

Position Paper

Bitkom Position Paper on the European Commission's proposals on Markets in Crypto-Assets (MiCA) and a pilot regime for market infrastructures based on distributed ledger technology

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Proposal for a regulation on markets in crypto-assets (MiCA)

We see the MiCA as a political milestone for crypto-adoption. It creates a fully harmonized market and establishes legal certainty for crypto-asset issuers and service providers. Thanks to MiCA, we expect the crypto-market to further mature and more and more institutional investors to enter the market. In several public consultations and political meetings during these last two years, we have been calling for a binding and unified European regulation in this area. We therefore highly appreciate the comprehensive EU Commission's proposal as a whole.

Due to the size and relevance of the EU single market, MiCA could potentially set global standards, shape crypto-regulation internationally, and attract market participants from all over the world. We are fully committed to supporting the EU on its way to becoming a global vanguard with regards to crypto-regulation and to offering our advice along the way as largest European digital trade association and largest German crypto network. In the following, we provide feedback from our members to several general and specific aspects of MiCA and the pilot regime for DLT market infrastructure. While we welcome the proposals on the whole, we still identified some key aspects and criticisms that should be addressed and amended during the legislative process in the European Parliament and the Council of the EU.

General

- Designing MiCA as a binding and directly applicable regulation is a crucial precondition to make these new asset classes trustworthy. It harmonizes the EU-crypto-market, ensures a level playing field for issuers and service providers,

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and creates legal certainty for businesses and consumers alike.

- We highly appreciate the extension of the passporting regime to new crypto-asset service providers. It enables growth and competitiveness and opens up a large and attractive market for innovative market participants.

Clear-cut definitions and technology neutrality

- We support the differentiation of crypto-asset-categories as well as the clear distinction between financial and non-financial crypto-assets. Over-regulation in the form of several applicable regulation-regimes should be prevented. We invite the EU Commission and the supervisory authorities to publish supervisory guidance and examples as soon as possible in order to make the classification criteria even more tangible and account for hybrid forms of tokens (see below). This holds also for the definition of certain terms such as “token” or “mining” that are not unanimously and clearly defined within the MiCA.
- From our point of view it is still unclear how the MiCA would interact with MiFID II when it comes to the so-called “hybrid” crypto-assets which most likely contain elements of a financial instrument (at any given point of its live-cycle). In our view, it should be dealt with within the scope of the respective financial instrument rules.
- The definition of DLT in Art. 3 (1) does not accurately describe the main characteristics of DLT in our opinion. In particular, the wording “distributed recording of encrypted data” doesn’t seem suitable to us. The use of cryptographic techniques in DLT is mainly required for fingerprinting (hashing) of transaction data and for signing processes. The stored data however is not necessarily encrypted. We therefore propose an alternative definition of DLT as *‘multi-party system in which all participants reach consensus over a set of shared data and its validity in the absence of a central coordinator’*.
- Utility Tokens are defined in MiCA (art. 3 (5)) as a “type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token”. The scope of this definition clearly includes non-financial types of assets, for example DLT-based mobility vouchers. Currently, voucher-like assets such as frequent flyer miles or Ebay vouchers do not fall under EU financial regulation (see EU directive 2016/1065). Hence, in or-

der to ensure a technology-neutral policy approach, they shouldn't be included in the scope of MiCA either, only because they are based on DLT. The commission should reconsider the scope of the regulation here, otherwise that could prevent a lot of interesting non-financial blockchain use cases in the real economy due to regulatory hurdles (whitepaper, but most importantly license requirements for any service provider), compliance costs, and tax reasons.

- More specifically, for utility tokens (crypto-assets linked to the provision of access to goods or services), we urge the European regulator to implement regulatory exemptions for such crypto-assets with limited application and no general purpose. Those exemptions should follow the example of the respective exemptions for e-money with limited application outlined in recital 5 of the EMD2. We propose the following recital to be added to the MiCA:

'This Regulation should not apply to crypto-assets designed to address precise needs that can be used only in a limited way, because they allow the token holder to purchase goods or services only in the premises of the issuer or within a limited network of service providers under direct commercial agreement with a professional issuer, or because they can be used only to acquire a limited range of goods or services. A crypto-asset should be considered to be used within such a limited network if it can be used only either for the purchase of goods and services in a specific store or chain of stores, including online stores, or for a limited range of goods or services, regardless of the geographical location of the point of sale. Such instruments could include crypto assets of a store, crypto assets to settle the purchase of petrol or charging of vehicles, membership tokens, public transport tokens, or vouchers for goods or services (such as vouchers for childcare, or vouchers for social services schemes which subsidise the employment of staff to carry out household tasks such as cleaning, ironing or gardening), which are sometimes subject to a specific tax or labour legal framework designed to promote the use of such instruments to meet the objectives laid down in social legislation. Where such a specific-purpose crypto-asset develops into a general-purpose instrument, the exemption from the scope of this Regulation should no longer apply.'

Applicability for Decentralized Finance (DeFi)

- Further, exemptions for "crypto-currencies" need to be made clear, and if they fall under the definition of crypto-assets. We welcome the exemptions (mentioned in Art. 4 Para 2 point b) for crypto-currencies with respect to white papers.

But as crypto-currencies mostly do not have a clear issuer, an exemption from Art. 4 Para 1 point a) would be needed as well. Otherwise evolution and trading of future crypto-currencies risk taking place outside the EU in the future.

- It is unclear to us how the proposed regulation would affect entirely decentralized financial services (DeFi). Who would be in charge for issuing a white paper and does the requirement of having a legal entity in the EU apply? Will those services be no longer accessible to EU citizens once the proposal is adopted? To make our questions more palpable: If Bitcoin was to be launched after MiCA came into force, would crypto-asset service providers be allowed to offer services based on it, even without a legal “Bitcoin-entity” in the EU and without a white paper sent to a supervisory authority? Further, what happens if a non-EU based issuer publishes a whitepaper, but not according to MiCAs requirements? A European crypto-asset service provider (e.g. when operating a trading platform) might not be able to admit to trading such crypto-assets, when the issuer has not notified a whitepaper according to MiCA with a NCA. We see the need for sufficient investor information based on a whitepaper, but would also suggest that similar whitepaper or information documents might be considered equivalent to MiCA-based whitepapers. Otherwise we see the risk that EU-based crypto-asset service providers might have a competitive disadvantage with non-EU market participants.
- While existing decentralized crypto-assets/ or crypto-currencies might benefit from the grandfathering clause (crypto-assets issued before the entry into force of MiCA will not need to comply, with the exception of asset-referenced tokens ART, and e-money-tokens EMT), future DeFi tokens will not. The DeFi ecosystem is a - if not the - crucial driver of innovation in the crypto space. If the EU wants to enable a thriving EU crypto market and EU crypto-asset service providers to be competitive, it clearly shouldn't put an end to the legality of future DeFi tokens and projects. Nevertheless, this whole concern depends on the definition and interpretation of an “issuer of crypto-assets” who according to MiCA (art. 3 (6)) is “a legal person who offers to the public any type of crypto-asset [...]”. The EU Commission or the EU financial supervisory authorities should clarify that and how decentralized projects don't fall under the definition of a “legal person” and should thus be exempted from the aforementioned regulatory obligations.

Obviously, the difficulty will be the definition and operationalization of “decentralization” criteria. Once established, on the other hand, it would not only provide clarity with regards to decentralized token issuances, but also to decentral-

ized financial services such as decentralized exchanging, borrowing, lending etc. and their applicability within MiCA. Otherwise, projects like Uniswap, Compound, Aave and others are doomed to a long-term regulatory gray area.

Regulation of stablecoins

- We suggest a more precise differentiation of the individual types of stablecoins (asset-referenced tokens and e-money tokens). The definitions of asset-referenced tokens and e-money tokens both provide the following formulation: "...that purports to maintain a stable value by referring to the value of...". We do not consider the term "referring" suitable to actually allow a delimitation of the two types of stablecoins, since there are crypto-currencies like e.g. the Dai from MakerDAO that refers to the dollar as currency 1:1. However, the asset reserve or collateral of Dai does not consist of US Dollars, since Dai are not issued against receipt of US Dollars, but of other Ethereum-based assets that are recognized by MKR (MakerDAO governance token) holders as eligible assets as collateral. In our interpretation, a Dai would be an asset-referenced token and not an e-money token, even if it refers to the value of a US dollar. However, Recital 10 of the MiCA draft could also suggest a different understanding, which would provide for an E-Money Token term "as wide as possible". At some points in the recitals, it seems that the term "backed" is used alternatively, i.e. "secured" instead of "referring". We urge the commission to create clarity here for issuers and the application of the law.
- With regards to e-money tokens it is important to note that certain e-money tokens might need to fulfil requirements from both, the MiCA regulation and at the same time Directive 2009/110/EC. For the sake of clarity, we suggest to reconsider a clear regulation of e-money within one regulatory framework only in order to prevent overregulation or overlapping frameworks.
- With regards to Stablecoins (EMT & ART), we see also the danger of a major competitive disadvantage for EU-regulated trading platforms in the future. Since already existing stablecoins such as DAI or Tether are not expected (to be able) to apply for an EU authorization, they won't be admitted to trading for EU-regulated trading platforms. This disadvantage might not only limit the EU trading platforms in their trading volume and sales (of the trading pairs with the highest trading volumes on most of the biggest crypto trading platforms, most include a stablecoin. Over half of all Bitcoin trades are effectuated with Tether

alone), but also possibly drive EU consumers towards unregulated exchanges in foreign countries.

- Plus, under MiCA's current "significance" thresholds, most of the relevant stablecoins on the market (Tether, USDT, Dai etc.) would currently count as "significant", since they easily exceed criteria such as one billion market capitalization and/or 100 million daily trading volume. That means that they would need to meet additional obligations, e.g. own capital funds of at least 3% of the average amount of the reserve assets (art. 41 (4)). Tether, for example, with currently approximately 19 billion US Dollars backing its stablecoins, would have to hold at least 570 million of own funds. The EU Commission must implement lower and more proportionate "significance" criteria, otherwise the current rules might entirely suppress the EU stablecoin market and damage EU crypto asset service providers.

Further aspects

- We encourage the EU to making sure that the regulatory requirements for crypto asset service providers don't overburden startups and young industry players with too costly and complex requirements, but measures proportionate to the financial risks and volumes dealt with and to the EU's policy objective of enabling and fostering innovation. The EU commission's impact assessment of the proposal currently estimates 35000-75000 EUR one-off costs for the whitepaper, 2.8-16.5 EUR million one-off compliance costs for unregulated entities, plus 2.2-24 million recurrent compliance costs (capital reserves, reportings, IT-security, governance etc.). These financial and administrative burdens could prove insurmountable for some of the younger market participants.
- Regarding the new crypto-asset service providers licenses, it is unclear to us whether those licenses will be transferable to subsidiaries the same way MiFID-licenses are. Regulatory clarity here would be helpful.
- With regards to the PSD2 (or a possible future PSD3), MiCA should provide more clarity towards the implications of PSPs, TPPs, SCA, RTS etc. for crypto-assets and crypto-asset service providers.
- Regarding trade processing by crypto-asset service providers who operate a trading platform: Recital 60 states that crypto-asset service providers should ensure

that transactions executed on their crypto-asset trading platform are processed expeditiously and recorded in the DLT. As certain trading venues allow netting of trade orders and not all orders are executed directly at the DLT level, consideration should be given to whether such execution facilities may continue to be available, provided that proper accounting of individual trade orders and transactions is ensured.

- Financial Market Infrastructures (FMIs) should be considered in the MiCA as a relevant entities to handle assets in scope (Art 63 and Art 64). FMIs should be permitted to deal with the assets in scope of the MiCA (asset-referenced tokens and e-money tokens), alongside banks and crypto-asset service providers. FMIs should also explicitly be allowed to deal with crypto-assets in future (e.g. CCPs to accept crypto-assets as margins or CSDs to offer services on crypto-assets).

Proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology

- As already stated in our position paper on the German legislative proposal for the introduction of electronic securities, we consider the planned EU pilot regime for market infrastructures based on distributed ledger technology to be an important and reasonable way to both enable a young innovative market to develop and obtain necessary regulatory insights into how to develop an appropriate legal framework in the future, while at the same time ensuring consumer protection and security standards.
- Approval of public and private DLT market infrastructures: the draft regulation only explicitly mentions private permissioned DLT systems ("proprietary DLT") in Recital 28 and in Art. 7 (2). Public permissionless DLT is not mentioned. In Art. 4

(2) subparagraph 1 of the draft regulation, a DLT MTF distributed ledger is mentioned: "recorded on the DLT MTF'S distributed ledger". According to Art. 6 (2) of the draft regulation, a DLT MTF shall establish rules for access to the DLT and for the participation of validator nodes. With a view to technology neutrality, we strongly advocate within the framework of a pilot regime that, in addition to closed DLT systems, public permissionless DLTs should also be permitted and that operators of a DLT market infrastructure should be able to use them, if the same level of consumer protection is met.

- Wide scope for action by national authorities: We consider it a reasonable move to try out new possibilities for securities delivery and settlement based on DLT as part of the pilot regime for knowledge and experience gathering. For example, we welcome the fact that DLT MTF operators will be able to obtain, with clear justifications, specific exemptions from existing rules.

Further, we are critical of the competence given to national supervisory authorities under Art. 4 (1) of the draft regulation to impose additional requirements for the granting of a DLT MTF license that the supervisory authority considers appropriate to achieve the regulatory objectives of the standards from whose application an exemption is granted or to ensure the objectives of investor protection, market integrity or financial stability. Although we understand the overall objective, there should not be room for supervisory discretion leading to an unlevel playing field. Instead, we would argue for a certain degree of legal certainty for market participants and for clearer powers of intervention by national supervisory authorities. Referring to Art. 7 (3) of the Pilot Regime, ESMA should have more competences to streamline supervisory practices.

- Role of intermediaries: Under the pilot regime, a DLT MTF will have the opportunity to fulfill several important functions, such as the issuance of a DLT-transferable security, trading, trade settlement and custody. We consider this proposal to be reasonable. In the interest of market openness and with a view to the intermediaries that have already established themselves in the market, such as crypto-custodians and crypto-custodian depository banks, issuers of own issues or also with a view to the introduction of crypto-security register operators in the recent German legislative proposal, we would plead for openness within the DLT ecosystem, so that these participants can also assume roles within these DLT security ecosystems, when compliant with the pilot.

- We highly welcome the possible direct access for retail investors on DLT MTFs. It enables retail investors to participate and engage with technological innovation and benefit from them. Evidently, high consumer protection standards have nevertheless to be guaranteed.
- Overall, we highly appreciate the goal of facilitating DLT-based innovation and thereby acquiring the necessary regulatory expertise. The pilot has the potential to reorganize today's market infrastructures and systems by making use of the latest technological developments, while at the same time keeping high standards for market integrity. Further, we see this pilot regime as a great opportunity to support the objectives and the integration of the Capital Market Union (CMU)
- Generally, the success of the pilot regime will depend on its practical implementation. However, with regard to the proposed volume thresholds, the uncertain continuation of the pilot after maximum 6 years, and the missing interoperability with other market infrastructures due to its closed nature, we are not sure whether the pilot's current conception is economically attractive enough for market participants. We urge the EU Commission to interact and communicate with potential participants in order to ensure the pilot regime's practical success. It is crucial that the thresholds and criteria are evaluated and adapted along the way instead of being fixed from the start. Market participants' experiences might offer new insights on the applicability and impacts of the regime's conditions. After all, this regime will only allow to draw the right lessons and pave the way for necessary regulatory changes, if it is widely used which on the other hand mainly depends on the attractiveness of its conditions.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these mem-

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