THE FUTURE OF ISSUANCE AND TRADING OF TOKENS (OTHER THAN FINANCIAL INSTRUMENTS) IN LUXEMBOURG: A MICA PRELIMINARY ANALYSIS

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The proposal for a Regulation of the European Parliament and of the Council on markets in crypto-assets and amending Directive (EU) 2019/1937[2] ("**MiCA**") forms an integral part of the digital finance package adopted by the European Commission on 24 September 2020 (the "**Digital Finance Package**")[3]. The Digital Finance Package follows from the adoption by the European Commission in March 2018 of a FinTech action plan whose objective was to allow financial services to make use of new technologies such as blockchain, and which led to the advice on crypto-assets given by the European Securities and Market Authority ("**ESMA**")[4] and the European Banking Authority ("**EBA**")[5] in January 2019.

According to the explanatory memorandum produced by the European Commission, the main objective of MiCA is to "*provide legal certainty for crypto-assets not covered by existing EU financial services legislation and establish uniform rules for crypto-asset service providers and issuers at EU level*"[6]. The European Commission also set additional objectives, namely, to support innovation, to introduce consumer and investor protection and market integrity, and to ensure financial stability[7]. In that memorandum, the European Commission also highlighted the necessity of introducing a common regulatory and supervisory regime for crypto-assets to avoid market fragmentation given that only a few Member States have adopted bespoke regimes in Europe, with a majority of Member States (including Luxembourg) relying primarily on their existing regulatory regimes[8].

At the time we write this paper[9], discussions between Member States and the European Commission are still ongoing and therefore a comprehensive analysis of the proposed Regulation would be premature at this stage. In this paper, we will instead focus our attention to new concepts, instruments and entities that MiCA proposes to introduce under EU law, and in particular, on the crypto-assets that MiCA intends to regulate and how it will do so through the creation of a regulatory regime for crypto-asset service providers.

I. THE FUTURE OF THE ISSUANCE OF TOKENS (OTHER THAN FINANCIAL INSTRUMENTS) IN LUXEMBOURG

Crypto-assets have already been widely discussed by legal authors and practitioners[10] and the classification of tokens into investment tokens, utility tokens and payment tokens was generally retained. As mentioned, the European Commission's intent with MiCA is to regulate crypto-assets that fall outside of the existing EU financial regulations. Thus, the scope of MiCA set forth in article 2.2 excludes (i) financial instruments as defined in article 4(1), point (15) of Directive 2014/65/EU ("**MiFID**"), (ii) electronic money as defined in article 2(2) of Directive 2009/110/EC ("**E-Money Directive**") (except to the extent crypto-assets qualify as e-money tokens), (iii) deposits as defined in article 2(1), point (3) of Directive 2014/49/EU on deposit guarantee schemes, (iv) structured deposits as defined in article 4(1), point (43) of MiFID and (v) securitisation as defined in arti-

1. The views expressed in this paper are those of the authors and do not necessarily reflect the views of the law firm Elvinger Hoss Prussen, *société anonyme*.
2. https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593
3. In addition to MiCA, the Digital Finance Package includes a digital finance strategy, the proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology as well as other legislative proposals, including a proposal of Regulation on digital operational resilience for the financial sector and a new retail payments strategy, which will not be discussed in this paper.
4. ESMA, "Advice on Initial Coin Offerings and Crypto-Assets", 9 January 2019.
5. EBA, "Report with advice for the European Commission on crypto-assets", 9 January 2019.
6. Proposal for a Regulation of the European Parliament and of the Council on Markets In Crypto-assets and amending Directive (EU) 2019/1937, Explanatory Memorandum, p.10.
7. *Ibid*, p. 2.
8. Even though no bespoke regime was adopted in Luxembourg, the law of 1 March 2019 and the law of 22 January 2021 have modernised the law of 1 August 2001 on the circulation of securities and the law of 6 April 2013 on dematerialised securities, respectively.
9. This paper was written as of 15 September 2021.
10. K. Pardaens, B. Nerriec, "Tokenised securities in Luxembourg: concept and legal considerations to be taken into account upon an issuance", *ALJB – Bulletin Droit & Banque*, Decembre 2020, n° 67, section I. A) 2. a).

cle 2, point (1) of Regulation (EU) 2017/2402. Coming back to the categories of tokens, MiCA will therefore not cover the regulation of investment tokens which, in light of MiCA' scope, should be treated as financial instruments under MiFID. The rationale in doing so was not to treat differently investment tokens having the characteristics of financial instruments simply because they rely on a specific technology (namely the distributed ledger technology). This approach, in theory, makes perfect sense, but the reality will not be that simple and the distinction between tokens that should be regulated under MiFID on the one hand, and tokens that should be regulated under MiCA on the other hand, will neither be straightforward nor clear-cut, and even more so until some guidelines are published by EU regulators such as ESMA. The International Association for Trusted Blockchain Applications (INATBA) raised that issue in its policy position on MiCA taking the example of derivatives being settled in crypto-assets rather than fiat currency and whether such derivatives should be viewed as financial instruments under MiFID or crypto-assets (and more precisely asset-referenced tokens) under MiCA[11]. The approach taken by European regulators is even more debatable that tokens often have a hybrid nature which renders their qualification more difficult to ascertain. Some authors[12] have also criticised that approach, explaining that "*MiCA must inevitably come to grips with the problem of clearly setting utility tokens within, or outside, the framework of existing EU financial legislation. This cannot be done by simply providing a negative scope for the application of the intended legislation, as MiCA does in Article 2(2)*" also flagging the important "*risks of re-caracterization and re-qualification of tokens*". Furthermore, the definition of financial instruments within the European Union is currently not applied consistently between Member States which increases the risks of regulatory arbitrage for issuers[13] and thus market fragmentation.

This criticism briefly addressed, we can now turn to the type of crypto-assets that will be regulated under MiCA.

A. Utility tokens

The first category of tokens to be regulated under MiCA are the utility tokens. Article 3.1(5) of MiCA defines them as "*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*", while Recital (9) specifies that they have "*non-financial purposes related to the operation of a digital platform and digital services*". The regulation of utility tokens will be governed by Title II of MiCA which does not expressly refer to utility tokens but to crypto-assets other than the asset-referenced tokens (the "**ARTs**") or the e-money tokens (the "**EMTs**"). This first category of tokens is therefore, somehow, a default or catch-all category covering crypto-assets which are neither financial instruments nor ARTs or EMTs. Nevertheless, in light of Recital (9), it seems that the intention here is to regulate the so-called utility tokens.

Issuers of utility tokens (or any other crypto-assets that are neither ARTs nor EMTs) will not need to be authorised by the competent authorities of their home Member States to issue tokens to the public or seek their admission to trading on a trading platform for crypto-assets, but will simply have to comply with the following requirements set out in article 4.1 of MiCA:

- the issuer of such crypto-assets shall be a legal entity, it being noted that there is no requirement to establish a legal entity within one Member State; and
- the issuer shall draft a white paper in accordance with article 5 of MiCA, shall notify it to the competent authorities of its home Member State (as per the definition of article 3.1(22)) in the way specified in article 7 and shall publish it on a website that is publicly accessible (article 8).

The regulation of utility tokens (and other crypto-assets falling under Title II of MiCA) shares a number of similarities with the requirements imposed on issuers by Regulation (EU) 2017/1129 (the "**Prospectus Regulation**"). First, article 4.2 of MiCA shares some of the exemptions as set forth in article 1.3 and 1.4(a) and (b) of the Prospectus Regulation[14]. Second, the content of the white paper will resemble somehow to what is generally included in terms of disclosure in a prospectus with a summary providing key information on the offer or admission to trading, detailed information on the issuer, information on the crypto-assets and the risks associated therewith and certain warning or statements to be introduced. Third, article 11.1 of MiCA provides that issuers shall modify their white paper to describe "*any change or new fact that is likely to have a significant influence on the purchase decision of any potential purchaser*" of such crypto-assets which is similar to the approach taken under article 23 of the Prospectus Regulation with supplements to prospectuses. Finally, we note that a right of withdrawal is also contemplated under MiCA, except that its scope is much broader than the

11. INATBA Policy Position on Market in Crypto-Assets (MiCA) Regulation, Issue #1 (https://inatba.org/updates/inatba-mica-policy-position/)

12. D. Zetzsche, F. Annunziata, D. Arner, R. Buckley "The Martkets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy", *Law Working Paper Series*, 11 November 2020, n° 2020-018, p. 23.

13. *Ibid.*, p. 8.

14. We note that the exemptions in article 4.2 (a) to (c) are more specific to the way tokens are issued, including in particular in the context of the mining process.

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right of withdrawal under article 23(2) of the Prospectus Regulation. Whereas the right of withdrawal under the Prospectus Regulation is offered in the context of the publication of a prospectus supplement and only exercisable within two working days, the right of withdrawal referred to in article 12 of MiCA would apply in the context of a purchase of crypto-assets directly from the issuer or through a CASP (as defined below) and would be available for a period of fourteen calendar days. This withdrawal right perfectly illustrates the intent of European regulators to give greater protection to consumers when investing in crypto-assets.

There is one difference which is of importance for issuers of utility tokens in terms of procedure and timing. Article 7.1 of MiCA provides indeed that competent authorities shall not require an ex ante approval of the white paper and any marketing communications. Knowing that it generally takes a few months to get a prospectus approved by the CSSF under the Prospectus Regulation, the absence of ex ante approval is certainly a good news for issuers of utility tokens but nevertheless should not mean that the competent authorities will not closely look into the offer and/or admission to trading of such tokens since issuers will be required to provide the competent authorities with the white paper (and marketing communications, as applicable) in advance of its publication. Finally, even though no legal opinion will be required as it will be the case for ARTs (see further below), issuers of utility tokens will have to explain in their notification of the white paper and/or marketing communications why their crypto-assets do not qualify as financial instruments, electronic money, deposits or structured deposits (or said differently, confirm that their crypto-assets fall indeed within the scope of Title II of MiCA). This means that issuers will have to go through a legal analysis of their tokens with their counsels to come to that conclusion, which will not be an easy exercise and may not always be as straightforward as it seems with competent authorities. Some authors have also raised the issue of leaving the definition of the scope of utility tokens to the private sector by explaining that the "*proposed private-sector-led approach risks a race-to-the-bottom among European jurisdictions as token issuers migrate to those jurisdictions in which practicing lawyers are most inclined to write accommodating legal opinion*"[15].

B. Asset-referenced tokens (ARTs)

The second category of tokens to be regulated under MiCA are the asset-referenced tokens which follow from the emergence over the last few years of the so-called stablecoins. Article 3.1(3) of MiCA defines them as "*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*" while Recital (9) specifies that these tokens "*often aim at being used by their holders as a means of payment to buy goods and services and as a store of value*". Before getting into the way the European Commission intends to regulate them, we should first briefly discuss what these tokens are and how they function.

The ARTs or stablecoins have been developed in order to create crypto-assets which are able to maintain a stable value (through the collateral kept in reserve) and can therefore be used as a store of value and/or a means of payment for transactions on DLT without having to go through the traditional payments channels and use fiat currencies. In the United States, the Financial Industry Regulatory Authority ("**FINRA**") has provided a helpful taxonomy to navigate the world of stablecoins[16]. FINRA categorised the stablecoins into four categories as follows:

- **fiat-backed stablecoins**: this is probably the simplest type of ARTs with the value of the ART pegged 1:1 to the value of the fiat currency (e.g. US$, Euro or GBP) held in reserve.
- **commodity-backed stablecoins**: these ARTs are collateralized by commodities such as gold, oil or real estate. As explained by FINRA, the value of such ARTs would typically be determined based on a ratio of one coin (or ART) "*worth one predetermined unit of the referenced commodity (e.g. one ounce of gold or one barrel of oil)*". This type of ARTs may be particularly interesting for investors seeking exposure to certain assets or commodities that may not be easily accessible for them or difficult to store, in which case the ARTs will be used as a store of value.
- **crypto-backed stablecoins**: these ARTs are collateralized by another cryptocurrency (such as bitcoin or Ether) or more generally another crypto-asset. This type of ARTs is entirely on-chain as it does not rely on traditional assets and works by locking a cryptocurren-

15. D. Zetzsche, F. Annunziata, D. Arner, R. Buckley, *op. cit.*, p. 23.
16. FINRA, "3 Things to Know About Stablecoins", 17 April 2020, available at https://www.finra.org/investors/insights/3-things-stablecoins.
17. https://www.gemini.com/cryptopedia/what-are-stablecoins-how-do-they-work

cy/crypto-asset into a smart contract to obtain tokens of equal representative value[17]. Whereas fiat currencies or commodites as collateral are subject to limited volatility, cryptocurrencies or crypto-assets as collateral are subject to high volatility in their prices which generally requires an "over-collateralisation" to mitigate this risk: unlike fiat-backed stablecoins, the collateralized ratio will not be 100% (or 1:1) but will be over 100% depending on the risks associated with the underlying cryptocurrencies/crypto-assets (a basket with multiple crypto-currencies and/or crypto-assets will probably be the preferred approach to limit the volatility risk and thus the collateralized ratio).

– **algo-based stablecoins**: these stablecoins are clearly the riskiest form of stablecoins as they "*do not hold any form of collateral, and instead rely on smart contracts that use algorithms to adjust the supply of the stablecoins based on market demand in order to keep the value stable*"[18]. Recital (26) of MiCA has specified that the so-called algorithmic stablecoins "*should not be considered as asset-referenced tokens, provided that they do not aim at stabilising their value by referencing one or several other assets*". The following developments will therefore not apply to this last category of stablecoins.

Turning to the regulation of ARTs, issuers of such tokens will not have the same flexibility as issuers of utility tokens as they will need to go through an authorisation process with their competent authorities in accordance with article 19 of MiCA in order to be able to offer ARTs to the public or seek their admission to trading[19]. Furthermore, unlike issuers of utility tokens, article 15.2 provides that issuers of ARTs will be required to establish a legal entity within the European Union in order to obtain their authorisation. According to the current draft proposal, only the three following exemptions will be available for issuers to avoid the authorisation requirement, with some similarities with the exemptions available for issuers under the Prospectus Regulation: (i) if the amount of ARTs in issue does not exceed EUR 5,000,000 over a twelve-month period, (ii) if the offer of ARTs is reserved to qualified investors (same as the exemption under article 1.4(a) of the Prospectus Regulation) or (iii) if the issuer of ARTs is a credit institution authorised in accordance with article 8 of Directive 2013/36/EU[20]. However, in such cases, issuers will nonetheless have to produce a white paper and notify it to the competent authorities.

As part of the authorisation process, it is worth mentioning that article 16.2(d) of MiCA requires "*a legal opinion that the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits*" i.e. in other words that the ARTs do not qualify as instruments which are already subject to other EU financial regulations and which are excluded from the scope of MiCA. Although the requirement is similar to the one for utility tokens in terms of confirmation sought, here the format of the confirmation is quite different as a legal opinion will be expected rather than a simple statement made by issuers in their notification to the competent authorities (see above). Issuing this type of legal opinion will be challenging for legal practitioners as they will need to perfectly understand the business of the issuer and the functioning of the ARTs in order to opine on their legal qualification. It goes without saying that guidelines from ESMA would be particularly helpful and welcomed by issuers and lawyers to harmonize the content of such legal opinions and also to avoid a forum shopping, which may become reality if, as already mentioned above, certain practitioners are more accommodating than others and, conversely, if certain authorities are more demanding than others vis-à-vis their standards for legal opinions.

We will not repeat what we have said above regarding the content of the white paper for utility tokens, which remains applicable here, but the nature of the ARTs will require further disclosures to be made in the white paper compared to utility tokens. Because ARTs rely on underlying assets to maintain a stable value, it is of paramount importance to describe in the white paper what will be those underlying assets, how they will be held and managed how their liquidity will be maintained and how holders of ARTs will be able to exercise their rights over such underlying assets in case of insolvency procedures[21]. These additional requirements in terms of disclosures in the white paper come along with additional obligations for issuers of ARTs. First, there are general obligations imposed on issuers in terms of communication (for instance, article 26.1 of MiCA states that issuers shall, at least on a monthly basis, disclose on their website the amount of ARTs in circulation and the value and composition of the reserve assets) but also in terms of governance (article 30) and own funds requirements (article 31). Second, and more importantly, MiCA devotes an entire chapter to the regulation of the reserve assets. We will not describe in details these provisions as they may change in

18. FINRA, *op. cit.*, available at https://www.finra.org/investors/insights/3-things-stablecoins.
19. Art. 15.1 of MiCA.
20. The exemption regarding the EUR 5 million offer is not directly provided for in the Prospectus Regulation but by article 4 of the Luxembourg law of 16 July 2019 on prospectuses for securities, whilst the exemption regarding credit institutions is narrower under the Prospectus Regulation than it is under MiCA.
21. Art. 17.1(b)-(f) of MiCA.

the coming months but we will just draw the attention of the readers to a few examples of the requirements that issuers may have to comply with in the future. The first example is article 32 of MiCA which emphasizes on the stability mechanism with a provision requiring expressly that the creation/destruction of ARTs is matched with the corresponding increase/decrease in the reserve assets and another provision requiring issuers to have "*a clear and detailed policy describing the stabilisation mechanism*" and detailing what that policy should contain. A second example that can be taken is the custody of the reserve assets with the requirement imposed at article 33 of MiCA for issuers to have a custody policy in place for each category of ART in issue (i.e. not an overall custody policy for all ARTs). As part of their custody policy, issuers will also have to maintain segregated accounts, ensure that the reserve assets are not pledged to third parties and that they are readily accessible. The custody itself will be entrusted either to a crypto-asset service provider for the custody of crypto-assets or to a credit institution for all other types of reserve assets (article 33.2 of MiCA). One final example is article 34 of MiCA which deals with the type of financial instruments in which issuers can invest, with the requirement that they be "*highly liquid*"; however, we note that nothing is said about the type of crypto-assets in which issuers may invest, it being noted that not all the crypto-assets can be considered as liquid.

C. E-money tokens (EMTs)

The third and last category of tokens to be regulated under MiCA are the electronic money tokens (or e-money tokens), which are defined in article 3.1(4) of MiCA as "*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*". As stated in Recital (9) of MiCA, the function of these tokens is very similar to electronic money as defined in article 2(2) of the E-Money Directive and even though they resemble to the ARTs, EMTs differ in two ways: first, they are only to be used as a means of exchange and not as a store of value, and second, the reserve assets are made of only one type of asset (i.e. a fiat currency that is legal tender) rather than a basket of different fiat currencies assets and/or crypto-assets.

Compared to ARTs, issuers of EMTs will not have to go through a specific authorisation process but they will have to be authorised as a credit institution or an electronic money institution. However, the same exemptions as the ones existing for issuers of ARTs (save for the exemption regarding credit institutions) will also be available here and the requirement to publish a white paper maintained.

As mentioned, EMTs resemble electronic money but deviate from the rules set forth in article 11 of the E-Money Directive in accordance with the provisions of article 44 of MiCA. Article 44 provides, *inter alia*, that holders of EMTs will have a claim against the issuers of EMTs, that EMTs shall be issued at par value and on receipt of funds and that, upon request by the holders of EMTs, the issuer shall redeem at any moment and at par value, the monetary value of the EMTs.

In terms of white paper requirements, the provisions of article 46 of MiCA are more limitative than the ones of article 17 for ARTs. In particular, there are no specific provisions regarding the reserve assets, their custody and the stability mechanism. This is justified by the fact that, first, EMTs are far less complex instruments with only one type of fiat currency as reserve assets, and second, because an issuer of EMTs will hold a license as a credit institution or e-money institution and will thus be already subject to quite stringent rules towards the protection of customers.

To conclude, it is important to mention the existence of additional rules for significant ARTs (articles 39 to 41 of MiCA) and significant EMTs (articles 50 to 52 of MiCA). The way these tokens should be regulated is subject to ongoing discussions at European level to determine the roles and responsibilities of the EBA and national competent authorities but the common goal remains to closely monitor them and put in place the relevant policies (including as regards their liquidity) and risk management procedures in order to ensure global financial stability, investors' protection and market integrity.

MiCA does not intend to regulate only the three categories of tokens that we have discussed in this section, it also contemplates the regulation of services provided by professionals of the financial sector in respect of crypto-assets, to the extent these services are provided within the European Union (article 2.1 of MiCA).

II. THE FUTURE OF TRADING AND OTHER FINANCIAL SERVICES PROVIDED BY PROFESSIONALS OF THE FINANCIAL SECTOR IN RESPECT OF TOKENS (OTHER THAN FINANCIAL INSTRUMENTS)

The aim of this section is not to describe the procedure for obtaining an authorisation as crypto-assets service provider ("**CASP**") or to comment on the general obligations that will be imposed on those service providers (which are dealt with in Chapter 1 and Chapter 2 of Title V of MiCA, respectively but to discuss the impact this new Regulation will have on professionals of the financial sector in the context of, and following, the issuance of crypto-assets.

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When issuing crypto-assets, one of the aspects that is generally discussed between issuers and their legal counsels is the question of the secondary market activities i.e. once the crypto-assets are issued how they may be traded, and what are the regulatory implications for issuers or the initial investors. The following developments should be read bearing in mind that the scope of MiCA is limited to the crypto-assets discussed in the previous section, thus excluding crypto-assets qualifying as financial instruments. In other words, service providers of tokenised securities will not be able to rely on the rules set forth in Chapter 3 of Title V of MiCA and will have to follow the MiFID rules (subject to any change that may be made to the scope of MiCA until its publication).

Once issued, the first question is generally how crypto-assets will be held and by whom. For instance, let us assume that utility tokens have been issued to the public. To subscribe to the utility tokens, investors will need a wallet compatible with the utility tokens, and the issuer will also need to ensure safe custody of the public keys associated with the private keys of each individual investor. This is an important element to take into consideration at the time of issuance and a situation where wallet service providers will often come into play. If a wallet service provider is used in the context of such public issuance of utility tokens, that wallet service provider will have to be authorised to do so, whereas currently it would not be subject to any particular rules or supervision. Article 67 of MiCA intends to regulate CASPs authorised for the custody and administration of crypto-assets[22] on behalf of third parties. In addition to the obligations that one would typically expect for this kind of services, such as the requirements to have an agreement in place, to keep a register of positions and to segregate the clients' holdings from the CASP's holdings, MiCA also imposes the establishment of a custody policy with rules and procedures to ensure the safekeeping of crypto-assets or their means of access such as cryptographic keys (article 67.3 of MiCA). This illustrates that investors participating in public offers of crypto-assets other than financial instruments will be able to benefit from greater protection with clear rules and procedures for safeguarding their crypto-assets while, conversely, issuers and professionals of the financial sector will benefit from more certainty as to the rules imposed on them when issuing and safekeeping crypto-assets.

After an issuance of crypto-assets, the second question that is frequently asked in practice is how such crypto-assets can be transferred and through which type of platform this can be done. The legal nature of the platform used by an issuer for its tokens must be analysed and, depending on the exact features of that platform, it may either be deemed as a simple bulletin board or a trading venue with different regulatory outcomes attached thereto. Article 3.1(11) of MiCA defines the operation of a trading platform for crypto-assets as "*managing one or more trading platforms for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat currency that is legal tender*". This definition is conceptually very similar to the definitions of multilateral trading facility and organised trading facility[23] which also use the terminology of "third party buying and selling interests interacting in a manner that results in a contract", the main difference between these definitions and the definition in article 3.1(11) of MiCA being the absence of a *"multilateral system"*. Depending on the legal nature of the tokens, the trading of the tokens will either be subject to MiFID (for crypto-assets qualifying as financial instruments) or subject to MiCA (for utility tokens, ARTs and EMTs), unless the operator of the platform is able to demonstrate to the competent authorities that the platform does not amount to a trading venue, in which case the trading of the tokens will be unregulated. A number of factors can be considered to determine whether the conditions for a trading venue are satisfied but, generally, the more the operator plays an active role in creating a market for the tokens the more likely it is to be viewed as operating a trading venue, especially if participants to the platform are professionals such as brokers or investment banks[24].

To the extent a trading venue of crypto-assets exists, its operator must be authorised as a CASP and comply with article 68 of MiCA. Paragraph 1 of that article provides that CASPs shall lay down operating rules such as the requirements and approval process for admitting crypto-assets, set out policies, procedures and level of fees for the admission to trading of crypto-assets, set requirements to ensure fair and orderly trading, set conditions under which trading can be suspended and procedures to ensure efficient settlement. Furthermore, article 68.4 specifies that CASPs shall have in place effective systems, procedures and arrangements to ensure that their trading systems (i) are resilient, (ii) have sufficient capacity to ensure orderly trading under conditions of severe market stress and (iii) are able to reject orders not satisfying the platform's

22. Art. 3.1(10) defines this service as "*safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys*".

23. Art. 4.1(22) and (23) of MiFID.

24. See also K. Pardaens, B. Nerriec, *op. cit.*, section II) B) 1.

criteria or that are erroneous. In short, a number of rules and procedures must be established by the operator and built into the trading platform which, conversely, implies that the absence of such rules and procedures could be an indication (although not necessarily conclusive in the regulators' view) that there is no trading platform. In any event, these rules mark the clear intent of the European Commission to establish a clear and safe regulatory framework for the trading of crypto-assets similar to what currently exists for the trading of financial instruments.

We note that a common trend for all crypto-assets services is the increased transparency imposed on the professionals of the financial sector offering these services, including on the communication of information on their services or the policies they have put in place. This will allow the creation of a regulatory environment more transparent and secured for investors similar to "traditional" financial markets, thus going towards the goal of the European Commission to introduce consumers' and investors' protection.

CONCLUSION

The future of issuance and trading of tokens in Luxembourg is not for tomorrow as one year after the publication of the Digital Finance Package, discussions are still ongoing at European level to agree on the best way to regulate these crypto-assets, but nevertheless the future is bright and source of opportunities and new challenges, including for lawyers and legal practitioners. With MiCA, issuers of tokens (other than those qualifying as financial instruments) will benefit from more legal certainty when issuing their tokens, with clearer requirements in terms of disclosures to be made and/or authorisations to be obtained. As things stand and at the time we write this paper, issuances of investment tokens will have to follow the rules of traditional offerings, including in particular the Prospectus Regulation and MiFID, whilst issuances of utility tokens will be regulated by the rules set forth under Title II of MiCA and issuances of payment tokens regulated by the rules under Title III (for ARTs) or Title IV (for EMTs) of MiCA, depending on their characteristics.

Upon the entry into force of MiCA, financial services provided in respect of utility tokens, ARTs and EMTs will benefit from a clear regulatory framework with specific rules and obligations imposed on the professionals offering them, which will thus be in the best interest of investors who will be able to invest and trade tokens in a more secured and transparent environment.

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