation of laws of the Member States that have as their objective the establishment and functioning of the internal market. The proposal aims to allow for experimentation through derogations for the use of DLT in the trading and post-trading of crypto-assets that qualify as financial instruments, where existing legislation precludes or limits their use.

Today, there is limited use of DLT in financial services, specifically by market infrastructures (trading venues or central securities depositories). Regulatory obstacles and legal certainty are most often cited as the main reasons for the limited uptake of this potentially transformational technology in market infrastructures. The EU follows the principle of technological neutrality, but rules are still created based on market realities, and the existing financial services legislation was not designed with DLT and crypto-assets in mind. This means that there are

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<sup>13</sup> European Commission, FinTech Action plan, COM/2018/109 final

<sup>14</sup> ESMA, Advice on ‘Initial Coin Offerings and Crypto-Assets’, 2019; EBA report with advice on crypto-assets, 2019.

<sup>15</sup> President Ursula von der Leyen, Political Guidelines for the next European Commission, 2019-2024.

<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, Shaping Europe’s Digital Future, COM(2020) 67 final.

<sup>17</sup> Recommendation 7 of the High-Level forum on the Capital Markets Union’s final report. ([https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/growth\\_and\\_investment/documents/200610-cmu-high-level-forum-final-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/growth_and_investment/documents/200610-cmu-high-level-forum-final-report_en.pdf)).

<sup>18</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy - COM(2020)605 final, 24.07.2020

provisions in it, which sometimes restricts and even prevents the use of DLT. The absence of a DLT-based secondary market, limits the efficiency gains and the sustainable development of a primary market for financial instruments in crypto-asset form.

Through the introduction of a common EU pilot regime for the experimentation of DLT market infrastructures, firms within the EU would be able to exploit the full potential of the existing framework, allowing supervisors and legislators to identify obstacles in the regulation, while regulators and firms themselves gain valuable knowledge about the application of DLT. This could facilitate a more reliable and safe secondary market for crypto-assets qualifying as financial instruments. This would also allow EU financial services firms to retain global competitiveness as other jurisdictions have already implemented measures to allow for experimentation with DLT in financial services. Lastly, the pilot regime would allow for real use cases and help build the necessary experience and evidence on which a permanent EU regulatory regime could be inspired.

- **Subsidiarity (for non-exclusive competence)**

The rules governing financial services and in particular market infrastructures across the Union are largely set at EU level. That is why any derogations or exemptions from specific provisions must be done at EU level.

Additionally, action at EU level, such as the proposed Regulation, would ensure consistency and a level playing field by granting powers to ESMA to oversee and coordinate experimentations as Member States' competent authorities submit evaluated applications from market participants.

Finally, the long-term objective of gaining experience on the application, and limits of, the existing financial services legislation to DLT market infrastructures, necessitates that this is done at EU level. Thus, the ESMA will evaluate the outcomes on a yearly basis and ESMA, together with the Commission will evaluate and report to the Council and Parliament on the pilot regime at the latest after a five-year period.

- **Proportionality**

Under the principle of proportionality, the content and form of EU action should not exceed what is necessary to achieve the objectives of the Treaties. The proposed rules will not go beyond what is necessary in order to achieve the objectives of the proposal. It will cover only the aspects that Member States cannot achieve on their own and where the administrative burden and costs are commensurate with the specific and general objectives to be achieved.

The proposed pilot regime will ensure proportionality by allowing adequate flexibility for supervisors to determine which provisions to disregard for a market participant's test, to allow for different tests cases to take place. The pilot regime will enable regulators to remove regulatory constraints that can inhibit the development of DLT market infrastructures, which could enable the transition to tokenised financial instruments and DLT market infrastructures, enabling innovation and ensuring EU's global competitiveness.

The pilot regime approach is at this stage considered the most proportionate to the objectives as there is presently not sufficient evidence to support more significant and wide-ranging permanent changes to the existing financial services framework in an effort to allow for the

use of DLT. This is also detailed in the accompanying impact assessment, for example in chapters 6 and 7.<sup>19</sup>

- **Choice of the instrument**

Article 114 TFEU allows the adoption of acts in the form of a Regulation or Directive. For this proposal, a Regulation was chosen in order to lay down a single set of immediately applicable rules throughout the Single Market.

The proposed Regulation establishes harmonised requirements for market participants wishing to apply for a permission to establish a DLT market infrastructure. Such DLT market infrastructures must not be subject to specific national rules. Therefore, a Regulation is more appropriate than a Directive.

### **3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS**

- **Stakeholder consultations**

The Commission has consulted stakeholders throughout the process of preparing this proposal. In particular:

- i) The Commission carried out a dedicated open public consultation (19 December 2019 - 19 March 2020)<sup>20</sup>
- ii) The Commission consulted the public on an inception impact assessment (19 December 2019 - 16 January 2020)<sup>21</sup>
- iii) The Commission services consulted Member State experts in the Expert Group on Banking, Payments and Insurance (EGBPI) on two occasions (18 May 2020 and 16 July 2020)<sup>22</sup>

The purpose of the public consultation was to inform the Commission on the development of a potential EU framework for crypto-assets. It included questions on crypto-assets not covered by the existing EU financial services legislation, crypto-assets covered by the existing EU financial services legislation (e.g. qualifying as transferable securities or electronic money), specific questions on so-called ‘stablecoins’ as well as more general questions on the application of DLT in financial services.

Many respondents believe that the application of DLT in financial services in general could lead to efficiency gains and that it could have an impact on current financial market infrastructures. There was also general agreement that when crypto-assets are financial instruments, existing rules governing financial instruments should apply. Lastly, there was wide recognition that the application of existing rules to crypto-assets and DLT-based business models can raise complex legal and supervisory questions.

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<sup>19</sup> Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 SWD(2020) 380

<sup>20</sup> [https://ec.europa.eu/info/sites/info/files/business\\_economy\\_euro/banking\\_and\\_finance/documents/2019-crypto-assets-consultation-document\\_en.pdf](https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/2019-crypto-assets-consultation-document_en.pdf)

<sup>21</sup> Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937, SWD(2020) 380

<sup>22</sup> [https://ec.europa.eu/info/publications/egbpi-meetings-2020\\_en](https://ec.europa.eu/info/publications/egbpi-meetings-2020_en)

Member State representatives expressed overall support for the approach chosen to create a pilot regime to allow for experimentation with the application of DLT in financial services. They highlighted it should not be too restrictive, but at the same time cannot lead to market fragmentation or undermine important existing regulatory requirements.

The proposal also integrates feedback received through meetings with stakeholders and EU authorities and institutions.

- **Collection and use of expertise**

In preparing this proposal, the Commission has relied on qualitative and quantitative evidence collected from recognised sources, including the reports from the EBA and ESMA.<sup>23</sup> This has been complemented with confidential input, and publicly available reports from supervisory authorities, international standard setting bodies and leading research institutes, as well as quantitative and qualitative input from identified stakeholders across the global financial sector.

- **Impact assessment**

This proposal is accompanied by an impact assessment, which was submitted to the Regulatory Scrutiny Board (RSB) on 29 April 2020 and approved on 29 May 2020.<sup>24</sup> The RSB recommended improvements in some areas with a view to: (i) better put the initiative into context with ongoing EU and international regulatory efforts; (ii) provide more clarity as to how the initiative will mitigate the risks of fraud, hacking and market abuse and also explain the coherence with the upcoming revision of the anti-money laundering legislation; and, (iii) explain concerns of financial stability relating to ‘stablecoins’ better and also clarify how supervisory bodies will ensure investor and consumer protection. The impact assessment has been amended accordingly, also addressing the more detailed comments made by the RSB.

The Commission considered a number of policy options for crypto-assets that qualify as financial instruments under the Markets in Financial Instruments Directive (MiFID II)<sup>25</sup>, and more specifically:

- Option 1: Non-legislative measures to provide guidance on the applicability of the EU framework on financial services to crypto-assets that qualify as financial instruments and DLT
- Option 2: Targeted amendments to the EU framework on financial services
- Option 3: Pilot regime – the creation of a DLT market infrastructure

Option 1 could provide clarification on when crypto-assets could qualify as financial instruments under MiFID II. Guidance could also support the primary market (e.g. by providing further clarification on how the prospectus regulation could apply to this type of issuances), and to some extent the secondary market (by specifying how a trading platform for crypto-assets could operate under the MiFID II/MiFIR<sup>26</sup> framework) as well as the

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<sup>23</sup> ESMA, Advice on ‘Initial Coin Offerings and Crypto-Assets’, 2019; EBA report with advice on crypto-assets, 2019.

<sup>24</sup> Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937, SWD(2020) 380

<sup>25</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU

<sup>26</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012

development of post-trading infrastructures for financial instruments in crypto-asset form. However, non-legislative measures under Option 1 could also have a limited effect. By nature, soft law measures are not binding and one Member State or one national competent authority (NCA) could decide not to apply the guidance. The guidance on which crypto-assets constitute ‘financial instruments’ under MiFID II could have limited effects due to the differences in the transposition of the notion of ‘financial instruments’ in national legislations.

Option 2 could provide a high degree of legal certainty for market participants and NCAs on how the EU financial services legislation applies to services related to the issuance, trading and settlement of financial instruments in crypto-asset form and the use of DLT. In principle, targeted amendments in well-defined areas (e.g. the Prospectus Regulation<sup>27</sup>, the Central Securities Depositories Regulation<sup>28</sup> and the Settlement Finality Directive<sup>29</sup>) could be effective to enable the use of DLT by market participants. However, those targeted amendments taken in isolation could have a limited impact to support the uptake of financial instruments in crypto-asset form and DLT in the financial sector. Under Option 2, the number of amendments to existing legislation would be relatively limited. As DLT and financial instruments in crypto-asset form are in nascent stages, it is difficult to identify all regulatory obstacles that would require immediate legislative action.

Lastly, Option 3, could give existing investment firms and market players the possibility to test the use of DLT on a larger scale, by offering trading and settlement services at the same time. DLT can allow for near real-time settlement, thereby reducing the counterparty risk during the settlement process. The distributed nature of DLT could also mitigate some cyber risks that centralised market infrastructures raise, such as the single point of failure. The use of DLT could decrease costs by freeing up capital through reduced need for collateral posting and through automated processes (with the use of smart contracts) that could simplify some back office processes (e.g. reconciliation).

The three options were considered coherent with the existing legislation and the Commission’s objectives as regards a digital economy and at the same time, they were not considered mutually exclusive and are seen as complementary to a gradual regulatory approach starting with a pilot regime.

- **Fundamental rights**

The EU is committed to high standards of protection of fundamental rights and is signatory to a broad set of conventions on human rights. In this context, the proposal is not likely to have a direct impact on these rights, as listed in the main UN conventions on human rights, the Charter of Fundamental Rights of the European Union, which is an integral part of the EU Treaties, and the European Convention on Human Rights (ECHR).

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<sup>27</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC

<sup>28</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012

<sup>29</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems

#### **4. BUDGETARY IMPLICATIONS**

This proposal holds implications in terms of costs and administrative burden for NCAs and ESMA. The magnitude and distribution of these costs will depend on the precise requirements placed on DLT market infrastructures and the related supervisory and monitoring tasks.

The estimated supervisory costs for each Member State (including staff, training, IT infrastructure) can range from €150.000 to €250.000 per year per DLT market infrastructure. However, this would be partially offset by the supervisory fees that NCAs would levy on DLT market infrastructures.

For ESMA, the estimated cost in relation to review and coordination are estimated at €150.000-300.000 in total, not per DLT market infrastructure, as they will have no direct supervision. These costs will be covered by ESMA's operating budget, which will be increased. In addition, ESMA is expected to maintain a register of DLT market infrastructures in operation, the costs related to this are considered to be covered by the costs relating to the maintenance of the register as referred to in the proposal for a Regulation on Markets in Crypto-Assets.

All budgetary implications of this proposal is detailed in the legislative financial statement attached to the proposal for a Regulation on Markets in Crypto-Assets.

#### **5. OTHER ELEMENTS**

- **Detailed explanation of the specific provisions of the proposal**

This proposal seeks to provide legal certainty and flexibility for market participants who wish to operate a DLT market infrastructure by establishing uniform requirements for operating these. Permissions granted under this Regulation would allow market participants to operate a DLT market infrastructure and to provide their services across all Member States.

Article 1 defines the subject matter and scope. In particular, this Regulation establishes operating conditions for DLT market infrastructures, permissions to make use of them and the supervision and cooperation of competent authorities and ESMA. The Regulation applies to market participants (either investment firms, market operators or central securities depositories, CSDs) permissioned in accordance with Article 7 or Article 8. Article 2 sets out terms and definitions, among others: 'DLT market infrastructure', 'DLT multilateral trading facility' or 'DLT MTF', 'DLT securities settlement system' and 'DLT transferable securities'. Article 3 describes the limitations in terms of DLT transferable securities that can be admitted to trading on, or recorded by, DLT market infrastructures. For shares, the market capitalisation or the tentative market capitalisation of the issuer of DLT transferable securities should be less than EUR 200 million; for public bonds other than sovereign bonds, covered bonds and corporate bonds the limit is EUR 500 million. DLT market infrastructures should not admit to trading or record sovereign bonds. In addition, the total market value of DLT transferable securities recorded by a CSD operating a DLT securities settlement system, or by a DLT MTF where allowed to record such DLT transferable securities, shall not exceed EUR 2.5 billion.

Article 4 sets the requirements for a DLT MTF, which are the same as for an MTF under Directive 2014/65/EU and specifies the exemptions possible under this Regulation. Article 5 sets the requirements for a CSD operating a securities settlement system, which are the same as for a CSD under Regulation (EU) No 909/2014 and specifies the exemptions possible under this Regulation. Article 4 and Article 5 contain a limited list of exemptions that DLT market infrastructures can request and the conditions attached to such exemptions.

Article 6 sets the additional requirements applicable to DLT market infrastructures to address the novel forms of risks raised by the use of DLT. DLT market infrastructures must provide all members, participants, clients and investors with clear and unambiguous information on how they carry out their functions, services and activities and how these are different from a traditional MTF or CSD. DLT market infrastructures must also ensure that overall IT and cyber arrangements related to the use of DLT are adequate. Where the business model of a DLT market infrastructure involves the safekeeping of clients' funds or DLT transferable securities, or the means to access these, they must have adequate arrangements to safeguard such assets.

Article 7 and Article 8 set out the procedure for the specific permission to operate a DLT MTF and a DLT securities settlement system respectively and include details on the information that must be submitted to the competent authority.

Article 9 defines the cooperation between the DLT market infrastructure, competent authorities and ESMA. DLT market infrastructures must inform competent authorities and ESMA of, for example: proposed material changes to their business plan including critical staff, evidence of hacking, fraud or other serious malpractice, material changes in the information contained in the initial application, technical or operational difficulties in delivering activities or services covered under the permission and any risks to investor protection, market integrity or financial stability that may have arisen and were not foreseen at the time the permission was given. Where notified of such information, the competent authority may request the DLT market infrastructure to submit an application for another permission, exemption or take any corrective measure it deems appropriate. The DLT market infrastructure is obliged to provide any requested information to the competent authority which granted the permission and ESMA. The competent authority, after the consultation of ESMA, may recommend corrective measures to the DLT market infrastructure to ensure investor protection, market integrity or financial stability. The DLT market infrastructure needs to detail how these have been accommodated. In addition, the DLT market infrastructure shall produce and submit a report to the competent authority and ESMA detailing all of the information above including potential difficulties in applying EU financial services legislation. ESMA shall, on a regular basis, inform all competent authorities about the aforementioned reports produced by DLT market infrastructures and exemptions granted in accordance with Article 7 and Article 8, monitor the application of these exemptions and submit an annual report to the Commission on how they are applied in practice.

Article 10 details, that at the latest after a five-year period, ESMA will produce a detailed report on the pilot regime to the Commission. On the basis of ESMA's assessment, the Commission will produce a report including a cost-benefit analysis on whether the pilot regime should be maintained as it is or amended, whether it should be extended to new categories of financial instruments, whether targeted amendments to EU legislation should be considered to enable a widespread use of DLT and whether the pilot regime should be terminated.

Article 11 indicates that the regulation shall enter into application 12 months after its entry into force.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on a pilot regime for market infrastructures based on distributed ledger technology**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>30</sup>,

Having regard to the opinion of the European Central Bank<sup>31</sup>

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The European Commission's communication on a Digital Finance Strategy<sup>32</sup> aims to ensure that the Union financial services legislation is fit for the digital age and contributes to a future-ready economy that works for the people, including by enabling the use of innovative technologies. The Union has a policy interest in developing and promoting the uptake of transformative technologies in the financial sector, such as blockchain and distributed ledger technology ('DLT'). Crypto-assets are one of the main DLT applications for finance.
- (2) The majority of crypto-assets fall outside of the scope of EU legislation and raise, among others, challenges in terms of investor protection, market integrity and financial stability. They therefore require a dedicated regime at Union level. By contrast, other crypto-assets qualify as financial instruments within the meaning of Directive 2014/65/EU of the European Parliament and of the Council (Markets in Financial Instruments Directive, MiFID II)<sup>33</sup>. In so far as a crypto-asset qualifies as a financial instrument under that Directive, a full set of Union financial rules, including Regulation (EU) 2017/1129 of the European Parliament and of the Council (the

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<sup>30</sup> OJ C , , p. .

<sup>31</sup> OJ C [...], [...], p. [...].

<sup>32</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the committee of the Regions on a Digital Finance Strategy for EU COM(2020)591

<sup>33</sup> Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (OJ L 173, 12.6.2014, p. 349).

Prospectus Regulation)<sup>34</sup>, Directive 2013/50/EU of the European Parliament and of the Council (the Transparency Directive)<sup>35</sup>, Regulation (EU) No 596/2014 of the European Parliament and of the Council (the Market Abuse Regulation)<sup>36</sup>, Regulation (EU) No 236/2012 of the European Parliament and of the Council (the Short Selling Regulation)<sup>37</sup>, Regulation (EU) No 909/2014 of the European Parliament and of the Council (the Central Securities Depositories Regulation)<sup>38</sup> and Directive 98/26/EC of the European Parliament and of the Council (the Settlement Finality Directive)<sup>39</sup> may apply to its issuer and firms conducting activities related to it. The so-called tokenisation of financial instruments, that is to say their transformation into crypto-assets to enable them to be issued, stored and transferred on a distributed ledger, is expected to open up opportunities for efficiency improvements in the entire trading and post-trading area.

- (3) The Union financial services legislation was not designed with DLT and crypto-assets in mind<sup>40</sup>, and there are provisions in existing EU financial services legislation that may preclude or limit the use of DLT in the issuance, trading and settlement of crypto-assets which qualify as financial instruments. There is also currently a lack of market infrastructures using DLT and providing trading and settlement services for crypto-assets that qualify as financial instruments. Without a secondary market able to provide liquidity and to enable investors to buy and sell such assets, the primary market for crypto-assets that qualify as financial instruments will never expand in a sustainable way.
- (4) At the same time, regulatory gaps exist due to legal, technological and operational specificities related to the use of DLT and crypto-assets that qualify as financial instruments. For instance, there are no transparency, reliability and safety requirements imposed on the protocols and smart contracts underpinning crypto-assets that qualify as financial instruments. The underlying technology could also pose some novel forms of cyber risks that are not appropriately addressed by existing rules. Several projects for the trading and post-trading of crypto-assets qualifying as

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<sup>34</sup> Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (OJ L 168, 30.6.2017, p. 12)

<sup>35</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC (OJ L 294, 6.11.2013, p. 13)

<sup>36</sup> Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (OJ L 173, 12.6.2014, p. 1)

<sup>37</sup> Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps (OJ L 86, 24.3.2012, p. 1).

<sup>38</sup> Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 (OJ L 257, 28.8.2014, p. 1)

<sup>39</sup> Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems (OJ L 166, 11.6.1998, p. 45)

<sup>40</sup> European Securities and Markets Authority's, Report with advice on Initial Coin Offerings and Crypto-Assets (ESMA50-157-1391)

financial instruments have been developed in the Union, but few are already in operation or they have limited scale. Given this limited experience as regards the trading and post-trading of transactions in crypto-assets that qualify as financial instruments, it would currently be premature to bring significant modifications to the Union financial services legislation to enable the full deployment of such crypto-assets and their underlying technology. At the same time, the creation of financial market infrastructures for crypto-assets that qualify as financial instruments is currently constrained by some requirements embedded in the Union's financial services legislation that would not be fully adapted to crypto-assets qualifying as financial instruments and to the use of DLT. For instance, trading platforms for crypto-assets usually give direct access to retail investors, while traditional trading venues usually give access through financial intermediaries.

- (5) In order to allow for the development of crypto-assets that qualify as financial instruments and DLT, while preserving a high level of financial stability, market integrity, transparency and investor protection, it would be useful to create a pilot regime for DLT market infrastructures. A pilot regime for DLT market infrastructures should allow such DLT market infrastructures to be temporarily exempted from some specific requirements under the Union financial services legislation that could otherwise prevent them from developing solutions for the trading and settlement of transactions in crypto-assets that qualify as financial instruments. The pilot regime should also enable the European Securities and Markets Authorities (ESMA) and competent authorities to gain experience on the opportunities and specific risks created by crypto-assets that qualify as financial instruments, and by their underlying technology.
- (6) To meet this objective, a new Union status of DLT market infrastructures should be created. This status of DLT market infrastructure should be optional and should not prevent financial market infrastructures, such as trading venues, central securities depositories and central counterparties, from developing trading and post-trading services and activities for crypto-assets which qualify as financial instruments or are based on DLT, under the existing Union financial services legislation.
- (7) A DLT market infrastructure should be defined either as a DLT multilateral trading facility (DLT MTF) or a DLT securities settlement system.
- (8) A DLT MTF should be a multilateral trading facility that is operated by an investment firm or a market operator that operate the business or a regulated market and maybe the regulated market itself, authorised under Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II), and that has received a specific permission under this Regulation. Such a DLT MTF should be subject to all the requirements applicable to a multilateral trading facility under the framework of Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II), Regulation EU No 600/2014 of the European Parliament and of the Council (the Markets in Financial Instruments Regulation, MiFIR)<sup>41</sup>, or any other EU financial services legislation, except if it has been granted one or several exemptions by its national competent

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<sup>41</sup> Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012 (OJ L 173, 12.6.2014, p. 84)

authority, in accordance with this Regulation and Directive (EU) .../... of the European Parliament and of the Council<sup>42</sup>.

- (9) The use of distributed ledger technology, with all transactions recorded in a decentralised ledger, can expedite and condense trading and settlement to nearly real-time and could enable the merger of trading and post-trading activities. However, the current rules envisage the performance of trading and settlement activities by separate market infrastructures. Regulation (EU) No 909/2014 of the European Parliament and of the Council (the Central Securities Depositories Regulation) requires that financial instruments admitted to trading on a trading venue within the meaning of Directive 2014/65/EU (Market in Financial Instruments Directive, MiFID II) be recorded with a central securities depository ('CSD'), while a distributed ledger could be potentially used as a decentralised version of such a depository. Therefore, it would be justified to allow a DLT MTF to perform some activities normally performed by a CSD. Therefore, when granted the relevant exemption(s), a DLT MTF should be allowed to ensure the initial recording of DLT transferable securities, the settlement of transactions in DLT transferable securities and the safekeeping of DLT transferable securities.
- (10) A DLT securities settlement system should be a securities settlement system operated by a CSD authorised under Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) that has received a specific permission under this Regulation. A DLT securities settlement system, and the CSD operating it, should be subject to the relevant requirements of Regulation (EU) No 909/2014 (the Central Securities Depository Regulation), except where the national competent authority has granted the CSD operating the DLT securities settlement system with one or several exemptions, in accordance with this Regulation.
- (11) A DLT MTF or a CSD operating a DLT securities settlement system should only admit to trading or record DLT transferable securities on their distributed ledger. DLT transferable securities should be crypto-assets that qualify as 'transferable securities' within the meaning of Directive 2014/65/EU (the Market in Financial Instruments Directive, MiFID II) and that are issued, transferred and stored on a distributed ledger.
- (12) In order to allow innovation and experimentation in a sound regulatory environment while preserving financial stability, the type of transferable securities admitted to trading on a DLT MTF or recorded in a CSD operating a DLT securities settlement system should be limited to securities, such as shares and bonds that are not liquid. In order to determine whether a share or bond is liquid or not, this Regulation should set some value thresholds. To avoid the creation of any risk to financial stability, the total market value of DLT transferable securities recorded by a CSD operating a DLT securities settlement system, or admitted to trading by a DLT MTF, should also be limited. DLT market infrastructures should also be prevented from admitting to trading or recording on the distributed ledger sovereign bonds. To verify that the DLT transferable securities traded on or recorded by a DLT market infrastructure meets the conditions imposed under this Regulation, national competent authorities should be allowed to require such DLT market infrastructures to submit reports.

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<sup>42</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020)596

- (13) In order to ensure a level playing field with transferable securities admitted to trading on a traditional trading venue within the meaning of Directive 2014/65/EU (the Market in Financial Instruments Directive, MiFID II) and a high level of market integrity, the DLT transferable securities admitted to trading on a DLT MTF should always be subject to the provisions prohibiting market abuse in Regulation (EU) No 596/2014 (the Market Abuse Regulation).
- (14) A DLT MTF should be able to request one or several exemptions on a temporary basis, as listed under this Regulation, to be granted by the competent authority, if it complies with the conditions attached to such exemptions as well as additional requirements set under this Regulation to address novel forms of risks raised by the use of DLT. The DLT MTF should also comply with any compensatory measure imposed by the competent authority in order to meet the objectives pursued by the provision for which an exemption has been requested.
- (15) Where a financial instrument is admitted to trading on an MTF, it is to be recorded with an authorised Central Securities Depository in accordance with Regulation (EU) No 909/2014 (the Central Securities Depository Regulation). While the recording of a transferable security and the settlement of related transactions could potentially take place on a distributed ledger, Regulation (EU) No 909/2014 imposes an intermediation by a CSD and would oblige to replicate the recording on the distributed ledger at the CSD level, potentially imposing a functionally redundant overlay to the trade lifecycle of a financial instrument handled by DLT market infrastructures subject to this Regulation. Therefore, a DLT MTF should be able to request an exemption of the book-entry requirement and the recording with a CSD set by Regulation (EU) No 909/2014, where the DLT MTF complies with equivalent requirements to those applying to a CSD. The DLT MTF should record the transferable securities on its distributed ledger, ensure the integrity of the issues on the distributed ledger, establish and maintain procedures to ensure the safekeeping of the DLT transferable securities, complete the settlement of transactions, and prevent settlement fails.
- (16) Where performing the settlement of transactions in DLT transferable securities, the DLT MTF should ensure that the payment for DLT transferable securities from the buyer occurs at the same time as DLT transferable securities are delivered from the seller (*delivery versus payment*). Where practicable and available, the cash payments should be settled through central bank money and, where not practicable or available, through commercial bank money. In order to test innovative solutions and to allow for the cash payments to occur on a distributed ledger, the DLT MTFs should also be allowed to use so-called settlement coins, that is to say commercial bank money in a tokenised form, or e-money tokens as defined in the Regulation No 2021/XX on Markets in Crypto-Assets<sup>43</sup>. Where using commercial bank money for cash payments, the DLT MTF should limit counterparty risk by establishing and monitoring adherence by the credit institutions used for the settlement of cash payments to strict criteria, such as their regulation and supervision, creditworthiness, capitalisation, access to liquidity and operational reliability.

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<sup>43</sup> Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937– COM(2020)593

- (17) Under Directive (EU) .../...<sup>44</sup>, which amends Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II), a DLT MTF is able to request an exemption from the obligation of intermediation. Traditional MTFs may admit as members or participants only investment firms, credit institutions and other persons who have sufficient level of trading ability, competence and with adequate organisational arrangements and resources. By contrast, many trading platforms for crypto-assets offer a disintermediated access and provide direct access to retail clients. One potential regulatory hurdle to the development of MTFs for DLT transferable securities could be the obligation of intermediation embedded in Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II). A DLT MTF is allowed to request a temporary derogation to such an obligation of intermediation and to provide access to retail investors, provided that adequate safeguards in terms of investor protection would be in place and that such retail investors are fit and proper for anti-money laundering and combatting the financing of terrorism purpose.
- (18) To be granted an exemption under this Regulation, the DLT MTF should demonstrate that the exemption is proportionate and limited to the use of DLT as described in its business plan and that the exemption requested is limited to the DLT MTF and not extended to any other MTF operated by the same investment firm or market operator.
- (19) A CSD operating a DLT securities settlement system should be able to request one or several exemptions on a temporary basis, as listed under this Regulation, to be granted by the relevant competent authority, if it complied with the conditions to such exemptions as well as additional requirements to address novel forms of risks raised by the use of DLT. The CSD operating the DLT securities settlement system should comply with any compensatory measure imposed by the competent authority in order to meet the objectives pursued by the provision for which an exemption has been requested.
- (20) A CSD operating a securities settlement system should be allowed to request exemptions from different provisions that are likely to create regulatory obstacles for the development of settlement securities systems for transferable securities. For instance, a CSD should be able to request an exemption from some definitions of Regulation (EU) 909/2014 (the Central Securities Depositories Regulation), such as the notion of '*dematerialised form*', '*security account*', '*transfer orders*' as well as exemptions from provisions which refers to the notion of '*security account*', such as the rules on the recording of securities, integrity of issue or segregation of accounts. CSDs operate securities settlement system by crediting and debiting the securities accounts of its participants. However, double-entry (or multiple-entry) book keepings securities accounts may not always exist in a DLT system. Therefore, a CSD operating a DLT securities settlements system should be able to request an exemption from the rules referring to the notion of '*securities account*' or '*book-entry form*' should it be necessary to allow the recording of DLT transferable securities on a distributed ledger, to ensure the integrity of the DLT transferable security issue on the distributed ledger and the segregation of the DLT transferable securities belonging to various participants.

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<sup>44</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive EU/2013/36, Directive 2014/65/EU, Directive (EU) 2015/2366, Directive 2009/138/EC, Directive EU/2016/2341, Directive 2009/65/EC, Directive 2011/61/EC and Directive 2006/43/EC, - COM(2020)596

- (21) Under Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation), a CSD can only outsource one of its core activities, after receiving an authorisation from the competent authority. The CSD is also required to respect several conditions, so that the outsourcing does not result in a delegation of its responsibility or in a modification of the obligations of the CSD towards its participants or issuers. Depending on its business plan, a CSD operating a DLT securities settlement system could be willing to share the responsibility of running its distributed ledger on which the transferable securities are recorded with other entities, including with its participants. The DLT securities settlement system should be able to request an exemption from the outsourcing requirements to develop such innovative business models. In such a case, they should demonstrate that the provisions on outsourcing are incompatible with the use of DLT as envisaged in their business plan and they should also demonstrate that some minimum requirements on outsourcing are met.
- (22) The obligation of intermediation through a credit institution or an investment firm so that retail investors are not able to obtain direct access to the settlement and delivery systems operated by a CSD could potentially create a regulatory obstacle to the development of alternative models of settlement based on a DLT that allow direct access by retail clients. Therefore, the CSD operating a DLT securities settlement system should be allowed to request an exemption from the notion of participant, as set out by Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation). Where seeking an exemption from the obligation of intermediation under Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation), the CSD operating a securities settlement system should ensure that these persons are of sufficient good repute and fit and proper for the purpose of anti-money laundering and combatting the financing of terrorism. The CSD operating the securities settlement system should also ensure that these participants have sufficient level of ability, competence, experience and knowledge of post-trading and the functioning of DLTs.
- (23) The entities that are eligible to participate in a CSD covered by Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) are based on the entities that are eligible to participate in a securities settlement system that is designated and notified in accordance with Directive 98/26/EC (the Settlement Finality Directive) because Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) requires securities settlement systems operated by CSDs to be designated and notified under Directive 98/26/EC. A DLT securities settlement system that applies to be exempted from the participation requirements of Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) would not be compliant with the participation requirements of Directive 98/26/EC. Consequently, such a DLT securities settlement system could not be designated and notified under that Directive. However, this would not preclude a DLT securities settlement system that complies with all of the requirements of Directive 98/26/EC from being so designated and notified.
- (24) Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) encourages the settlement of transactions in central bank money. Where the settlement of cash payments in central bank money is not available and practicable, this settlement can take place in commercial bank money. That provision can be difficult to apply for a CSD operating a DLT securities settlement system, as such a CSD would have to effect movements in cash accounts at the same time as the delivery of securities on the DLT. A CSD operating a DLT securities settlement system should be allowed to request an exemption from the rules of Regulation (EU) No 909/2014 (the

Central Securities Depositories Regulation) on cash settlement in order to develop innovative solutions, such as the use of settlement coins or ‘e-money tokens’ as defined in the Regulation No 2021/XX on Markets in Crypto-Assets<sup>45</sup>.

- (25) Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation) requires that a CSD gives access to another CSD or to other market infrastructures. The access to a CSD operating a DLT securities settlement system can be burdensome or difficult to achieve, as the interoperability of legacy systems with DLT has not been tested yet. A DLT securities settlement system should also be able to request an exemption from such rules, if it can demonstrate that the application of such rules are disproportionate to the size of the DLT securities settlement system.
- (26) Irrespective of the rule for which an exemption is requested, a CSD operating a DLT securities settlement system should demonstrate that the exemption requested is proportionate and justified by the use of DLT. The exemption should also be limited to the DLT securities settlement system and not cover other securities settlement systems operated by the same CSD.
- (27) DLT market infrastructures should also be subject to additional requirements, compared to traditional market infrastructures. These requirements are necessary to avoid risks raised by the use of DLT or by the new way the DLT market infrastructure would carry out its activities. Therefore, DLT market infrastructure should establish a clear business plan that details how the DLT would be used and the legal arrangements put in place.
- (28) A CSD operating a DLT securities settlement system, or DLT MTF where they are permitted to settle the transactions in DLT transferable securities themselves, should establish the rules on the functioning of the proprietary DLT they operate, including the rules to access and admission on the DLT, the rules for the participating nodes and the rules to address potential conflicts of interest, as well as risk management measures.
- (29) A DLT market infrastructure should be required to inform members, participants, issuers and clients on how they intend to perform their activities and how the use of DLT will create deviations compared to the way the service is normally provided by a traditional MTF or a CSD operating a securities settlement system.
- (30) A DLT market infrastructure should have specific and robust IT and cyber arrangements related to the use of DLT. These arrangements should be proportionate to the nature, scale and complexity of the DLT market infrastructure’s business plan. These arrangements should also ensure the continued reliability, continuity and security of the services provided, including the reliability of smart contracts that are potentially used. DLT market infrastructures should also ensure the integrity, security, confidentiality, availability and accessibility of data stored on the DLT. The competent authority of a DLT market infrastructure should be allowed to request an audit to ensure that the overall IT and cyber arrangements are fit for purpose. The costs of such an audit should be borne by the DLT market infrastructure.
- (31) Where the business plan of a DLT market infrastructure would involve the safekeeping of clients’ funds, such as cash or cash equivalent, or DLT transferable securities, or the means of access to such DLT transferable securities, including in the

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<sup>45</sup> Proposal for a Regulation of the European Parliament and of the Council on markets in crypto-assets, and amending Directive (EU) 2019/1937 – COM(2020)593

form of cryptographic keys, the DLT market infrastructure should have adequate arrangements in place to safeguard their clients' assets. They should not use clients' assets on own account, except with prior express consent from their clients. The DLT market infrastructure should segregate clients' funds or DLT transferable securities, or the means of access to such assets, from its own assets or other clients' assets. The overall IT and cyber arrangements of DLT market infrastructures should ensure that clients' assets are protected against fraud, cyber threats or other malfunctions.

- (32) At the time where the specific permission is granted, DLT market infrastructures should also have a credible exit strategy in place in case the regime on DLT market infrastructures should be discontinued or the specific permission or some of the exemptions granted should be withdrawn.
- (33) The specific permission granted to a DLT market infrastructure should follow the same procedures as the authorisation of a traditional MTF, or a CSD where such a CSD is seeking to operate a new securities settlement system. However, when applying for a permission, the applicant DLT infrastructure should indicate the exemptions it would be seeking. Before granting a permission to a DLT market infrastructure, the competent authority should consult ESMA. ESMA should issue a non-binding opinion and make any recommendations on the application or the exemptions requested. ESMA should also consult the competent authorities of the other Member States. Where issuing its non-binding opinion, ESMA should aim at ensuring financial stability, market integrity and investor protection. In order to ensure the level-playing field and fair competition across the single market, ESMA's non-binding opinion should also aim at ensuring the consistency and proportionality of the exemptions granted by different competent authorities across the Union.
- (34) The competent authority which would examine the application submitted by a prospective DLT market infrastructure should have the possibility to refuse a permission if there were reasons to believe that the DLT market infrastructure would pose a threat to financial stability, investor protection or market integrity or if the application were an attempt to circumvent existing requirements.
- (35) The specific permission given by a competent authority to a given DLT market infrastructure should indicate the exemptions granted to that DLT market infrastructure. Such a permission should be valid for the Union. ESMA should publish on its website the list of DLT market infrastructures and the list of exemptions granted to each of them.
- (36) The specific permission and the exemptions granted by national competent authorities should be granted on a temporary basis, for a period of up to six years from the date of the specific permission. After a five-year period from the entry into application of the Regulation, ESMA and the Commission would be required to make an assessment of this pilot regime for market infrastructures based on digital ledger technology. The aforementioned six-year period provides DLT market infrastructures sufficient time to adapt their business models to any modifications of this regime and operate under the pilot in a commercially viable manner. It would allow ESMA and the Commission to gather a useful data set encompassing around three calendar years of the operation of the pilot regime following the grant of a critical mass of specific permissions and related exemptions and to report thereon. It would also allow time for DLT market infrastructures to take the necessary steps either to wind down their operations or to transition to a new regulatory framework following ESMA's and the Commission's reports.

- (37) Without prejudice to the relevant provisions of Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II) or Regulation (EU) No 909/2014 (the Central Securities Depositories Regulation), the competent authorities should have the power to withdraw the specific permission or any exemptions granted to the DLT market infrastructure, where a flaw has been discovered in the underlying technology or the services or activities provided by the DLT market infrastructure, and provided that this flaw outweighs the benefits provided by the service at stake, or where the DLT market infrastructure has breached any conditions attached to the exemptions imposed by the competent authority at the time of the granting of the specific permission, or where the DLT market infrastructure has recorded financial instruments that do not meet the conditions of DLT transferrable securities under this Regulation. In the course of its activity, a DLT market infrastructure should have the possibility to ask for additional exemptions to those requested at the time of the permission. In such a case, these additional exemptions requested by the DLT market infrastructures should be subject to a specific permission by the competent authorities, in the same way as those requested at the time of the initial permission of the DLT market infrastructure.
- (38) Since DLT market infrastructures could receive temporary exemptions from existing Union legislation, they should closely cooperate with competent authorities and the European Securities and Markets Authority (ESMA) during the time of their specific permission. DLT market infrastructures should inform the competent authorities and ESMA about any material change to its business plan and its critical staff, any evidence of cyber threats or attacks, fraud or serious malpractice, of any change in the information provided at the time of the initial application for permission, of any technical difficulties, and in particular those linked to the use of DLT, and of any new risks to investor protection, market integrity and financial stability that was not envisaged at the time where the specific permission was granted. Where notified of such a material change, the competent authority should request the DLT market infrastructure to apply for a new permission or exemption or it should take any corrective measures it deems appropriate. DLT market infrastructures should also provide any relevant data to competent authorities and ESMA, whenever such data is requested. To ensure investor protection, market integrity and financial stability, the competent authority which granted the specific permission to the DLT market infrastructure should be able to recommend any corrective measures, after consultation with ESMA.
- (39) DLT market infrastructures should also make regular reports to their competent authorities and ESMA. ESMA should organise discussions on these reports to enable all competent authorities across the Union to gain experience on the impact of the use of DLT and on any adaptations to the Union financial services legislation that could be necessary to allow for the use of DLT on a greater scale.
- (40) Five years after the entry into application of this Regulation, ESMA should report to the Commission on this pilot regime for DLT market infrastructures, including on the potential benefits linked to the use of DLT, the risks raised and the technical difficulties. Based on ESMA's report, the Commission should report to the Council and European Parliament. This report should assess the costs and benefits of extending this regime on DLT market infrastructures for another period of time, extending this regime to new type of financial instruments, making this regime permanent with or without modifications, bringing modifications to the Union financial services legislation or terminating this regime.

- (41) Some potential gaps have been identified in the existing EU financial services rules as regards their application to crypto-assets that qualify as financial instruments<sup>46</sup>. In particular, some regulatory technical standards under the Regulation EU No 600/2014 (the Markets in financial instruments Regulative) relative to certain data reporting requirements and pre- and post-trade transparency requirements are not well adapted to financial instruments issued on a distributed ledger technology. Secondary markets in financial instruments issued on distributed ledger technology or similar technology are still nascent and therefore their features may differ from markets in financial instruments using traditional technology. The rules set out in these regulatory technical standards should be capable of being effectively applied to all financial instruments, regardless of the technology used. Therefore, ESMA should be mandated to carry out a comprehensive assessment of these regulatory technical standards adopted in application of Regulation EU No 600/2014 and propose any needed amendments aimed at ensuring that the rules set out therein can be effectively applied to financial instruments issued on distributed ledger technology. In carrying out this assessment, ESMA should take into account the specificities of those financial instruments issued on a distributed ledger technology and whether they require adapted standards which would allow for their development without undermining the objectives of the rules laid down in the regulatory technical standards adopted in application of Regulation EU No 600/2014.
- (42) Where the objectives of this Regulation cannot be sufficiently achieved by the Member States, because any regulatory obstacles to the development of DLT market infrastructures for crypto-assets that qualify as financial instruments under Directive 2014/65/EU (Markets in Financial Instruments Directive, MiFID II) are embedded in Union financial services legislation such objectives can rather be better achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (43) In order for the Union to keep pace with innovation, it is important that the regime of DLT market infrastructures enters into application, as soon as possible, after the transposition by Member States of the Directive (EU) .../... of the European Parliament and of the Council<sup>47</sup>.
- (44) The European Data Protection Supervisor and the European Data Protection Board were consulted in accordance with Article 42(1) of Regulation (EU) 2018/1725(CE) of the European Parliament and of the Council<sup>48</sup>, and delivered their opinion on...[date of the opinion(s)],

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<sup>46</sup> European Securities and Markets Authority's, Report with advice on Initial Coin Offerings and Crypto-Assets (ESMA50-157-1391)

<sup>47</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020)596

<sup>48</sup> Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC (OJ L 295, 21.11.2018, p. 39).

HAVE ADOPTED THIS REGULATION:

## *Article 1*

### *Subject matter and scope*

- (1) This Regulation lays down requirements on multilateral trading facilities and securities settlement systems using distributed ledger technology ‘DLT market infrastructures’, which are granted with a specific permissions to operate in accordance with Article 7 and Article 8.
- (2) This Regulation establishes the requirements for:
  - (a) granting and withdrawing such specific permissions;
  - (b) granting, modifying and withdrawing related exemptions;
  - (c) mandating, modifying and withdrawing attached conditions, compensatory or corrective measures;
  - (d) operating such DLT market infrastructures;
  - (e) supervising such DLT market infrastructures; and
  - (f) cooperation between operators of DLT market infrastructures, competent authorities and ESMA.

## *Article 2*

### *Definitions*

For the purposes of this Regulation, the following definitions apply:

- (1) ‘distributed ledger technology’ or ‘DLT’ means a class of technologies which support the distributed recording of encrypted data;
- (2) ‘DLT market infrastructure’ means either a ‘DLT multilateral trading facility’ or a ‘DLT securities settlement system’;
- (3) ‘DLT multilateral trading facility’ or ‘DLT MTF’ means a ‘multilateral trading facility’, operated by an investment firm or a market operator, that only admits to trading DLT transferable securities and that may be permitted, on the basis of transparent, non-discretionary, uniform rules and procedures, to:
  - (a) ensure the initial recording of DLT transferable securities;
  - (b) settle transactions in DLT transferable securities against payment; and
  - (c) provide safekeeping services in relation to DLT transferable securities, or where applicable, to related payments and collateral, provided using the DLT MTF;
- (4) ‘DLT securities settlement system’ means a securities settlement system, operated by a ‘central securities depository’, that settles transactions in DLT transferable securities against payment;
- (5) ‘DLT transferable securities’ means ‘transferable securities’ within the meaning of Article 4(1)(44) (a) and (b) of Directive 2014/65/EU that are issued, recorded, transferred and stored using a DLT;

- (6) ‘multilateral trading facility’ means a ‘multilateral trading facility’ as defined in Article 4(1)(22) of Directive 2014/65/EU;
- (7) ‘central securities depository’ or ‘CSD’ means a ‘central securities depository’ as defined in Article 2(1) of Regulation (EU) No 909/2014;
- (8) ‘financial instrument’ means a ‘financial instrument’ as defined in Article 4(1)(15) of Directive 2014/65/EU;
- (9) ‘settlement’ means ‘settlement’ as defined in Article 2(7) of Regulation (EU) No 909/2014;
- (10) ‘business day’ means ‘business day’ as defined in Article 2(14) of Regulation (EU) No 909/2014;
- (11) ‘delivery versus payment mean’ or ‘DVP’ means ‘delivery versus payment’ as defined in Article 2(27) of Regulation (EU) No 909/2014;
- (12) ‘settlement fail’ means a ‘settlement fail’ as defined in Article 2(1)(15) of Regulation (EU) No 909/2014;
- (13) ‘sovereign bond’ means a bond issued by a sovereign issuer which is either:
  - (a) the Union;
  - (b) a Member State including a government department, an agency or a special purpose vehicle of a Member State or another sovereign entity;
  - (c) a sovereign entity which is not listed under points (a) and (b);
- (14) ‘other public bond’ means a bond issued by any of the following public issuers:
  - (a) in the case of a federal Member State, a member of that federation;
  - (b) a special purpose vehicle for several Member States;
  - (c) an international financial institution established by two or more Member States which has the purpose of mobilising funding and providing financial assistance to the benefit of its members to safeguard the stability of the euro area as a whole.;
  - (d) the European Investment Bank;
  - (e) a public entity which is not an issuer of a sovereign bond as specified in point (13).
- (15) ‘convertible bond’ means an instrument consisting of a bond or a securitised debt instrument with an embedded derivative, such as an option to buy the underlying equity;
- (16) ‘covered bond’ means bonds as referred to in Article 52(4) of Directive 2009/65/EC of the European Parliament and of the Council<sup>49</sup>;
- (17) ‘corporate bond’ means a bond that is issued by a Societas Europaea established in accordance with Council Regulation (EC) No 2157/2001<sup>50</sup> or a type of company

<sup>49</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ L 302 17.11.2009, p. 32).

<sup>50</sup> Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) OJ L 294, 10.11.2001, p. 1–21

listed in Annex I of Directive 2017/1132/EC<sup>51</sup> of the European Parliament and of the Council or equivalent in third countries;

- (18) ‘other bond’ means a bond that does not belong to any of the types of bonds specified in points (13) to (17);
- (19) ‘investment firm’ means an ‘investment firm’ as defined in Article 4(1)(1) of Directive 2014/65/EU;
- (20) ‘market operator’ means a ‘market operator’ as defined in Article 4(1)(18) of Directive 2014/65/EU;
- (21) ‘competent authority’ means one or more competent authorities designated either in accordance with:
- (a) Article 67 of Directive 2014/65/EU for investment firms and market operators operating a DLT MTF;
  - (b) Article 11 of Regulation (EU) No 909/2014 for a CSD operating a DLT securities settlement system; or
  - (c) otherwise designated by the Member States for the purposes of overseeing the application of this Regulation.
- (22) ‘home Member State’ means in the case of:
- (a) an investment firm operating a DLT MTF, the Member State determined in accordance with Article 4(55)(a) (ii) and (iii) of Directive 2014/65/EU;
  - (b) a market operator operating a DLT MTF, the Member State in which the market operator of the DLT MTF is registered or, if under the law of that Member State it has no registered office, the Member State in which the head office of the market operator of the DLT MTF is situated;
  - (c) a CSD operating a DLT securities settlement system, the Member State determined in accordance with Article 2(23) of Regulation (EU) No 909/2014/EU.
- (23) ‘e-money tokens’ means ‘e-money tokens’ as defined in Article XX of Regulation No 2021/XX on Markets in Crypto-Assets<sup>52</sup>.

### Article 3

#### *Limitations on the transferable securities admitted to trading on or settled by a DLT market infrastructure*

1. Only DLT transferable securities that meet the following conditions may be admitted to trading on a DLT MTF and recorded on a distributed ledger by a CSD operating a DLT securities settlement system
- (a) shares, the issuer of which has a market capitalisation or a tentative market capitalisation of less than EUR 200 million; or

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<sup>51</sup> Directive (EU) 2017/1132 of the European Parliament and of the Council of 14 June 2017 relating to certain aspects of company law (OJ L 169, 30.6.2017, p. 46)

<sup>52</sup> Proposal for a Regulation of the European parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 – COM(2020)593

- (b) convertible bonds, covered bonds, corporate bonds, other public bonds and other bonds, with an issuance size of less than EUR 500 million.
- 2. An investment firm or market operator operating a DLT MTF shall not admit to trading sovereign bonds under this Regulation. A CSD operating a DLT securities settlement system, or an investment firm or market operator that is permitted to record DLT transferable securities on a DLT MTF, in accordance with paragraphs 2 and 3 of Article 4, shall not record sovereign bonds under this Regulation.
- 3. The total market value of DLT transferable securities recorded in a CSD operating a DLT securities settlement system shall not exceed EUR 2.5 billion. Where a DLT MTF records the DLT transferable securities instead of a CSD, in accordance with paragraphs 2 and 3 of Article 4, the total market value of the DLT transferable securities recorded by the investment firm or market operator operating the DLT MTF shall not exceed EUR 2.5 billion.
- 4. For the purposes of determining and monitoring the total market value of DLT transferable securities under paragraph 1, the total market value of the DLT transferable securities shall be:
  - (a) determined daily, either by the CSD or the investment firm or market operator concerned; and
  - (b) equal to the sum of: the daily closing price of each DLT transferable security admitted for trading on a DLT MTF, multiplied by the number of DLT transferable securities with the same ISIN that are settled on the DLT securities settlement system or DLT MTF concerned on that day, whether in full or in part.
- 5. The operator of a DLT market infrastructure shall submit to the competent authority that granted the specific permission, in accordance with Article 7 or Article 8, monthly reports, demonstrating that all the DLT transferable securities that are recorded and settled on a DLT MTF permitted to do so, in accordance with paragraphs 2 and 3 of Article 4, or by a CSD on a DLT securities settlement system, fulfil the conditions under paragraphs 1 to 3.

Where the total market value of the DLT transferable securities reported under paragraph 1, has reached EUR 2.25 billion, the investment firm or market operator operating the DLT MTF concerned, or the CSD operating the DLT securities settlement system concerned shall activate the transition strategy, referred to in Article 6(6). They shall notify the competent authority of the activation of their transition strategy, in their monthly report and of the time-horizon for such transition.

The competent authority concerned may permit the DLT market infrastructure concerned to continue to operate until the total market value of the DLT transferable securities reported under paragraph 1 reaches EUR 2.75 billion provided that such leeway is requested by the operator of the DLT market infrastructure concerned and that it is objectively necessary for the orderly implementation of the transition strategy.

- 6. Regulation (EU) No 596/2014 shall apply to DLT transferable securities admitted to trading on a DLT MTF.

## Article 4

### *Requirements and exemptions regarding DLT multilateral trading facilities*

1. A DLT MTF shall be subject to all the requirements applicable to an MTF under Directive 2014/65/EU and Regulation (EU) No 2014/600, except if the investment firm or the market operator operating the DLT MTF:
  - (a) has requested an exemption as specified in paragraph 2 or under Directive (EU) .../...<sup>53</sup> and has been granted such an exemption by the competent authority that granted the specific permission in accordance with Article 7; and
  - (b) complies with the obligations set out in Article 6; and
  - (c) complies with the conditions set out in paragraphs 2 to 4 and with any additional compensatory measures that the competent authority which granted the specific permission may deem appropriate in order to meet the objectives pursued by the provisions from which an exemption is requested or to ensure investor protection, market integrity and/or financial stability.
  
2. At its request, an investment firm or a market operator operating a DLT MTF may be permitted to admit to trading DLT transferable securities that are not recorded in a CSD in accordance with Article 3(2) of Regulation (EU) 909/2014 but instead recorded on the DLT MTF's distributed ledger.

An investment firm or market operator requesting an exemption pursuant to paragraph 1 shall propose compensatory measures to meet the objectives pursued by the provisions from which an exemption is requested, and ensure at a minimum:

  - (a) the recording of the DLT transferable securities on the digital ledger technology;
  - (b) that the number of DLT transferable securities recorded on the DLT MTF equals the total number of such DLT transferable securities in circulation on the digital ledger technology at any given time;
  - (c) that the DLT MTF keeps records which enable the investment firm or market operator operating the DLT MTF, without delay at any given time, to segregate the DLT transferable securities of a member, participant, issuer or client from those of any other member, participant, issuer or client.

Where no request for an exemption has been made by the DLT MTF in accordance with the first subparagraph, the DLT transferable securities shall either be recorded in book-entry form in a CSD or on the distributed ledger technology of a CSD operating a DLT securities settlement system.
  
3. Where an investment firm or a market operator operating a DLT MTF has requested an exemption under paragraph 2, it shall ensure, by means of robust procedures and arrangements that, the DLT MTF:
  - (a) guarantees that the number of DLT transferable securities in an issue or in part of an issue admitted by the investment firm or market operator operating the

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<sup>53</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - COM(2020)596 - - COM(2020)596

DLT MTF, is equal to the sum of DLT transferable securities making up such an issue or part of an issue, recorded on the DLT, at any given time;

- (b) guarantees the safekeeping of any DLT transferable securities, as well as any funds to effect payments for such securities or any collateral provided in respect of such transactions using the DLT MTF;
- (c) enables clear, accurate and timely confirmation of the details of transactions in DLT transferable securities including any payments made in respect thereof as well as the discharge of or calling for any collateral in respect of the same;
- (d) provides clear, accurate and timely information in relation to the settlement of transactions, including settlement finality, by defining the moment from which transfer orders or other pre-identified instructions may not be revoked by a member, participant, issuer or client;
- (e) settles transactions in DLT transferable securities close to real time or intraday, and in any case, no later than on the second business day after the conclusion of the trade;
- (f) ensures delivery versus payment.

The settlement of payments may be carried out through central bank money where practicable and available, or where not practicable and available, through commercial bank money, including commercial bank money in a token-based form, or in e-money tokens.

Where settlement occurs through commercial bank money or e-money tokens, the investment firm or market operator operating the DLT MTF shall identify, measure, monitor, manage, and minimise any counterparty risk arising from the use of such money; and

- (g) either prevents or, if not possible, addresses settlement fails.

4. Where an investment firm or a market operator operating a DLT MTF requests an exemption in accordance with paragraph 2 or with Directive (EU) .../...<sup>54</sup>, it shall in any case demonstrate that the exemption requested is:

- (a) proportionate to and justified by the use of a DLT; and
- (b) limited to the DLT MTF and does not extended to any other MTF operated by the said investment firm or market operator.

## *Article 5*

### *Requirements and exemptions regarding DLT securities settlement system*

1. A CSD operating a DLT securities settlement system shall be subject to the requirements applicable to a CSD under Regulation (EU) No 909/2014, except if such a CSD:

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<sup>54</sup> Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341 - - COM(2020)596

- (a) has requested exemptions as specified in paragraphs 2 to 6 and has been granted such exemptions by the competent authority that granted the specific permission in accordance with Article 8;
  - (b) complies with the obligations set out in Article 6; and
  - (c) complies with the conditions set out in paragraphs 2 to 7 and with any additional compensatory measures that the competent authority which granted the specific permission may deem appropriate in order to meet the objectives pursued by the provisions from which an exemption is requested or to ensure investor protection, market integrity and/or financial stability.
2. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 2(4) on dematerialised form, Article 2(9) on transfer of orders, Article 2(28) on securities accounts, Article 3 on the recording of securities, Article 37 on the integrity of issue, Article 38 on the segregation of assets of Regulation (EU) No 909/2014, provided that the CSD operating the DLT securities settlement system:
- (a) demonstrates that the use of a ‘securities account’ as defined under Article 2(28) of Regulation (EU) No 909/2014 or the use of book-entry form are incompatible with the use of its particular DLT;
  - (b) proposes compensatory measures to meet the objectives pursued by the provisions from which an exemption is requested, and ensures at minimum that:
  - (c) the recording of the DLT transferable securities on the distributed ledger;
  - (d) the number of DLT transferable securities in an issue or in part of an issue admitted by the CSD operating the DLT settlement securities system, is equal to the sum of DLT transferable securities making up such issue or part of an issue, recorded on the distributed ledger at any given time; and
  - (e) it keeps records which enable the CSD, without delay at any given time, to segregate the DLT transferable securities of a member, participant, issuer or client from those of any other member, participant, issuer or client.
3. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 19 and Article 30 of Regulation (EU) No 909/2014, provided that:
- (a) such provisions are incompatible with the use of a DLT as envisaged by the particular DLT operated by the CSD concerned; and
  - (b) the CSD operating the DLT securities settlement system ensures that the conditions set out in points (c) to (i) of Article 30(1) and in Article 30(2) of Regulation (EU) No 909/2014 are complied with.
4. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 2(19) of Regulation (EU) No 909/2014 on participants and may be permitted to admit as participants natural and legal persons other than those referred to in Article 2(19), provided that such persons:
- (a) are of sufficient good repute and are fit and proper; and
  - (b) have sufficient level of ability, competence, experience and knowledge of the post-trading and the functioning of DLT.

5. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Article 40 of Regulation (EU) No 909/2014 on cash settlement, provided that the CSD ensures delivery versus payment.

The settlement of payments may be carried out through central bank money, where practicable and available, or where not practicable and available, through commercial bank money, including commercial bank money in a token-based form, or in e-money tokens.

Where settlement occurs through commercial bank money or e-money tokens, the investment firm or market operator operating the DLT MTF shall identify, measure, monitor, manage, and minimise any counterparty risk arising from the use of such money.

6. At its request, a CSD operating a DLT securities settlement system may be exempted by the competent authority from the application of Articles 50 and/or Article 53 on standard link access and access between a CSD and another market infrastructure of Regulation (EU) No 909/2014, provided that it demonstrates that the use of a DLT is incompatible with legacy systems of other CSDs or other market infrastructures or that granting such access to another CSD or another market infrastructure using legacy systems would trigger disproportionate costs, given the size of the DLT securities settlement system.

7. Where a CSD operating a DLT securities settlement system has requested an exemption in accordance with the first sub-paragraph, it shall give access to other CSDs operating a DLT securities settlement system or to DLT MTFs.

Where a CSD operating a DLT securities settlement system requests an exemption in accordance with paragraphs 2 to 6, it shall in any case demonstrate that:

- (a) the exemption requested is proportionate to and justified by the use of its DLT, and;
  - (b) the exemption requested is limited to the DLT securities settlement system and does not extend to any other securities settlement system as defined in Article 2(10) of Regulation (EU) No 909/2014 operated by the same CSD.
8. Where a CSD has requested and been granted an exemption under paragraph 3, the requirement in Article 39(1) of Regulation (EU) No 909/2014/EU for Member States to designate and notify the securities settlement system operated by the CSD in accordance with Directive 98/26/EC shall not apply to the DLT securities settlement system. The foregoing shall not preclude Member States from designating and notifying a DLT securities settlement system in accordance with Directive 98/26/EC where the DLT securities settlement system fulfils all of the requirements of that Directive.

## *Article 6*

### *Additional requirements on DLT market infrastructures*

1. The operators of DLT market infrastructures shall establish a clear and detailed business plan describing how they intend to carry out their services and activities, including a description of critical staff, technical aspects, the use of the DLT and the information required in paragraph 3.

They shall also have up-to-date, clear and detailed publically available written documentation, which may be made available by electronic means, defining the rules under which the DLT market infrastructure shall operate, including the agreed upon associated legal terms defining the rights, obligations, responsibilities and liabilities of the operator of the DLT market infrastructure, as well as that of the members, participants, issuers and/or clients using the DLT market infrastructure concerned. Such legal arrangements shall specify the governing law, the pre-litigation dispute settlement mechanism and the jurisdiction for bringing legal action.

2. A CSD operating a DLT securities settlement system, and an investment firm or a market operator operating a DLT MTF requesting an exemption from Article 3(2) of Regulation (EU) No 909/2014, shall establish rules on the functioning of the DLT they operate, including the rules for accessing the distributed ledger technology, the participation of the validating nodes, addressing potential conflicts of interest, and risk management including any mitigation measures.
3. The operators of DLT market infrastructures shall provide their members, participants, issuers and clients with clear and unambiguous information on their website on how they carry out their functions, services and activities and how this performance of functions, services and activities deviates from an MTF or a securities settlement system. This information shall include the type of DLT used.
4. The operators of DLT market infrastructures shall ensure that the overall IT and cyber arrangements related to the use of their DLT are proportionate to the nature, scale and complexity of their business. These arrangements shall ensure the continued transparency, availability, reliability and security of their services and activities, including the reliability of smart contracts used on the DLT. These arrangements shall also ensure the integrity, security and confidentiality of any data stored, and the availability and accessibility of such data.

The operators of DLT market infrastructures shall have a specific operational risk procedure for the risks posed by the use of a DLT and crypto-assets and on how these risks would be addressed if they materialised.

To assess the reliability of the overall IT and cyber arrangements of a DLT market infrastructure, the competent authority may require an audit. The competent authority shall appoint an independent auditor to carry out the audit. The DLT market infrastructure shall bear the costs of such an audit.

5. Where the operator of a DLT market infrastructure ensures the safekeeping of participants', members', participants', issuers' or clients' funds, collateral and DLT transferable securities, as well as the means of access to such DLT transferable securities, including in the form of cryptographic keys, the operators of such DLT market infrastructures shall have adequate arrangements in place to prevent the use of the said funds, collateral or DLT transferable securities on their own account other than with the express consent, evidenced in writing, which may be made through electronic means, of the participant, member, issuer, or client concerned.

The operator of a DLT market infrastructure shall maintain safe, accurate, reliable and retrievable records of the funds, collateral and DLT transferable securities held by its DLT market infrastructure for members, participants, issuers or clients as well as of the means of access to such assets.

The operator of a DLT market infrastructure shall segregate the funds, collateral and DLT transferable securities as well as the means of access to such assets, of the

members, participants, issuers or clients using its DLT market infrastructure from its own assets as well as from the same assets of other members, participants, issuers or clients.

The overall IT and cyber arrangements, referred to in paragraph 4, shall ensure that the said funds, collateral and DLT transferable securities, as well as the means of access to such assets, are protected from the risks of unauthorised access, hacking, degradation, loss, cyber-attack or theft.

6. The operator of a DLT market infrastructure shall establish a clear, detailed and publically available strategy for transitioning out of or winding down a particular DLT market infrastructure (referred to herein as the ‘transition strategy’), ready to be deployed in a timely manner, in the event that the permission or some of the exemptions granted in accordance with Article 4 or Article 5 have to be withdrawn or otherwise discontinued, or in the event of any voluntary or involuntary cessation of the business of the DLT MTF or DLT securities settlement system. The transition strategy shall set out how members, participants, issuers and clients shall be treated, in the event of such withdrawal, discontinuation or cessation. The transition strategy shall be updated on an ongoing basis subject to the prior consent of the competent authority which granted the permission to operate and related exemptions under Article 4 and Article 5.

#### *Article 7*

##### *Specific permission to operate a DLT multilateral trading facility*

1. A legal person authorised either as an investment firm or to operate a regulated market, under Directive 2014/65/EU, may apply for a specific permission to operate a DLT MTF under this Regulation.
2. Applications for a specific permission to operate a DLT MTF under this Regulation shall be accompanied by the following information:
  - (a) the information required under Article 7(4) of Directive 2014/65/EU;
  - (b) the business plan, rules of the DLT MTF and associated legal arrangements as referred to in Article 6(1) as well the information regarding the functioning, services and activities of the DLT MTF as referred to in Article 6(3);
  - (c) where applicable, the functioning of its proprietary DLT as referred to in Article 6(2);
  - (d) its overall IT and cyber arrangements as referred to in Article 6(4);
  - (e) where applicable, a description of the safekeeping arrangements of clients’ DLT transferable securities as referred to in Article 6(5);
  - (f) its transition strategy, as referred to in Article 6(6); and
  - (g) the exemptions it is requesting in accordance with Article 4, the justification for each exemption sought, any compensatory measures proposed as well as the means envisaged to comply with the conditions attached to such exemptions under Article 4.
3. Before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority of the home Member State shall notify and provide all relevant information on the DLT MTF to ESMA, an

explanation of the exemptions requested, their justifications and any compensatory measures proposed by the applicant or required by the competent authority.

Within three months of receipt of the notification, ESMA shall provide the competent authority with a non-binding opinion on the application and shall make any recommendations on the exemptions requested by the applicant, that are necessary to ensure investor protection, market integrity and financial stability. ESMA shall also promote the consistency and proportionality of exemptions granted by competent authorities to investment firms or market operators operating DLT MTFs across the Union. In order to do so, ESMA, shall consult the competent authorities of the other Member States in a timely manner and take the utmost account of their views in its opinion.

4. Without prejudice to Article 7 and Article 44 of Directive 2014/65/EU, the competent authority shall refuse to grant the applicant a permission to operate a DLT MTF under this Regulation if there are objective grounds for believing any of the following:
  - (a) significant risks to investor protection, market integrity or financial stability are not properly addressed and mitigated by the applicant; or
  - (b) the specific permission to operate a DLT MTF under this Regulation and the exemptions requested are sought to circumvent legal and/or regulatory requirements.
5. The specific permission granted to either an investment firm or a market operator to operate a DLT MTF shall be valid throughout the Union for up to six years from the date of the specific permission. It shall specify the exemptions that are granted, in accordance with Article 4.

ESMA shall publish on its website the list of DLT MTFs, the start and end dates of their specific permissions and the list of exemptions granted to each of them.

6. Without prejudice to Article 8 and Article 44 of Directive 2014/65/EU, the competent authority which granted a specific permission under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA, in accordance with paragraph 3, if any of the following has occurred:
  - (a) a flaw has been discovered in the functioning of the DLT or in the services and activities provided by the operator of the DLT MTF that poses a risk to investor protection, market integrity or financial stability, which outweighs the benefits of the services and activities under experimentation;
  - (b) the investment firm or market operator operating the DLT MTF has breached the conditions attached to the exemptions granted by the competent authority;
  - (c) the investment firm or market operator, operating a DLT MTF has admitted to trading financial instruments that do not fulfil the conditions laid down in Article 3(1) and 3(2);
  - (d) the investment firm or market operator, operating a DLT MTF, that has requested an exemption from Article 3(2) of Regulation (EU) No 909/2014, has recorded DLT transferable securities that do not fulfil the conditions laid down in Article 3(1) and 3(2);
  - (e) the investment firm or market operator, operating a DLT MTF, that has requested specific permission to be exempted from Article 3(2) of Regulation

(EU) No 909/2014, has exceeded the thresholds referred to in Article 3(3) or (5), third subparagraph; or

- (f) the competent authority becomes aware that the investment firm or market operator that applied for a specific permission to operate a DLT MTF, obtained such permission or related exemptions on the basis of misleading information including any material omission.

7. Where in the course of its activity, an investment firm or a market operator operating a DLT MTF proposes to introduce a material change to the functioning of the DLT, or to its services or activities, which requires a new permission, a new exemption, or the modification of one or more of its existing exemptions or of any conditions attached to it, it shall request such permission, exemption or modification in accordance with Article 4. Such permission, exemption or modification shall be processed by the competent authority, in accordance with paragraphs 2 to 5.

Where in the course of its activity, an investment firm or a market operator operating a DLT MTF requests a new permission or exemption, it shall do so in accordance with Article 4. Such permission or exemption shall be processed by the competent authority, in accordance with paragraphs 2 to 5.

## *Article 8*

### *Specific permission to operate a DLT securities settlement system*

1. A legal person authorised as a CSD under Regulation (EU) No 909/2014, may apply for a specific permission to operate a DLT securities settlement system under this Regulation.
2. Applications for a specific permission to operate a DLT securities settlement system under this Regulation shall be accompanied by the following information:
  - (a) the information required under Article 7(9) of Regulation (EU) No 909/2014;
  - (b) the business plan, rules of the DLT securities settlement system and associated legal arrangements as referred to in Article 6(1) as well as information regarding the functioning, services and activities of the DLT securities settlement system as referred to in Article 6(3);
  - (c) the functioning of its proprietary DLT as referred to in Article 6(2);
  - (d) its overall IT and cyber arrangements as referred to in Article 6(4);
  - (e) the safekeeping arrangements as referred to in Article 6(5);
  - (f) the transition strategy as referred to in Article 6(6);
  - (g) the exemptions it is requesting, in accordance with Article 5, the justifications for each exemption sought, any compensatory measures proposed as well as the measures envisaged to comply with the conditions attached to such exemptions under Article 5.
3. Before deciding on an application for a specific permission to operate a DLT MTF under this Regulation, the competent authority shall notify and provide all relevant information on the DLT securities settlement system to ESMA and an explanation of the exemptions requested, their justification and any compensatory measures proposed by the applicant or required by the competent authority.

Within three months of receipt of the notification, ESMA shall provide the competent authority with a non-binding opinion on the application and shall make any recommendations on the exemptions requested by the applicant, that are necessary to ensure investor protection, market integrity and financial stability. ESMA shall also promote the consistency and proportionality of exemptions granted by competent authorities to CSDs operating DLT securities settlement systems, across the Union. In order to do so, ESMA, shall consult the competent authorities of the other Member States in a timely manner and take the utmost account of their views in its opinion.

4. Without prejudice to Article 17 of Regulation (EU) No 909/2014, a competent authority shall refuse to grant a specific permission under this Regulation, if there are grounds for believing any of the following:
  - (a) significant risks to investor protection, market integrity or financial stability are not properly addressed and mitigated by the applicant; or
  - (b) the specific permission to operate a DLT securities settlement system and the exemptions requested are sought to circumvent legal and/or regulatory requirements.
5. The specific permission granted to operate a DLT securities settlement system shall be valid throughout the Union for up to six years from the date of the specific permission. It shall specify the exemptions that are granted, in accordance with Article 5.

ESMA shall publish on its website the list of DLT securities settlement systems, the start and end dates of their specific permissions and the list of exemptions granted to each of them.

6. Without prejudice to the application of Article 20 of Regulation (EU) No 909/2014, the competent authority which granted the specific permission, under this Regulation shall withdraw such permission or any of the exemptions granted, after consultation with ESMA, in accordance with paragraph 3, if any of the following has occurred:
  - (a) a flaw has been discovered in the functioning of the DLT or in the services and activities provided by the CSD operating a DLT securities settlement system that poses a risk to market integrity, investor protection or financial stability, which outweighs the benefits of the services and activities under experimentation; or
  - (b) the CSD operating the DLT securities settlement system has breached the conditions attached to the exemptions granted by the competent authority; or
  - (c) the CSD operating the DLT securities settlements system has recorded financial instruments that do not fulfil the conditions laid down Article 3(1) and (2); or
  - (d) the CSD operating the DLT securities settlements system has exceeded the thresholds referred to in Article 3(3) and (5), third subparagraph; or
  - (e) the competent authority becomes aware that the CSD operating the DLT securities settlement system that applied for a specific permission to operate a DLT securities settlement system, obtained such permission or related exemptions on the basis of misleading information including any material omission.

7. Where in the course of its activity, a CSD operating a DLT securities settlement system proposes to introduce a material change to the functioning of the DLT, or to its services or activities, which require a new permission, a new exemption or the modification of one or more of its existing exemptions or of any attached conditions, it shall request such permission, exemption or modification, in accordance with Article 5. Such permission, exemption or modification, shall be processed by the competent authority, in accordance with paragraphs 2 to 5.

Where in the course of its activity, a CSD operating a DLT securities settlement system requests a new permission or exemption, it shall request such permission or exemption, in accordance with Article 5. Such permission or exemption or modification shall be processed by the competent authority, in accordance with paragraphs 2 to 5.

### *Article 9*

#### *Cooperation between operators of DLT market infrastructures, competent authorities and ESMA*

1. Without prejudice to the application of any relevant provisions of Directive 2014/65/EU and Regulation (EU) No 909/2014, the operators of DLT market infrastructures shall cooperate with the competent authorities which are entrusted with granting specific permissions under this Regulation and with ESMA.

In particular, immediately upon becoming aware of any of the matters listed below, the operators of DLT market infrastructures shall notify, the said competent authorities and ESMA, thereof. Such matters include, without limitation:

- (a) any proposed material change to their business plan including critical staff, the rules of the DLT market infrastructure and associated legal arrangements at least four months before the change is planned, notwithstanding whether the proposed material change requires a change in the specific permission or related exemptions or conditions attached thereto, in accordance with Article 7 or Article 8;
- (b) any evidence of unauthorised access, material malfunctioning, loss, cyber-attacks or other cyber-threats, fraud, theft or other serious malpractice suffered by the DLT market infrastructure;
- (c) any material change in the information provided to the competent authority which granted the specific permission;
- (d) any technical or operational difficulty in delivering the activities or services subject to the specific permission, including difficulties related to the development or use of the DLT and DLT transferable securities; or
- (e) any risks to investor protection, market integrity or financial stability that have arisen and were not anticipated in the application requesting the specific permission or at the time of granting the specific permission.

Where notified of such information, the competent authority may require the DLT market infrastructure concerned to make an application under Article 7(7) or Article 8(7) and/or may take any corrective measures required as referred to in paragraph 3.

2. The operators of DLT market infrastructures shall provide the competent authority which granted the specific permission and ESMA with any relevant information they may require.
3. The competent authority which granted the specific permission may require any corrective measures to the business plan, the rules of the DLT market infrastructure and associated legal arrangements to ensure investor protection, market integrity or financial stability. Before requiring any corrective measures, the competent authority shall consult ESMA, in accordance with Article 7(3) or Article 8(3). The DLT market infrastructure shall report on the measures taken to implement any corrective measures required by the competent authority, in its reports referred to in paragraph 4.
4. Every six months from the date of the specific permission, the operator of a DLT market infrastructure shall submit a report to the competent authority and ESMA. Such report shall include, without limitation:
  - (a) a summary of any information listed in the second sub-paragraph of paragraph 1;
  - (b) the number and value of DLT transferable securities admitted to trading on the DLT MTF, the number and value of DLT transferable securities recorded by a CSD operating DLT securities settlement systems, and where applicable, the number and value of transferable securities recorded by an investment firm or market operator operating on a DLT MTF;
  - (c) the number and value of transactions traded on a DLT MTF and settled either by a CSD operating a DLT securities settlement system, or where applicable, by an investment firm or market operator operating a DLT MTF;
  - (d) a reasoned assessment of any difficulties in applying Union financial services legislation or national law; and
  - (e) the measures taken to implement any compensatory or corrective measures required by the competent authority or conditions imposed by the competent authority.
5. ESMA shall fulfil a coordination role between competent authorities, with a view to building a common understanding of distributed ledger technology and DLT market infrastructure as well as a common supervisory culture and convergent supervisory practices, ensuring consistent approaches and convergence in supervisory outcomes.

ESMA shall inform all competent authorities on a regular basis of:

  - (a) the reports submitted in accordance with paragraph 4;
  - (b) the specific permissions and exemptions granted in accordance with Article 7 and Article 8 as well as the conditions attached thereto;
  - (c) any refusal by a competent authority to grant a specific permission or any exemption in accordance with Article 7 and Article 8, any withdrawal of such a specific permission or exemptions and any cessations of business by a DLT market infrastructure.
6. ESMA shall monitor the application of the specific permissions, related exemptions and conditions attached thereto, granted in accordance with Article 7 and Article 8, as well as any compensatory or corrective measures required and shall submit an annual report to the Commission on how they are applied in practice.

## Article 10

### *Report and review*

1. Five years from the entry into application of this Regulation, at the latest, ESMA shall present a report to the Commission on:
  - (a) the functioning of DLT market infrastructures across the Union;
  - (b) the number of DLT MTFs and CSDs operating a DLT securities settlement system which have been granted a specific permission under this Regulation;
  - (c) the type of exemptions requested by DLT market infrastructures and the type of exemptions granted by competent authorities;
  - (d) the number and value of DLT transferable securities admitted to trading on DLT MTFs, the number and value of DLT transferable securities recorded by CSDs operating DLT securities settlement systems, and where applicable, the number and value of transferable securities recorded by DLT MTFs;
  - (e) the number and value of transactions traded on DLT MTFs and settled by CSDs operating DLT securities settlement system, and where applicable, by DLT MTFs;
  - (f) the type of DLT used and technical issues related to the use of DLT, including the matters referred to in point (b) of the second sub-paragraph of Article 9(1);
  - (g) the procedures put in place by DLT MTFs in accordance with Article 4(3)(g);
  - (h) any risks presented by the use of a DLT;
  - (i) any interoperability issues between DLT market infrastructures and other infrastructures using legacy systems;
  - (j) the benefits resulting from the use of a DLT, in terms of any efficiency improvements and risk reductions across the entire trading and post-trading chain, including without limitation, with regard to the recording and safekeeping of DLT transferable securities, the traceability of transactions, corporate actions, reporting and supervision functions at the level of the DLT market infrastructure;
  - (k) any refusals by a competent authority to grant specific permissions or exemptions in accordance with Article 7 and Article 8, modifications or withdrawals of such specific permissions or exemptions as well as of any compensatory or corrective measures; and
  - (l) any cessations of business by a DLT market infrastructure and the reasons for such cessation.
2. Based on the report referred to in paragraph 1, the Commission shall present a report to the European Parliament and Council including a cost-benefit analysis on whether the regime for DLT market infrastructures under this Regulation should be:
  - (a) extended for another period;
  - (b) extended to other types of financial instruments that can be issued, recorded, transferred or stored on a DLT;

- (c) amended;
- (d) made permanent with or without amendment; or
- (e) terminated.

In its report, the Commission may propose any appropriate modifications to the Union framework on financial services legislation or harmonisation of national laws that would facilitate the use of distributed ledger technology in the financial sector as well as any measures needed to bridge the transition of DLT market infrastructures out of the pilot regime.

## *Article 11*

### ***Entry into force and application***

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

It shall apply from ... *[please insert date 12 months after the date of entry into force of this Regulation]*.

Within three months from the entry into force of this Regulation, the Member States shall notify their competent authorities within the meaning of Article 2(21)(c), if any, to ESMA and the Commission. ESMA shall publish a list of such competent authorities on its website.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the European Parliament*  
*The President*

*For the Council*  
*The President*