

The UK's cryptoassets financial promotions regime – everything you need to know...

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Background

Cryptoassets are never far away from the news and have been the subject of increased regulatory scrutiny during the last couple of years, with the government and the FCA concerned by events in the crypto sector such as the collapse of FTX and increasingly volatile prices. The government and the FCA have recognised that, without regulation, trading in cryptoassets can represent a significant risk to consumers. The FCA wants consumers to understand the risks of investing in cryptoassets, which will involve consumers receiving timely, accurate information that allows them to make effective investment decisions.¹ Consequently, we are seeing, and will continue to see, a lot of activity to extend the regulatory perimeter to expressly capture activities around cryptocurrencies.²

Legislative reforms

A key extension to bring activities relating to cryptoassets within the regulatory perimeter is incorporating them within the ambit of the financial promotions regime (the **FinProm regime**). It is worth noting some of the key features of the FinProm regime as they now apply to financial promotions of cryptoassets:

- The FinProm regime is set out in the Financial Services and Markets Act 2000 (the **FSMA**) and starts with a general prohibition (the **general FinProm prohibition**) on persons, in the course of their business, communicating an invitation or inducement to engage in investment activities.³ The Financial Services and Markets Act 2023 (the Act) amends the definition of “investment activities”, to bring invitations and inducements relating to cryptoassets within the regulatory framework and therefore within the FCA’s regulatory reach.⁴ Section 69(4) of the Act introduces into the FSMA a definition of “cryptoassets”⁵ which acts as a limitation on the FCA’s reach, i.e., any cryptoassets which fall outside the definition will not be subject to the general prohibition. The effect of these amendments is to bring invitations or inducements to engage in the following activities relating to relevant cryptoassets within the ambit of the FinProm regime:
 - dealing in securities and contractually based investments;
 - arranging deals in investments;
 - managing investments;
 - advising on investments; and
 - agreeing to carry on specified kinds of activities.
- The FSMA authorises HM Treasury to prescribe, through secondary legislation, exceptions to the general FinProm

prohibition. Pursuant to these powers HM Treasury has introduced secondary legislation which provides that cryptoassets firms that are registered with the FCA under the Money Laundering, Terrorist Financing and Transfer of Funds (information on the Payer) Regulations 2017, but are not otherwise authorised, can issue financial promotions relating to cryptoassets.⁶

- More generally, but importantly, the Act amends section 21 of the FSMA to create a regulatory gateway, known as the s21 gateway, which provides that non-authorised persons can communicate financial promotions to UK consumers if the content is approved by an authorised firm with approver permissions. Previously, all authorised firms could approve the content of promotions made by non-authorised persons. Under the gateway, authorised firms now need express permission from the FCA to approve financial promotions. This means that cryptoasset firms must ensure that any authorised firm approving their financial promotions has the correct authorisation. **For more information on the s21 gateway, see our [recent article on this general reform](#).**

FCA guidance

The FCA has issued a number of guidance documents over the past six months which explain how the new rules on promoting cryptoassets will operate.⁷ Most recently, the FCA published non-handbook guidance on how to comply with the cryptoassets FinProm regime. At the heart of these arrangements is a requirement that promotions must be “fair, clear and not misleading”.⁸ The FCA has produced a checklist of considerations for firms making and approving cryptoasset financial promotions, which can be found at Paragraph 2.33 of **FG23/3**. To demonstrate compliance, firms should ensure that:

- the promotion is clear and easy to understand;
- the consumer is fully informed of potential risks;
- the promotion is balanced and the risks are as identifiable as the potential benefits;
- claims about potential benefits are not exaggerated;
- all relevant information is included;
- all claims are accurate and substantiated;
- where information on past and future performance is included, the promotion is based on reasonable assumptions supported by up-to-date data and includes an adequate risk warning that past performance is not a reliable indicator of future results;
- all fees, costs and charges for the products or services promoted are clearly outlined; and
- effective controls and systems are in place to monitor the compliance of promotions.⁹

Additionally, the new Consumer Duty (the **Duty**) also applies to cryptoasset financial promotions, following its entry into force on 31 July 2023.¹⁰ The Duty requires firms to deliver good outcomes for retail consumers, placing a higher regulatory burden on firms (for more information on the Duty – see our [recent article](#)) The Duty requires firms making or approving cryptoasset financial promotions to act in good faith and avoid causing consumers foreseeable harm (whether through acts or omissions).

What is a cryptoasset financial promotion?

As stated above, invitations or inducements to engage in certain activities relating to cryptoassets will fall within the FinProm regime.

Inducements include the giving of "free" cryptocurrency as a reward for opening an account or investing a certain amount, as well as other common marketing tools such as "refer a friend" bonuses, whilst invitations cover communications to the consumer where there is an element of request or persuasion. The new rules will significantly reduce a crypto firm's ability to run such promotions by restricting both the promotion's content and the method by which it can be presented to consumers in the UK.

The new regime

Under the new regime, cryptoassets can only be promoted to UK consumers by one of the following methods:

- an authorised person communicates the promotion;
- an authorised person approves the promotion. Note that the new s21 gateway regime would apply to this scenario;
- a crypto firm registered under the Money Laundering Regulations (MLR) communicates the promotion; or
- the promotion otherwise complies with the conditions of an exemption under the financial promotions order.

Sanctions

The FCA has a range of actions available to it, including:

- issuing take down requests of websites in breach;
- placing firms on the FCA warning list; and
- restricting firms to prevent harmful promotions.

Those who illegally communicate financial promotions to UK consumers will be committing a criminal offence, punishable by an unlimited fine and/or up to two years in prison.

The EU position

Whilst the UK has managed to bring cryptoassets within the scope of existing regulation through legislative amendments, the EU has opted to create an entirely new regulatory framework for cryptoassets through Regulation **(EU) 2023/1114** – the Markets in Crypto-assets Regulation (the MiCAR).

The MiCAR defines a cryptoasset as a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology.¹¹ This definition is coextensive with that of the UK. However, the MiCAR also subdivides cryptoassets into asset-referenced tokens, e-money tokens and all other crypto assets for the purposes of imposing differing authorisation and promotion requirements for each type of cryptoasset.

The "white paper"

Issuers of all three types of cryptoassets must submit a "white paper" to the relevant authority (though there are

limited exceptions).¹² The white paper should contain detailed descriptions of the cryptoasset's characteristics, as well as the rights and obligations attached to it. There is a requirement, similar to the UK, that all information in the white paper is fair, clear and not misleading.¹³ Additionally, the white paper cannot contain any assertions on the future value of the cryptoasset.¹⁴

Asset-referenced tokens

These are defined by the MiCAR as cryptoassets that aim at maintaining a stable value by referencing several currencies that are legal tender, one or several commodities, one or several cryptoassets, or a basket of such assets. To be able to offer asset-referenced cryptoassets to the public in the EU, the issuer must be authorised with the relevant authority¹⁵ which includes submitting a white paper.

E-money tokens

These are defined by the MiCAR as cryptoassets that are intended primarily as a means of payment aimed at stabilising their value by referencing only one fiat currency. Similar to asset-referenced tokens, to be able to offer e-money tokens to the public in the EU, the issuer must be authorised,¹⁶ which includes having their white paper approved by the relevant authority.

All other cryptoassets

For all other types of cryptoassets, the requirements are less stringent. There is no need for authorisation, and although a white paper is required, there is no need for regulatory approval of the white paper before the cryptoasset can be issued.¹⁷

Publishing/marketing requirements

Issuers of all three types of cryptoasset must publish their white papers on their website. All marketing materials must be clearly identifiable as such, be consistent with the information in the white paper, and indicate where potential investors can find the white paper.¹⁸ Additionally, all issuers are required to act honestly, fairly and professionally.

Sanctions

Member States can impose criminal sanctions for breaches of the MiCAR. In the absence of criminal sanctions, they must ensure that the relevant regulatory body is able to impose the following administrative sanctions:¹⁹

- a public statement indicating the person/entity responsible and the nature of the infringement;
- an order requiring the person/entity to cease the conduct constituting the infringement;
- maximum fines ranging from €500,000 to €5 million – depending on the nature of the offence and the person/entity responsible.

What does this mean for firms and the consumer?

Clearly, the intended outcome of both regimes is enhanced consumer protection. In the UK, by incorporating cryptoassets into the existing financial promotions regime, the aim is to increase consumer awareness about the potential risks, as well as limit who can market cryptoassets to UK consumers. The FCA's ambition is for consumers only to invest in cryptoassets where they understand the risks involved and are able to afford to absorb potential losses. A key barometer of success will be reducing the number of consumer investors in cryptoassets who have an

inappropriate risk tolerance or exhibit characteristics of vulnerability.²⁰ The EU's approach also reflects a concern for consumer vulnerabilities and places an emphasis on issuers to provide consumers with sufficient information to make informed decisions on the merits of a cryptoasset investment.

However, a key requirement for success is regulators' ability to take effective enforcement action, especially in the fast-paced environment of social media, where non-compliant promotions can be communicated and spread on a mass scale far faster than regulators can act to remove them and where promotions may originate in foreign jurisdictions where sanctions are not easy to enforce. Regulators can, of course, make statements to warn consumers about firms who make non-compliant promotions; however, it remains to be seen if those warnings will reach the consumer. That said, there is a degree of harmonisation between the UK and EU regimes in terms of the language used to describe compliant promotions – which under both regimes must be fair, clear and not misleading. Promotions under both regimes will likely therefore be held to similar standards, meaning that a compliant promotion under one regime is likely to be compliant under the other.

Lastly, it will be interesting to see how the regime will affect the crypto sector as a whole. By incorporating cryptoassets into the financial promotions regime – regardless of where the promoter is based – the FCA hopes to level the playing field and ensure that overseas firms are subject to the same regulatory advertising standards as domestic firms – thus promoting competition. However, one potential concern is that consumers may be driven overseas by inducements or overly optimistic promotions from non-compliant promoters abroad. Indeed, the FCA has expressed concern over a lack of engagement throughout the consultation process from many unregistered, overseas cryptoasset firms.²¹ Additionally, firms seeking to promote cryptoassets in both the UK and EU will be subject to two sets of regulatory regimes. Although the requirements as to the content of the promotion are similar, the administrative and cost burden on firms seeking to make promotions through the correct legal routes for both regimes may be prohibitive for certain firms.

In its final warning letter dated 21 September 2023, the FCA cautioned that it expected firms to comply with the new regime as soon as it enters into force, with criminal liability for firms and individuals in breach. It remains to be seen as to the scale, and indeed the severity, of the FCA's enforcement action in tackling non-compliance.

Why does this matter? The FCA has signalled that it sees the changes to the FinProm Regime as an important step in increasing consumer protection, in a letter to firms, the FCA stated:

“It is up to consumers to decide whether they buy crypto, but they should do so on the basis of fair and accurate information that helps them make effective investment decisions. The [amended FinProm Regime] will ...create a fairer and more consumer-focussed landscape in which firms can compete and innovate. Firms can most effectively compete in the interests of consumers where consumers have the information that helps them make effective investment decisions.”²²

The FCA has set out its stall in that it issued 146 alerts within the first 24 hours of the regime coming into force.²³ Given the potential criminal liability for non-compliance, it is of vital importance that firms and individuals engaging in the promotion of cryptoassets are aware of their regulatory obligations.

1. Paragraph 1.1 of GC23/1: Guidance on cryptoasset financial promotions. ↩

2. For more information, see our article on [FSMA 2023 and cryptoassets regulation](#). ↩

3. See section 21 of FSMA. ↩

4. Section 69(2) of the Act. ↩

5. Defined as "any cryptographically secured digital representation of value or contractual rights that can be transferred, stored or traded electronically and that uses technology supporting the recording or storage of data". ↩

6. Financial Services and Markets Act 2000 (Financial Promotion) (Amendment) Order 2023, SI 2023/612. ↩

7. See, for example: [FG23/3](#), [Statement on 25 October](#), [Statement on 9 October](#), [Final warning on 21](#)

September, Letter to firms on 7 September, Correspondence on 4 July, and PS23/6. ↩

8. Paragraph 1.4 of **GC23/1**: Guidance on cryptoasset financial promotions <https://www.fca.org.uk/publication/guidance-consultation/gc23-1.pdf>). ↩
9. Paragraph 2.33 of FG23/3: Finalised non-handbook guidance on Cryptoasset Financial Promotions. ↩
10. Paragraph 2.33 of FG23/3: Finalised non-handbook guidance on Cryptoasset Financial Promotions. ↩
11. Article 3(1)(5), MiCAR. ↩
12. Articles 5(1)(b), 18(2)(k) and 48(1)(b) MiCAR. ↩
13. Articles 6(2), 19(2) and 51(2) MiCAR ↩
14. Articles 6(4) and 19(3) MiCAR. ↩
15. Article 16(1) MiCAR. ↩
16. Article 48(1) MiCAR. ↩
17. Articles 4(1) and 8(3) MiCAR. ↩
18. Articles 7(1)(d), 29(1)(d) and 53(1)(d) MiCAR. ↩
19. Article 111 (1-5) MiCAR ↩
20. Paragraph 1.28, FCA Policy Statement 23/6. ↩
21. FCA Final Warning Letter 21 September 2023. ↩
22. <https://www.fca.org.uk/publication/correspondence/final-warning-cryptoasset-firms-marketing-consumers.pdf>. ↩
23. <https://www.fca.org.uk/news/statements/fca-issues-146-alerts-first-24-hours-new-crypto-marketing-regime> ↩

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