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**NOTE**

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From: General Secretariat of the Council  
To: Permanent Representatives Committee

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Subject: Regulation on Markets on crypto-assets and amending Directive (EU)  
2019/1937 (MiCA)  
- Preparation of the trilogue

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**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. A first political trilogue took place on March 31, 2022. A first exchange of views on the main provisions of the text was held. Several objectives are shared by both colegislators, but important differences still need to be bridged. Teams were asked to work on building a technical compromise on several parts of the text.

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

3. The second political trilogue, which will be held on May 18 in the European Parliament's premises, will be the opportunity to take stock of the work done at technical level and to come back on the main provisions of the text.
4. A first discussion to prepare the second political trilogue was held on May 6 in a Council Working Party.
5. Regarding the scope of the Regulation, the Presidency could :
  - (i) promote the flexible approach chosen by the Council to define, via European Supervisory Authorities' guidelines setting a standardised test, crypto-assets which do not fall under MiCA, like financial instruments or pension products ;
  - (ii) insist on excluding non-fungible tokens (« NFT »), a category of assets which includes diverse goods such as collectible arts, and on designing a proper regulatory treatment via the review clause or a dedicated piece of legislation ;
  - (iii) reaffirm the preference of the Council for letting the Commission specify in delegated acts technical elements of the definitions in order to adapt more easily to future developments in the crypto ecosystem ;
  - (iv) deal with Decentralized Finance in the review clause, as advocated by the European Commission in a note sent to both co-legislators, in order to gain sufficient expertise on this emerging field and to test new supervisory tools.

6. With regard to crypto-assets which are not deemed stable (« stablecoins »), the Presidency could underline the risks of allowing an issuer of crypto-assets to require a supervisory authority a pre-approval of the white paper accompanying an issuance of crypto-assets. The Presidency could nevertheless support the idea of granting the national competent authorities the power to require amendments or additional elements to the white paper, ex ante or ex post. Besides, the European Parliament would like to strengthen consumer protection by adding provisions to avoid conflict of interests when drafting the white paper, while the Presidency does not believe in their added value and could express scepticism.
7. On the major issue of crypto-assets deemed stable and referring to the value of several fiat currencies, commodities or other crypto-assets (« asset-referenced tokens » or « ART »), the Presidency could :
- (i) defend the criteria chosen by the Council to qualify an ART as significant, in particular the deletion of the criteria related to cross-border activity, as well as the specification in level 1 of the quantitative criteria ;
  - (ii) ask the European Parliament for clarifications on some provisions included in its negotiating mandate (delay for the redemption of ART, calculation methodology of own funds of ART issuers) ;

- (iii) insist on the appropriateness of the approach chosen by the Council to identify and regulate more tightly ART used as means of payment, while underlining the risks of the approach chosen by the European Parliament even if both approaches share the same objective ;
  - (iv) show flexibility on the liquidity requirement applying to significant ART to have a proportion of assets in the reserve stored in bank deposits ;
  - (v) defend the discretion given by the Council to national supervisors to increase own fund requirements, notably depending on the outcome of *stress-tests*.
8. Regarding crypto-assets deemed stable referring to a single official currency (« e-money tokens » or « EMT »), the Presidency could :
- (i) underline the downsides of granting the ECB the power to authorize issuers of EMT, while the Council already grants a veto power to the ECB (or national central banks for non euro-area Member States) ;
  - (ii) ask the EP for clarifications with regard to some provisions included in its negotiating mandate (redemption deadlines, obligation to fulfil redemption request of a holder of EMT enlarged to encompass third party entities that has been in contractual arrangements with the issuer, such as custodians) ;

9. The co-legislators made different choices on the supervisory framework. The Presidency could:
- (i) oppose a supervision by ESMA of the biggest crypto-asset service providers (CASP), and promote an alignment in this regard with the EU legislation applying to equivalent entities in the sphere of traditional finance (for instance trading venues);
  - (ii) maintain the Council restrictions on the scope of legal opinions issued by EBA and ESMA in the authorization process of ART issuers (classification of the crypto-asset);
  - (iii) insist strongly 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 predominantly – 80% – in a single Member State);
  - (iv) explain the European Parliament the practical need for national supervisors to be given sufficient time to authorize CASP (3 months in the Council mandate) and reject the European Parliament's idea of an automatic approval of a CASP once the deadline for authorization has expired, which would pose reputational and operational risks.

10. The idea to take into account the environmental impact of issuances and transactions of crypto-assets will be discussed more in details on the basis of a compromise proposal of the European Commission. The Presidency could, in the spirit of compromise, show openness on this topic, while requiring compliance with the principles of proportionality and technology neutrality.
11. The Presidency will once again advocate for dealing with money laundering and terrorism financing issues in the AML-CFT package currently under discussion.
12. The Presidency will stick to the Council mandate concerning transitional provisions and will be open, in a spirit of compromise, to include in the review clause provisions related to decentralized finance, non-fungible tokens, and the environmental and climates impacts of the crypto ecosystem.

### **III. Question**

10. In the light of the previous points, the Permanent Representatives Committee is invited to support the negotiating position proposed by the Presidency.
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