

6 May 2021

EBF key messages

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

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.

A strong and robust regulatory regime for crypto-assets in the EU is essential to ensure that this technology provides for a competitive, financial and economic ecosystem that protects consumers, investors and businesses.

An approach based on the principle of “same activities, same risks, same rules” is crucial. It relies on existing regulations, triggers regulatory adaptation and, where necessary, calls for introduction of new rules that address the novel nature of crypto-assets. At all times, financial stability needs to be retained.

A particular challenge is the different meaning that crypto-assets can have for different audiences: investments (similar to financial instruments), store of value, means of exchange (as seen with payments), record of rights, ownership or rewards (as seen with loyalty programs). The scope of crypto-assets is broad and is not solely focused on financial services.

While the technological development is still in its early stages, it is hard to predict what will happen in the coming years. But European banks believe that the DLT-based economy will likely be an impactful innovation. Crypto-assets are the enabler for this development.

For the financial industry, crypto-assets have the potential to feature many of the elements needed in a digital and globalized financial marketplace, for example real-time finality of transactions or frictionless cross-border availability. But to realize the potential, further

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institutionalization is needed: the establishment of a regulatory foundation followed by an at-scale participation of key members of the regulated financial ecosystem.

MiCA is an essential first step for the financial sector in the EU. It will allow the EU economy and citizens to make use of the benefits of crypto-assets in future, while offering required safeguards and protection. In the global context, a proportionate MiCA – properly embedded and aligned with existing financial regulation – has the potential to become a benchmark for other regions.

To foster this potential, the EBF would like to offer suggestions for amendments to MiCA, adding clarification where needed and aligning requirements in the context of financial regulation today. We kindly invite EU legislator and stakeholders to take note of 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, 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.

2) 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-mandated guidance targeting crypto-asset constellations. Requirements for treating a crypto-asset as a financial instrument should be clearly stated.

Recital 3: The European Securities and Markets Authority (ESMA) should be mandated by the European Commission to publish guidelines in order to reduce legal uncertainty and guarantee a level playing field between market operators.

3) 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 assume 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 cryptocurrencies. Without such clarification, use cases of cryptocurrencies such as bitcoin or ether are not sufficiently addressed. The MiCA Regulation needs to cover them without room for doubt. This supports a clear anchorage of issuers' liabilities on basis of more precise criteria. Uncertainties regarding covered illicit conduct and related liabilities must 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 2017¹: "***Distributed ledger technology (DLT) refers to the protocols and***

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](https://www.bis.org/publ/qtrpdf/r_qt1709y.htm#:~:text=(Extract%20from%20page%2058%20of,synchronised%20way%20across%20a%20network)

supporting infrastructure that allow computers in different locations to propose and validate transactions and update records in a synchronized way across a network”.

Since cryptocurrency solutions such as bitcoin and ether are not encrypted, **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) (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. Proposed amendment: *“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 (1) (6): The definition of issuer should not include entities that only seek admission of crypto-assets to a trading platform for crypto-assets. The reference should be deleted accordingly: *“‘issuer of crypto-assets’ means a legal person who offers to the public any type of crypto-assets ~~or seeks the admission of such crypto-assets to a trading platform for crypto-assets;~~”*

Where an admission-seeking status would already be enough to qualify as issuer of a crypto-assets, there would be a risk of entities exploiting the transitional protection under Art. 123 (1) MiCA. By way of fast admission application, legal persons could deliberately circumvent the application of MiCA, undermining the intended harmonization of protection levels in the proposal. Please consider also the EBF amendment proposal for Art. 123 (1) below, proposing an important time limitation to the transitional protection.

Art. 3 (1) (23): Consistent with the proposed amendment to Art. 3 (1) (6), the “*host Member State*” should not refer to issuers that are only *seeking admission* to trading on a trading platform for crypto-asset providers.

Article 4 (2) (b): The MiCA requirements should apply to crypto-assets with decentralized issuing (e.g. bitcoin). In turn, the exemption under (b) should be deleted: *“~~the crypto-assets are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions;~~”*.

b) Clarification for evolving tokens

The Regulation focuses 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 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.

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) The EBF welcomes a binding opinion of ECB and the Member States' central banks for asset-referenced tokens.

Asset-referenced tokens can achieve market volumes which might have an impact on monetary and payment systems and services security in the euro area. This should be taken into account by involving the ECB in the authorization process accordingly in the form of mandatory positive certification.

This should include ECB considerations of monetary policy as well as payment oversight. By doing so, the ECB would execute its tasks as designated by the fourth indent of Article 127 (2) of the Treaty on the Functioning of the European Union. This is mirrored in Article 3.1 of the Statute of the European System of Central Banks and the European Central Bank, where one of the tasks to be carried out through the ESCB is "*to promote the smooth operation of payment systems*". Furthermore, such considerations follow out of Article 22 of the Statute of the ESCB and of the ECB: "*The ECB and national central banks may provide facilities, and the ECB may make regulations, to ensure efficient and sound clearing and payment systems within the Union and with other countries*".

Art. 18 (4): Reflecting on the comments above, the paragraph should be amended to include the advocated role for ECB and national central banks. Additions should read: "*4) The EBA, ESMA, the ECB and, where applicable, a central bank as referred to in paragraph 3 shall, within 2 months of receiving the draft decision and the application file, issue **an opinion on the application and transmit their opinions to the competent authority concerned. Opinions should be non-binding with the exception of those of the ECB and the Member States' central banks on monetary policy enforcement and ensuring the secure handling of payments.** The competent authority shall duly*

*consider those opinions and the observations and comments of the applicant issuer. **If the ECB delivers a negative opinion because of monetary policy considerations or payment oversight considerations, the competent authority should refuse the application for authorisation and inform the applicant issuer of the decision.***

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 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.

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

Article 33 (8): The paragraph should be deleted. It provides for a disproportionately burdensome extension of liability for the custody of reserve assets, forcing custodians to face unclear liability rules. It also creates an uneven level of liability within the same service/business, i.e. the custody of client assets. From a service or client perspective, there is no reason to treat issuers of asset-referenced tokens differently than any other client of a custodian.

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. To achieve protection of investors in asset-referenced tokens, issuers of asset-referenced tokens should be regulated similar to investment funds. To that end they should be obliged to appoint special depositaries for the custody of their reserve assets and such depositaries should be granted similar control functions like depositaries under AIFMD or UCITS V. Only under such circumstances could an extension of the liability for custody of client assets be justified.

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. 37 (2): Consistent with paragraph 1, the reference to 10% should be deleted.

Art. 74 (1), (2): Reiterating the point made on Art. 37 (1) and (2), the reference to 10% should be deleted.

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

a) Classification and redeemability

Article 43 (1): The EBF suggests the definition of e-money token to be clarified in Article 3 (1) (4). No further sub-classification should be introduced under Art. 43 (1).

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 should not single out point (a) and thereby introduce an only limited determination of electronic money. Instead, we propose to add "*For the purpose of point (a) to (c), and with respect to Art. 3 (1) (4), an 'electronic money institution' as defined in Article 2(1) of Directive 2009/110/EC shall be authorised to issue 'e-money tokens' and e-money tokens shall be deemed to be 'electronic money' as defined in Article 2(2) of Directive 2009/110/EC. [...]*"

Article 44 (7): Redeemability obligations for e-money tokens are extended in Article 44 (7) to the entities safeguarding the funds or distributing the tokens when the issuer does not fulfil redemption requests. Such obligations of reserve custodians and distributors are disproportionate and not aligned with their role in EMT arrangements. Art. 44 (7) should be transformed into a crisis management provision, ensuring that, once the issuer is not able to redeem the EMTs, operational procedures are triggered to liquidate the reserve and distribute it evenly among the holders: "*Where issuers of e-money tokens do not fulfil legitimate redemption requests from holders of e-money tokens within the time period specified in the crypto-asset white paper and which shall not exceed 30 days, a process should be triggered by its supervisory authority to ensure that the reserve is rapidly liquidated and evenly distributed to holders. ~~the obligation set out in paragraph 3 applies to any following third party entities that has been in contractual arrangements with issuers of e-money tokens:~~*"

~~(a) entities ensuring the safeguarding of funds received by issuers of e-money tokens in exchange for e-money tokens in accordance with Article 7 of Directive 2009/110/EC;~~

~~(b) any natural or legal persons in charge of distributing e-money tokens on behalf of issuers of e-money tokens."~~

b) Alignment with the 5th Anti-Money Laundering Directive

MiCA should align with the 5th Anti-Money Laundering Directive (AMLD5) and its concept of "virtual currencies" as well as the relevant obliged entities "virtual currencies exchange providers" and "custodian wallet providers". This follows a FATF recommendation for a definition of 'virtual assets'. In order to provide advanced clarity and dedication to AML in Europe, new paragraphs 10 and 11 should be added under Art. 61, explicitly referencing applicable AML legislation.

Art. 61 (10), (11) new: "10. Providers of crypto services, insofar as they are obliged within the meaning of Directive 2015/849/EU, have effective procedures in place for the prevention, detection and investigation of money laundering and terrorist financing in accordance with Directive 2015/849/EU.

11. Providers of crypto services that transfer crypto values for payment purposes must have internal control mechanisms and effective procedures for the complete traceability of all crypto value transfers within the EEA as well as transfers of crypto values from the EEA to another region and vice versa in accordance with the provisions of the regulation (EU) 2015/847."

c) 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 proposed amendment to Art. 3 (1)) would clarify the regulatory framework to be applied not only to issuers, but also to service providers managing such tokens.

d) Additional requirements for significant providers because of 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 Board². 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.

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>.

9) Proposed mechanisms and procedures for guarantee and reimbursement should be targeted.

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. **"Issuers of crypto-assets"** should be explicitly mentioned throughout the entire Art. 66, next to the service providers.

Art. 66 a (new): From a risk perspective, the obligation for orderly wind down (for ART specifically included under Art. 42) should be extended to all crypto-asset service providers. A new Art. 66 a on **"Orderly wind down"** would reflect this need:

"1. Crypto-asset service providers shall have in place a plan that is appropriate to support an orderly wind-down of their activities under applicable national law. That plan shall demonstrate the ability of the crypto-asset service providers to carry out an orderly wind-down without causing undue economic harm to their customers.

2. The plan referred to in paragraph 1 shall be approved by the Board of Directors of the issuing company and reviewed and updated regularly.

3. The plan shall outline, if token owners receive a preferential role compared to other creditors of the issuing crypto-asset service provider."

Articles 67 (8): The liability of custodians of crypto-assets as regards the loss of the assets should be further specified to exclude the possible loss due to circumstances outside the control of the custodian. Custodians can only be made liable for malfunction or hacks proven to have occurred or originated in their own systems and not from malfunction or hacks occurred in the DLT network. Furthermore, it is to consider that for those crypto-assets that do not count on a central operator of the DLT ledger embedding the asset, losses arising from a hacking or malfunction of the network cannot be directly transferred to any legal entity either. Rather than introducing unsuitable liability, users should be made aware of this kind of possible losses from the outset.

This logic follows the inherent idea of MiCA to target liability rules according to reasonable control. Liability for events beyond the control of the custodian could result in systemic risk, particularly as the operational risk, for example hacks, cannot be precluded. Moreover, liability under a de facto guarantee model is not foreseen in MiFID II either. MiCA should not diverge from this regulatory model for liability, instead following the concept under AIFMD or UCITS: Liability rules here are a special solution for the investment triangle consisting of the investor, the investment fund and the depositary. They cannot be transposed to the bilateral relationship between investor and custodian. Any risk relating from a malfunctioning or hacks of the DLT network should therefore be subject to regulatory supervision and not resulting in a financial impairment of an inculpable service provider.

We propose to amendment paragraph 8 accordingly: *"Crypto-asset service providers that are authorised for the custody and administration of crypto-assets on behalf of third parties shall be liable to their clients for loss of crypto-assets as a resulting from a malfunction or hacks **proven to have occurred or originated in their own systems***

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and not from malfunction or hacks occurred in the DLT network of the crypto-asset, up to the market value of the crypto-assets lost.

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.

10) 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: “1. **For a temporary period of 6 months**, Articles 4 to 14 shall not apply to crypto-assets, other than asset-referenced tokens and e-money tokens, which were offered to the public in the Union or admitted to trading on a trading platform for crypto-assets before [please insert date of entry into application].”

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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.

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