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The Italian Regulatory Approach to Crypto-Assets and the Utility Tokens' ICOs

By Paolo Carrière

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Abstract

The Italian Stock Exchange Commission (Consob) recently launched a "public consultation" on a Discussion Paper concerning "initial offers and exchanges of crypto-assets", which outlines an early domestic regulatory approach to ICOs, waiting for a harmonized initiative at EU level. The Commission is inspired by a commendable intent to "facilitate" this new phenomenon – thus, with the aim of avoiding those restrictions and hindrances that characterize Italian legislation today, more than other European or foreign jurisdictions – and, consequently, design a "safe harbour" based on an "opt-in" regime. Considering critically the Paper - although the general approach will appear fully convincing and understandable - certain definitory limits and certain specific regulatory options suggested in it, could result in excluding the possibility to take advantage of the "safe harbour", for various kind of utility tokens that appear potentially most deserving of the envisaged "favourable" regulatory approach; as such, in a paradoxical and contradictory manner.

Keywords: Crypto-Asset; Cryptocurrencies; ICOs; Tokens; Utility Tokens

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Introduction

On 19 March 2019, the Italian Stock Exchange Commission (Consob) launched a "public consultation" (then terminated on the following 5 of June) on the Discussion Paper concerning "initial offers and exchanges of crypto-assets", (the "**Paper**") which outlines an early domestic regulatory approach (Sciarrone Alibrandi A., 2019; Carriere, 2019:3), to those transactions globally known as ICOs of "crypto-assets", waiting for a harmonized initiative at EU (ESMA, 2019)[1] level, where an advanced study and comparative monitoring is currently in progress with the aim to identify the best strategies for an effective regulatory approach.

A critical comprehension and appraisal of the Paper requires cross-application of skills in "financial markets law", along with a thorough understanding of "crypto-assets", with regards to their technological and operative nature and to their typical delocalized and transnational dimension.

The Paper is inspired by a commendable intent to "facilitate" this new phenomenon – thus, with the aim of avoiding those restrictions and hindrances that characterize Italian legislation today, more than other European or foreign jurisdictions – and, as a consequence, suggests regulatory solutions that appears to be highly advisable: creating a "safe harbour" based on an "opt-in" regime.

Having carefully considered the assumptions and implications (the rationale and the aims) of the regulatory approach pursued by the Commission's Paper, we focus on the effort conducted by Consob in providing a definition of the specific subset of the phenomenon to be accordingly regulated, underlining the limits of the definition proposed in the Paper, in so far as it does not completely reflect such underlying phenomenon, consequently excluding from the "safe harbour" various **types of tokens** that appear potentially most deserving of the envisaged "favourable" regulatory approach; as such, in a paradoxical and contradictory manner. At the end of the analysis we will hereby conduct, a more conceptually disambiguating definition may be proposed.

After having traced back the Regulators' intent, the Paper's scope of intervention will consequently appear to be limited to those tokens qualifying, essentially, as **Utility Tokens** (or, residually, payment tokens). We will then describe the peculiar feature of the utility token model that seems to restyle, in a new and original perspective, some traditional schemes aimed at "financing" entrepreneurial projects as utilized, so far in very specific industries and now proliferating as a "third way" (alongside debt and equity instruments) for the fund-raising of entrepreneurial projects. This will lead us to the addressing of the delicate and intriguing question, as to what extent should be considered the (quantitative and structural) limits beyond which, the chameleonic nature of utility tokens may be qualified (in substance) as that of a real " financing" or "capital contribution" instruments and thus, as "financial instruments" (debt or equity), regardless of and overtaking their (formal?) underlying civil law structure.

Moving on to consider the specific regulatory options suggested in the Paper, we will carefully consider the Regulators' option to designate managers of crowdfunding platforms as the most suitable players to manage the "contiguous"(?) area of "crypto-assets"; as a matter of fact , such an approach risks weakening the envisaged regulatory proposal, unless it is "critically" reconsidered. In fact, the structural, morphological and functional differences of the underlying assets do not allow a replication of a "crowdfunding approach", *per se*, for "crypto-assets", without a correct comprehension of their different characteristics and connected technicalities.

In order to appraise the regulatory approach adopted in the Paper, the technological background underlying the implementation of an ICO must therefore be carefully investigated with regard to the connected creation

[1] With reference only to the most recent and analytical review, in the regulatory framework discussed herein, reference may be made to ESMA Advice – Initial Coin Offerings and Crypto-Assets, 9 January 2019 (ESMA-157-1391), available at: https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf.

("issuance")/placement of the tokens (where these phases are characterized by a tendential logic and legal concurrence/identity). As a consequence of this analysis, the Commission's decision to regulate the (sole) "offering" phase – which, from a technical and legal perspective, will appear able to be separated and distinguishable from that of the "issuance/placement" of tokens – will appear **fully convincing and understandable**. Thus, according to the Commission's views, within the scope of an ICO, such an offering phase should be entrusted – hence, on an exclusive and reserved basis – to appropriate "regulated offering platforms", at least, where, following an opt-in choice, the advantages of a "simplified" regime are sought for, as a consequence of derogation from the rules applicable to "financial products". Furthermore, it will appear that the recourse to regulated offering platforms may also be an advantage for ICOs having as their object tokens that **do not** qualify as "financial products" - therefore not requiring the "safe harbour" - seeking the attribution of a special 'label' granting reputational benefits.

Finally, we will critically evaluate the regulatory option suggested by the Paper, of granting the above mentioned "facilitated" regime only to those tokens that opt for the adoption of a "double track", consisting in resorting to a "regulated offering platform" simultaneously with the resort to a "**regulated trading systems**"; this latter, as the Paper say, in "*close link with offerings (in the primary market phase*". Such a determination will appear justifiable, **at most** – although such an option remains arguable for multiple reasons, even in such a circumstance – **in the sole event** that the tokens are actually expected or designed for "trading". **Only** in this case, may a prescription be justified to impose that such a trading must take place on "authorized trading systems", in order to benefit from the "facilitated" regime. **Quite the opposite**, if no "tradability" regime has been provided for the tokens, in the light of the intended regulatory purposes, no valid grounds will emerge from our analysis in support of the option that the **sole** requirement of the recourse to regulated and supervised "offering platforms" would not be sufficient to grant access to the above regulatory "safe harbour".

1. <u>The reconstruction of the regulatory options adopted and pursued in the Paper.</u>

As a preliminary, functional step towards a correct comprehension of the options adopted in the Paper (from a definitory and, hence, regulatory perspective), a careful reconstruction has to be conducted of the assumptions and implications (the rationale and the goals) pursued by the Commission.

1. A preliminary assumption has to be fixed. The regulatory approach adopted in the Paper is not aimed at considering and regulating those kind of "crypto-assets" that clearly and indisputably can be described and qualified as "financial instruments " (according to the MiFID) or as "investment products" (PRIIP, PRIP and IBIP), in relation to which any issue related to their issuing, trading and post-trading activities should be subject to the EU provisions applicable to financial instruments and investment products, in so far that they are (will be?) deemed applicable to security tokens. As said, at European level, ESMA published the 2019 Advice addressing the issues of the application of investment services legislation, in particular to tokens that qualify as financial instruments[2].

[2] However, it is worth pointing out that after an understanding of the peculiar functioning model of the technological infrastructure necessarily underlying "crypto-asset" (basically attributable to the use of the blockchain or DLT technologies) it is hardly conceivable that tokens may be considered (at least, nowadays, although some jurisdictions are taking steps in this direction) or even be described in terms of traditional "security assets" (in particular, shares or bonds), in the absence of specific provisions of **corporate law** that regulate and allow for the issuance and placement thereof, "since the very beginning", through the use of the said crypto-technology, then directly, simultaneously and without intermediaries. In most cases, reference can be made to – and this matter described in terms of – "derivatives" (for such a forward-looking and innovative perspective *cf*. ANNUNZIATA F., 2019). Following the above consideration, the regulatory approach today applicable to such a class of security tokens is difficult to be conceived as a mere "extension" for crypto-asset – *sic et simpliciter* - of MIFID's definition of "financial instruments". In fact, it is worth considering that the usual, "traditional" methods of issuance/placement/trading/custody safekeeping and holding cannot apply *sic et*

2. It follows that, as of today, any ICO of crypto-asset whose object can be described/qualified as financial instruments, may be subject to supervisory assessment in order to verify their compliance with applicable EU regulations (Prospectus, MiFID II, etc.). In this case, any infringement of the rules on the provision of investment services and activities involving financial instruments could be responded to, with appropriate sanctioning remedies of the administrative type as well as of the criminal type (according to domestic, rule on unauthorised activity provided for by Article 166 of the Italian Consolidated Financial Act, hereinafter "ICFA"). The same creator/issuer/offerer/proponent of the security token would be directly exposed to the liability arising from non-compliance with the regulations on "remote marketing" and the Prospectus (when the conditions for their application are fulfilled, i.e., in the event of an offering of financial instruments that does not come under the possible exemptions provided for in Article 100 of the ICFA).

3. Having clarified the above, in order to focus the scope of the regulatory intervention outlined in the Paper, it is necessary to start from the **key concept of** "financial products" as provided for, within the Italian legal framework, by art. 1, paragraph 1, let. u of the ICFA as follows: "*Financial products*: *shall mean financial instruments and every* ***other form of investment of a financial nature****; bank or postal deposits without the issue of financial instruments shall not constitute financial products*" (emphasis added). To cope with the progressing of financial innovation Consob has contributed in the last decades, through its supervisory activities and rulings[3], to better specify the domestic notion of "financial product", with particular regard to its "residual" component of "**investments of a financial nature**", it consisting of investment schemes involving the three following elements: (i) the investment of capital; (ii) the promise/expectation of a financial return ; and (iii) the assumption of a risk directly connected and related to the investment of capital[4]. Consob has further specified these positions over time, up to identifying the following additional elements for assessment, in order to determine whether a transaction has the distinctive elements of an "investment of a financial nature": "*a) Prevalence of the financial aspects over the material benefits related to the availability of the asset acquired with the transaction; b) 'actual and predetermined promise, upon the establishment of the contractual relationship, of a return connected to the asset', with such a promise suggesting that 'the expected increase in the value of the capital invested (and the related risk) is intrinsic to the transaction itself', which is different from the mere appreciation of the asset over time, thus accessing the cause of the underlying contract"*. The same approach has been recently upheld by the Italian Supreme Court in a "leading case"[5] concerning the asset class of "art works" (Carriere P., 2018:2).

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simpliciter to these new "assets"; their peculiar nature necessarily demands a thorough reconsideration and resetting of the consolidated organisational and conduct patterns as currently targeted for investment activities and services having as their object "traditional" financial instruments; from this standpoint, a clear limits shows the so called "technology neutral" approach.

[3] CONSOB's position in this respect has remained unchanged in time, *cf.* resolutions no. 14422 of 13 February 2004, no. 14347 of 10 December 2003, no. 14110 of 3 June 2003, no. 13423 of 22 January 2002, and warnings no. DEM/3082035 of 19 December 2003 and no. DEM/1027182 of 12 April 2001. The issues raised by Consob, in many respects, may be those identified in the quoted US leading case *SEC v. W.J. Howey co* (1946). Having special regard to "crypto-currencies" or better, crypto-assets, reference is made to the extensive number of guidelines provided by Consob over the last years: Resolution no. 19866 of 1st February 2017 ; Resolution no. 19968 of 20 April 2017 ; Resolution no. 20110 of 13.9.2017; Resolution no. 20346 of 21 March 2018; Resolution no. 20381 of 13 April 2018; Resolution no. 20693 of 14 November 2018; Resolution no. 20694 of 14 November 2018; Resolution no. 20751 of 19 December 2018; Resolution no. 20741 of 12 December 2018*;* Resolution no. 20845 of 13 March 2019*;* Resolution no. 20740 of 12 December 2018*;* Resolution no. 20844 of 13 March 2019*;* Resolution no. 20814 of 14 February 2019.

[4] In several respects, the "category" investigated by Consob match those identified in the notorious US leading case: *SEC v. W.J. Howey co (1946).*

[5]. *Cf.* Civil Supreme Court, Sect. II, no. 5911 of 12.3.2018, against decree no. 4027/2014 of the Court of Appeals of Naples, filed on 29 August 2014, case law concerning a multifaceted contractual scheme relating to "artworks" and deriving

4. It appears that, according to the supervisory activities and rulings issued by Consob in recent times[6], many crypto-assets (tokens) – although not able to be described/qualified as financial instruments or investment product (PRIIP, PRIP and IBIP) - may show the defining elements of "financial products" (Carriere 2019), since in any case, they are characterised by an investment of financial capital, the assumption of the related risk and the expectation of a return; it follows that they will have to comply with the "remote marketing" and the Prospectus rules (when the conditions for their application are fulfilled), failing this, the creator/issuer/offerer/proponent could be subject to administrative and/or criminal type sanctions, as a consequence of the unauthorised performance of "reserved activity" in Italy.

5. Having clarified the above legal framework, it can now be underlined that the regulatory approach adopted by Consob in the Paper, is a "concessional" one, it being aimed at granting to crypto-assets that may be described/qualified as **investments of a financial nature** - other than financial instruments and packaged investment and insurance-based investments products - a special regulations, thus **exempting them** from the rules set forth by the ICFA for financial instruments (" marketing" and/or prospectus rules).

6. To this purpose, the Paper sets forth from the need to provide a suitable definition for typifying those "crypto-assets" to be considered by the above regulatory approach, as an independent category. As stated in the Paper*, "we are involved in a process of establishing definitions outside the perimeter of financial instruments and investment products (PRIIPs, PRIPs and IBIPs) as designed by the EU legislator".*

7. Such a definitory effort is considered crucial by Consob in order to give certainty to addressees and, also, to neutralise any elusive objective that may underlie the engineering of tokens that do not qualify as "financial instruments" but may still present elements susceptible to be subsumed the domestic notion of "financial product", the latter being interpreted as an investment of a financial nature, different from other instruments. As clarified in the Paper "*the advantage that CONSOB attaches to the identification of an ad-hoc category - different from that of financial products - is connected, in the first place, with the possibility to limit the burden - on both the market and the Authority - of conducting case-by-case analyses for checking for the presence or absence of the typical characteristics of investment of a financial nature. Furthermore, the provision of special regulations on crypto-assets allows to tackle the matter while taking in account its peculiarities, and therefore avoids the promoters of these schemes (issuer/offerer/proponent) to be subjected to the applicable national legislation (on prospectuses and "remote marketing") when their offerings present the characteristic elements of financial products (i.e., of investments of a financial nature other than financial instruments)*".

8. According to the regulatory approach adopted by Consob in the Paper, the "**safe harbour**" so designed for such "crypto-asset", appears conditional upon the circumstance that – according to an opt-in regime - regulated platforms supervised by Consob (i.e. offering platforms as well as trading

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from the sanctioning decision adopted by Consob in its Resolution no. 18443 of 17 January 2013, as described in P. CARRIÈRE, 2018:2.

[6] Cfr., in particular, the recent "TOGACOIN" case (in Resolution no. 20660 of 31 October 2018 – *Suspension of the offering of "TGA tokens" made by Togacoin LTD to the public residing in Italy including through the website https://togacoin.com, pursuant to article 99, paragraph 1, item b), of Legislative Decree no. 58/1998*; and Resolution no. 20786 of 22 January 2019, *Ban on the offering of "tga tokens" made by Togacoin LTD to the public residing in Italy including through the website https://togacoin.com, pursuant to article 99, paragraph 1, item d), of legislative decree no. 58/1998,* respectively. In this case, Consob intervened to point the finger at the "offering to the public" in breach of the Prospectus rules ((art. 94 of the ICFA). In this respect, CONSOB's position has remained unchanged, as evidenced by resolutions no. 14422 of 13 February 2004, no. 14347 of 10 December 2003, no. 14110 of 3 June 2003, no. 13423 of 22 January 2002, and warnings no. DEM/3082035 of 19 December 2003 and no. DEM/1027182 of 12 April 2001.

platforms), are used. As stated in the Paper, in fact, "*an incentive to accessing offering facilities that guarantee regulatory protection could be represented by the provision of a **derogation** from the application of the regulations on public provision and remote marketing in parallel with the application of the special regime to crypto-asset offerings that subsume the domestic notion of financial product"* (emphasis added).

9. As a consequence, offerings of tokens offered/traded outside the regulated platforms would still be lawful (provided that they do not relate to tokens subsumed within the notion of "financial product" or, if so, provided they comply with prospectus and/or "remote marketing" rules).

10. Furthermore, Consob underlines that offerings conducted outside of "regulated platforms" would be clearly recognisable by the general public as deprived of the protection provided for by the applicable regime to the offerings that, by the will of the issuer/offerer/proposer, are proposed within the regulated offering facility. This will constitute an incentive - also for ICOs having as their object tokens that **do not** qualify as "financial products"- to utilize regulated offering and trading since the attribution of a special 'label' should grant reputational benefits. As clarified in the Paper, "*in other words, the intended result of the double opt-in regime - i.e., the possibility of choosing the channel (regulated or non-regulated), possibility offered in the first place to the issuer/offerer/promoter and in second place, to the trading system operator - would be that of laying the foundations for final investors to make conscious choices, as final investors would be aware that investment schemes involving crypto-assets offered on regulated platforms and traded on regulated systems are more reliable than those offered in a non-regulated environment".*

11. The final advantage of the regulatory approach adopted by Consob (at least, at this earlier stage of initial regulatory "approach") include acting as a "testing ground" or a "launching pad" of the likely second regulatory step, which will be put in place when the operating models and underlying technological infrastructures are consolidated/standardized and a sufficient consensus will be gained on a common EU regulatory approach to be adopted with respect to the security-type or investment-like tokens.

In conclusion and synthesis, the envisaged regulatory framework designed by Consob appears to be aimed: **(i)** ***in the first instance***, and substantially, at designating a "safe harbour" for those tokens that – although they are not eligible to be classified and/or described as "financial instruments" or "investment products", as such situations expressly remained outside the regulatory scenario contemplated by Consob – still they can be classified and/or described on the basis of their features as "financial products", and consequently submitted to the applicable domestic legislation, where they are offered to the public and/or the object of "remote marketing" **(Primary Regulatory Goal)**; **secondly, (ii)** to support a further regulatory intent and aimed at enhancing resort to "regulated platforms" also for the launching of those ICOs that do not require the above regulatory derogations (as the relevant tokens do not fall within the definition of "*financial product*") and, therefore, with the specific aim of seizing advantages of reputational nature **(Residual Regulatory Goal)** .

2. <u>The limits of the definition of "crypto-assets" proposed in the Paper.</u>

Having so traced back the Regulators' intent, the scope of intervention of the Paper can be consequently identified in those tokens qualifying essentially as **Utility Tokens** (or, residually, payment tokens) - according to customary definitions adopted in the widely accepted international tassonomy (Hacker, P. andThomale C., 2018; Rohr J. and Wright A., 2018; Sorelanski L., 2018; Bonneau, J., 2018; EBA, 2019; SMSG, 2018; FCA, 2019).

If so, the opportunity to adopt a different **definition** from that of "crypto-asset" proposed by the Commission in the Paper could be underlined *in primis*, to refer to the specific subject matter of its envisaged regulatory intervention. An appropriate definition would be, e.g., that of "**crypto-investment**". In fact, as seen above, the regulatory scope considered by the Commission immediately appears – as the paper explicitly states – a much narrower sub-set than the broader scope of "crypto-assets" (a category that according to traditional tassonomy also includes "security tokens", which may be described or qualified as "financial instruments" or "investment products"). In the absence of such a linguistic clue, readers, especially foreign observers, may be easily mislead in their understanding of the regulatory intent behind such a definition.

Having clarified the above, it is worth highlighting the limitation which emerges from the **contents of the definition** proposed by Consob of "crypto-asset" (*rectius*, "crypto-investment"), in the following terms (see BOX 1 of the Paper):

"*(…) it seems viable to define 'crypto-assets' in such a way as to focus on their nature of digital recordings representing rights related to investments in entrepreneurial projects. In order to understand, in particular, the peculiarity of the use of Distributed Ledger Technology (DLT) or Blockchain Technology, the aforesaid digital recordings should be created, kept and transferred by means of Distributed Ledger Technology, and this technology should allow the identification of the holder of the rights relating to the investments underlying or embedded into the crypto-assets. At last, the category should only include those crypto-assets that are intended to be traded or are traded in one or more trading systems.*

In other words, without prejudice to the presence of the investment element (common to financial products and instruments), the hallmarks of crypto-assets are the following: - Use of innovative technologies of the blockchain type, in order to embed the rights of those who invested for funding the underlying entrepreneurial project; and - The ultimate purpose of the subsequent trading of tokens (crypto-assets), whose transferability is also closely connected to the technology used, i.e., its ability to record and maintain evidence of the ownership of the rights connected with the crypto-assets traded" (emphasis added).

From the above, the following features of the proposed "crypto-asset" definition emerge:

1. the presence of an "investment" element (as "financial products");
2. use of innovative technologies of the blockchain type;
3. the circumstance that the concerned tokens are "*intended to be traded or are traded in one or more trading systems*";
4. the functional element consisting in the fact that investors, "*invested for funding* (financing) *the underlying entrepreneurial project*".

Now, it can be noted as **the latter two** features of the above listed, do not completely reflect the underlying phenomenon, with the consequence that such definition runs the risk that many **types of tokens** that most could deserve the envisaged "favourable" regulatory approach will be excluded from the "safe harbour", thus in a paradoxical and contradictory manner.

2.1 Limited descriptive value of the "tradability" feature.

As regards to **item 3 above,** note that in Consob's endeavours to achieve a description and definition of crypto-asset, weighty importance is placed upon "tradability" (which, as such, is a separate concept, unsuitable to be reduced to mere "transferability" (Hacker P. and Thomale C., 2018, p. 21.). However, as seen above, this element is excluded from the traditional features characterizing the category of "other investments" qualifying as "financial products", as it evolved in the enduring interpretative work of Consob; it is rather a traditional element that falls within the different notion of "securities". Therefore, the option to attribute to this element a definitory capability of the subject matter to the envisaged regulatory approach

is debatable, if considering that many business models relating to the creation of utility token seem to be deprived of such an objective characteristic of "tradability", as pointed out in literature ("*utility/consumer tokens are non-tradable (though transferable at times) digital tokens that exclusively offer administrative rights or use licences, such as access to a platform, a facility, a network of individuals, or "customer loyalty" schemes"* Caponera A. and Gola C., 2019, p. 6 and 11; see also Benedetti H. & Kostovetsky, 2018) and as it emerges from ESMA's Advice, as well.[7] In fact, utility tokens often come down to mere contractual investment schemes, whose rise, development and outcome occur within the contractual framework that distinguishes, from time to time, each of such business models. Then, in such circumstance, the contractual scheme that consists in the token will always be describable in terms of "financial product", where all of the abovementioned "traditional" features are recognized, irrespective of its "tradability" in a secondary market, with the consequence that "facilitated" regime outlined in the preceding paragraphs should appropriately apply, regardless of whether the tradability feature can be identified or not.[8]

2.2 Ambiguity of the "functionality" feature.

As regards to **item 4 above**, another critical element of the above mentioned definition of "crypto-asset", as proposed in the Paper – considering that this should be aimed at "capturing" those tokens that, although not able to be described or classified as "financial instruments", though still be endowed with all typical features of "financial products" - consist in the fact that investors in the tokens, "*invested for funding* (financing) *the underlying entrepreneurial project*". Besides being irrelated – likewise "tradability" – with the above illustrated traditional features of the category of "financial products", this feature seems to be highly misleading with respect to the need of effectively distinguishing the categories of utility/payment tokens (which, as said, are the subject-matter of the specific regulatory measures considered in the Paper), from the category of "security tokens" that, on the other hand, is excluded from it; as a matter of fact, this feature can be considered as referable to the "ICOs" model, as an innovative "capital rising" technique, rather than to the "tokens"*, per se*.

From this point of view, the general functional and "neutral" model to which reference should correctly be made with regard to the ICOs, can be described – based on the definition proposed by ESMA[9]– in terms of "*fund raising"* or "*capital raising"* by various players (companies, entrepreneurs, developers or other promoters) aimed at "supporting" or "developing" (the use of the word "financing", here, has been knowingly neglected by us, in favour of a more "neutral" *funding*[10]) their entrepreneurial projects (scaling of business)

[7] Although in terms of general reference to tokens, Esma's Advice 2019, at par.35, reads as follows: "*Crypto-assets may be traded or exchanged for fiat currencies or other crypto-assets after issuance on specialised trading platforms. Estimates suggest that there are more than 200 trading platforms operating globally, although a handful concentrate most of the flows. The largest platforms are currently located outside of the EU, in Asia or in the United States. Only between a fourth and a third of those crypto-assets issued through ICOs are being traded."* (emphasis added). In addition, Annex 1 points out that, with regard to the utility token case explained therein (*case* 5), the majority of policymakers believed that the "tradability" aspect was absent (see page 6, paragraph 20). In addition, SMSG's 2018 Report infers that "*If the asset token gives right to an entitlement in kind, without giving the holder decision power, and the asset token is not transferable, these tokens share much characteristics with prepaid assets. The SMSG is of the opinion that they currently do not fall under the scope of application of financial regulation and the SMSG sees no need for those asset tokens to be covered in the future*" (emphasis added).

[8] Indeed, this is the approach emerging from some recent cases examined by Consob: See, in particular, the TOGACOIN Resolution n. 20660 of 31 October 2018; the CRYPTON case, Resolution no. 20694 of 14 November 2018; and the "AvaCrypto Investment Plan", Resolution no. 20751 of 19 December 2018.

[9] ESMA Advice 2019, Glossary.

[10] ESMA Advice 2019, par.70. Note that in the official English translation of the Paper a more neutral and concret term as "funding" is used instead of "financing" ("*finanziamento*", as used in the Italian text of the Paper).

through the "creation"[11] (better than "issuing") and concurrent "distribution" (better than "placement") of tokens. As a consequence, (i) the analytical standpoint to be adopted should exclusively be that of fund "recipient" (whom, subject to the nature of the underlying tokens, may be described in terms of issuer/borrower/seller), rather than that of the "investor" (which, at different instances, subject to the nature of the underlying tokens, may be described in terms of subscriber/lender/purchaser); (ii) any ambiguous legal concept should intentionally be avoided (such as "financing", "funded business initiative", "issuance" etc.) which would immediately and inevitably push the analysis towards the domain of financial instruments (in particular, transferable securities), then, towards a clear IPO model[12], so rendering any definitory effort ambiguous.

2.3 An alternative definition.

As a consequence of the above illustrated limits outlined in the definition of "crypto-assets" proposed in the Paper, its regulatory approach could resort to preventing certain kind of tokens from the opportunity to fall within the scope of the "safe harbour" so established, for the mere reason that they don't meet the additional "features" that are required by the proposed definitions, although they will appear consistent with the traditional definition of "financial product" and therefore, fully eligible for the "safe harbour".

In the light of the above analysis, a more meaningful and conceptually disambiguating definition, could be that of **"crypto-investments", thus referring to all of those "crypto-assets" – this meaning any values or rights represented by means of "Distributed Ledger Technologies", as defined in article 8-*ter* of law-decree no. 135 of 14 December 2018[13] – that cannot be classified or described *per se* as "financial instruments" or "investment products" but, nevertheless, eligible of being classified or described as "financial products".**

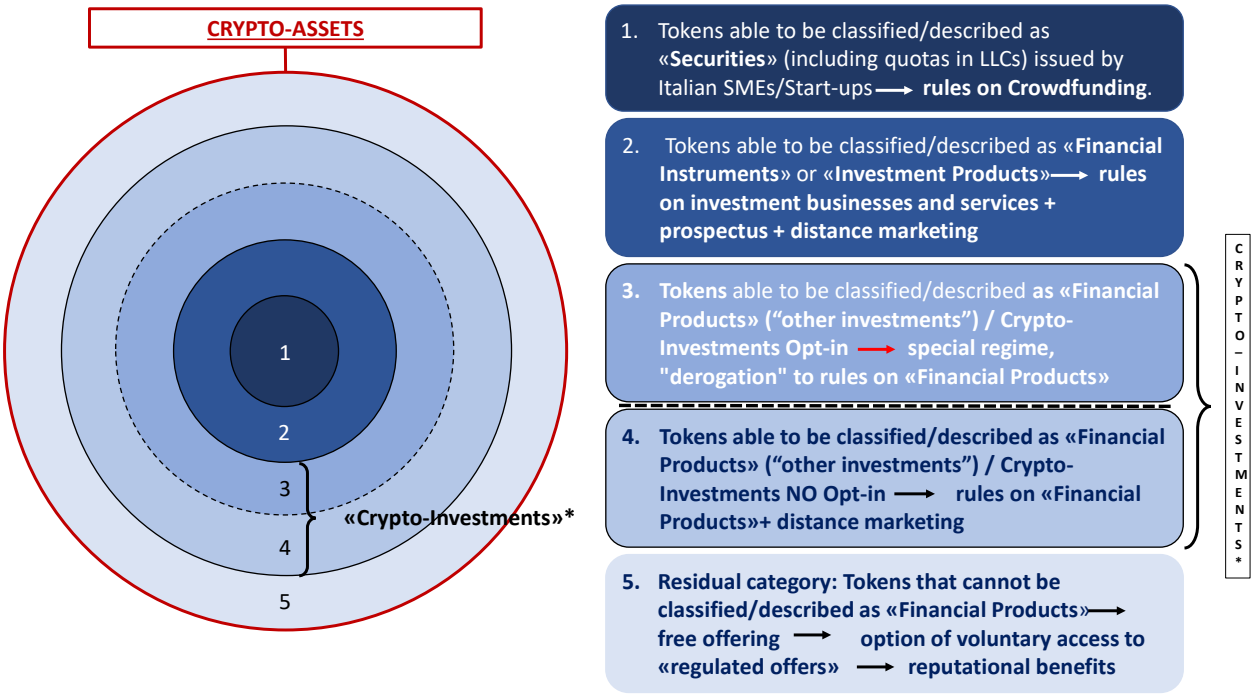
Note that the above definition will intentionally exclude those – presumably fringe, residual category (see n. 5 in the following graphic) – situations that may be contemplated in the cases falling within the **Residual Regulatory Goal**, namely those tokens that cannot be classified and/or described in terms of "financial products". As such, they do not need to be "captured" in the abovementioned regulatory "definition", which is necessary, instead – considering the current legislative framework hinging on the notion of "financial products" – in view of the achievement of the fundamental regulatory goal under the **Primary Regulatory Goal**.

[11] This term being preferable – as it has been adopted by some scholars and some policymakers – to the more rather ambiguous term of "issuance" which immediately recalls the "financial instruments". *Cf*., e.g., HACKER P. and THOMALE C., 2018, *passim*, or the definition of *Initial coin offering* (ICO) as entered in the Glossary offered by ESMA in its Advice 2019: "*an operation through which companies, entrepreneurs, developers or other promoters **raise capital** for their projects in exchange for crypto-assets (often referred to as 'digital tokens' or 'coins'), that they **create**."* (emphasis added).

[12] Having regard to the notion of Initial Coin Offering ICO as used to refer to the general "public offering" of –almost any sort of –tokens, the tendency can be observed to the prevailing use of this acronym in connection with the offering of tokens that are not eligible to qualify as securities; in this case, a different acronym of STO (Security Token Offering) seems preferable. In addition, offerings of utility tokens, in particular, are at times denominated "token sales".

[13] So-called 'Simplification Decree' (Decree-law no. 135 of December 14, 2018), "*Distributed Ledger Technology: [means] IT technologies and protocols that use a ledger that is shared, distributed, replicable, simultaneously accessible and with an architecture decentralised on cryptographic bases; these IT technologies and protocols allow the recording, validation, updating and storage of data in a non-encrypted form as well as in an encrypted form for additional protection, allowing verification of data by every participant, with data remaining non-alterable and non-editable*".

Chart 1: Graphic representation of the relevant (concentric) conceptual categories



* In the Paper: Definition of "crypto-assets".

2.4 "Utility Tokens" as a revived "third way" for the funding of entrepreneurial projects.

From the observation of the "international markets", it may be certainly inferred that most of the ICOs – in their narrow sense – concern **utility tokens** (Aru, 2018; Sameeh, 2018). With regard to the "neutral", and generally accepted description, as adopted also by ESMA[14], these are tokens that provide ("their bearer") with some sort of utility in terms of use/consumption/purchase of assets and/or services supplied within the platform itself (or its "ecosystem"), rather than "paying for" "external" assets and/or services (which would otherwise fall within the category of payment-type tokens). From this point of view, the business model is very similar to that of the so-called Reward Crowdfunding.

In an attempt of a more accurate reconstruction of the civil law aspects of this phenomenon, one could construe (i) the underlying consideration ("*causa*"), in terms of sale and purchase of future assets (*emptio spei* or *empio rei speratae*) or (ii) their potential nature as "negotiable instruments", or "improper notes"[15], even though "atypical", (iii) or, moreover, in a corporate perspective, as "quasi-equity instruments"[16]; all of these domains should undergo an accurate analysis, from time to time, to focus on the boundaries and legal effects of what could seem to refer, at first glance, to "traditional" legal concepts , here technologically re-iterated. Having said this, it is true that the functional aspects of an ICO, especially when **utility tokens** are offered, in the majority of cases may be described (assuming here the "investor"/purchaser perspective) as a "financing" – a term to be here considered broadly, within its non-technical legal meaning – and "fund-raising" (if assuming the "issuer"/seller perspective), geared to funding underlying business or entrepreneurial project. Therefore, after a closer examination, these tokens may sometimes be indistinguishable from securities, at least from a functional standpoint, if not from a structural or

[14] In par. 19 of Advice 2019. Still clearer is the description provided in SMSG 2018, paragraphs 37 and 38. As for the scholars, *cf*. CAPONERA A. and GOLA C., 2019, p. 11.
[15] Art. 2002 of the Italian Civil Code.
[16] *Strumento finanziario partecipativo ex* art. 2346 of the Italian Civil code.

morphological one, given that the tokens represent (embody) a right to receive (future?) "prepaid" assets or services (Adhami et al., 2018; Bakos and Halaburda, 2018). As a result – from a structural and morphological point of view - oftentimes the separation from the class of "financial instruments" seems to gradually fade away, if thinking of the negotiable instruments that represent commodities, namely the "derivatives" (Annunziata, 2019, p.43).

In any case, from a functional point of view, the utility token model seems to originally restyle, some traditional commercial schemes aimed at "financing" entrepreneurial projects, resorting to price "advances" or "instalments" advanced by customers, as well as certain contractual schemes adopted in specific industries, e.g. in the movie industry – with the traditional "pre-sale" of rights on future movies, as a method of "financing" the underlying production – or the real estate sector, with regard to the contractual scheme of purchase of future properties "to be built". As anticipated, an utility token may be construed as a sale of "future - but certain - assets", being regarded as an unconditional (or "unconditionally mandatory") sale; differently thus from the *emptio spei*, which is an aleatory contract, or the *emptio rei speratae*, which is a partially conditional agreement (Greco P. and Cottino G., 1981, p. 85). As a result, the risk of "failure" - consisting in the fact that the "future asset" does not "come to existence" - will be for the account of the "seller", who will therefore be held in breach of its obligation to deliver, and consequently bound to return (at least) any "advances of the purchase price" received and collected from the "investor". Of course, the parties will remain free to stipulate a partially or totally aleatory agreement, with the consequence that the relevant Civil Code provisions shall apply, including the last paragraph of article 1472 of the Italian civil code, which allocate the risk to the purchaser; this scenario appears to be similar to that of the "Reward Crowdfunding" model, when adopting the so-called "All Or Nothing" scheme.

At this stage of our analysis, and with special regard to **utility tokens** a delicate and intriguing question could then be addressed, as to what extent should be considered the (quantitative and structural) limits beyond which[17] the chameleonic nature of the utility tokens **-** as a new (revived), proliferating method of "financing" (or "pre-financing") of entrepreneurial projects (such term "financing" being here used in a broad, "economic" and legally non-technical meaning, considering the "investor"/purchaser's perspective) and, correspondingly, as a new (revived), proliferating "fundraising" method aimed at funding entrepreneurial projects (here considering the "issuer"/seller's perspective) **-** may be qualified (in substance) as that of a real "financing" or "capital contribution" instrument – using now such terms in their narrow and legally "technical" meaning – and thus, as "financial instruments" (debt or equity), regardless of and overtaking their (formal?) underlying civil consideration ("causa"), which may be almost always attributed, as we have seen, to a "sale of future assets".

Leaving aside a more exhaustive analysis of such a challenging conceptual question, a conclusion may here be adopted , at least as a rough approximation, in line with that reached by ESMA (*cf.* par. 86 of the 2019 Advice), according to which the rights associated with those type of token seem to excessively depart from those of a typical structural "financial" and "monetary" nature attached to securities and/or financial instruments.

3. Critical analysis of the regulatory option to tackle the (sole) "offering" of tokens (rather than their "issue/placement").

The Paper states that, "*at present, at the domestic level, the operators that are in the best position to offer professional assistance for the offering of crypto-assets to a potentially undetermined number of investors are the crowdfunding portal managers authorised pursuant to Article 50-quinquies of Legislative Decree no. 58 of 1998 (Consolidated Law on Finance), whose activity is regulated by CONSOB Regulation no. 18592 of*

[17] Leaving apart the pathological hypothesis of considering the whole transaction as a fraudulent scheme.

June 26, 2013 (Crowdfunding Regulation). It might also be envisaged the possibility for crypto-asset offering platforms to be managed by different entities that meet the subjective requirements established for the aforesaid category of crowdfunding portal operators. This would be aimed at not precluding the development of alternative business models, i.e., business models in which the manager entity intends to specialise, provided that it meets subjective requirements similar to those considered reasonable for crowdfunding portal managers; this only for the sector of Initial Coin Offerings".

To some extent, the Regulators' option is understandable in the designation of managers of crowdfunding platforms[18] (a regulation which has been pioneered under the Italian domestic framework, in spite of some enduring rigidity) as the most suitable players to manage the "contiguous"(?) area of "crypto-assets"; similarly, the crowdfunding regulations could be considered as the more eligible to absorb/inspire the forthcoming regulatory framework for crypto-asset, partially taking benefit from this legislative experience. Nevertheless, such an approach risks weakening the envisaged regulatory proposal, unless it is "critically" reconsidered. In fact, the structural, morphological and functional differences of the underlying assets do not allow to replicate a "crowdfunding approach", *per se*, to "crypto-assets", without a correct comprehension of their rather different characters and connected specific technicalities (Rohr J. and Wright A., 2019).

The risk lies in an opaque repetition of the typical operating models of crowdfunding, which, regrettably, cannot effectively match "crypto-assets" as they are. In particular, it can't be neglected that a typical feature of the business models adopted by all ICO "platforms" can be identified in the inextricable commingling of roles and functions of "issuer" and "placing agent", as a direct consequence of their inherent "disintermediation" feature (Rohr J. and Wright A., 2019), unlike the typical features of the "contiguous" phenomenon of crowdfunding which, on the contrary, is focussed on a traditional "intermediary" pattern, technically attributable to the investment services of "reception and transmission of orders". When it comes to crowdfunding, such roles and functions of issuer and placing agent are traditionally clearly distinct. Such a peculiarity of the operating models of "issuance/placement" of "crypto-assets", therefore risks making of little use (and potentially misleading) the adoption of the same regulatory approach utilised for the crowdfunding.

3.1 Overview of a typical process of creation/placement of tokens in the context of an ICO

In order to appraise the regulatory approach adopted by the Paper and for the purpose of the following analysis, a reconstruction of the technological background behind the implementation of an ICO, along with the connected activities for the creation/("issuance")/placement[19] of tokens (these phases, as mentioned, being characterized by a tendential logical concurrence/identity), cannot be avoided**.**

[18] Note that, so far, no European harmonized rules have been laid down for the Crowdfunding, although the European Commission submitted a Bill of Regulation in March 2018 – *Proposal for a regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business*" (COM(2018)0113) – in the framework designed by the Fintech Action Plan. Therefore, in Autumn 2018, the European Parliament – based on the indications submitted by CEMA (*European Parliament's Committee on Economic and Monetary Affairs*) in its "*Draft Report"* of 10 August 2018 (2018/0048(COD)) – elected to extend the scope of application of its measure to security tokens and their relevant ICOs, or better, STOs. The proposed regulatory approach (which seems to have been dropped) was that of a "double track" able to leave the domestic legislation unprejudiced, if existing within single Member States, which was the case of Italy. Having regard to the ability to compare ICOs and Crowdfunding, provided that traditional "security assets" are concerned (including, in a broader sense, the quotas into limited liability companies), see P. CARRIÈRE, 2019:1, p. 28.

[19] The term here is used in a "technical" sense, with reference to the complex of activities aimed at entering into subscription/sale agreements, and supplying certain settlement, payment and allocation services connected therewith. Typically, these businesses are accompanied by "promotional" activities, conducive and functional at entering into these agreements.

In order to fully understand the differences and similarities between a crowdfunding and a ICO business model, in particular it is worth noting that utility tokens may commonly be "created" ("issued") by anybody using a blockchain through a Distributed Ledger Technology (DLT), typically the (permissionless and decentralized) blockchain Ethereum,[20] through standard protocols and smart contracts – the most renowned being "ERC20 token standard" or its *Basic Attention Token* (BAT) version – usually supported by specialized technical advisers that release the codes to the general public (in the form of open source licences), after "validating" them. Then, the "creation" (issuance) stage of the tokens (which indissolubly coincide here with that of their simultaneous "placement") directly takes place on the blockchain by the "creators" – or founders/promoters or developers – who proceed to draw up the advertising/information memoranda known as white papers, "promoted" (circulated) through the internet or social media (Twitter, Reddit, Telegram, Slack etc.). As soon as a token has been created and "launched for sale" – sometimes at different "pre-sale" and "sale" stages – anyone, worldwide, endowed with a connection to the internet has the power to "purchase", transfer and have the tokens stored in an appropriate digital wallet. In its essence, this process may be described as a totally disintermediated (self-placed), global-scale, world-wide "placement", implemented on (and benefitting from) a blockchain platform supported by the internet. According to the above, it may be inferred that the typical players in these transactions[21] are commonly identified in the following characters: **(i)** the promoters/founders (issuers?); **(ii)** the developers (technological experts that provide technical support in the development of protocols and smart contracts); **(iii)** the providers of wallets or digital wallets (other than the founders) that offer safe-custody services for the "issued" tokens; and **(iv)** even if not always and not necessarily (especially, as seen, for utility tokens), the exchange or trading platform (*i.e.* "secondary" trading platforms for the tokens). Eloquently, in the consolidated description of this matter, it is uncommon to notice the presence of an additional category of "players" managing the tokens' "offering platforms", perhaps on the assumption that this stage may be easily managed by the "creator" of the tokens itself, in concurrence with their creation/"placement" that takes place in the blockchain platform[22].

56. A rough description of the prevailing business model that can be observed nowadays in the "market" behind any ICO aimed at "creating"/"placing" utility tokens, will consist of the following steps:

(i) – definition of the "entrepreneurial project" by the promoter ("issuer"?) – *founder/promoter* –, which may be either represented by an individual, a company, a network of developers, or other

(ii) – selection of the blockchain platform that will be adopted (as mentioned, as regards the utility tokens the Ethereum platform seems to be most frequently adopted through the ERC20 protocol).

(iii) – drafting of the so-called "*white paper*", i.e. the information memorandum concerning the ICO.

(iv) – **management of the "offering": consisting in the planning and "launching" on the www of the website** connected with the ICO. Besides the publication of the "white paper" – which is often accompanied by a "presentation video" – the following information must be disclosed: (i) the team of promoters of the initiative; (ii) the purpose of the project and "case studies"; (iii) security measures adopted to protect investors' interests; (iv) "subscription form" and other SAFT contractual documentation;[23] (v) "roadmap" specifying the development milestones of the project; (vi) legal documentation (terms & conditions, disclaimer… etc.); (vii) indication of any partners, advisors and early investors; (viii) contact details with special regard to the links to the project accounts over the social networks.

In order to take part in the ICO so "launched":

[20] Other platforms are: Waves, EOS, Cardano and Tezos.
[21] *Cf.*, above all, ESMA Advice 2019.
[22] According to Esma description, within its Advice (par. 34), "*some digital platform have specialised in the promotion of ICOs*".
[23] "*Simple Agreement for Future Tokens*"; which, in turn, may represent a "financial instrument".

(v) – **any and all** worldwide **investors** endowed with a point of access to the internet are commonly requested to "log on" the project website;

(vi) – subsequently, any logged-on investor shall proceed to transfer the necessary funds into the project wallet address designated in the project website (they are typically designated in a crypto-currency previously obtained by the investor, and held in accordance with the diverse methods currently available: *e-wallet*; *hard wallet* or *wallet providers*).

(vii) – as soon as the investor has regularly "paid" for the tokens, these will be automatically assigned and transferred to the investor's wallet, which details the latter will have previously notified. Commonly, tokens issued under an ICO performed, say, through Ethereum are "supported" by the most recurrent wallet service providers.

3.2 Limited heuristic value of the *crowdfunding* model

According to the above analysis of the necessary features of disintermediation, decentralization and globalization that qualify the platforms' distinctive operation for the "creation/placement" of tokens*,* a preliminary conclusion may be drawn: the typical analytical approach of an "intermediary model" as that of the "traditional" crowdfunding model, cannot, per se, apply to the ICOs business model investigated herein (Ahlers et al., 2015; Giudici and Rossi-Lamastra, 2018).

In the light of above, any reference *sic et simpliciter* to the operating model and the domestic legislative framework of crowdfunding[24], where not correctly understood and adjusted, may appear misleading from a twofold perspective:

1) on one hand, this is a "traditional", typically "intermediary" model, conceived for "issuances" of "financial instruments", therefore somehow reiterating the underlying ambiguity already mentioned, as to the nature of "crypto-assets", which should be defined and regulated as such and not taking into account "financial instruments" patterns.

2) on the other hand, the very typical specificity of crypto-asset platforms dedicated to the "issuance" (creation) of "utility tokens", has not been taken into consideration here, this being the lack of subjective separation between an "issuer" (creator) and the "placement agent" as a consequence of the total disintermediation of the process. On the contrary, this separation typically marks out the crowdfunding model, which in fact is traditionally considered as a particular kind of investment service of "reception and transmission of orders", (so excluded under article art. 3 of the MIFID)[25]. As a result, the crowdfunding model is blatantly unsuitable to effectively (or even plausibly) regulating ICOs, unless their noteworthy functional and structural differences are taken into account[26].

As a consequence of the above analysis, it would appear totally impossible or unrealistic that other "traditional" placement agent (or crowdfunding platforms), other than the "creator", may play an internal role in the above process of the "creation/placement" of the tokens; such a process, *per se*, appears unable to be "captured" and submitted to a domestic regulatory regime. In fact, it seems difficult (if not impossible) to envisage that any traditional "placement agent" could enter in the operational process of an ICO, in order to directly manage the operating phases, as commonly occurs in the "issuance of financial instruments" (interacting with "investors", receiving orders, execution, payment, "issuing", placement, etc.), in order to ensure their technical and legal reliability. On the contrary, within the context of an ICO, all these phases take

[24] See. MACCHIAVELLO E*.,* 2018.On the most recent regulatory amendments and perspectives, see De Mari M., 2019.
[25] Although, nowadays, the *self-placing* model is also provided for in our domestic legislative crowdfunding model.
[26] For similar conclusions with regard to the United States regulations, see Rohr J., and Wright A., 2018, p. 511.

place in an extricable and simultaneous fashion within the context of the sole global, decentralized, disintermediated, and automated context of the underlying blockchain infrastructure on which the whole ICO is unavoidably based, alongside the use of smart contracts.

3.3 The option adopted by Consob to focus on the "offering" phase of ICOs only.

Based on the operating model outlined above, it emerges, ***vice versa*****,** that the two phases of the "creation/placement" and the "offering" are legally, logically and technologically separated and distinguishable in the context of the same multifaceted process that takes place in any ICO. In fact, the choice to entrust the "offering phase" of the process to specialized entities may not be deemed too unfamiliar (though not typical) in ICO process, as ESMA[27] noticed when asserting that "*some digital platforms have specialised in the promotion of ICOs*"; in essence, this phase will consist in the promotional and marketing activities of the ICO that, obviously, cannot depart from, nor replace, but stand aside the above mentioned mechanics for the "creation/placement" of the tokens.

In order to delegate such "offering" phase, in its narrow sense, to these "dedicated" operators (or platforms), this phase must be intended in its "technical" meaning, then with reference to the traditional statutory definition currently in force, which describes an "offer" as "*any notice addressed to persons, in any form and by any means, that provides sufficient information of the conditions of the offer the offered financial products, so as to enable an investor to take its decision on the subscription or the purchase of these financial products*"[28]. In this respect, Consob's election to limit its regulatory intervention on the matter only to this phase appears entirely consistent with the operating model of any ICO, it being possible to isolate it effectively from the "creation/placement" phase.

In particular, in the light of the operating and procedural model explained in the foregoing, the activities of "promotion and launch of the offer" of tokens in particular, ought to be identified with the planning, development, management and control of the on-line portal (the website) dedicated to the ICO.

From this standpoint (only), it is certainly useful to refer to the features of the crowdfunding regulatory and operating model – although the "offering phase" does not constitute here the "core" issues, which lies instead in the "intermediary" role of the platform – since, traditionally, in any crowdfunding model as well, the offering occurs through online "shop windows", "displaying" the platform pre-selected investment opportunities.

Furthermore, considering the characteristic features of the business model that distinguish token "offering platforms", which can be compared to typical crowdfunding platforms only at a cursory and approximative glance, it becomes clear that these crypto-asset offering platforms may either be operated by managers qualified to carry out crowdfunding activities, as well as by "new" and different players, subject to their compliance with similar supervisory and authorisation requirements, in connection with the specific offering activities considered herein.

3.4 The "regulated offering" aimed at centralizing – on an exclusive basis – the ICO's "critical information" (and at allowing their verification /assessment).

The "*on-line*" *web offering*, (as a model derogating from the ordinary prospectus regulations), is the operating phase that may be effectively borrowed by the crowdfunding model – although requiring to reconsider its

[27] Cfr. ESMA Advice 2019 (par. 34).
[28] According to the definition of "public offering of financial products" under article 1.1 item t) of the ICFA.

contents, keeping into account the characteristics of the underlying phenomenon – then, regarding to the duties entrusted to the platform: **(i)** of due verification the information to be circulated among the public of potential "investors", under a twofold perspective of: **(a)** completeness; and of **(b)** reliability, subject to previous ascertainment of correctness of certain critical information (identity of promoters and founders; means of "payment" and "settlement" of the tokens, wallets, etc.); and **(ii)** of assessment and "certification" of certain requirements that the "issuer" (or its "financial products") must meet (likewise in the domestic discipline of equity-crowdfunding, with regard to the assessment that platform managers are requested to carry out of certain requirements that the issued and placed "financial instruments" must meet, as well as the issuers themselves, for instance, regarding certain specific statutory requirements).

In conclusion, according to the envisaged regulatory model, in order to benefit from the "facilitated" treatment, the "creators/placement agents" are mandatorily compelled to use the regulated (authorised and supervised) platforms, on an exclusive basis, since any concurrent "direct" offering may not be simultaneously permitted, nor the concurrent adoption of (one or more) non-regulated platforms; otherwise, **the goal** to grant a legislative "favourable" treatment to those ICOs that only comply with certain reliability standards - to be verified by the "regulated" platforms, centralizing the diffusion of any "critical information" – **will be off-target**.

In view of this regime of necessary exclusiveness of the offering platform to be utilized within the framework of an ICO aiming at obtaining the benefits of the "safe harbour", it would be necessary to clearly and accurately identify the rules of coordination/compatibility to be adopted in relation to the additional usual – unfailing and unavoidable, in reality – means of marketing, advertising, promotion and support, typically through social media. Obviously, the contents of these channels could not overlap the same "critical information", which must necessarily be centralized and conveyed, on an exclusive basis, through the authorized "offering" platform (especially, the technical instructions for subscription to the offer and, more specifically, the "payment" and settlement methods of the issued tokens; these constituting the most critical profiles of the process that are more frequently concerned by frauds to the detriment of "investors"). In this respect, the same coordination procedures may apply, *mutatis mutandis,* as required under article 101 of the ICFA, concerning the need to coordinate the contents of the "prospectus" with any other further advertising activity connected with the offer.

As to the role to be attributed to regulated offering platform, it can be outlined as the Paper states that "*as regards the issuers of crypto-assets, as explained above they can be companies, natural persons or networks of product developers; very often, the company's business activity is merely in the phase of being planned (more or less organised start-ups). In this regard, the issue arises of the characteristics of the said entities and the assessment of possible minimum requirements to be imposed, and their type, for these entities to be eligible candidates for authorisation to the promotion of related offerings on the platforms in question. Therefore, the detail requirements could include suitable arrangements for the selection of entrepreneurial projects deserving access to the platform for the promotion of the relative crypto-asset offerings, as well as rules of conduct that the entities managing crypto-asset offering platforms would be bound to respect in their relationship with investors*".
In spite of an evident, typical "performance" [29] and "counterparty" risk, that any "utility token" may reveal and although the Commission seems oriented to vest in the regulated platforms a duty to "*select the*

[29] **Counterparty or Performance Risks**: because of their underlying civil "cause", consideration, (attributable, as explained, to that of a sale of future assets (or services), or *emptio spei/ emptio rei speratae*), utility tokens mainly involve "Counterparty's" or "Performance" risks, having regard to the "issuer" ability to "deliver" the assets or services in accordance with the modes and timing established upon "placement" of the tokens; such an issue has become still sharper as this business model is proliferating in many industries as method of "financing" (broadly)/"fundraising" for the underlying business project (c.d. "scaling" del business project), so that the future productive capacity required to ensure prompt and regular fulfilment of the delivery obligations may often appears to be extensively exceeded or overestimated.

entrepreneurial project deserving to be admitted to the platform" – it appears difficult to envisage an active role of the offering platform in the assessment/validation of the business content of the project underlying an ICO, considering the multifaceted contents and business models that may be adopted and the different features, purposes and development stages that the underlying projects may, case by case, present; therefore appearing impossible to "equalize" and turn them into "ratings", evaluation patterns, or even, significant and comparable descriptive models.

Such a critical remark is based on the assumption that, behind the regulatory approach followed by the Commission, no explicit achievement of national "industrial policy" goals is (also) entrusted (?). As a matter of fact, the Paper sometimes seems to hint at an underlying - but, if so, debatable and reductive - regulatory aim of pursuing national industrial goals, then, limiting and reserving ICO accession to the Italian market, exclusively to those offers – whose underlying assets consist – of entrepreneurial projects pursued, mainly, by start-up or SMEs exclusively incorporated in the domestic territory[30]. Should this be the case, any opportunity to have access to "regulated trading platforms" authorized to offer to investors residing in Italy, would be immediately eradicated for all of those ICOs (nowadays almost the whole bulk!) planned/ created/placed from/in foreign countries and/or by foreign entities/promoters/founders, then in the context of foreign jurisdictions. Furthermore so, such an approach would be blameable in connection with a "dumping" effect of the correct regulatory approach to this matter, which the Commission appears to have knowingly and comprehensibly adopted when they elected to "capture" and regulate the sole "offering" phase – eligible to be isolated and "controlled" from a legal and operational standpoint – rather than the underlying, preliminary stage of "creation/issuance" of the tokens, which is, *per se,* a decentralized, disintermediated and automated procedure.

3.5 Structure of the "reservation of activity" designed for regulated offering platforms.

According to the envisaged regulatory model, the "regulated offering" activity has to be "reserved" to "regulated platforms", insofar as their adoption is aimed at satisfying the standards required in order to benefit of the "derogation regime" from application of "financial products" rules (the "safe harbour"); *vice versa*, no hindrances should exist for (non "regulated", then) ICOs to be implemented from non-regulated platforms, in cases where: **(i) either** the relevant tokens cannot be described nor qualify as "financial products"; **or**, in the affirmative **(ii)** the "creator"/"placement agent" of the relevant tokens does not intend to take advantage of the "safe harbour" and, therefore, proceed to their issuance/placement in compliance with the "default" applicable prospectus and "remote marketing" regulations (provided that it is materially feasible, considering that, as we will consider hereafter, the opt-in nature of the regulatory "safe harbour", could appear merely theoretical, appearing in practice an obliged option). **Furthermore,** no hindrances should prevent "regulated platforms" from promoting and managing, as a "reserved" activity, – of course, subject to compliance with the same organizational and conduct standards – "regulated" offerings of tokens that **do not** fall within the notion of "financial products" and, therefore could be directly offered by their creator/placement agent (as it is typically the case) or by non-regulated platforms , not being in a position to take any advantage from the "safe harbour". This choice would be only justified by the seeking of a sort of "reliability label", consequently encouraging a wider recourse to a regulated platform. On the contrary, "regulated" platforms should be forbidden to manage "non-regulated" offerings.

In essence, from the nature of "regulated platform" adopted, must necessarily follow the status of "regulated offering", regardless of whether or not this may grant the derogation regime from the rules applicable to

[30] Such seems the position held by FRANZA E., 2019, although the Author essentially considered the scenario of "issuances" through ICO of traditional "financial instruments" launched by start-ups e SMEs, consistently with the classic crowdfunding model. In this respect, see also CARRIÈRE P., 2019:1, p. 28.

"financial products" rules, should those be otherwise applicable. An additional advantage of such a regulatory option lies in contributing to incentive the spreading of such regulated models, so anticipating a forthcoming market's phase, where the extension of the need to adopt "reserved offering platforms" to any offering of "crypto-assets" could be envisaged.

The contents of the activity performed by "authorized" offering platforms is only partially comparable to that of "traditional" crowdfunding (conceived for an "intermediary" role, in the process of issuance of traditional "financial instruments"); therefore required will be the assessment with the manager and/or the platforms, of the existence of specific features (skills, expertise, IT infrastructures, organizational and control procedures, capital requirements, procedure and rules of conduct…), other than those traditionally imposed on the managers of authorised crowdfunding platforms, according to current applicable domestic laws and regulations, therefore to be appropriately adapted.

In the light of the analysis so far conducted, a final remarks may be advanced at this stage: the *opt-in* nature of the regulatory option adopted in the Paper risks to appear merely theoretical; in fact, in the light of the ICOs business model, the simple hypothesis of entrusting traditional qualified intermediaries with the "promotion and placement/issuance" activities within the context of an ICO, following traditional operational patterns of "remote marketing" according to article 32 of the Consolidated Law on Finance - should the "safe harbour" opt-in be disregarded - would probably prove technically impossible and operatively unfeasible. In reality, the regulatory option adopted by Consob to intervene on the "offering phase" –as described above – appears to be the sole effectively viable option, as it takes place outside the "creation/placement" process – which, as seen, is fully and necessarily disintermediated, decentralized, automated and globalized on the blockchain platforms. As seen, the "offering" phase only appears to be legally and technologically distinguishable and isolable, alongside the "creation/placement" phase, without inextricably overlapping with it.

Chart 2: Option tree

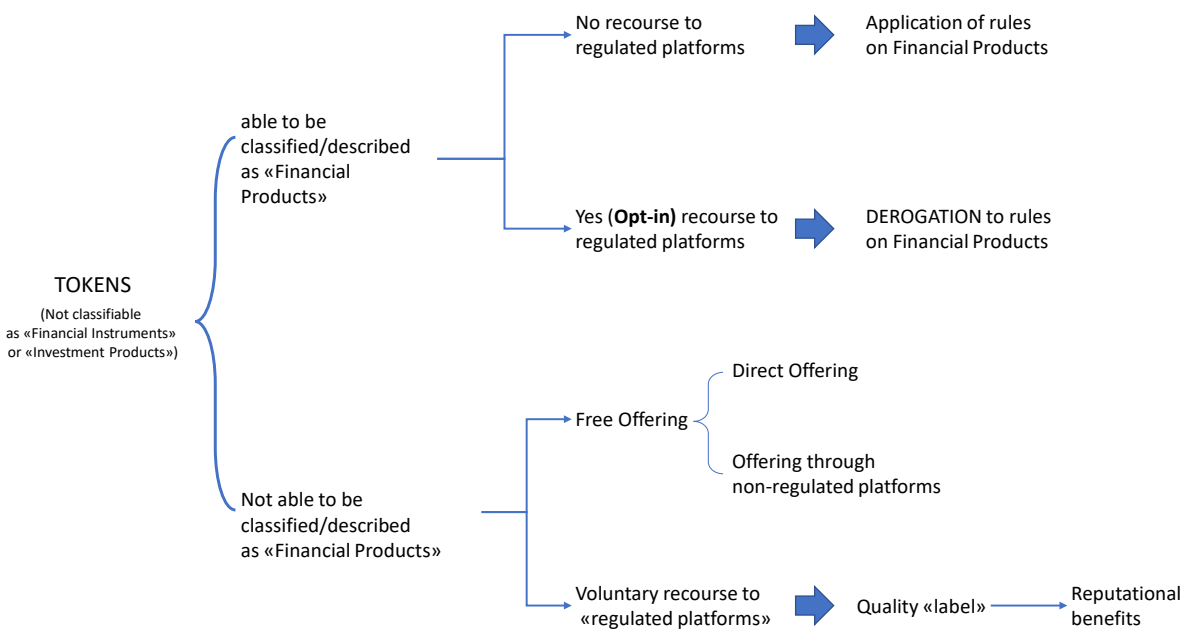


Chart 3: The Matrix of the "reservation of activity " for regulated offering platforms.

	«Regulated» offering permitting derogations for Tokens/Financial Products	«Regulated» offering granting reputational «labels» for Tokens other than «Financial Products»	«Non»-Regulated Offering
Regulated Platforms	Reservation of activity	Reservation of activity	N.A.
Non-regulated Platforms	N.A.	N.A.	Applicable
Issuers/Dealers – «Direct Offerors»	N.A.	N.A.	Applicable

4. Critical evaluation of the "dual track" regulatory option.

Taking into acccount the preceding considerations as to the impossibility to identify as a standard, typical feature of the Utility Tokens the actual or potential "tradability", the determination is debatable of granting the abovementioned "facilitated" regime only to those tokens that opt for the adoption of a "double track", consisting in resorting to a "regulated offering platform" simultaneously with the resort to a "**regulated trading systems**" , in "*close link with offerings (in the primary market phase…*". Such a determination could be explained **at most** – although such an option remains arguable on multiple levels, even in such circumstance – **in the sole event** that the tokens would actually be expected or designed for trading. **Only** in this case, could a prescription be justified to impose that such a trading should take place on "authorized trading systems", in order to benefit from the "facilitated" regime. **Quite the opposite**, if no "tradability" regime has been provided for the tokens, in the light of the intended regulatory purposes, no valid grounds can be found in support of the option that the **sole** requirement of the recourse to regulated and supervised "offering platforms" would not be sufficient to grant access to the above regulatory "safe harbour".

As aforementioned, such an option **might eventually** be justified, only in the case that these tokens are actually envisaged or expected to be "traded", so imposing that the relevant trading has to be carried out on "supervised exchange systems" – in order to benefit from the "facilitated" regime.

Moreover, even where the tokens are actually endowed with the features of "tradability" or "actual negotiation" and are then traded, or intended for trading, one may still raise the question on the suitability of imposing their trading/tradability on dedicated and authorized exchange systems, as a further requirement (condition) to benefit from the "facilitated regime":

(i) in the first instance, such a regulatory requirement appears "exorbitant" if compared to the general regulatory approach that the Commission adopted in the Paper overall, as knowingly and intentionally limited to the domestic legal regime applicable to "financial products", whose scope of operation is limited to the

public offering phase; the subsequent "secondary" trading phase seems therefore totally unfamiliar, even better, exorbitant with regard to such a regulatory scope and approach;

(ii) as a matter of fact, a regulatory trading regime is typical of the context of "financial instruments"; to this extent, the extension of this regulatory approach to the different and broader class of the "financial products" appears inconsistent, as well as the levy of connected organizational or behavioural obligations – which instead are common features of the former class, thus bewildering a correct separation of the regulatory contexts that the Commission, in the Paper, has knowingly adopted.

(iii) in addition, it is worth highlighting that, with regard to the goal of regulating the trading phase, very complex regulatory solutions will have to be foreseen, anticipating the solutions that ought to be found at EU level, when a harmonized regulatory approach to "security tokens" would be achieved. In this respect, such "trading systems" – along with their relevant, specific technological characteristics, compared to the "plain" models whereby "traditional" financial instruments are traded – ought to be considered in the scope of the MIFID regulations, such as MTF or OFT.

(iv) In addition, it could be noted that – based on the scholars' "alternative" construction of this matter (ANNUNZIATA F., 2019) – imposing a non-decentralized "exchange system" may compel the tokens negotiated therein (then including utility tokens) to be classified as "derivatives" [31], thus as "financial instruments", with all the relevant consequences that may derive from such a qualification.

(v) Finally, it is worth highlighting that the regulatory guidelines already drafted in the Paper in relation to the envisaged "authorisation" requirements for these regulated "trading systems" do not seem to reflect todays' generally accepted practice, as it may be observed in the marketplaces ("*trading venues*" or "*exchanges*") where the vast majority of tokens are traded, where decentralized and *permissionless* platforms are mostly used. Thus, imposing the use of trading venues that are not endowed with those features, would result in the exclusion of almost all (negotiable/traded) tokens from the scope of the "safe harbour" envisaged in the Paper – then its neutralization – and as a practical consequence, their exclusion from the Italian market, if considering that – as already emphasized – the nature of discretionary opt-in decision in adopting the facilitated regime, would in practice be a "mandatory" option, since the alternative (default) applicable traditional legal regime ("remote marketing" according to art. 32 of the ICFA), will most probably prove to be inapplicable in regards to the specific technological infrastructure of ICOs.

As a last remark, it may be observed that the Regulators' attention should be paid on assessing whether – upon "primary" placement of the tokens, and in tight connection/concurrence with the offering – rather than the access to "supervised exchange systems" (a dispensable scenario, as seen, since the tokens are not necessarily vested with a "tradable" nature), a reliable structure for the deposit/safe-custody of the tokens assigned to the investors has been (indispensably) adopted, through appropriate and technologically secure e-wallets or wallet providers. As a matter of fact, this stage is perhaps one of the most critical steps towards the need to ensure an effective "investor's" protection regime.

The probable, realistic regulatory approaches may be limited – at least in the initial regulation of this phenomenon – to impose upon the manager of an offering platform, or its "technical sponsor", to adopt e-wallets or wallet providers that have been chosen from a list of "credited" or even "internationally reputable" players of the "crypto" - ecosystem (such an evaluation may be delegated to AGID[32]). In a subsequent

[31] In addition, it could be noted that – based on an "alternative" analytical construction of this issue (ANNUNZIATA F., 2019, *cf.* in particular p. 49) – imposing a non-decentralized "exchange system" may cause the tokens negotiated therein (then including utility tokens) to be classified as "derivatives", thus as "financial instruments", with all the relevant consequences that may derive from such a qualification, which would not be limited to the rules of "financial products" (which, by the way, would be derogated in the case at issue, just as a result of the recourse to the "trading systems").

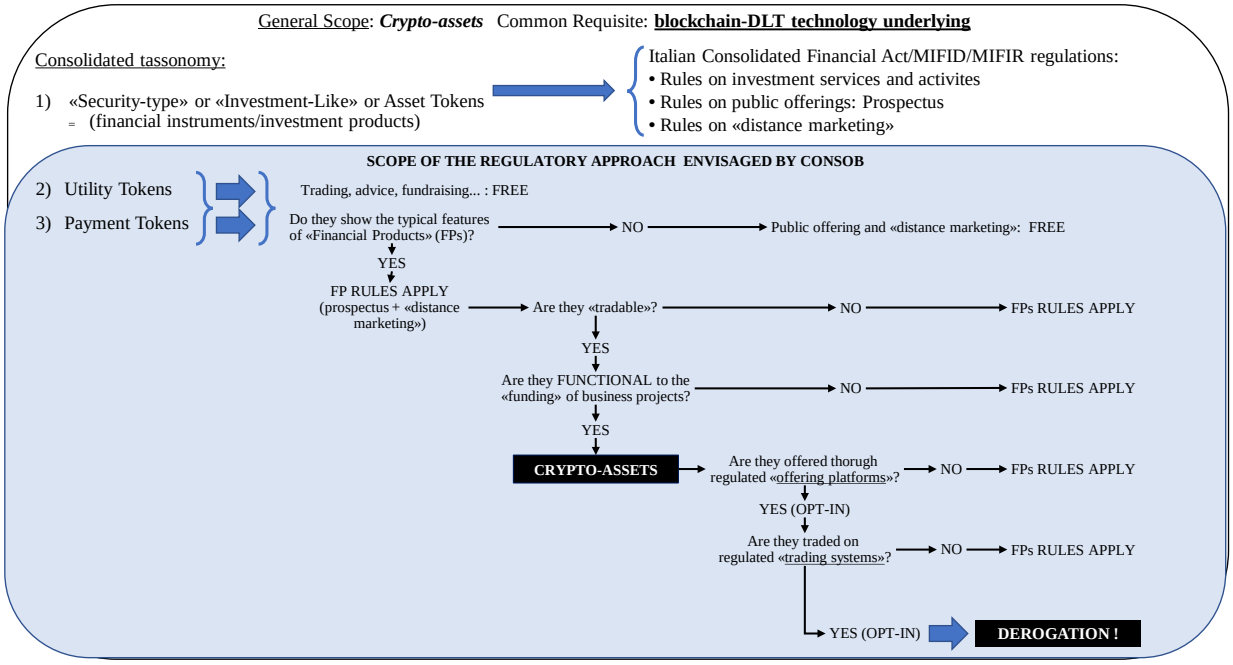
[32] Agenzia per l'Italia Digitale - Agency for Digital Italy (AgID) is the technical agency of the Presidency of the Council of Ministers. "*The main purpose of the Agency is to guarantee the achievement of the Italian digital agenda objectives and*

regulatory phase, a direct authorisation/supervision regime could be envisaged for these players of the ecosystem (to be laid down together with the Bank of Italy and AGID) – subject to prior satisfaction of appropriate organizational and behavioural requirements (commonly, segregation and traceability, AML, conflicts of interests, cyber-resilience, reliability of IT infrastructure, etc.), without disregarding the insurmountable difficulties to regulate such a delocalized and cross-border service.

In particular, it is worth considering – where such activity is carried out in the Italian territory – the laws and regulations concerning the statutory obligations set out in article 17-*bis* of Legislative Decree no. 141/2010 at the charge of currency exchange operators vis-à-vis the general public, and consisting in their enrolment with an appropriate Register held by the Board of Agents and Mediators (*Organismo degli Agenti e dei Mediatori*, or "OAM") set out in article 128-*undecies* of Legislative Decree no. 385 of 1st September 1993 (the "Italian Consolidated Banking Act" or, in brief, the "TUB"), which were extended to "*providers of services related to the use of virtual currencies*" under article 1, paragraph 2, item ff) of Legislative Decree no. 231/2007, or any "*legal or natural person that, for business purposes, provides third parties with those services conducive to the use, exchange and storage of virtual currencies, and their conversion from, or to, legal tender*"[33].

Chart 4: Conceptual Road Map

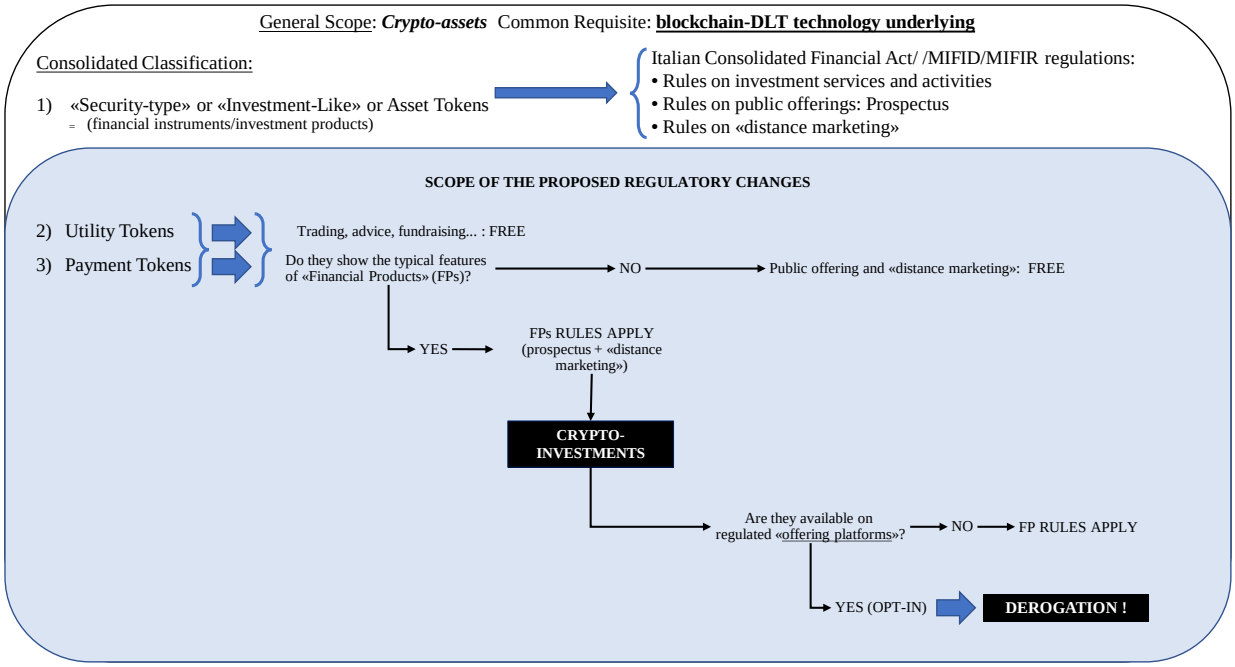
4.1 CHART OF THE REGULATORY APPROACH ENVISAGED IN CONSOB'S PAPER



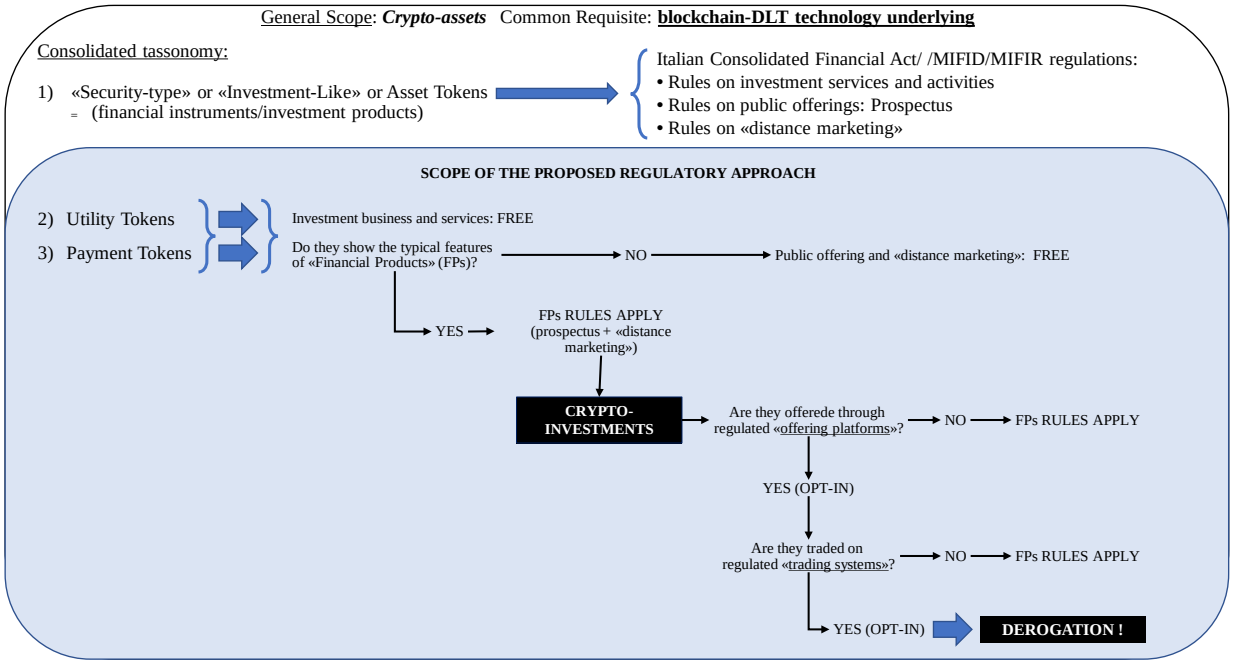
contribute to the diffusion of information and communication technologies, with the aim of fostering innovation and economic growth."

[33] At present, these obligations remained unenforced, since following the public consultations launched by the Ministry of Economy and Finance (incorporated in Press Release no. 22 of 2 February 2018), the scheme of ministerial decree, concerning the registration methods and timing for providers of services relating to the use of cryptocurrencies to notify the Ministry of Economy and Finance of their operations throughout the territory of the Republic of Italy, is still pending.

4.2 CHART OF THE ALTERNATIVE REGULATORY APPROACH



4.3 CHART OF THE ALTERNATIVE REGULATORY APPROACH (on a subordinate basis, in the sole event that the tokens are actually "traded")



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