11 January 2021

EBF_043879

EBF key messages

European Commission proposal: Regulation on Markets in crypto-assets (MiCA)

Following the publication of MiCA on 24 September 2020, the European Commission invited stakeholders to provide a consultation response by 11 January (have-your-say). European banks would like to highlight the following key messages, for consideration of the EU institution in the legislative process. ***While these messages reflect common considerations at this time, EBF and its members will continue position building on the MiCA proposal in the time to come.***

The EBF supports the digital transformation of banking, positioning and representing European banks to boost innovation while ensuring resilience.

New and amended EU legislation targeting crypto-assets needs to deliver on a

- ***technology-neutral and innovation-friendly*** *EU financial services framework*
- ***fair competition*** *in a digitally transformed market, characterized by a* ***level playing field, with proportionate regulation*** *– "same activities, same risks, same rules, same supervision" principle*
- ***innovation balanced with proper protection*** *of investors and consumers*
- ***resilient financial ecosystem****, following a risk-based approach while avoiding disproportionate burden on financial institutions.*

Looking at the MiCA proposal, the EBF would like to highlight the following key messages.

1) European banks welcome MiCA to close gaps of the regulatory framework for crypto-assets that are not considered financial instruments.

The EBF welcomes the European Commission's proposal and its intended rules in an area that is presently largely unregulated at the EU level. Addressing the issuance of crypto-assets as well as the provision of related services, the proposal establishes minimum requirements for unregulated providers, and it is broadly consistent with the essential principle of "same activity, same risk, same regulation and supervision".

The European Commission takes a welcomed comprehensive view, addressing the full value chain of the crypto-asset market, encompassing placement, issuance, advice,

European Banking Federation aisbl

Brussels / Avenue des Arts 56, 1000 Brussels, Belgium / +32 2 508 3711 / info@ebf.eu
Frankfurt / Weißfrauenstraße 12-16, 60311 Frankfurt, Germany
EU Transparency Register / ID number: 4722660838-23

www.ebf.eu

marketing, exchange, custody and destruction. European banks appreciate the dedication to create a harmonized framework, aiming to avoid detrimental fragmentation of the regulatory approach to crypto-assets in different Member States. The proposal addresses regulatory uncertainty and positively contributes to the harmonization of crypto-asset requirements across Europe. It provides an opportunity to develop new services (e.g. issuance of crypto-assets, payments, custody of crypto assets) for issuers of crypto-assets, crypto-assets services providers, credit institution, and market infrastructures.

European banks welcome the avoidance of regulatory duplication by MiCA, leading to partial exemptions from MiCA's scope according to Art. 2 (2). These are sensible and of particular relevance since overlapping requirements and duplicated regulation between MiCA and, for example, MiFID II have to be avoided. Regulatory regimes should not conflict, as this would increase regulatory uncertainty or create undue burden. Ultimately, such uncertainty could limit innovation. However, European banks welcome further clarity for the customers of products covered by MiCA as to the applicability of existing consumer protection rules in Member States (such as PSD2, banking transparency rules, deposit protection laws, rules on the contractual form, etc.).

2) The definitions included in the proposal should be further elaborated, without relying on a future delegated act.

The variety and (today still) unclear scale of technically feasible token models render it impossible to make a definitive appraisal of all aspects related to the proposal. However, the proposed definitions and scope are of particular importance. Having a future-proof perspective in mind, we would like to raise several comments, to further tailor and clarify this foundational aspect of MiCA.

a) Reassessing the selected classification of crypto-assets

The definitions under Art. 3 MiCA require further amendments.

Article 3 (1): The MiCA distinction of (1) "Utility tokens", (2) "Asset-referenced tokens" and (3) "E-Money tokens" can be considered a good first step towards a taxonomy and allows for some flexibility. However, there is a concern that non-DLT systems that are already regulated may inadvertently fall within the definitions as well.

The proposal's three asset sub-categories are defined in a such a way that they are assumed to have an identifiable "issuer", which can be made subject to requirements. However, some crypto-assets do not have identifiable issuers, or issuance may be a distributed process (such as known cryptocurrencies). It is not clear how such assets will interact with the proposed framework, or whether they are not supposed to fall under the regulation at all. In particular, we encourage the EU legislator to clarify the application of Title V "Authorization and operating conditions for Crypto-Asset service providers" for all crypto-currencies. Without such clarification, use cases of cryptocurrencies such as Bitcoin or Ethers are not sufficiently addressed. The MiCA Regulation needs to cover them without room for doubt on the legal interpretation. This supports a clear anchorage of issuers' liabilities on basis of more precise criteria. Uncertainties regarding covered illicit conduct and related liabilities have to be avoided, ultimately fostering consumer and investor protection, issuers themselves and integrity of the market.

To ensure that definitions sufficiently cover (only) the intended types of assets, we encourage the EU policymakers to engage with the industry on amendments to the definitions. European banks propose:

Article 3 (1) (1): The DLT definition should be amended to reflect the BIS paper from September 2017[1]: "Distributed ledger technology (DLT) refers to the protocols and supporting infrastructure that allow computers in different locations to propose and validate transactions and update records in a synchronized way across a network".

Since crypto-currency solutions such as Bitcoin and Ethereum are not encrypted, at least **the word "*encrypted*"** should be deleted from the definition under Art. 3 (1), avoiding any unclarity as to the inclusion of such non-encrypted solutions.

Article 3 (1): The current categories do not designate all existing use cases with sufficient clarity. We encourage clarification if the following constellations fall under MiCA: (i.) crypto-assets that are used to record deposits if they are used for payment purposes; (ii.) single-fiat tokens used for payments, where the proposed definition could potentially leave a gap for stablecoins linked to a single fiat currency that is not intended as a means of payment (e.g. Tether).

Article 3 (1) (4): The definition of e-money token should include a reference to its nature as e-money, in order to clarify the regulatory treatment of these tokens and the regulatory framework to be applied not only to issuers, but also to service providers managing such tokens. This could simply be added to the definition: *'electronic money token' or 'e-money token' means a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender****. Electronic money tokens referred to a union currency shall be deemed to be 'electronic money' as defined in Article 2 (2) of Directive 2009/110/EC.***

Article 3 (3): The definitions of asset-referenced token (ART) and electronic money token (EMT) should be adjusted to reflect the MiCA Recitals (in particular 25 and 66). There, an EMT is described as a "means of payment" and an ART as a "means of exchange". But Article 3 describes an EMT as a "means of exchange" while an ART is not assigned any specific purpose under Art. 3 (1). Furthermore, the precise meaning of "means of payment" and "means of exchange" should be elaborated on in more detail under Art. 3. At this point, they are not sufficiently clear.

Article 4: The use of the classification of "*crypto-assets, other than asset-referenced tokens or e-money tokens*" requires a more concrete definition of this category.

b) Clarification for evolving tokens

The Regulation appears to focus on crypto-assets belonging to a single category, dividing them along the lines of Art. 3. However, some crypto-assets can convey different functions over time, running through different stages with different functions. European banks call upon the EU legislator to clarify the application of definitions for such evolving

[1] See BIS "What is distributed ledger technology?", BIS Quarterly Review, September 2017: https://www.bis.org/publ/qtrpdf/r_qt1709y.htm#:~:text=(Extract%20from%20page%2058%20of,synchronised%20way%20across%20a%20network

constellations, since this can impact security tokens, means of exchange and, in some cases, also utility tokens.

c) No delegated act for additional details on definitions

Article 3 (2): Definitions should allow for a technologically neutral application yet provide for a harmonized approach across European Member States. Detrimental fragmentation of the regulatory framework needs to be avoided. In order to secure legal certainty and advance the Commission's definitions within the legislative process at Level 1, no delegated act should be used to specify technical elements of the definitions only later on. European banks call upon the EU legislator to include these fundamental requirements directly in the Regulation, providing clarity early on and avoiding a potential interim period of up to 36 months before the Commission would produce a delegated act under Art. 121 MiCA.

3) We welcome the European Commission's intention to provide further guidance on the classification of crypto-assets as financial instruments under MiFID II.

European banks appreciate the Commission's intention to avoid detrimental fragmentation by creating a harmonized regulatory approach to crypto-assets. Where these are covered by existing legislation due to a classification as a "financial instrument" under EU legislation, specifically MiFID II, there is nevertheless room left for different interpretation in Member States due to the legal nature of existing requirements. This may cause an unlevel playing field and arbitrage. To achieve further harmonization, and hence needed legal clarity for stakeholders, the definition under MiFID II should be elaborated by further Commission guidance targeting crypto-asset constellations.

4) Transparency requirements should be consistent with established wording under MiFID II.

In order to ensure consistency with established transparency requirements under MiFID II, Article 17 (5) MiCA ("*white paper shall be made available in machine readable formats*") should be amended to existing MiFID II terminology: "*made available in a **durable medium***". Such consistency secures harmonized consumer and investor protection and avoids detrimental burden due to legal unclarity.

5) Third party obligations under MiCA should be further clarified.

a) Clarify obligations for e-money tokens

Article 44: Redeemability obligations for e-money tokens are extended to the entities safeguarding the funds or distributing the tokens when the issuer does not fulfil redemption requests. These third parties' obligations should be clarified and further specified. Obligations should not automatically extend from the issuer to third parties,

whose responsibility should be limited to their role in the stablecoin arrangement. This means entities safeguarding the funds can only be responsible to make the funds available under their custody, as long as legal certainty on the procedure is provided. Similarly, the distributors of e-money tokens can facilitate the execution of redemption rights, due to their direct relationship with the holders, but should not bear the financial responsibility.

b) Clarifications of requirements for parties of a payment arrangement

A uniform regulatory treatment of e-money tokens is to apply not only to issuers but also to service providers managing e-money tokens. The same rights and protections are to apply for service providers offering equivalent payment services, independently of the underlying technology. The proposed reference to the nature of e-money tokens as e-money (2009/110/EC) in the definition of e-money tokens (see our proposal above 2) a) regarding Art. 3 (1)) would clarify the regulatory framework to be applied not only to issuers, but also to service providers managing such tokens.

c) Additional requirements for significant providers due to the effect on financial stability

As regards financial stability risks related to payments through DLT technology, different parts of the value chain, other than the issuance of the tokens, could concentrate payments and materialize the risks pointed out by the Financial Stability Board[2]. If widely used for payments, any operational disruption in a global stablecoin arrangement could have significant impact on the economic activity and financial system functioning. If users would rely upon a stablecoin to make regular payments, significant operational disruptions could quickly affect real economic activity, e.g. by blocking remittances and other payments. Additionally, financial stability risks can arise from the concentration of users' tokens and operations in a few service providers (e.g. wallets) that could undergo operational disruptions, therefore blocking a significant volume of payments and possibly triggering confidence effects on the arrangement.

It should be considered whether significant service providers should be identified and be subject to additional requirements and/or oversight. Such consideration should go beyond Title V and focus on additional prudential requirements.

6) The EBF welcomes the "passporting model" for authorization yet calls for more clarity regarding the authorization process.

Interpretation of the Regulation and the decisions taken by the national legislator and National Competent Authorities should be consistent as much as possible, avoiding regulatory/supervisory fragmentation and guaranteeing a level playing field for market participants. The possibility of using the "passport concept" for authorized entities can help to avoid legislative arbitrage.

MiCA applies the principle of home state oversight. Generally, EBF members believe that the Commission is taking the right approach in requiring crypto-asset service providers and issuers of e-money tokens and asset-referenced tokens to seek regulatory

[2] See FSB Final Report and High-Level Recommendations: Regulation, Supervision and Oversight of "Global Stablecoin Arrangements" from 13 October 2020: https://www.fsb.org/wp-content/uploads/P131020-3.pdf.

authorization. The EBF supports the envisaged requirement for a registered office in the European Union since effective enforcement is essential. It remains an open question what concrete expectations supervisors will have in terms of the suitability of management, risk management, compliance, etc. and what capital requirements will apply. The "same risks, same rules" approach should be applied to the implementation of such requirements.

More clarity under MiCA is, for example, needed for the following points:

- Does the applicant need to apply individually for each crypto-asset service he wants to provide?
- Or will applicants, similar to the regime applicable to investment firms, be entitled to provide different crypto-asset services depending on the license they apply for?

7) Proposed mechanisms and procedures for guarantee and reimbursement should be clarified and extended.

To ensure effective protection for the holders of crypto-assets, given the high risk and volatility of these assets, the Regulation should more precisely regulate the guarantee and reimbursement mechanisms to be granted to the holder of crypto-assets. The requirements to guarantee the quality of the underlying reserves should be strengthened.

Article 42: Issuers of ARTs should draw up an appropriate plan for an orderly wind-down. From a risk perspective, this obligation should be extended to all crypto-asset service providers.

Article 43: The EBF suggests the definition of e-money token to be clarified in Article 3 (1) (4) (see above under 2) a)). Electronic money tokens referred to a union currency should be deemed to be 'electronic money' as defined in Article 2 (2) of Directive 2009/110/EC. In turn, Art. 43 (1) should be clarified in its wording, avoiding the impression that different e-money tokens shall be deemed differently, depending on applicable individual criteria under Art. 43 (1) sub-paragraph 1 (a) to (c). These criteria should apply cumulatively. For clarity, we suggest adding "*and*" at the end of the letters (a) and (b). Furthermore, Art. 43 (1) sub-paragraph 3 ("*For the purpose of point (a)* [...])" should not single out point (a) and thereby introduce an only limited determination of electronic money. Instead, e-money tokens should be classified by the definition under Art. 3 (1) (4) only, without further sub-classifications under Art. 43 (1).

Articles 63, 67: The meaning of "safekeeping", "custody" and "administration" of crypto-assets should be further explained beyond the definition in Article 3 (1) (10), providing for additional legal clarity. To that end, European banks welcome added guidance in the Recitals.

Article 66: Requirements are envisaged for outsourcing by service providers of crypto-assets, but not for outsourcing by issuers. There are also numerous ways in which issuers can outsource, so corresponding requirements are needed in this area, too.

Articles 99, 101: It is envisaged that issuers of significant ARTs and EMTs will be supervised by the EBA. Where this covers institutions, which are already supervised under other regimes (e.g. by the ECB and/or national competent authorities), we suggest to ensure that the supervision is not conflicting.

8) There should be no additional liability requirements beyond comparable models under existing EU legislation.

Article 33 (8): The envisaged liability for crypto-assets held as reserves is modelled on liability under UCITS and the AIFMD. However, the custodians of these reserve assets will not assume functions beyond the usual for depositaries of investment funds, for example such as monitoring. The MiCA Regulation should not impose any new crypto-asset liability rules on these custodians which would go beyond the traditional requirements for custodians. In its present form, Article 33 (8) of the proposal would result in the custodian becoming liable for a "loss" of crypto-assets. This is especially concerning since the definition of crypto-assets does not provide legal clarity as to the coverage of non-issuer crypto-assets. In turn, Art. 33 (8) provides for a disproportionately burdensome extension of liability, forcing custodians to face unclear liability rules.

Where MiCA raises technical requirements already addressed – for financial instruments – under existing EU regulation, the requirements should be consistent to avoid fragmentation of legal understanding.

Article 37 (1): MiCA introduces a 10% threshold for voting rights or capital held, triggering "qualifying" holding and respective notification requirements. Art. 6 (1) PSD2, Art. 3 (3) EMD and Art. 11 (1) MiFID II state a qualifying holding only as of 20%. In the interest of consistency, the threshold of 10% should be raised accordingly by deleting the "*10%*" reference from the included list under Art. 37 (1).

Art. 74 (1), (2): Reiterating the point made on Art. 37 (1), MiCA should not introduce a threshold for notification of qualifying holding as low as 10%. The threshold of "*10%*" should be deleted, starting the list only with 20%.

9) The transitional period under Art. 123 (1) requires a clarification.

We invite the EU legislator to clarify the applicability and limits of transitional measures for specific tokens.

Art. 123 (1): European banks understand the need for a transitional period, considering that pre-existing crypto-assets in the category of "other" may require a longer period to comply with MiCA. However, the transitional period should not be inappropriately long, undercutting the fundamental principle of "same services, same risks, same rules" and the resulting level playing field. More importantly, the crypto-assets exempted under Art. 123 (1) should not be allowed to operate in a permanent state of exemption from Art. 4 to 14. We feel that the current wording is ambiguous, leaving unclarity as to the application of the Articles 4 to 14 in case the token under Art. 123 (1) is carried out again in a second round of offering after MiCA comes into force. The paragraph should not allow for a permanent exemption without end date for certain tokens, since this endangers the protection provided by MiCA through consumer protection requirements such as the obligation to act fairly, communicate in a fair, clear and not misleading manner. We encourage the EU legislator to clarify Art. 123 (1) respectively.

For more information:

Julian Schmücker
Senior Policy Adviser – Digital Innovation
j.schmucker@ebf.eu
+ 32 (0) 24315744

About the EBF

The European Banking Federation is the voice of the European banking sector, bringing together 32 national banking associations in Europe that together represent a significant majority of all banking assets in Europe, with 3,500 banks - large and small, wholesale and retail, local and international – while employing approximately two million people. EBF members represent banks that make available loans to the European economy in excess of €20 trillion and that reliably handle more than 400 million payment transactions per day. Launched in 1960, the EBF is committed to a single market for financial services in the European Union and to supporting policies that foster economic growth.

www.ebf.eu @EBFeu