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## **NOTE**

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
Subject:	Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (MiCA) - Preparation of the trilogue

### **I. Introduction**

1. On September 24, 2020, the Commission presented its "Digital Finance Package," including the proposed Regulation on Markets in Crypto-Assets. The Council approved its negotiating mandate in Coreper on November 24, 2021, as outlined in ST 14061/21 + ADD1. The European Parliament approved a negotiating mandate on March 23, 2022.
2. The three first political trilogue took place on March 31, June 1 and June 14, 2022. The substantial progress made makes it possible to envisage important steps at the next trilogue which will take place on June 30 in the European Parliament.

### **II. Preparation of the fourth political trilogue**

3. A first discussion to prepare the fourth political trilogue was held in the Council Working Party of June 22.

4. Regarding the scope of the Regulation, the Presidency could :
- (i) express its strong preference for excluding non-fungible tokens (« NFT ») from the scope of the regulation, except for those whose features or de facto uses would allow to requalify them as crypto-assets covered by the Regulation or as financial instruments. A Commission report, assessing the opportunity and the potential modalities of a regulation of non-fungible tokens would be submitted within 18 months after the entry into force of the Regulation. If the European Parliament makes it a strong political point, the Presidency could nevertheless accept a limited inclusion of non-fungible tokens in the scope of the Regulation, in line with the proposal put forward during the Council Working Party of June 22. It consists in exempting issuers and offerors of non-fungible tokens from Title II requirements, as well as crypto-asset service providers from Title V requirements, whenever they provide services on non-fungible tokens issued by themselves or if their activity does not cross specific quantitative threshold. Those quantitative thresholds could be set in level two, in view of the early stage of development of this market, which requires further assessment ;
  - (ii) in order to ensure a better harmonisation of the classification of crypto-assets within the EU, strongly insist on a solution based on guidelines instead of the regulatory technical standards proposed by the European Parliament. This solution would limit encroachments on national interpretations of the notion of financial instruments within the framework of directive 2014/65/EU (“MiFID”).
5. Regarding crypto-assets, the Presidency could :
- (i) strongly support, concerning the classification as significant of crypto-assets deemed stable, replacing the criteria on cross-border activity by a criteria on the international activity of an issuer outside the EU ;
  - (ii) strongly oppose the European Parliament’s idea to require a localization in the EU of the offerors of crypto-assets which are not deemed stable, since it would take a severe blow to the attractiveness of the European market.

6. Concerning the supervisory framework, the Presidency could :
- (i) strongly oppose a direct supervision by ESMA of the biggest crypto-asset service providers (CASP). If necessary to reach an agreement, the Presidency could nevertheless propose that national competent authorities of “significant” CASPs, as defined by a criteria like the number of active users in the EU, should annually update ESMA’s Board of Supervisors on key supervisory developments. ESMA would not be granted any binding powers and the national competent authority would be responsible for all supervisory decisions. Product intervention powers on the marketing and distribution of a crypto-asset could also be granted to ESMA ;
  - (ii) strictly oppose the European Parliament’s idea to task ESMA with the supervision of issuers of significant ARTs, since the EBA appears to be better suited to supervise crypto-assets which are likely to be used as means of payments;
  - (iii) maintain the choice made by the Council of a limited scope of legal opinions issued by EBA and ESMA in the authorization process of ART issuers (classification of the crypto-asset) ;
  - (iv) strongly insist on the importance to take into account the specificities of non euro area Member States (national supervision for issuers of significant EMT referring a non euro currency and used predominatly – 80% – in a single Member State);
7. Concerning the idea – particularly important to the European Parliament – to take into account the environmental impact of crypto-assets, the Presidency could accept the compromise proposal prepared at a technical level.

8. The Presidency could accept the establishment of a list of non-compliant CASPs trying to provide their services in the EU, as detailed during the last Council Working Party. However, the Presidency will oppose the European Parliament's idea to refuse in an automatic way an authorization to a CASP whose parent company is located in countries listed on EU list of AML high-risk third countries as well as on the EU list of non-cooperative jurisdictions for tax purposes. Those CASPs should nevertheless implement enhanced checks required by the EU AML framework. In line with a proposal circulated at a technical level, strengthened requirements could also be applied to shareholders and to the management of the CASPs, notably with regard to their localization.
9. The Presidency could show openness to shorten implementation periods of the Regulation as well as the duration of specific transitory provisions, in line with the proposal made at a technical level.

### **III. Question**

10. Do you deem the approach proposed by the Presidency acceptable?
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