



## CONSOB's final report on "initial coin offerings and crypto-assets exchanges"

On 2 January 2020 CONSOB (the Italian regulator supervising financial markets and listed companies) published the final report on "Initial coin offerings (ICOs) and crypto-assets exchanges" ("**Final Report**"), following the public consultation carried out in the first half of 2019 in view of the possible definition of a national regulatory regime governing the public offer of crypto-assets and related negotiations. The main contents of the Final Report are summarized in the paragraphs below.

### 1. Definitory aspects

As far as defintory aspects related to the crypto-assets are concerned, the Final Report provides a number of clarifications that may be summarized as follows:

- with regard to the **difference from the category of financial instruments**<sup>(1)</sup>, CONSOB pointed out that the criteria useful to operate the relevant distinction can be directly found in the European legislation (MiFID), which may not be integrated by the Italian Regulator with additional indications. Similar considerations apply also with regard to investment products (PRIIP, PRIP, IBIP);
- focusing on the **underlying technology**, CONSOB shared the view of the stakeholders who affirmed it is appropriate to distinguish the notion of *blockchain* (species) from that of *distributed ledger technology* (genus), stating that for the purposes of defining crypto-assets which should fall in the perimeter of the proposed regulation, it seems indeed more suitable to refer only to DLT in the meaning set forth by the Simplifications Decree<sup>(2)</sup>. Moreover, CONSOB specified that - although DLT may be used also for the offering and/or exchange of tokens that are financial instruments - in the special regime proposed by the same DLT should be relevant only in relation to tokens other than those which qualify as financial instruments under the applicable rules. In CONSOB's view, reference to DLT remains in any case crucial for the purpose of defining crypto-assets which should be covered by the proposed regulation, being the technological element an essential feature to be taken into account;
- CONSOB confirmed **the reference to the entrepreneurial project** in the definition of crypto-assets. As clarified by the Italian Regulator, such approach is meant to preserve the quality of projects in which Italian savers invest and to emphasize the protection of savings used for the financing of real economy. According to CONSOB, the proposed regulation's scope should cover all investments of a financial nature, in the form of tokens, which incorporate the right to a future benefit which may also consist in the possibility of using a good or receiving a service that the issuer/promoter intends to produce in the future or is currently implementing. Mere "tokenization transactions" of rights connected with the transfer of movable or immovable property or parts of them are therefore excluded from the proposed perimeter of regulation, in order to prevent speculative behavior;

<sup>(1)</sup>It should be recalled that the regulatory approach proposed by CONSOB is not intended to cover crypto-activities representing payment instruments, nor crypto-activities which, because of their characteristics, fall into categories governed by EU-derived legislation (financial instruments, IBIP, ...; see Discussion Paper).

<sup>(2)</sup>Decree-Law no. 135 of 14 December 2018, art. 8-ter, comma 1: "technologies based on distributed registers are defined as technologies and protocols using a shared, distributed, replicable, simultaneously accessible, architecturally decentralised on a cryptographic basis register, such that data can be recorded, validated, updated and stored in clear text and further protected by encryption that can be verified by each participant, unalterable and unmodifiable". According to CONSOB, it does not seem appropriate to open the proposed regulatory regime to other types of technology which are different from the one considered in the Simplifications Decree.

- in line with the suggestions of a number of stakeholders, CONSOB decided to eliminate the **reference to the identification of holders of crypto-assets** from the definition of crypto-assets itself. According to the Italian Regulator, such aspect is indeed more related to a subsequent controlling phase than to the characteristic elements that should be taken into account under a definitory perspective. In this sense, CONSOB confirmed the intention to include in the proposed regulation an obligation for the manager of the crypto-assets offering platform and for the operator of the crypto-assets trading system to identify crypto-assets' holders;
- with respect to the **negotiation** as a defining element of crypto-assets, stakeholders observed, *inter alia*, that some types of tokens are not intended for negotiation and that, at the same time, there could be crypto-assets issued directly in an exchange phase (*i.e.* without being launched through an ICO). It was also stated that including the negotiation element in the definition of crypto-assets could end up by excluding some types of utility tokens or illiquid products and, on the other hand, that negotiation is a common element also for security tokens and pure commodity tokens. Notwithstanding such comments, CONSOB confirmed that negotiation is a relevant defining element of crypto-assets that the proposed regulation is intended to cover. According to CONSOB, this approach takes into account empirical analysis which show that the attractiveness of ICOs *vis-à-vis* retail investors seems based, to a large extent, on the possibility to resell tokens in secondary markets. In this sense, the proposed regulation also aims at protecting investors that buy tokens with the intention to obtain a profit from the resell of the same on exchange platforms;
- in CONSOB's view, it will be necessary to ensure the possibility to **verify negotiability of the crypto-assets** through the information provided in the offering documents (so-called white papers), in the context of which the promoters of the ICO will have to disclose agreements entered into with the operator of the selected system of exchange;
- finally, a number of stakeholders highlighted that **the use of the general term "crypto-asset"** could be misleading, considering that such term normally refers to a broader category which encompasses a number of assets that should not be covered by the proposed regulation, such as crypto-currencies. In this regard, CONSOB simply reiterated that its intention is not to capture crypto-assets which are payment instruments, nor crypto-assets that, based on their characteristics, fall within categories regulated by EU legislation (financial instruments, IBIP, etc.).

## 2. Platforms for the offer of newly issued crypto-activities

The majority of stakeholders supported the **subjective scope of the proposed regulation** as suggested by CONSOB in the consultation document. The opinion shared by market participants is that, at present, the operators which are in the best position to offer professional assistance for the offering of crypto-assets to a potentially undetermined number of investors are indeed the crowdfunding portal managers, as well as other entities that meet the subjective requirements established for the same. According to CONSOB, taking into account the characteristics of the current framework, the setting up of a new *ad hoc* regulation would not be useful.

With respect to the **link between crypto-assets offering platforms and crypto-assets trading platforms** under the double opt-in regime, different stakeholders raised a number of issues related to: (a) illiquidity of trading platforms and consequent risk that investors could be more inclined to seek foreign platforms; (b) possible absence of national ICO platforms (in connection with letter a above); (c) need to ensure that also crypto-assets issued at a foreign State or already issued before the entry into force of the proposed new regulation have access to trading platforms; (d) development of Initial

Exchange Offerings, which cover crypto-assets issued directly in an exchange phase (without being launched through an ICO).

Taking into account the comments provided by market participants, CONSOB stated the need to adopt a **solution able to ensure, at the same time, liquidity of the investment in crypto-assets and reliability of the trading platform**. To such an end, CONSOB clarified that the proposed regulation shall establish that the tokens being offered should be admitted to negotiations in trading platforms authorized in Italy or in trading platforms authorized abroad, provided, in this latter case, that: (a) the platform is subject to similar regulation and supervision and (b) there are *ad hoc* cooperation agreements with the foreign competent authority. Considering that negotiation is one of the definitory elements of crypto-assets that should be covered by the proposed regulation, according to CONSOB future trading of the same will have to be specifically indicated in the offering documents (so-called white papers).

A number of stakeholders stated the need to establish **minimum requirements applicable to the promoters of the initiatives** (for example, capital and/or technological requirements). According to CONSOB, an approach able to balance, on the one hand, the need not to introduce a burdensome regime and, on the other, to ensure protection for investors, is to avoid the provision of organizational and/or capital requirements for issuers and to focus on transparency (for example, minimum information to be included in white papers, publication of updates to the offering documentation on annual and event basis). CONSOB considers appropriate to contemplate the possibility for platform operators to provide for additional requirements, discretionally.

Moreover, CONSOB intends to impose an **obligation on the platform manager to ensure technological reliability**, possibly by providing regulatory requirements concerning: (a) minimum validation / certification obligations of the technological protocols used by the promoters (using, for example, specific indications of the Agency for Digital Italy); and (b) the procedures for verifying these obligations, which could be preferably assigned to technological sponsors of the promoters, instead to the managers of the offering platforms themselves.

According to CONSOB, in line with suggestions of a number of stakeholders, requirements could possibly be graduated on the basis of the different token issuance value.

As regards the **proportionality of the proposed regulation**, CONSOB decided not to introduce specific exemption thresholds, without prejudice to the possibility of reconsidering the issue, as suggested by market participants, following a first period of observation.

### 3. Crypto-assets exchange systems

During the consultation, CONSOB's proposal regarding the regulation of crypto-assets exchange systems - which autonomously decide to submit to regulation and supervision (opt-in) - received substantial consent and no critical issues emerged. Leaving aside the more detailed elements, main comments concern the aspects briefly illustrated below.

With regard to **business models**, during the consultation it was suggested not to exclude from the scope of the proposed regulation so-called "permissionless" blockchain, as well as the so-called "decentralized" systems, given that this would run against market developments. In this regard, stakeholders have more generally pointed out the opportunity to adopt a functional approach, not based on the specific technologies used by the system, but rather on the safeguards implemented by the same in order to ensure appropriate protection for investors and the market as a whole.

Taking into account the comments received, CONSOB stated that it is indeed preferable to follow a neutral approach under a technological perspective, provided that there is a manager: a) clearly identifiable, responsible for the definition of the trading and operating rules of the system and for the monitoring of the correct functioning of the platform, of which it shall take full responsibility *vis-à-vis* third parties; b) able to identify the participants in the platform.

As regards the **requirements to which exchange systems should be subjected for the purposes of registration (and permanence) in the CONSOB's register**, during the consultation phase, stakeholders highlighted the need to provide further requirements of compliance, business continuity, due diligence, transaction monitoring, information on crypto-assets and cyber security. According to CONSOB, such further requirements may be detailed in future second-level regulations, taking into account the proportionality principle and the need to ensure proper balance between authorization requirements and benefits that the manager of the platform would have by exercising the opt-in.

During the consultation, it was proposed to allow the exchange system operators registered with CONSOB to make available for trading "at any time" - beyond, therefore, a mere transitional regime, as instead proposed in the consultation document - also **crypto-assets that have not been offered through one of the regulated ICOs platforms**, provided that a sufficient information set relating to the same is available to the public. Alternatively, some suggested that these crypto-assets could be traded in a separate section of the platform used by the exchange system.

According to CONSOB, in order to attract a wider range of crypto-assets into the regulatory perimeter, the above suggestions can be positively assessed, provided that the crypto-assets in question comply with the admission conditions generally established by the manager of the trading system and that, as suggested during the consultation, adequate information is made available to investors. For the same reasons, it is believed that an Initial Exchange Offering (IEO) can be made on the exchange systems registered with CONSOB, if aimed at subsequent negotiation on the same and provided that investors receive appropriate information on the tokens and the offer.

#### 4. Aspects relating to the custody and transfer of crypto-assets' ownership

Finally, analyzing the aspects related to the custody and transfer of the ownership of crypto-assets, CONSOB accepted the suggestion of market participants concerning the **independent regulation of these services**, as compared to the regulation of the management of crypto-asset exchange systems: in this way, a second register, separate from the register for trading systems, should be established at CONSOB, intended only for providers of "digital portfolio services", that is to say, *"services relating to the safeguarding and provision of access to crypto-assets on behalf of third parties, including through the holding of private cryptographic keys, for the purpose of holding, storing and transferring crypto-assets"*.

With regard to the requirements that the regulation should establish for entities requesting registration in the register relating to the provision of "digital portfolio services", CONSOB stated that it considers appropriate to confirm the regulatory approach already proposed, within the consultation document, for crypto-assets trading systems, which consists in establishing general provisions which will then be further detailed in the second-level regulation.

In this sense, CONSOB considers appropriate to apply the same requirements (except for the necessary adjustments) indicated for the managers of the exchange also to the digital portfolio service providers, in order to protect the risks associated with custody and settlement activities.

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