

Initial Coin Offerings

✘ **Caterina Mancini**

Legal and regulatory department of British American Tobacco

Caterina Mancini graduated in law at Roma Tre University in 2015, discussing a thesis on the one share-one vote principle in the public companies in the USA and Europe.

Right after, she joined the law firm Pavia e Ansaldo, working in the banking & finance and litigation departments in the Rome office. During this time, she got passionate about the Fintech world, going deeper into this topic.

She left Pavia e Ansaldo in 2018, joining the legal and regulatory department of British American Tobacco. She is currently working in the same company, at the Madrid office.

23 May 2019

The *Initial Coin Offering* (hereinafter, *ICO*) is an instrument through which an issuer offers the sale of tokens^[1], in exchange for other currency with legal tender or, most commonly, virtual.

The underwriters buy the tokens, in the hope that over the time they could increase their value, with a consequent return

on the investment. On the contrary, through the revenues resulting from the subscription, the issuers finance their projects (e.g. creation of new currency, app or services). Indeed, being common in *hi-tech* and *startup* companies, the *ICO* constitutes a fast way to collect funds on the web.

The features of each *ICO* are contained in a *white paper*, an information document drafted by the offeror, containing the essential elements of the offer and of the related project. Notwithstanding the content of the *white paper* is not imposed by any regulation, this document normally contains the following information:

- 1) features of the currency issued and of the issuer;
- 2) characteristics and goals of the project to which the funds collected are devolved;
- 3) information related to the distribution of gains among underwriters.

Indeed, frequently, the *ICO* is aimed at financing an activity still in its infancy, where the production is expected to start after the conclusion of the fundraising.

As a consequence, where the funds collected reach the predetermined minimum value indicated in the *white paper*, these are invested by the issuer in the project; where not, the funds are normally returned to the underwriters.

As clear from the terminology used, in the context of the sale of crypto-currencies, the *ICOs* have a function comparable to

that of the *Initial Public Offerings*, both being intended to a potentially undetermined public of investors. On the other hand, *ICOs* differ from the financial instruments offer for: a) the use of the blockchain technology; b) the use of virtual currencies for the regulation of financial flows (as seen, the purchase of tokens generally takes place through virtual currencies); c) promotion via web; and, finally, d) the publication of the aforementioned white-paper in place of the prospectus[\[2\]](#).

In particular, if until the 2017 the proliferation of this means of crowdfunding gone – almost – unnoticed, the increase of the economic significance of the phenomenon alerted the markets supervisory bodies. Nowadays, while some States attempted to clarify the regulation applicable to *ICOs* – also answering to the question if the regulation applicable to the offer of financial instruments could be applied to *ICOs*; other States remained silent, in some cases, just alerting the public of the possible risks.

The study conducted by the *Securities Market and Shareholder Group* for the *European Securities and Market Authority (ESMA)*, published in October 2018[\[3\]](#) (the ‘Study’), summed up the progresses of the European regulation on the matter. In particular, the Study distinguished between the jurisdictions:

1) with a ‘proactive approach’, directly regulating the phenomenon or providing guidelines on the matter (e.g. Malta, in 2018 enacted a law providing for operators to verify if the token can be considered: *virtual token*, with the non-applicability of any financial regulation; *financial instrument*, with the consequent applicability of the European regulation; or *virtual financial asset*, to which a new *ad hoc* regulation would apply[\[4\]](#));

2) with a 'careful approach', determining the applicable regulation only on single proposals, on a case by case basis (e.g. United Kingdom, in January 2019 started a public consultation through the document titled *Guidance on Crypto-assets*[\[5\]](#));

3) with 'undefined approach', meaning that information are not available to the public.

Later, in January 2019, the ESMA released its *Advice to the EU Institutions on initial coin offerings and crypto-assets*[\[6\]](#). In this document, ESMA has identified some concerns related to the applicability of the current regulatory framework to crypto-assets. In particular, distinguished two categories:

- Crypto-assets which may qualify as financial instruments, for which the full set of EU financial rules would apply, although still remain challenges in interpreting certain requirements;
- Crypto-assets falling outside the current financial security framework.

In this context, the recent paper drafted by the Consob on *ICO e crypto-assets* has been published[\[7\]](#). The purpose of this document is to promote a discussion over the applicable regulation by consulting the subjects operating in the sector. As far as this work is concerned, Consob proposed a definition of *crypto-asset*, as a category distinct from that of financial products, finding the use of innovative technologies (i.e. the *blockchain*) and the destination of the *crypto-assets* to the negotiation as distinctive elements.

According to Consob, the codification of an *ad hoc* category

for *crypto-assets* would have the advantage of avoiding the need to conduct a case-by-case analysis of the instruments, facilitating their possible classification as financial products.

If confirmed, this line would bring Italy – even if with a delay compared to the other European countries – to re-enter the first group, among the States that have decided to regulate the phenomenon, avoiding case-by-case evaluations. Only the results of the consultations and subsequent intervention by Consob will confirm or deny this approach.

[1] The token can incorporate various right, not necessarily constituting a crypto-currency.

[2] Consob, *Le offerte iniziali e gli scambi di cripto-attività – Documento per la discussione*, 19 March 2019, available

at: http://www.consob.it/documents/46180/46181/doc_disc_20190319.pdf/64251cef-d363-4442-9685-e9ff665323cf .

[3] *Advice to ESMA – Own Initiative Report on Initial Coin Offerings and Crypto-Assets*, European Securities and Market Authority website,

link: https://www.esma.europa.eu/databases-library/esma-library?f%5B0%5D=im_esma_sections%3A9 .

[4] Available at the link: <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=29079&l=1>.

[5] Available at the link: <https://www.fca.org.uk/publication/consultation/cp19-03.pdf> .

[6] *Crypto-assets need common EU-wide approach to ensure*

investor protection, European Securities and Markets Authority website,
link: https://www.esma.europa.eu/system/files_force/library/esma71-99-1084_advice_on_crypto_assets.pdf?download=1 .

[7] Consob, *Le offerte iniziali e gli scambi di cripto-attività – Documento per la discussione*, cit.

DISCLAIMER

The contents of this publication is for informational purposes only. It is not intended to provide legal or other professional advice or opinions on specific facts or matters. Pavia e Ansaldo assumes no liability in connection with the use of this publication.