DIGITAL FINANCIAL PACKAGE: AGREEMENT REACHED ON MICA

Only one month after the publication of Regulation (EU) 2022/858, the so-called pilot scheme on distributed ledger technology (DLT) (see Client Alert No. 4/2022), the Council and the European Parliament reached a provisional agreement (the "**Agreement**") on the proposed regulation on crypto-asset markets (the "MiCA"), the second act of the so called Digital Financial Package.

Previously, on November 24, 2021, the Council had already adopted its negotiating mandate on the MiCA. The trilogues between the European co-legislators (Parliament, Council and Commission) started on March 31, 2022, and ended precisely with the Agreement.

The goal, promoted in general by the Digital Financial Package, is to develop a uniform and specific framework within the EU, ending the "crypto wild west" (considering that some member states already have non-uniform national legislation for crypto-assets), and to confirm the role of the EU as a standard-setter for digital topics, promoting the crypto-asset sector while protecting consumers and ensuring financial stability.

In particular, MiCA outlines regulation for crypto-asset markets regarding issuers of unsecured crypto-assets and so-called stablecoins, as well as for trading platforms and portfolios in which crypto-assets are held.

The purpose of this legislation is limited to crypto-assets that do not qualify as financial instruments and are not assimilated to deposits or structured deposits, securitizations and e-money (except in case of instruments that are qualified as electronic money tokens, see below) for which, vice versa, existing EU legislation on financial services will continue to apply.

Currently, only the proposal for the MiCA Regulation as resulting from the first drafting (dated 9/24/2020) (the "**Draft Regulation**") is available in the Official Journal of the European Union; the text resulting from the recently Agreement has not been made public yet.

The original Draft Regulation comprises a body of legislation of 126 articles. Article 3, devoted to definitions, provides the meaning of key terms such as:

- **crypto-asset**: a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology;
- **asset-referenced token**: a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets;
- **electronic money token or e-money token**: a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to

maintain a stable value by referring to the value of a fiat currency that is legal tender;

- **utility token**: 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.

Depending on the diversity among the various types of crypto-assets, the Draft Regulation divides the specific provisions for each of them into different Titles:

- Title II: Crypto-Assets (included the utility token), other than asset-referenced tokens or e-money tokens;
- Title III: Asset-referenced tokens;
- Title IV: Electronic money tokens.

Article 3 of the Draft Regulation also contains other important definitions such as those dedicated to: **issuer of crypto-assets**, offer to the public, **crypto-asset service provider**, **crypto-asset service**, custody and administration of crypto-assets on behalf of third parties, **operation of a trading platform for crypto-assets**, exchange of crypto-assets for fiat currency, exchange of crypto-assets for other crypto-assets, execution of orders for crypto-assets on behalf of third parties, placing of crypto-assets, reception and transmission of orders for crypto-assets on behalf of third parties, providing advice on crypto-assets, management body, etc.

The remaining Titles of the regulatory text are dedicated to regulations regarding the *Authorisation and operating conditions for Crypto-Asset Service providers* (Title V) and the *Prevention of Market Abuse involving crypto-assets* (Title VI), as well as competent authorities.

The Draft Regulation aims to establish stringent requirements on issuers and service providers for crypto assets in order to protect consumers' portfolios and establish a liability regime in case of loss to investors.

Specifically, the Draft Regulation lays down uniform rules for the following:

a) transparency and disclosure requirements for the issuance and admission to trading of crypto-assets;

b) the authorisation and supervision of crypto-asset service providers and issuers of asset-referenced tokens and issuers of electronic money tokens;

c) the operation, organisation and governance of issuers of asset-referenced tokens, issuers of electronic money tokens and crypto-asset service providers;

d) consumer protection rules for the issuance, trading, exchange and custody of crypto-assets;

e) measures to prevent market abuse to ensure the integrity of crypto-asset markets.

The main new features of the Draft Regulation introduced for consumer protection and prudential purposes are noted below.

To ensure consumers' awareness and protection of their investments, it is necessary to make them aware of the characteristics, functions and risks of the crypto-assets they intend to purchase. In this regard, Draft Regulation imposes to issuers of crypto-assets to publish, notify their competent authority and publish an information document ("**Crypto-asset White Paper**") containing general information (differentiated according to the type of crypto-asset and detailed within both the text and the annex to the Draft Regulation) on the issuer, on the project

to be carried out with the capital raised, on the public offer of crypto-assets or on their admission to trading on a trading platform for crypto-assets, on the rights and obligations attached to the crypto-assets, on the underlying technology used for such assets and on the related risks.

In order to ensure adequate supervision and monitoring by European authorities, issuers, who intend to offer to the public in the Union or who wish to be admitted to trading on a crypto-asset trading platform, shall: (i) in case they offer asset-referenced tokens, be **authorized** by the competent authority of their home Member State, and such authorization may be granted only to legal entities established in the Union except in cases specifically provided for[1], and (ii) in case they offer e-money tokens, is authorised as a **credit institution or as an electronic money institution** within the meaning of Article 2(1) of Directive 2009/110/EC; complies with requirements applying to electronic money institution set out in Titles II and III of Directive 2009/110/EC, unless stated otherwise and publishes a crypto-asset white paper notified to the competent authority[2].

Similarly, crypto-asset services shall only be provided by legal persons that have a registered office in a Member State of the Union and that have been authorised as crypto-asset service providers by the competent authority of the member state where they have their registered office.

For prudential purposes, issuers of asset-referenced tokens shall, at all times, have in place **own funds** equal to an amount of at least the higher of: (a) Euro 350,000; (b) 2% of the average amount of the reserve assets. Such issuers shall at all times constitute, maintain and manage a reserve of assets, which is separate for each category of asset-referenced tokens.

Issuers of asset- referenced tokens and issuers of e-money tokens shall establish, maintain, and implement **custody policies, procedures, and contractual arrangements regarding custody of reserve assets**. If such reserve assets are invested, such investment shall include only highly liquid financial instruments with minimal market and credit risk such that they can be liquidated rapidly, with minimal adverse price effect. The financial instruments in which reserve assets are invested are held in custody and all profits or losses, including fluctuations in the value of the financial instruments, and any counterparty or operational risks that result from the investment of the reserve assets shall be borne by the issuer of the asset-referenced tokens.

Similarly, crypto-asset services providers shall, at all times, have in place **prudential safeguards** equal to an amount of at least the higher of the following: (a) the amount of permanent minimum capital requirements indicated in Annex IV, depending on the nature of the crypto-asset services provided; (b) one quarter of the fixed overheads of the preceding year, reviewed annually. Such prudential safeguards shall take any of the following forms: (a)own funds; (b) an insurance policy.

[1] Restrictions shall not apply where (a) over a period of 12 months, calculated at the end of each calendar day, the average outstanding amount of asset-referenced tokens does not exceed EUR 5 000 000, or the equivalent amount in another currency; (b) the offer to the public of the asset-referenced tokens is solely addressed to qualified investors and the asset-referenced tokens can only be held by such qualified investors.

[2] Restrictions shall not apply (a) to e-money tokens that are marketed, distributed and held by qualified investors and can only be held by qualified investors;(b) if the average outstanding amount of e-money tokens does not exceed Euro 5.000.000, or the corresponding equivalent in another currency, over a period of 12 months, calculated at the end of each calendar day.

Another important innovation envisaged for issuers of e-money tokens is the **obligation to redeem**, upon request by the holder of e-money tokens, at any moment and at par value, the monetary value of the e-money tokens held to the holders of e-money tokens, either in cash or by credit transfer.

From an **AML/CF** perspective, the Draft Regulation does not include any overlap with the recently updated Transfer of Fund Regulation, which was the subject of the recent agreement between the Council and the European Parliament on June 29 that extends the scope of these rules to crypto-asset transfers.

The press release referring to the Agreement also indicates that crypto-asset market participants will be required to **declare information on their environmental and climate footprint**. On this point, ESMA will develop draft regulatory technical standards and the European Commission will have to provide a report on the environmental impact of crypto-assets and the introduction of mandatory minimum sustainability standards for consensus mechanisms, including the proof-of-work.

Non-fungible tokens (NFTs), i.e., digital assets representing real objects such as art, music, and videos, appear to be excluded from the scope of the Agreement, except if they fall under existing crypto-asset categories. Within 18 months the European Commission will be tasked to prepare a comprehensive assessment and, if deemed necessary, a specific, proportionate and horizontal legislative proposal to create a regime for NFTs and address the emerging risks of such new market.

The newly provisional Agreement is subject to approval by the Council and the European Parliament before going through the formal adoption procedure.

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