Initial offers and exchanges of crypto-assets

Final report

2 January 2020

1. Introduction

On 19 March 2019, Consob published a document for discussion on "Initial bids and exchanges of crypto-assets"[1]. On 21 May 2019, a public hearing was held at Bocconi University, attended by over 200 participants. The consultation ended on 5 June 2019, with 61 replies received (including 8 academics, 4 trade associations, 7 from FinTech trade associations, 2 incumbent market operators, 12 FinTech market operators, 25 law firms/professionals, 3 natural persons).[2]

This document provides a response to the issues unveiled by the analysis of the replies to the consultation.

2. Defining aspects

With regard to the defining aspects, special attention was paid to the following points from the contributions received.

2.1. Drawing a distinction with respect to financial instruments

In particular, it has been argued that the definition of crypto-assets proposed does not draw a sufficiently clear distinction (and therefore one which can be ascertained in this specific case) between crypto-assets falling into the category of financial instruments and those not falling in that. Many respondents would like to introduce a more explicit interpretive criterion to make such a distinction.[3]

As we know, the concept of 'financial instrument' is contained in the EU reference legislation (MiFID framework). This European harmonisation regulation takes supremacy in the hierarchy of sources and postulates a homogeneous regulation that also brings together the defining aspects on the subject, inter alia, of financial instruments. This requires national authorities to avoid 'regulatory additions' and to exercise their powers in harmony with European provisions.

[1] The first part of the document contains a description of the phenomenon of the spread of ICOs and their technological, financial and legal aspects, as well as a comparative analysis of the initiatives undertaken in this regard in other European States; in the second part, a definition of crypto-assets is proposed, structured according to those presented as the constituent elements of the phenomenon, and which contribute to the establishment of an ad hoc framework; in the third part, a regulatory approach is outlined with respect to offers of crypto-assets when first issued, focused on the role of platforms in their promotion; lastly, rules are proposed for the subsequent crypto-asset trading phase, emphasising the role of organisers in the exchange platforms. The document also includes 15 questions aimed at stakeholders.

[2] The Annex contains a list of the replies received authorising publication.

[3] Alternatively, some have also suggested providing a case-study analysis (e.g. through an example table or similar tool) or activating a permanent channel of comparison between industry and authority for such defining/interpretive aspects.

Therefore, the said EU legislation on financial instruments is not amenable to be integrated at national level, even indirectly, with additional criteria which, in this case, could be represented by those additional distinguishing elements (between financial instruments and crypto-assets) the introduction of which, into the proposed regulations, is sought by the aforementioned respondents.

The interpretive criteria for applying the required distinction may be found in the European legislation, where a catalogue of categories of financial instruments is codified[4] that enables a judgement of comparability to identify the hypotheses in which the characteristics of a crypto-asset (as well as of the associated operations) lead us to consider the existence of elements of strict analogy with regard to those that commonly characterise the categories of financial instruments listed in the European legislation.[5]

Similar conclusions are reached with regard to the differentiation between crypto-assets and the investment products referred to in Article 1(1), points w-*bis*.1, w-*bis*.2 and w-*bis*.3 of the TUF (Consolidated Law on Finance), which are also derived from European harmonisation provisions.

2.2. DLT technology

With reference to the underlying technology, some respondents stressed that the terms "distributed ledger technology" and "blockchains" are sometimes used as synonyms, while in reality there is a distinction between the two, as blockchain technology represents a *species* of the broader *genus* of DLT technology. Although the use of the specific definition of "technology based on distributed ledgers" - as set out in the definition of Decree-Law no. 135 of 14 December 2018 (Simplifications Decree) - is generally shared by the respondents, some suggest, as an alternative, making reference to the underlying technology in a broad sense, to ensure that it also includes other innovative technologies suitable for allowing the same functions.

It has been pointed out how the use of DLT-type technologies, as a particular element of crypto-assets, is not in itself suitable for defining the category, as it may also potentially be present in cases that may fall within the scope of financial instruments (in the form of security tokens) as well as pure commodity tokens.

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[4]Hence, *(i)* shares and other equivalents securities, *(ii)* bonds and other forms of securitised debt, *(iii)* any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures, *(iv)* other financial derivative contracts, *(v)* money market instruments *(vi)* units in collective investment undertakings.

[5] In this sense, as an additional interpretive criterion, see also ECB Occasional Paper Series No. 223 / May 2019 "Crypto-Assets: Implications for financial stability, monetary policy, and payments and market infrastructures":

- "*In this paper, the term "crypto-asset" denotes any asset recorded in digital form that is not and does not represent either a financial claim on, or a financial liability of, any natural or legal person, and which does not embody a proprietary right against an entity*" (page 7) e "*…the distinctive feature of crypto-assets, as defined in this paper, from which they derive their specific risk profile, is the lack of an underlying claim/liability*" (pages 7-8);
- "*A crypto-asset [as defined in this paper] is not a financial instrument, as listed in Section C of Annex 1 of the Markets in Financial Instruments Directive (MiFID), as that would typically represent a financial liability or equity on the side of some issuer.* […] *A crypto-asset as defined in this paper is not a mere representation of any of the above-mentioned financial assets. Mere digital representations of existing assets are referred to as 'tokens', which allow recording these assets by means of a different technology. The same technology-neutral rules and legal provisions shall therefore apply, to the extent possible, to the issuance, bookkeeping and use of these "tokens" as they apply to the financial assets they represent*" (pages 8-9).

According to some, there should be a further distinction of permissioned blockchains within the blockchains category (permissionless blockchains reportedly are the most common and may have security profiles similar to permissioned blockchains).

It is understood that the concept of blockchains should be distinguished from that of DLT technology, understood as a wider category within which blockchain technology is developed. In this regard, in the European Parliament Resolution of 3 October 2018 on distributed ledger technologies and blockchains (2017/2772(RSP)) it is stated that "*blockchain is only one of several types of DLTs;* […] *some DLT solutions store all individual transactions in blocks which are attached to each other in chronological order in order to create a chain which ensures the security and integrity of the data*". Therefore, when choosing a definition, it seems wise to make reference to DLT technology alone, the translation of which into Italian has already been implemented by the legislator in the relevant provision in the Simplifications Decree.

At present, it is not considered appropriate to open this up to technologies other than the definition in the Simplifications Decree.

The regulations proposed by Consob on "initial offers and exchanges of crypto-assets" are based on the need to regulate the ICOs that are typically characterised in operational practice through the use of DLT technology and, therefore, these proposed regulations include, as a defining element, the technology based on distributed ledgers, considering the innovative scope of that technology and in consideration of the continuous development thereof which requires a legal framework to allow it to evolve, acting as a reference for operators while promoting, at the same time, the protection of investors. In this context, if it is true - as has been observed - that the use of DLT-type technologies may also potentially be present in cases that may fall within the scope of the financial instruments, it has also been clarified that Consob's proposed regulations are not intended to regulate transactions on financial instruments or tokens that share such characteristics. Therefore, in the ad hoc scheme outlined by Consob, DLT technology is relevant solely for the purpose of offers of tokens different than financial instruments.

In defining what a crypto-asset is, it is not considered appropriate to introduce distinctions, in the context of distributed ledger technologies, that are based on the governance of the technology itself, or between permissioned or permissionless blockchains (see above).

Finally, as regards the observations on whether or not the technological element is sufficient in itself to outline the scope of crypto-assets, since the definition is based on additional elements just as essential as the technological component, it is therefore deemed that all such elements should equally concur to the definition.

2.3. Reference to a Business Project

As regards the reference to an underlying business project, it is acknowledged, on the one hand, that this reference can make the offer more concrete, and the value of the investment more verifiable (by the operator of the offer platform on the primary market or the investors), whereas, on the other hand, it has been argued that this can be too limited, since it excludes from the set of crypto-assets broad categories of tokens such as assets tokens (the so-called tokenisation phenomenon). Although this element would exclude the most strictly speculative assets from the definition, it has been sustained that the exclusion of tokens lacking a connection to any business project might have the undesirable consequence of leaving a market sector unregulated and of failing to encourage its development.

With regard to business projects, it is suggested that the alternative wording "business nature" or "financial investment nature" be considered, or that the term "financing" be replaced by

"investment". In particular, some consider the element of "financing" to be misleading as being more relevant to the ICOs, as a means of raising capital, rather than to the tokens themselves.

More than one party asked about the compatibility and relevance, in this context, of the definitions of entrepreneur and business activity, as contained in Article 2082 of the Italian Civil Code.[6] Some parties have asked for clarification as to whether the underlying financial project should belong to an entity with a particular legal qualification (e.g. corporate form).

Some contributions noted that this element might also be found in traditional financial instruments (capital or debt instruments, which represent the main financing tools for a company).

With regard to the above, respondents have stressed the need to preserve the quality of the projects in which the investors, whom Consob is called to protect, invest their savings. Therefore, it is believed that the objective of providing for the appropriate safeguards to savings directed to financing an economic activity is paramount in defining the scope.

Given the above, it should not be forgotten that the objective scope of application of the regulatory approach is investments with financial characteristics, in the form of tokens, which incorporate the right to a future service, which may also consist in the possibility of using goods or receiving a service that the issuer/promoter promises to carry out or is currently implementing. The investor also expects to be able to earn income from such investments in connection with the possibility of trading tokens representing its rights.

For this reason, it is believed that transactions entailing the mere tokenisation of rights related to the transfer of movable or immovable assets or parts thereof (e.g. rights connected with the ownership of works of art, property, etc.) should be excluded. These transactions, to the extent that they are not anchored to concrete business projects and therefore do not involve the promise of goods/services to be carried out, can lend themselves to opportunistic behaviour, aimed at collecting savings without the typical protective framework guaranteed by existing corporate and bankruptcy legal provisions and the rules of financial markets, with regard to the business activities, which make it easier to check whether or not the underlying activity actually exists.[7]

As for the request to introduce a more explicit definition of the business project, it is preferable not to be bound by pre-established definitions, since the project in question may be purely embryonic in nature or rather a more developed activity and may be carried out both by networks of developers (as is typically the case in the Fintech ecosystem) or by companies that assume a traditional corporate form.

In light of the above, the criticisms expressed as to the possible confusion between ICO operations and the object thereof, i.e. crypto-assets, are not considered valid.

Lastly, as regards differentiating between crypto-assets and financial instruments, refer to the clarifications in para. 2.1.

[6] Article 2082 of the Italian Civil Code: "An entrepreneur is a party who professionally pursues an organised economic activity in order to produce or exchange goods or services."
[7] See paragraph 3.3 below regarding subjecting business initiatives to civil law.

2.4. Identifiability of rights-holders

A large number of parties have expressed reservations about the appropriateness of considering the identifiability of the holders of rights incorporated in the crypto-asset as a defining element of the crypto-asset itself, while some have argued, at the technical level, that DLT-type technologies are in themselves suitable for enabling identification of the owners of so-called tokens.

In line with these suggestions, it is recommended that the above element be expunged from the definition of crypto-assets, with this aspect potentially of relevance for a later phase of verification by the operators involved rather than for distinctive profiles in terms of classification.

With this in mind, in the future, Consob will carry out its supervisory activities to protect investors by requiring, when issuing regulatory legislation, that this characteristic be determined and guaranteed by the platform operator for the launch of first-issue offers and by the organiser of the crypto-assets trading platform, respectively (see below). In any case, for reasons of completeness, it should be noted that we are aware of the fact that the operator of the platform for first-issue offers may be held responsible for identifying the subscribers to the offers, but not also with regard to the subsequent stages, where trading activities have already been carried out.

2.5. Trading element

With regard to the element of the trading (or the purpose to access a trading space), some respondents pointed out that some types of tokens are not intended for trading, at least not since the time when they are issued, although their issuance is performed through an offer (ICO) intended for a large audience of potential investors, and that, on the contrary, there are also crypto-assets issued directly during the exchange phase (Initial Exchange Offering) without a preliminary Initial Coin Offering. Other respondents, on the other hand, believe that, once issued, given their nature as instruments that can be traded over the internet, it is impossible to monitor the trading phase of the tokens after they are issued.

The responses received also show that the element of using crypto-assets for potential trading through specific systems could, on the one hand, exclude certain types of utility tokens and illiquid products, while, on the other hand, this would also be a common element for security tokens and pure commodity tokens.

The proposed regulatory approach takes into account the empirical finding that the appeal of ICOs for the retail market appears to be largely composed of the prospect/possibility of reselling tokens on a secondary market.[8]

The reference to the trading purpose of crypto-assets is a defining element for the regulations proposed by Consob, which aim at offering protection to those who purchase tokens, including when their goal is to obtain a revenue from the resale of the same on a trading/exchange platform.

Moreover, it should be noted that the return from trading, expected by the investor, and consisting in the appreciation of crypto-assets on the trading market, may depend both on the successful outcome of the underlying activity connected to expected future service (goods/services in the case of utility tokens or other) and on the trend in supply and demand on the crypto-assets secondary market.

[8] In this context, the observations made with regard to so-called Initial Exchange Offering transactions were also assessed. For details on this, refer to para. 4.4 below.

The respondents also expressed the need for the verification in practice of the trading or the ultimate purpose of the circulation of crypto-assets in specific trading platforms. One respondent in particular does not consider a simple declaration in this regard from the issuer or determination of the mere potential tradability due to the use of DLT technology to be sufficient.

The trading element must be verifiable through the information provided in the preliminary offer document (white paper) which must indicate the agreements between the promoter of the ICO transaction and the organiser of the chosen trading platform.

Lastly, problems may arise in all cases where crypto-assets not initially intended for trading are used for that purpose after issue, and with regard to this aspect, some are seeking the introduction of a coordination framework.

One of the objectives of the regulatory framework is to ensure that the transaction is carried out transparently right from the start and that all the phases thereof are expressly disclosed to the purchasers at the time of the offer on the primary market.

In order for the ad hoc regime to apply, the trading purpose of tokens (or the fact that trading has already taken place) should be envisaged since the launch of the transaction, in the preliminary information document on the offer (white paper) and/or in documentation related to this (this aspect might be resumed and further detailed in the level II regulations).

If it is not permitted to make the offer on regulated crypto-assets platforms where the trading purpose is not certain or cannot be ascertained, there is merit in allowing the subsequent access to a regulated trading platform for crypto-assets that have not previously been issued and offered through a regulated platform (see below).

2.6. The term “crypto-assets”

The respondents to the consultation argued, in some cases, that “crypto-assets” is too broad a term and that there may be some doubt as to whether or not it encompasses crypto-currencies and other such.

In this regard, it should be noted that the regulatory approach proposed by Consob is not intended to encompass crypto-assets that are payment instruments, nor crypto-assets that, by their very nature, fall into categories governed by legislation of EU origin (financial instruments, IBIP, etc.; see Document for Discussion).

The approach proposed by Consob thus seeks to identify “crypto-assets” as assets other than the financial instruments referred to in Article 1(2) of the TUF (Consolidated Law on Finance) and the investment products referred to in paragraph 1, points w-*bis*.1, w-*bis*.2 and w-*bis*.3, consisting in the digital representation of rights associated with investments in business projects, issued, kept and transferred through distributed ledger-based technologies, as well as traded or intended to be traded in one or more trading platforms.

3. Platforms for offering newly issued crypto-assets

3.1. Parties who manage dedicated platforms

A significant number of respondents agreed with the scope proposed in the Document for Discussion with regard to the regulations of an initial offering of crypto-assets.
The creation of a new, dedicated regulatory framework is not considered useful. The possible introduction of new regulations, other than those envisaged for crowdfunding, would require a further provision for disclosure mechanisms and organisational measures to provide similar forms of protection. In addition, in the presence of the opt-in system, the existing legislation for crowdfunding portals would not be applicable to those who decide not to use the new regulatory framework.

It is therefore the belief of the respondents that the approach outlined in the consultation document may be confirmed.

3.2. Offer of tokens on dedicated platforms and their trading on authorised trading platforms

The proposed regulations, through the dual opt-in regime, might entail a close link between the offer platforms and the trading platforms, insofar as offers made through the dedicated and regulated platforms must only cover crypto-assets intended to access regulated and supervised exchangeplatforms. In response to a specific question from the Document for Discussion, comments and clarifications were made for this specific aspect.

It should be noted that, firstly, one form of incentive for the exercising of the opt-in by the promoters of the ICOs is represented by the derogation from the application of the regulations related to the prospectus to be published when securities are offered to the public and remotely promoting and placing crypto-assets that incorporate the domestic definition of financial product.

The link between the platforms for issuing tokens and the platforms for trading tokens - according to the terms described above - is not shared by several respondents, who highlighted several critical aspects with reference to:

- the risk of illiquidity of the trading platforms and the resulting risk that investors may be attracted to more flexible and liquid foreign platforms;
- the possibility that platforms for ICOs may not be developed (including in connection with the previous point);
- the suitability of allowing access to the regulated and supervised exchange platforms for those crypto-assets that have already been issued (before the introduction of the new regulations) or issued abroad;
- the recent development of Initial Exchange Offerings (IEO), which offer an alternative token offer model, where the issuer/supplier/proposer raises capital from the public by offering tokens for sale directly on the exchanges without launching the project through an ICO with a smart contract on its website.

In light of the comments received, it is considered appropriate to adopt a solution which ensures both the liquidity of the investment in crypto-assets and the reliability of the trading platform. To this end, it is necessary to ensure that the token offered is admitted to trading in a crypto-assets trading platform listed in a register kept by Consob or in a crypto-assets exchange platform based in a country other than Italy, provided that it is subject to a regulatory and supervisory regime with characteristics in keeping with the provisions of Italian law and that, in relation to the trading

platform itself, Consob has entered into a special cooperation agreement with the corresponding competent foreign authority.
The intention to trade the tokens, after being issued, on trading platforms, including those different from the trading platforms provided for in the regulations, must be contained in the white paper. Given that the tradability is one of the defining (and, therefore, essential) elements of the tokens subject to the proposed regulations, the future tradability of the tokens should be subject, during the offer phase, to specific indications within the white paper on *i)* the platform(s) and exchanges on which tokens may be traded as well as *ii)* the relevant agreements reached by the promoter of the ICO initiative with the operators of said platform(s) (who could also be different, as stated above, from the operators of platforms regulated and supervised by Consob).

Therefore, the fact that the crypto-assets are to be "*intended to be traded or traded on one or more trading platforms*" remains a necessary defining aspect.

3.3. Minimum requirements for initiative promoters and tasks of dedicated platforms

As shown in the Document for Discussion, parties who issue crypto-assets may be companies, natural persons or networks of product developers.

Many respondents mentioned the need to set more or less stringent requirements for the initiatives, so as to provide sufficient protection for investors. Some instead feared that minimum requirements might jeopardise the development of ICOs. In particular, the following proposals were made:
a) requirements for issuers/promoters (equity requirements, corporate organisational rules, disclosure obligations, annual and extraordinary obligations);
b) requirements relating to the technology used (use of reliable DLT technology).

With regard to the above mentioned requirements (relating to issuers/promoters), in particular, where the promoter has been established as a corporate vehicle, it will be required to set a structure characterized by administration and management control tools , as well as to draw up and publish accounting reports (which will also be audited), as required by the Italian Civil Code. Promoters who are natural persons or networks of various subjects, on the other hand, would not be subject to a similar provision.

It is believed that an approach suitable for balancing the need not to introduce excessive burdens, but ensuring safeguards of investors, is not to set organisational/capital requirements, but rather to focus on transparency. In particular, provision should be made for the following, as a minimum:

a) the publication of an initial document for the offer, with minimal information (on the model of the common White Papers) containing elements on the transaction (use of tokens and resources, returns, etc.), on crypto-assets (number, valuation, incentive systems, tradability etc.) and on the exchange platforms on which the crypto-assets will be traded;
b) the publication of annual updates of the said initial document (White Paper);
c) the publication of extraordinary updates of the said initial document (White Paper) on the occasion of exceptional events likely to significantly alter the initiative.

It is considered appropriate for platform operators, through self-regulation, to use their own discretion when deciding to make provision for additional requirements.

As emerged from the consultation, some respondents do not agree that the operators of platforms for promoting ICOs should be required to select transactions worthy of accessing the platform, as this would introduce scrutiny of the merits of the ICOs by the platforms.

It is believed, instead, that the operators of the platforms must remain responsible for checking compliance in relation to verifying the validity of the proposed transactions, including in consideration of the type of investors at which the offers are aimed. These types of obligations may be detailed with second-level measures.

With regard to the technological requirements, the respondents put forward differentiated proposals in terms of minimum requirements and resulting burdens, mostly aimed at ensuring the technical quality of the smart contracts and associated tokens, as well as the functionality of the distributed ledger-based technologies, as chosen by the promoters. In this regard, respondents believe that the platform operator's intervention must be limited to the offer launch phase. The subsequent phases (subscription/placement) should be managed within the single automated (through the use of smart contracts) and global context of the underlying technological infrastructure used in the ICO itself, without any intervention from the platform operator.

The optimal solution, therefore, appears to be to impose an obligation on the platform operator to ensure technological reliability, where appropriate by establishing at the regulatory level:
- minimum requirements for the validation/certification of the technological protocols used by the promoters (e.g. using specific indications from the Agenzia per l'Italia Digitale);
- the procedures for checking such obligations that could preferably be placed under the responsibility of technological sponsors of the promoters, instead of the operators of the platforms for the offers.

The above-mentioned requirements, both for issuers/promoters and for the technology used, could, as proposed by some respondents, be graded according to the size of the total consideration of the token issuance.

3.4. Proportionality approach

Lastly, with respect to the question put forward in the Document for Discussion - regarding the possible introduction of value thresholds for exemptions (relating to below-threshold emissions) or greater safeguards (for above-threshold emissions) - the majority of the replies received were in favour of endorsing the approach initially proposed.

In particular, it has been argued that the grading of the safeguards when first introduced is not appropriate, and that this could be carried out after a reasonable period of observation. Others argued that this grading, in existence for financial instruments and products, would not be appropriate for crypto-assets in view of their specific features, mainly due to the technology used, as well as "*an often hybrid nature in which the financial characteristic is often not so marked*". Lastly, others agreed that grading would be unsuitable, with specific regard to a possible exemption threshold, in order to protect investors.

Some supported the introduction of proportional requirements, according to the value of the individual offers and the risk that such offers present for the system, the number of entities to whom they are addressed and the nature thereof (e.g. institutional investors), or to take into account the nature of the issuer's small/medium-sized undertaking. In any case, those who advocated the introduction of thresholds hoped, at the same time, that the definition of domestic regulations would not be excessively strict compared with that introduced in other jurisdictions, in order to avoid regulatory 'shopping'.

On the other hand, others claimed that an identical protection system between the offer of tokens and the offer of financial products should be ensured, in order to ensure the same safeguards as for retail investors, since such assets are often considered perfect substitutes.

Some others also claimed that provision should be made for different exemptions from the qualitative/quantitative point of view, tailor-made for crypto-assets.

Therefore, the final decision is to maintain the initial proposal, which does not rule out the possibility of reassessing the subject, as also suggested in consultation, after an initial observation period. On the other hand, the intrinsic proportionality approach proposed is ensured through the provision of an opt-in scheme, which is based on the incentive to opt for the choice of a regulated regime due to the possibility of benefiting from ‘proportional’ treatment with respect to the domestic regulations of financial products.

4. Secondary markets for crypto-assets

During the consultation phase, Consob's proposal concerning the regulation of platforms for the exchange of crypto-assets - which independently decide to be subject to regulation and supervision (opt-in) - received substantial approval and no relevant critical issues emerged. Without going into too much detail, the comments received relate to the topics discussed individually below.

4.1. Business models

As regards business models, during the consultation it was proposed not to exclude permissionless blockchains from the scope of the *de jure condendo* legislation, as well as 'decentralised' systems, since this would "conflict with market developments".

More generally, it was also noted that "Consob adopts a functional approach in this regard, which does not concern the specific technologies used by the system, but rather the safeguards prepared by the system in order to ensure adequate protection of investors and the market as a whole". In similar terms, it is suggested that "a precise but at the same time broad definition [should be adopted] in order to avoid its continuous re-modulation and keep it in line with the continuous technological innovations affecting the sector".

In view of the comments received, it is considered preferable to follow a neutral approach from a technological point of view, without excluding the possibility that the exchange platforms based on specific models and technologies may benefit from the regulatory regime in question, provided that there is an operator who is:

a) clearly identifiable, tasked with defining the trading and operating rules for the platform and monitoring its proper functioning, assuming full liability with respect to third parties;

b) able to identify the participants on the platform.

During the consultation, some respondents also suggested the introduction of an ad hoc framework for the custody service, to which crypto-assets exchange platforms offering such a service would also be subject. As described in the subsequent paragraph dedicated to "*Aspects related to the custody and transfer of ownership of crypto-activities*", to which reference should be made, it is considered appropriate to accept this suggestion, including in view of the significance of the risks associated with post-trading activities. Therefore, the organisers of crypto-assets trading platforms which also intend to offer digital portfolio services should comply with the requirements indicated separately for the two activities. As indicated in the Consultation Document, it is still agreed that crypto-assets trading platforms should be equipped with measures to ensure efficient settlement of transactions.

4.2. Requirements of the exchange platforms

As regards the requirements which must be satisfied by the exchange platforms for the purposes of being listed (and remaining) in the Consob register, the consultation phase also shed light on the need to establish further requirements regarding compliance, business continuity, due diligence, transaction monitoring, information on crypto-assets and cyber security.

In this regard, it should be noted that the additional requirements - inherent in the carrying out of the activities -, the introduction of which has been proposed in general, could be further detailed by Consob in the level II regulation.

The respondents certainly agree with what was said in the consultation on the suitability of the fact that "the phase of regulatory development of the requirements (…) is based on a principle of proportionality that ensures a balance between the onerousness of requests during the authorisation and supervision phase and the benefit that the operator would obtain from exercising the opt-in".

The need for the requirements to be modulated in relation to the characteristics, model of service and organisation of the trading platform was also stressed.

In this respect, it should be noted that the requirements set out by Consob in the consultation document contain general safeguards which must be ensured by any trading platform, regardless of the business model taken as a reference. Specific risks associated with the use of particular operational models may, in any event, be considered in the level II regulation. This multi-level structure ensures a sufficient degree of flexibility of the ad hoc regulatory regime for the circulation of crypto-assets.

4.3. Subjective requirements of the operator

The respondents agreed that it would be preferable to have a system that enables the launch of a crypto-assets exchange platform, for the purposes of registration with Consob, not only for "new entities" (with specific requirements), but also for entities already authorised to manage crowdfunding portals and trading platforms for financial instruments.

This thus confirms the approach already illustrated in the Document for Discussion, as it allows to exploit, for the organisation of a platform for trading crypto-assets, the experience of entities that already operate in a similar and regulated environment and that, as such, offer guarantees of reliability and seriousness. Furthermore, the fact that these entities are already being supervised would reduce the costs associated with Consob's control activities for the purpose of registration and permanence on the register.

4.4. Requirements of tradable crypto-assets

During the consultation, it was proposed that operators of the exchange platforms registered with Consob should be allowed to make crypto-assets that have not been the subject to an offer through one of the regulated platforms of ICOs available for trading "at all times" (i.e. beyond a mere transitional regime, as proposed by the Consob), provided that a sufficient set of information related to the same is available to the public. Alternatively, some suggested that such crypto-assets should be traded in a separate section of the platform.

In order to attract a wider range of crypto-assets into the regulatory area, this proposal may be assessed positively, provided that the crypto-assets in question comply with the general conditions of admission laid down by the organiser of the trading platform and that, as suggested during the consultation, adequate information is (made) available to investors.

For the same reasons, it is considered that an Initial Exchange Offering (IEO) may also be carried out on the exchange platforms registered with Consob, if its purpose is subsequent trading on said

platforms. As shown above, IEOs represent an alternative token offering model, where the issuer/supplier/proposer raises capital from the public by offering tokens for sale directly on an exchange. During the consultation, some of the advantages of this operational model compared with the ICOs were highlighted. In IEOs, in particular, there would be a reduction in the costs of the transaction charged to the issuer, which would be related to a single platform (the exchange), and a greater protection of subscribers from the point of view of 'liquidity', due to the fact that newly issued tokens would be immediately tradable on the 'secondary' market.

As a condition to enable an Initial Exchange Offering to be carried out on a crypto-assets exchange platform registered with Consob, it is considered appropriate to provide suitable investor information on the characteristics of the tokens and the offer.

5. Matters relating to the custody and transfer of ownership of crypto-assets

The Document for Discussion illustrated, *inter alia*, the characteristics and modes of operation, as things stand, of the systems that allow the custody and the transfer of tokens, known as "wallets"[9].

It has also been shown that the dominant operating model for the crypto-asset trading platforms is represented by so-called centralised exchange platforms, which operate both as a trading platform and as custodial wallet service provider. In these cases the exchange also acts as a "settlement internaliser", by recording the transfer of tokens (and possibly of fiat currencies) resulting from the trading on its systems.[10] For this reason, the regulatory proposal outlined in the Document also contains, among the requirements that crypto-assets trading platforms should meet for the purposes of registration - under an opt-in regime - in the Consob register, specific provisions aimed at safeguarding risks associated with post-trading services, i.e. custody services and settlement activities, which centralised exchange platforms carry out as custodial wallet providers.

During the consultation, several subjects suggested considering the suitability of regulating these services - in particular the custody service - independently of the management of crypto-assets exchange platforms, in order to encompass, within the scope of the regulation, parties which operate exclusively as custodial wallet providers.

It is believed that this suggestion might be welcomed, also in order to protect investors who decide to deposit, with a custodial wallet provider, tokens purchased under an Initial Coin Offering, without participating in the trading activities that take place on a crypto-assets trading platform.

To this end, the regulatory proposal could be supplemented by introducing the definition of "digital portfolio services" and identifying the requirements that providers of such services should meet, should they decide to use the opt-in scheme, in order to be registered in a special register, held by Consob.

Compared to the original proposal, two separate registers would be established at Consob: a register for "crypto-assets trading platforms" and a register for "digital portfolio service providers". Entities requesting use of the opt-in scheme to be registered as operators of crypto-assets trading platforms and also wishing to offer custody services and conduct settlement activities should also request registration in the register of digital portfolio service providers, provided that they comply with the objective requirements for conducting the two activities, which are indicated separately. On a subjective level, therefore, those already operating in the organisation of crypto-assets trading platforms could provide digital portfolio services, but so could anyone who fulfils the requirements that should be specifically dictated for registration in the register kept by Consob.

With respect to the definition, the concept of "digital portfolio services" would indicate services related to safeguarding and provision of access to crypto-assets on behalf of third parties, including

[9] The custody of tokens consists in the holding of the cryptographic keys that allow to control/transfer tokens within the DLT system where they are recorded.
Custody may be carried out: (i) by a custodial wallet provider, i.e. a party acting as an intermediary between the investor and the DLT system; or (ii) directly by the investor through a non-custodial wallet (or decentralised wallet), i .e. software installed on a device owned by the same investor, which enables interaction with the DLT system.

[10] In this operational model, therefore, trading activities do not generate any transfer of crypto-assets on the DLT system, which is updated exclusively to record transfers, related to the deposit and withdrawal of tokens, which take place between investors and the exchange platform .

through the holding of private cryptographic keys, in order to hold, store and transfer crypto-assets.[11]

Many respondents to the consultation highlighted the particular importance of the risks associated with the custody of crypto-assets, and suggested the adoption of specific requirements to be established for providers of this service, e.g. requirements related to: IT security, asset segregation, operational procedures, management of conflicts of interest, anti-money laundering safeguards, investor protection insurance mechanisms.

However, with regard to the requirements that should be laid down by the legislation for parties requesting to be listed in the register for "digital portfolio services" providers, it is considered appropriate to confirm the regulatory approach already proposed, within the Document for Discussion, for crypto-assets trading platforms, which consists in providing general provisions which will then be further detailed in the level II regulation.

Consequently, it is considered appropriate to apply to "digital portfolio services" providers - to protect from risks associated with custody services and settlement activities - the same requirements (unless any necessary adaptations) that had been indicated for crypto-assets trading platforms.

The regulatory proposal could therefore provide that the registration, upon request, of a "digital portfolio service" provider in a special Consob register may take place provided that the entity is equipped with:

a) rules and procedures relating to customer identification;
b) measures to adequately protect crypto-assets and to ensure their segregation and conservation, as well as appropriate rules and procedures with regard to the investment of financial resources;
c) measures to allow the efficient settlement of trading transactions relating to the crypto-assets kept by it;
d) procedures for identifying and managing risks related to the provision of services;
e) adequate management and operation oversights, including as regards business continuity and IT security;
f) adequate procedures for managing conflicts of interest;
g) sufficient financial resources for sound and prudent management.

[11] This proposal for a definition is in keeping with what has already been provided for in the European Anti-Money Laundering Directive (AMLD 5) and in the newly issued French legislation ("Plan d'Action pour la Croissance et la Transformation des Entreprises" - loi PACTE"). Specifically:

- AMLD defines the "*custodian wallet provider*" as "*an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.*";
- in PACTE, the custody service is defined as "*the service of storing digital assets or providing access to digital assets on behalf of third parties, where appropriate in the form of private cryptographic keys, for the purpose of holding, storing and transferring digital assets*".