ABI Associazione Bancaria Italiana

Regulation on Markets in crypto-assets (MiCA)

ABI's observations

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ABI welcomes the European Commission's decision to provide the EU with a specific framework for crypto-asset markets. The MiCA Regulation aims to provide legal certainty for crypto-assets not covered by existing EU legislation and establish uniform rules for crypto-asset issuers and related service providers. We appreciate the effort to create a harmonized framework, aiming to avoid detrimental fragmentation of the regulatory approach to crypto-assets in different Member States, thus ensuring the desired level playing field among EU market operators.

The European Commission proposes a specific, EU-wide harmonized set of rules to support innovation and fair competition in the crypto-asset sector, while ensuring a high level of consumer protection and market integrity. To this end, a very accurate analysis of all market actors and services has been carried out, identifying the riskiest aspects for investors throughout the entire value chain (issuance, public offering, custody, exchange and trading). In particular, we support the provisions aimed at ensuring greater transparency with regard to crypto-assets offered to the public, which could seriously damage their savings given the high volatility, and at increasing investor protections when they purchase certain types of crypto-asset.

ABI underlines the importance of avoiding excessive or duplicated burdens on entities that provide crypto-asset services equivalent to those offered outside this market and already subject to regulation. Allowing investment firms authorised under Directive 2014/65/EU (MiFID) to enjoy a favourable regime when providing crypto-asset services is considered appropriate, especially if they provide one or more services deemed equivalent to investment services and activities for which they are already authorised under the MiFID. In this regard, it will be essential to match perfectly the MiCA and MiFID lists of services.

Complete clarity of the regulatory framework applicable to all types of crypto-asset, to the issuers of such instruments and to all entities offering related services, is considered key to the creation of innovative value-added solutions within this market. We support the use of a regulation instead of a directive, as this limits the risk of non-homogeneous transposition into national laws.

Furthermore, it is important that the L1 regulation contains the whole legal framework for crypto-assets. Specifically, the L1 regulation should include not only all the definitions needed to apply the discipline correctly, but also all the requirements, authorizations and supervision to which market operators will be subject. This solution would limit as much as possible non-

convergent choices by member states when adapting their existing national regulations.

The L2 regulation should only include operational rules intended to clarify and enrich the content provided in the L1 regulation.

1. European Commission's approach on taxonomy

1.1. Definitions

ABI welcomes the European Commission's effort to outline definitions that are technology-neutral and future proof. However, while the definitions of "crypto-assets" and "distributed ledger technology" are adequate, the definitions for the identification of crypto-assets categories need substantial specification. This is most noticeable with regard to the "other than" category.

In particular, we consider the specific definitions for "crypto-assets" and "distributed ledger technology" to be appropriate. Moreover, the Association appreciates the deliberate effort made to leave the above definitions as broad as possible, in order to encompass the various types of crypto-asset already available on the market and cope with all future developments. We also appreciate the exact alignment with the definition of "virtual assets" outlined in the FATF recommendations, so that all safeguards to combat money laundering and terrorist financing apply.

Turning to the crypto-assets taxonomy, the aim of these definitions is to establish specific legal requirements for each category. ABI however underlines the need to provide a clear indication of the activities in each category. If this is not the case, there is a substantial risk that the category is too broad and therefore not useful for the purpose. This is especially the case with the "other than" category, which will be extensively discussed below.

Concerning the definitions of the crypto-asset categories identified by the Regulation, we agree on the separation of crypto-assets that peg the stability of their value to a single currency from other initiatives that refer to several currencies or other goods. However, most asset-referenced tokens aim in various ways to achieve a stable value in relation to a national currency. They thus have a monetary or at least a quasi-monetary feature. This means that the distinction between asset-referenced and e-money tokens is likely to become blurred. For example, it is important to highlight the case in which an asset-referenced token, nominally using two or more currencies as collateral, is actually weighted in favour of just one fiat currency. In such a

case, while the crypto-asset is formally an asset-referenced token, it is essentially built to link with a single currency and, for that reason, should fall under the e-money token category. Accordingly, all initiatives should be assessed carefully and monitored continuously, since some crypto-assets could change stability mechanism over time.

As a final consideration, the taxonomy should also include certain categories that the Regulation explicitly excludes from its scope, e.g. security tokens and e-money (article 2(2)). We support a more detailed and explicit definition of the types of asset that fall outside the Regulation, as a reference for a more comprehensive approach in future.

1.2. "Other than" category

The provision of a residual category for crypto-assets other than asset-referenced tokens and e-money tokens helps to cover all possible present and future initiatives. Such an approach, however, entails a significant interpretative risk in the treatment of the multiple and heterogeneous types of crypto-asset that might fall under this residual category. We believe that the "other than asset-referenced tokens and e-money tokens" category should be defined more clearly.

The "other than" category includes utility tokens, payment tokens other than stable coins and some hybrid tokens. The utility token definition provided in the draft regulation[1] seems to be merely descriptive and unable to guarantee the necessary legal certainty, without limiting the "other than" category to these specific types of token. As a result, the "other than" category includes crypto-assets with very different risk profiles, some of which would require greater protection for their owners. As such, we suggest a risk-based approach with stricter rules for those initiatives considered "significant", given their global scale, features and high volatility. We recommend separating payment tokens from the residual category, as that would provide more clarity and support a specific set of regulatory requirements.

Also, it is relevant to clarify how tokens that cannot be treated as security tokens (because they lack some of the requisites of traditional financial instruments), but which are still used for investment purposes with an expectation of remuneration, should be considered (and treated) in the context of the Regulation.

[1] "a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token" in accordance with article 3.

2. Clarification for security tokens

ABI agrees with the Commission's choice to clearly exclude financial instruments from the scope of the Regulation via a specific exemption (Article 2(2)). These measures are appropriate and of particular relevance, as it is necessary to avoid overlap between the MiCA and the MiFID, for example. Regulatory regimes should not conflict each other, as that would increase regulatory uncertainty or create excessive burdens, thus potentially limiting innovation.

However, exempting financial instruments from the scope of the MiCA regulation is not sufficient to reduce legal uncertainty. The requirements for a crypto-asset to be considered a financial instrument and, as such, subject to specific, existing EU regulations (e.g. MiFID), are not specified in the proposed regulation.

To achieve full separation and thus the necessary legal certainty, the definition of 'security tokens' should be clear and the distinctive features of a crypto-asset that qualifies as a financial instrument should be specified.

In order to reduce legal uncertainty and guarantee a level playing field between operators, it is essential that this exemption be accompanied by exact identification of the requirements for treating a crypto-asset as a financial instrument. This would eliminate any possibility for different interpretations by individual Member States and an unlevel playing field. If this cannot be provided in the MICA regulation, the use of guidelines drawn up by ESMA is highly recommended.

3. Clarification for hybrid tokens

After issue, some crypto-assets can perform different functions and even change their nature under predetermined conditions. ABI asks the European legislator to clarify the regulatory regime to be applied to such evolving hybrid tokens, since a change in nature may require the application of different regulatory provisions.

4. Passporting

The MiCA Regulation applies the principle of home state oversight. ABI believes that the Commission is taking the right approach in requiring crypto-asset service providers and issuers of e-money tokens and asset-referenced tokens to seek regulatory authorization. The procedures and decisions in the authorization process should be as consistent as possible among the different

National Competent Authorities. This would ensure a level playing field and avoid legislative arbitrage between Member States, not least considering the ability of authorized entities to use the EU-wide passporting regime.

5. Transitional measures

The proposed Regulation contains a regulatory exemption provision, i.e. 'transitional measures' pursuant to art. 123. It exempts the residual category of crypto-assets from the application of arts. 4 to 14 when they were already available on the market and/or admitted to trading before the entry into force of the Regulation. The rationale behind this exemption from prior notification to the authorities and the publication of a whitepaper containing information about the instrument issued, seems appropriate. We also consider acceptable the provision contained in the same article that allows existing crypto-asset service providers an 18-month adaptation period to comply with the Regulation. However, the permanent exemption of issuers of crypto-assets in the residual category from compliance with arts. 4 to 14 (i.e. to act honestly, fairly and professionally, and to communicate with the holders of crypto-assets in a fair, clear and not misleading manner) is questionable.

ABI is not in favour of a "transitional regime" that provides permanent exemption from compliance with the Title II provisions. We strongly recommend careful reconsideration before allowing crypto-assets that have already been issued to enjoy such an exemption on a permanent basis, as this would compromise the safeguards provided by the "same risk, same activity, same treatment" principle. For these reasons, we propose making the provision truly transitory, by establishing an adaptation period for crypto-assets in this category that are already on the market.