

The offer of cryptocurrency derivatives requires authorization and electronic prohibition thereof is prohibited.

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Following an analysis of the legal qualification of cryptocurrency derivatives, the AMF has concluded that platforms offering these products must comply with the rules governing approval and good conduct, and that these products must not be advertised electronically.

Over the past few months, the cryptocurrency boom has spurred several online trading platforms to offer binary options, CFDs or forex contracts with an end-of-day maturity (rolling spot forex), and an underlying cryptocurrency. Such contracts allow investors to bet on a cryptocurrency's rise or fall, without holding the underlying cryptocurrency.

The AMF has conducted a legal analysis of cryptocurrency derivatives. The process of reasoning is twofold: on the one hand, to determine the legal qualification of the notion of "derivative" in the context of cryptocurrency derivatives and, on the other hand, to assess whether a cryptocurrency could be legally regarded as an eligible underlying cryptocurrency. The notion of "derivative" is not defined in EU legislation per se. Within the MiFID framework, EU lawmakers have only set out a list of derivatives (such as options, futures, swaps or forwards), followed by a list of eligible underlying items.

The AMF has concluded that a cash-settled cryptocurrency contract may qualify as a derivative, irrespective of the legal qualification of a cryptocurrency.

As a result, online platforms which offer cash-settled cryptocurrency derivatives must comply with regulations applicable to financial instruments, in particular the rules governing good conduct and mandatory authorization to provide investment services, and the EMIR trade reporting obligation to a trade depository. Above all, these products are subject to the Sapin 2 law provisions¹, and notably the advertising ban relating to certain derivatives².

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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¹ Law No. 2016-1691 of December 9, 2016 on transparency, the fight against corruption and the modernization of economic life.

² See Article L. 533-12-7 of the French Monetary and Financial Code stemming from the Sapin 2 law.

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