Faculty of Law,
Economics
and Finance

Law Working Paper Series
Paper number 2020-018

The Markets in Crypto-Assets Regulation(MICA) and the EU Digital Finance Strategy

Dirk A. Zetzsche, University of Luxembourg
Dirk.Zetzsche@uni.lu

Filippo Annunziata
filippo.annunziata@unibocconi.it

Douglas W. Arner, University of Hong Kong
douglas.arner@hku.hk

Ross P. Buckley, University of New South Wales
ross.buckley@unsw.edu.au

11/11/2020

UNIVERSITÉ DU LUXEMBOURG

EBI Working Paper Series

2020 – no. 77

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06/11/2020

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THE MARKETS IN CRYPTO-ASSETS REGULATION (MICA) AND THE EU DIGITAL FINANCE STRATEGY

Dirk A. Zetzsche,[*] *Filippo Annunziata,*[**]
Douglas W. Arner[***] *& Ross P. Buckley*[****]

ABSTRACT

The European Commission published its new Digital Finance Strategy on 24 September 2020. One of the centrepieces of the Strategy is the draft Regulation on Markets in Crypto-Assets (MiCA), designed to provide a comprehensive regulatory framework for digital assets in the EU.

With MiCA the EU Commission has proposed bespoke regulation for utility tokens and stablecoins including payments tokens, asset-backed tokens and "significant" stablecoins (including "global stablecoins"). As to investment and securities tokens, the EU Digital Finance Strategy relies on the existing body of EU financial and securities law, with the Prospectus Regulation, the MiFID framework as well as the UCITSD and AIFMD at its core, with the intention to incorporate necessary changes as part of the existing ongoing amendment and review processes. MiCA provides for a bespoke prospectus regime for crypto-assets, with the issuing of e-money tokens (i.e. payment tokens), asset-referenced tokens (also known as stablecoins) and crypto-asset services being regulated activities subject to licensing. While supervision of crypto-asset service providers (CASPs) will rest with national authorities, supervision of significant asset-referenced and e-money tokens will rest mainly with the European Banking Authority.

The EU Digital Finance Strategy marks a very important step for the EU in developing both innovation and the Single Market. At the same time, while MiCA is an ambitious legislative project, there is room for improvement. First, the scope of MiCA remains uncertain as the draft MiCA does not clearly delineate between usage tokens subject to MiCA and investment tokens subject to EU securities law. Second, a systematic approach to EU law is absent. Thresholds and concepts known from other EU laws should be firmly embedded in MiCA. Third, a framework for supervisory cooperation with regard to truly global stablecoins is missing.

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[*] Professor of Law, ADA Chair in Financial Law (Inclusive Finance), Faculty of Law, Economics and Finance, University of Luxembourg. Co-Chair, Fintech Working Group, European Banking Institute, Frankfurt.

[**] Professor of Law, Bocconi University, Co-Director Unit Rules Baffi-Carefin Center, Bocconi University. European Banking Institute, Frankfurt.

[***] Kerry Holdings Professor in Law and Director, Asian Institute of International Financial Law, University of Hong Kong.

[****] Australian Research Council Laureate Fellow, Scientia Professor, KPMG Law and King & Wood Mallesons Professor of Disruptive Innovation, UNSW Sydney.

This article benefited from presentations at the Crypto Asset Lab 2020 conference (Milan, Oct. 27, 2020), the University of Venice (Sep. 25, 2020) and the 6th Luxembourg FinTech Conference (Oct. 7, 2020). For helpful comments, questions, and discussions, thanks also to Linn Anker-Sørensen, Robin Veidt, Jannik Woxholth. We also thank Jack Zhou for his research assistance, and the Australian Research Council Laureate Programme and the Hong Kong Research Grants Council Research Impact Fund for financial support.

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I. Introduction

Global stablecoins (GSCs) have attracted significant global political, regulatory and supervisory attention following Facebook's proposal for the creation of Libra – a combination of a private cryptocurrency fixed in value to major fiat currencies mated with its own and other global electronic payment and identification systems.[1] Beyond the high-profile example of Libra and other potential GSCs, the question of regulatory treatment of crypto-assets has been a major focus of regulators and market participants across the world since the launch of Bitcoin in 2009 and in particular in the course of the crypto bubble of 2018.[2] Not only across the world, but also in the context of the EU, legal uncertainty remains, resulting in divergent approaches to crypto-assets, token offerings and stablecoins.

Instead of merely addressing issues and challenges of digital assets, the European Commission took a broader approach to the future development of digital finance and innovation in the EU, and adopted on 24 September 2020 a new Digital Finance Package.[3] The new Digital Finance Package comprises a new Digital Finance Strategy combined with a renewed Retail Payments Strategy, in an effort to "boost Europe's competitiveness and innovation in the financial sector, paving the way for Europe to become a global standard-setter." By pursuing enhanced

[1] See Dirk Zetzsche, Ross Buckley & Douglas Arner, *Regulating Libra*, OJLS (forthcoming).
[2] See Dirk Zetzsche, Ross Buckley, Douglas Arner & Linus Föhr, *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators,* (2019) 60(2) HARV. INT'L L. J. 267.
[3] Financial Stability, Financial Services and Capital Markets Union, European Commission, "Communication on Digital Finance Package" (24 September 2020) <https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en>.

consumer choice, while at the same time ensuring consumer protection and financial stability, the Commission "aims to boost responsible innovation in the EU's financial sector, especially for highly innovative digital start-ups, while mitigating any potential risks related to investor protection, money laundering and cyber-crime".

The new Retail Payments Strategy builds on previous (largely successful) efforts in developing the Single European Payments Areas (SEPA) and focuses on furthering digitalization in EU retail payments.[4] In particular, it seeks to support cross-border European payment solutions, further develop a competitive and innovative payments market, support the development of better payments infrastructure, and support more efficient international payments including through the use of the euro.

Our focus is the other component of the Digital Finance Package:, the new Digital Finance Strategy.[5] The Digital Finance Strategy (DFS 2020) provides a very broad and comprehensive framework for future reforms to further the development of digital finance in the EU. The DFS 2020 focuses on four major objectives:

- removing fragmentation in the Digital Single Market;
- adapting the EU regulatory framework to facilitate digital innovation;
- promoting data-driven finance; and
- addressing the challenges and risks with digital transformation, including enhancing the digital operational resilience of the financial system.[6]

While some of its building blocks were sketched out in the EU Commission's FinTech Action Plan of 2018,[7] the DFS 2020 is a strong and comprehensive move forward. In particular, the DFS 2020 promises new proposals on prudential regulatory treatment of crypto-assets, on SME financing, and on the role of distributed ledger technology (DLT) and the Internet of Things (IoT) in the new EU Sustainable Finance Taxonomy. It also provides support for a possible central bank digital currency (CBDC) from the European Central Bank (ECB), the subject of a separate ECB report published later the same week.[8]

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[4] European Commission, Communication on a Retail Payments Strategy for the EU (Communication) COM (2020) 592 final.

[5] European Commission, Communication on a Digital Finance Strategy for the EU (Communication) COM (2020) 591 final.

[6] Ibid.

[7] European Commission, Communication on a FinTech Action Plan: For a More Competitive and Innovative European Financial Sector (Communication) COM (2018) 109 final.

[8] European Central Bank, Report on a Digital Euro (October 2020) <

The DFS 2020 further focuses on risks. In addition to consumer and investor protection, the DFS 2020 frames a new approach to financial stability, based on the principle of "same activity, same risk, same rules", in contrast to approaches focusing on certain technologies rather than economic functions. It also addresses TechRisks[9] through a new proposed Regulation on Digital Operational Resilience ("DORA"). DORA aims 'to ensure that all participants in the financial system have the necessary safeguards in place to mitigate cyber-attacks and other risks. The proposed legislation will require all [financial] firms to ensure that they can withstand all types of Information and Communication Technology (ICT)-related disruptions and threats.' The DORA proposal also introduces an oversight framework for ICT providers, such as cloud computing service providers.

At the core of the EU Digital Finance Package, however, lie the legislative proposals for an EU regulatory framework on crypto-assets to support passporting for innovative startups across the EU including in relation to crypto-assets. This includes both the proposal for a new Regulation on Markets in Crypto-Assets (MiCA)[10] as well as a new proposal for a Regulation on a Pilot Regime for Market Infrastructures Based on Distributed Ledger Technology (DLT Infrastructure Regulation).[11] While MiCA deals with crypto-assets (understood as "a digital representation of values or rights that can be stored and traded electronically") the DLT Infrastructure Regulation will introduce a so-called 'sandbox' approach for DLT-based market infrastructures, allowing temporary derogations from existing rules to assist regulators' gaining of experience.

MiCA is the EU's response to the policy debate prompted by the Libra proposal in June 2019. The question as to whether the market for crypto-assets ought to be regulated under EU law is moving towards an unequivocal affirmative answer. The instrument chosen (a Regulation) speaks clearly to the seriousness of regulatory intentions. Its intention is, effectively, to fill a major regulatory gap and ensure a harmonized approach to crypto-assets across the EU Single Market. The dance floor is therefore open, a political agreement will need to be reached, and what happens in the coming months will tell us whether the EU will effectively be able to draft its rules on crypto-assets in order to become (or not) a *parterre de Rois*.

This article introduces the motives and background of MiCA and

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https://www.ecb.europa.eu/pub/pdf/other/Report_on_a_digital_euro~4d7268b458.en.pdf >.

[9] See Ross Buckley, Douglas Arner, Dirk Zetzsche & Eriks Selga, *Special Feature: Techrisk* [2020] SING JLS 35.

[10] European Commission, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and Amending Directive, COM (2020) 593 final.

[11] European Commission, Proposal for a Regulation of the European Parliament and of the Council on a Pilot Regime for Market Infrastructures Based on Distributed Ledger Technology, COM (2020) 594 final.

provides some critical reflections to be considered in the forthcoming legislative procedure. It is structured as follows: Part II summarizes the regulatory difficulties when dealing with token offerings and argues that token offerings in general, and global stablecoins in particular, have become too important an issue to be ignored. Part III provides an overview of MiCA's content and summarizes its approach. While details will be left to further discussion, Part IV lays out our main concerns including uncertainty as to MiCA's scope; the lack of connection of MiCA to existing EU financial law and its focus on regional concerns; and the building of barriers to a truly global stablecoin regulatory regime (even if MICA proves to be well-regulated and supervised).

II. Crypto-assets as a Regulatory Challenge

1. Three Categories of Crypto-assets

Given that crypto-assets can be designed in a variety of ways and entail the ownership of a variety of rights, ranging from a financial interest in a company to purely non-financial rights, academic analysis tends to place crypto-assets into one of three categories.[12]

Utility tokens grant some sort of access or right(s) to use a company's ecosystem, goods or services.[13] Utility tokens may also provide holders with governance rights in the issuing company, such as the right to vote for updates in the functional structure, and otherwise shape the future of issuing entities. These kinds of tokens often resemble the pre-payment of license fees or crowdfunding sales on websites such as Kickstarter.[14] A utility token falling into these schemes is not usually considered a traditional security or financial product: its aim is not to create future cash flows but rather enable functional use of a blockchain-based ecosystem.[15]

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[12] See Iris M. Barsan, *Legal Challenges of Initial Coin Offerings* (2017) 3 RTDF 54, 62 (identifying only "currency like" and "security like" tokens); Philipp Maume & Mathias Fromberger *Regulations of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws,* (2019) 19 CHIC. J INT'L L. 548, 558; Zetzsche/Buckley/Arner/Föhr (n 2), at 276. See also the distinction between "app tokens" and "protocol tokens" by Jonathan Rohr & Aaron Wright, *Blockchain- Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets,* (2019) 70 HASTINGS L.J. 463, 469.

[13] Thomas Bourveau, Emmanuel T. De George, Atif Ellahie & Daniele Macciocchi, *Initial Coin Offerings: Early Evidence on the Role of Disclosure in the Unregulated Crypto Market* 12, 18 (2018) <https://www.marshall.usc.edu/sites/default/files/2019-03/thomas_bourveau_icos.pdf>.

[14] Sabrina T. Howell, Marina Niessner & David Yermack, *Initial Coin Offerings: Financing Growth with Cryptocurrency Token Sale* 9, ECGI Finance Working Paper 564/2018.

[15] Lars Klöhn, Nicolas Parhofer & Daniel Resas, *Initial coin offerings (ICOs),* [2018]

Security/financial/investment tokens are tied to an underlying asset and represent a fractional ownership of the overall value of the asset, albeit not of the asset itself (e.g. a firm, real estate or collectibles). They offer rights to future profits and are typically treated under financial regulatory regimes as financial products, securities, financial instruments, derivatives or collective investment schemes.

Currency/payment tokens in their pure form fulfil the economic criteria of money, which are to serve as a means of exchange, storage of value, and unit of account.[16] Famously represented by Bitcoin, currency tokens have lately grown more diverse and now include stablecoins like Libra.[17]

Many current and forthcoming regulatory approaches follow these three categories.[18] In Europe, the Swiss Financial Market Supervisory Authority (FINMA) used these categories in the new Swiss DLT Law of 2020.[19] The Maltese regulation specifically focused on crypto-assets from June 2018, yet its scope is narrow: it does not cover electronic money, financial instruments, or utility tokens. The Liechtenstein Token and Trusted Technology Service Provider Act (TVTG) of January 2020 does not focus only on cryptocurrencies, but also addresses trustworthy technology (TT) systems and tokens in general, as well as issues of ownership, registration, and transfer of assets.

After the French *Autorité des marchés financiers* (AMF) noted in Fall 2017 that tokens rarely fall into any of the three major categories of financial instruments set forth in Article L. 211-1 of the *Code Monétaire et Financier,*[20] Parliament voted in April 2019 to insert a new chapter in the *Code Monétaire et Financier*, that *only* applies to the so-called *jeton d'usage* (i.e. if the token does not qualify as a financial instrument). However, unlike in Liechtenstein, French issuers are free to decide whether to carry out a regulated offer of tokens, subject to AMF approval, or to proceed without the French authority's approval. An equivalent opt-in

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Zeitschrift für Bankrecht und Bankwirtschaft, 89, 102. But see Dmitri Boreiko, Guido Ferrarini & Paolo Giudici, *Blockchain Startups and Prospectus Regulation,* (2019) 20 EUR. BUS. ORG. L. REV. 665, 672 (arguing that almost all ICO tokens would qualify as financial instruments).

[16] Benjamin Geva, *Cryptocurrencies and the Evolution of Banking, Money, and Payments*, in Chris Brummer (ed.), *Cryptoassets: Legal, Regulatory, and Monetary Perspectives* (OUP 2019) 12.

[17] On Libra, see Zetzsche/Buckley/Arner (n 1).

[18] Appoline Blandin, Ann Sofie Cloots, Hatim Hussain, Michel Rauchs, Rached Saleuddin, Jason G. Allen, Bryan Zheng Zhang & Katherine Cloud, *Global Cryptoassets Regulatory Landscape Study* (2019), U Cambridge Fac. L Res. Paper No. 23/2019, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379219.

[19] See Swiss Financial Market Supervisory Authority, "Federal Council wants to further improve framework conditions for DLT/blockchain" (27 November 2019) <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-77252.html>.

[20] AMF, Discussion Paper on Initial Coin Offerings (ICOs) (26 October 2017).

system for tokens that do not qualify as financial instruments or financial products has been under discussion in Italy, where the Authority for Financial Markets (Consob), issued the results of a consultation in March 2019.[21] It is likely that this proposal, albeit interesting, will now be superseded by MiCA.

Despite its advantages, the three categories bring uncertainties in legal systems with a comprehensive definition of ”security” or ”financial product” which is wider than the narrow categories of EU Capital Markets Legislation. This is the case for the U.S. under the Howey test (after the leading case *SEC vs. Howey* of 1946[22]), and in Italy, where a broad definition of ‘”financial product” is provided by law in addition to EU categories. This may explain why the SEC has been using enforcement actions, public statements and no-action letters in order to provide guidance in employing a functional, Howey-like approach on a case-by-case basis.[23]

2. Risks Created by Crypto-assets

Crypto-asset token offerings create various risks, with the specific type of risk depending on the nature of the token in question. Financial regulation seeks to address these risks as they relate to financial markets and systems: financial stability, market integrity, client/investor protection and market efficiency are core concerns of financial regulation.

While payment and securities tokens, for instance, create risks for investors and clients, market efficiency and market integrity, they are usually of less concern from a financial stability perspective given that most token offerings are small compared to the size of the financial system. At the same time, the potential for the emergence of global stablecoins – with Facebook’s Libra being the most notable example – raises much greater and different concerns, as stablecoins have the potential to reach globally systemic dimensions from a financial stability perspective. Tokens are also often structured as hybrids with payment, securities and utility

[21] CONSOB, “Le offerte iniziali e gli scambi di cripto-attività” (19 March 2019) <http://www.consob.it/documents/46180/46181/doc_disc_20190319.pdf/64251cef-d363-4442-9685-e9ff665323cf>.

[22] *SEC v. Howey Co.*, 328 U.S. 293 (1946) (“*Howey*”). See also *SEC v. Edwards*, 540 U.S. 389 (2004); *United Housing Found, Inc. v. Forman*, 421 U.S. 837 (1975) (“*Forman*”); *Tcherepnin v. Knight*, 389 U.S. 332 (1967) (“*Tcherepnin”); SEC v. C. M. Joiner Leasing Corp., 320 U.S. 344 (1943) (“Joiner”)*. For a detailed analysis see JOHN C. COFFEE & HILLARY A. SALE, SECURITIES REGULATION - CASES AND MATERIALS 247-269 (12th ed., 2012).

[23] See William Mougayar, ‘While We Wait for Laws, We Need Better Interpretations of Existing Regulation’ (Coin-Desk, 4 January 2020), https://www.coindesk.com/while-we-wait-for-laws-we-need-better-interpretations-of-existing-regulation, last accessed 5 January 2020 (arguing that the results are difficult to determine).

characteristics, with risks mutating over time depending on a number of internal and external factors. This renders the risk assessment relating to crypto-assets a particular challenge.

In line with important voices in the policy and academic worlds, most supervisory authorities have seen a need to intervene. For instance, with regard to global stablecoins, the FSB analysed the financial stability perspective in its October 2020 report,[24] while IOSCO addressed certain investor protection aspects relating to stablecoins generally in March 2020[25] and the FATF provided recommendations on how to deal with "so-called stablecoins" in July 2020.[26]

3. Ambiguity and Legal Uncertainty

In light of the need to provide appropriate regulatory responses to the emergence of crypto-assets and token offerings, supervisory authorities have faced the problem of finding the legal basis upon which they are allowed to intervene. In this regard, different competent authorities in the EU have applied different definitions of core concepts of EU financial law. There is significant disagreement as to the qualification of certain token types among various regulators in the EU and the EU member states (which all applied substantially the same EU financial law): for instance, depending on country and regulator, stablecoins may be qualified as financial instruments, transferable securities, derivatives, collective investment schemes, units of account, e-money, commodities, and/or deposits, depending both on the exact design of the instrument as well as upon the details of the relevant legal and regulatory system.[27]

In financial regulation the classification of instruments and transactions determines which body of law will apply, and which supervisory powers a competent authority may exercise. Further, in the Single European Financial Market, uncertain classifications based on uncertain definitions create the potential for regulatory arbitrage, in which financial intermediaries seek out the most favourable regulatory environment – potentially at the cost of effective financial supervision. Other implications stemming from non-harmonised classifications of tokens relate to valuation for tax purposes, identification of ownership for anti-money laundering purposes and the application of data protection rules

[24] FSB, "Regulation, Supervision and Oversight of "Global Stablecoin" Arrangements" (13 October 2020) < https://www.fsb.org/2020/10/regulation-supervision-and-oversight-of-global-stablecoin-arrangements/>.

[25] IOSCO, "Global Stablecoin Initiatives" (OR01/2020, March 2020) < https://www.iosco.org/library/pubdocs/pdf/IOSCOPD650.pdf>.

[26] Financial Action Task Force, "FATF Report to G20 on So-called Stablecoins" (June 2020) <https://www.fatf-gafi.org/media/fatf/documents/recommendations/Virtual-Assets-FATF-Report-G20-So-Called-Stablecoins.pdf>.

[27] See Vlad Burilov, *Regulation of Crypto Tokens and Initial Coin Offerings in the EU*, (2019) 6(2) EUR. J. COMP. L. & GOV. 146 (arguing that EU regulators shall first ensure legal certainty by defining the scope of tokenised financial instruments).

(GDPR). Reducing ambiguity and enhancing legal certainty is thus a major regulatory objective in itself.

III. MiCA's Bespoke Regulatory Approach

Title I of MiCA details its scope and definitions. It introduces the key terms including definitions for crypto-assets, asset-referenced tokens and e-money tokens. As often in financial law, these parts are crucial and will be discussed further below.

Title II to IV provide the core of MICA, the rules on *issuers* of crypto-assets. Title III deals with asset-referenced tokens (ARTs) which, as we analyze below, is the EU term for stablecoins, including "significant ARTs" (SARTs), the EU term for GSCs, while Title IV provides the rules for e-money tokens (EMTs) (which is the term for payment tokens that do not qualify as asset-referenced token), with "significant EMTs" being the term of very large EMTs. As is apparent from Article 2(2), MiCA anticipates the existence of EU financial law for financial instruments, e-money and structured deposits. In this regard, MiCA does not apply.

Title II can thus be understood as a general part of MiCA for all crypto-assets not belonging in the previous categories. Its scope is essentially limited to utility tokens and other non-financial instruments.

This results in the following hierarchy: payment tokens [SART/SEMT > ART> EMT] > Crypto-assets (that is, utility tokens).

Figure 1: Concept of MiCA

Token Type	**Regulatory Focus**	**Tool**	**Supervision**
Significant ART & EMT	Systemic Risk	Additional own funds, EBA supervision	EBA
Payment Tokens (ART & EMT)	Market Integrity, Investor / Client Protection	Authorization, Reserve & Safeguarding Rules, Own Funds, Disclosure	NCA (EBA)
Utility tokens (crypto-assets)	Investor / Client Protection	Disclosure	NCA
Investment Tokens	Systemic Risk, Market Integrity, Investor / Client Protection	EU financial law	NCA, ESMA

While ART and EMT issuers will be subject to a licensing and authorization requirement as well as certain operating conditions, the general part in Title II of MiCA on crypto-assets merely focuses on enhanced disclosure

Title V provides general authorization and operating requirements for certain *service providers* to crypto-assets. Title VI, also quite general, foresees rules to prevent market abuse, while Title VII stipulates the supervisory competencies of national competent authorities (NCAs) for ART and EMT issuers, the competencies of the European Banking Authority (EBA) for SARTs, and joint competency with NCAs for significant EMTs. The remainder of MiCA deals with legislative technique

in Titles VIII and IX.

It thus follows that the structure of the draft MiCA is articulated around two different concepts: on the one hand, there are rules applicable to crypto-assets that belong to the world of, or are similar to, payment instruments and e-money, including stablecoins; on the other hand, MiCA provides rules applicable to any and all crypto-assets that are not already within the scope of existing EU financial markets legislation, including tokens that are not intended to offer any kind of financial investment or return (commonly referred to as utility tokens).

We will briefly sketch out the rules for the second group, before we focus more in detail on the first group.

1. Issuers of Utility Tokens: Disclosure

Title II MiCA applies to issuers of crypto-assets other than ART or EMT issuers.

a. Crypto-assets, in particular, Utility Tokens

'Crypto-asset' is defined as a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger or similar technology (Article 3(1) No. 2 MiCA). However, MiCA does not apply to crypto-assets qualifying as financial instruments, e-money, deposits, and structured deposits or securitized assets. Thus, MiCA applies only to crypto-assets not subject to other EU financial law.

Such a regulatory approach makes sense if the terms used are clearly defined and their limits clearly established. However, as we will demonstrate in more detail infra (at IV.1.), this is not the case - which has certain repercussions for MiCA's application.

Further, while ART and EMT meet the definition of crypto-assets they are subject to bespoke disclosure rules in Title III and IV MiCA. In essence, Title II MiCA only applies to so-called utility tokens.

b. Disclosure rules

Pursuant to Article 4(1) MiCA, no issuer of crypto-assets other than AMTs or EMTs, shall, in the Union, offer such crypto-assets to the public, or seek an admission of such crypto-assets to trading on a trading platform for crypto-assets, unless that issuer:

- is a legal entity (which can reside inside or outside the European Economic Area). For issuers established in a third country, jurisdiction lies with the competent authority of the Member State where the crypto-assets are intended to be offered or where the admission to trading on a trading platform for crypto-assets is sought in the first place (Recital 7);

- has drafted a crypto-asset white paper that complies with Article 5 MiCA;
- has given notice of that crypto-asset white paper to the competent authority and published it,
- has ensured that funds provided to the crypto-asset offering are safeguarded and segregated until the thresholds are met, and
- complies with basic conduct of business rules laid down in Article 13 MiCA.[28]

Marketing information must be clearly marked as such and refer to the white paper. Further, issuers assume liability for non-disclosure and wrongful disclosure under Article 14 MiCA.

The MiCA disclosure, conduct and liability rules on the white paper are in principle prospectus requirements that seek to address the inadequate disclosures, misrepresentations and fraud currently often observed in certain initial coin offerings.[29] Additionally, the fact that implementing powers in Title II MiCA are vested into ESMA underlines the similarity between a prospectus and a white paper.[30] In return for complying with MiCA, white paper issuers benefit from a European Passport in regard to that crypto-asset (Article 10 MiCA), which thereby opens a Single European Market for the token industry.[31]

c. Ex post Accountability?

Contrary to established prospectus rules, the white paper is not subject to any preliminary check or approval by any supervisors: Article 7(1) MiCA explicitly prohibits an *ex ante* approval requirement.[32] Article 82(1)(l) to (x) in connection with Art. 7(2) MiCA however requires that the white

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[28] These rules require the issuer to (a) act honestly, fairly and professionally; (b) communicate with the holders of crypto-assets in a fair, clear and not misleading manner; (c) prevent, identify, manage and disclose any conflicts of interest that may arise; (d) maintain all of their systems and security access protocols to appropriate Union standards.

[29] See Zetzsche/Buckley/Arner/Föhr (n 2) at 304.

[30] See Rec. (17) MiCA, where the *vis attractiva* of the prospectus results in an improper citation, that confuses white paper and prospectuses: "Beyond the obligation to draw up a prospectus, issuers of crypto-assets should be subject to other requirements."

[31] Cf. Art. 7(3) and 10 MiCA.

[32] For instance, Art. 4(2) MiCA exempts from the obligation to publish a white paper similar to conditions set out in Art. 1 (3) to (6) EU Prospectus Regulation, e.g. when the crypto-assets are offered for free; or the crypto-assets are automatically created through mining as a reward for the maintenance of or validation of transactions on a or similar technology; or the crypto-asset is unique and not fungible with other crypto-assets; or the offering of crypto-assets is addressed to fewer than 150 natural or legal persons per Member State acting on their own account; the total consideration of such an offering in the Union does not exceed EUR 1,000,000; the corresponding equivalent in another currency or in crypto- assets, over a period of 12 months; the offering of crypto-assets is solely addressed to qualified investors and the crypto-assets can only be held by such qualified investors.

paper is posted with the competent authority twenty days prior to the offer and gives the power to intervene before and after the offer is under way. Competent authorities are therefore allowed to carry out supervisory functions before and after the publication of the white paper. MiCA justifies this unusual approach with the need to avoid placing an excessive burden upon competent authorities. This, *per se*, seems a weak justification as in other respects MiCA mirrors the approach to be found in the EU Prospectus Regulation.[33]

We take issue with this approach: mere *ex post* enforcement and accountability through liability does not really seem sufficient to ensure adequate levels of integrity and confidence in the market. Customers receiving various versions of the white paper due to *ex post* interventions may find themselves confused. Only public authorities' *ex ante* review - coordinated by ESMA - can ensure a harmonized application of MiCA (see infra, at IV.1.). We propose to clarify that an ex ante review by competent authorities must take place.

2. Issuers of Payment Tokens: Regulation

Issuers of ARTs and EMTs are subject to regulation under Title III and IV MiCA.

a. Definitions

ARTs are crypto-assets that purport to maintain a stable value by referring to the value of one or several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets.[34] In short, these are tokens referencing a basket of currencies, commodities and/or crypto-assets. The proposed global stablecoin Libra would qualify as an ART.

EMTs in turn are crypto-assets whose main purpose is to be used as a means of exchange and that purport to maintain a stable value by referring to the value of a fiat currency that is legal tender.[35] Examples include a 1:1 tokenized currency like EURS – the Euro Stablecoin. Given that an EMT is referenced to only one fiat currency, an EMT cannot qualify as an ART.

b. Authorization and Operating Conditions

Title III and IV MiCA set authorization requirements and operating conditions for ART and EMT issuers. While a bespoke authorization requirement is set for ART issuers, EMT issuers must be credit institutions

[33] See Rec. (19).
[34] Cf. Art. 3(1) No. 3 and Rec. 9 MiCA.
[35] Cf. Art. 3(1) No. 4 and Rec. 9 MiCA.

or e-money institutions under the CRD or the E-Money-Directive.[36] The regulation further foresees some modifications to the minimum prospectus content and ongoing disclosure rules (Articles 17, 21, 22, 24-26, 46 MiCA) and some standard conduct of business, including conflict rules (Articles 23, 28 MiCA), governance requirements (Articles 30 MiCA) and rules on acquisitions (Articles 37, 38 MiCA). These are all known from other pieces of EU financial law, for instance Prospectus Regulation, MiFID, the Financial Holding Directive, the CRD and the E-Money-Directive (which applies to EMT issues by virtue of Article 46(1) MiCA) and will not be discussed here in detail.

The bespoke core of MiCA relates to the own funds' requirements, the handling of the reserve and investor rights.

i. Own funds

As to own funds**,** ART issuers need to put up EUR 350,000 plus 2% of the average amount of the average reserve assets in the last six months in Tier 1 capital as defined by Articles 26-30 CRR. That means, for an overall volume of EUR 10 billion the issuer must set aside EUR 200 million in unencumbered, high quality capital, typically consisting of issuers' shareholders' equity (Article 31 MiCA). MiCA vests power into competent authorities to increase or lower the own funds requirement by 20% depending on the quality of risk management, complexity and a number of other factors. In setting these requirements, the MiCA apparently looked at Article 5 E-Money-Directive 2009/110/EC for e-money institutions which also applies to EMT issuers pursuant to Article 43 (1) MiCA. Given that own funds must be, in principle, in triple-A securities and central bank accounts, they cannot be used for other investment purposes or the further development of the ART systems.

ii. Reserve of Assets or Safeguarding

ART issuers must maintain a reserve of assets; issuers that issue several token types must provide one reserve for each token type, segregated from the other reserves. The reserve must be prudently managed. Any creation and destruction of ARTs must be matched by a corresponding increase or decrease in the reserve of assets while ensuring the smooth market in the ART.

Part of the reserve requirements is a *stabilization mechanism* which includes:

[36] Council Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, [2009] OJ L 267/7.

- a list of the reference assets which the ART uses to stabilize token value and the composition of such reference assets;
- a determination of the type, and precise allocation, of the assets included in the reserve assets;
- a detailed assessment of the risks, including credit risk, market risk and liquidity risk resulting from the reserve assets;
- the procedure by which the ARTs are created and destroyed, and the consequence of such creation or destruction on the reserve assets;
- details of whether and how the reserve assets are invested;
- when part or all of the reserve assets are invested, a detailed description of the investment policy and assessment of the impact of the policy on the value of the reserve assets; and
- a description of the procedure by which ARTs will be purchased and redeemed against the reserve assets, and list the persons or categories of persons who are entitled to do so.

The reserve must be put into segregated custody at well-chosen and qualified credit institutions, investment firms or crypto-asset service providers (Article 33 MiCA). This is to protect the reserve assets against claims of the issuers' and custodians' creditors. In case of a loss the custodian must return to the ART issuer an asset of identical type to that lost. The reserve custodian will not have to do so where it can prove the loss arose as a result of an external event beyond its reasonable control, and the consequences of which would have been unavoidable despite all reasonable efforts.[37]

Reserve assets must be invested in highly liquid financial instruments with minimal market and credit risk which are capable of being liquidated rapidly with minimal adverse price effects, with the EBA to determine the details (Article 34 MiCA). All profits or losses, including fluctuations in the value of the financial instruments, and any counterparty or operational risks that result from the investment of the reserve assets, should be internalized by the ART issuer.

While EMT issuers do not need to provide for a reserve, they are subject to the safeguarding requirements of Article 7 of the E-Money-Directive which itself refers to Article 10 of the Payment Services Directive (EU) 2015/2366 (PSD2). Under those provisions, similarly to the rules for the ART reserve:

> funds shall not be commingled at any time with the funds of any natural or legal person other than payment service users on whose behalf the funds are held and, where they are still held by the payment institution and not yet delivered to the payee or transferred to another payment

[37] The later language stems from the EU legislation on investment fund depositaries, in particular Article 21 (12) AIFMD and Article 24(1) UCITSD.

> service provider by the end of the business day following the day when the funds have been received, they shall be deposited in a separate account in a credit institution or invested in secure, liquid low-risk assets as defined by the competent authorities of the home Member State; and they shall be insulated in accordance with national law in the interest of the payment service users against the claims of other creditors of the payment institution, in particular in the event of insolvency.

An insurance policy or similar safeguards must cover those funds. Article 49 MiCA prohibits the assumption of FX risks for funds received in exchange for EMT and invested in secure, low-risk assets under Article 10 PSD2.

iii. ART and EMT Holders' Rights

For crypto-asset holders' rights, MiCA follows a mixed approach. While Article 35 MiCA relies, in principle, on contractual stipulations it also sets certain minimum requirements to protect in particular ART holders. ART issuers must in detail determine:

- conditions, including thresholds, periods and timeframes, for holders of asset-referenced tokens to exercise those rights;
- redemption mechanisms under ordinary and extraordinary circumstances;
- valuation policy;
- settlement conditions and
- fees applied by ART issuers for exercising those rights.

MiCA requires such fees to be proportionate and commensurate with the actual costs, and where ART issuers do not grant rights to *all* ART holders, the implementation of detailed policies and procedures may determine the natural or legal persons who do receive such rights. If this is the case, the ART issuer must put in place a liquidity mechanism to ensure the ARTs are liquid in lieu of redemption. Where the market price of the ARTs varies significantly from the value of the reference assets or the reserve assets, notwithstanding that the issuer has not granted such a right contractually, ART holders will have the right to redeem ARTs from the issuer directly at proportionate and commensurate fees. Finally, the issuer must provide for the procedure that will apply upon a winding-up or other cessation of its operations.

For EMT issuers, Article 44 MiCA foresees bespoke regulation that deviates from Article 11 E-Money-Directive. Article 44 MiCA grants EMT holders a statutory claim against the EMT issuer. Issuers must issue EMTs only at par value and on the receipt of funds as defined by Article 4(25) PSD2. Upon request by the EMT holder the respective issuer must redeem, at any moment and at par value, the monetary value of the EMTs held in cash or credit transfer. Redemption conditions and fees must be disclosed

and be set only proportionately and commensurately with the actual costs incurred by issuers of e-money tokens. If the redemption request is not met within 30 days the EMT holder can turn to the custodian safeguarding the funds and/or any EMT distributor acting on behalf of the issuer. No doubt, this sets the circle of potential defendants very wide, but responds to the widespread abuses endemic to the token world.[38]

Both ART and EMT issuers are prevented from paying interest or any other benefit to ART holders related to the length of time the holder holds its ART (Article 36 and 45 MiCA). That requirement mirrors Article 12 E-Money-Directive. Recital 41 MiCA explains that the prohibition of interest should ensure ART are mainly used as a means of exchange and not a store of value. In other words, it is an attempt to ensure ARTs and EMTs are payment, rather than securities/investment, tokens: the prohibition seeks to avoid a circumvention of EU securities law, given that the promise to pay interest may mix up the criteria for currency and bonds (where only bonds are subject to securities regulation).

c. Significant Payment (ART and EMT) Tokens

Prevention and control of systemic risk is the rationale behind the regulation of significant ART (SART) and EMT (SEMT) issuers.

The assessment of significance is performed by EBA. For that purpose EBA must consider a number of criteria, including:

- size of the customer base, the shareholders of the issuer of ARTs or of any of the third-party entities (whatever this is);
- value of the ARTs or market capitalization of all ARTs of that type;
- number and value of transactions;
- amount of reserve assets;
- significance of cross-border activities; and
- interconnectedness with the financial system.

Once classified as significant, SART and SEMT issuers are subject to the supervision of the EBA pursuant to Articles 98 et seq MiCA. Further, SART and SEMT issuers are subject to the specific risk management requirements of Article 41 and 52 MiCA including, for instance:

- a remuneration policy that promotes sound and effective risk management;
- the duty to diversify custody of crypto-assets;
- for SARTs the duty to establish, maintain and implement a liquidity management policy and procedures so as to ensure the reserve assets

[38] cf Lars Hornuf, Theresa Kück, Armin Schwienbacher, "*Initial Coin Offerings, Information Disclosure, and Fraud"*, CESifo Working Paper No. 7962 (2019)<https://ssrn.com/abstract=3498719>.

have a resilient liquidity profile that enables issuers of SARTs to continue operating normally, including under liquidity stressed scenarios; and
- importantly for SARTs, an enhanced own funds requirements of 3% of the average amount of the reserve assets.

3. Crypto-asset Service Providers

Title V regulates crypto-asset service providers (CASPs).

a. Definition

Article 3(1) No. 9 MiCA defines "crypto-asset service" exclusively as comprising:
- custody and administration on behalf of third parties;
- operation of a trading platform;
- exchange of crypto-assets for fiat currency that is legal tender or for other crypto-assets;
- execution of orders for crypto-assets on behalf of third parties;
- placing of crypto-assets;
- reception and transmission of orders on behalf of third parties; and
- providing advice on crypto-assets.[39]

While this provision follows examples such as those in the MiFID annex I.A. for investment services, a few details of this list surprise. For instance, while the exchange of crypto-assets for fiat currency that is legal tender or for other crypto-assets is covered, the exchange of crypto-assets for financial instruments is not. Further, portfolio management of crypto-assets – an activity undertaken by many emerging crypto-asset funds – is missing.[40] In order to ensure consistency with MiFID, we recommend the full adoption of the MiFID annex.

b. Authorization and Operating Conditions

While Articles 53 to 58 MiCA provide standard procedures for authorization by the providers' home competent authority, Articles 59 to 66 MiCA provides standard conduct of business rules. The only bespoke aspects noticeable relate to the own fund requirements in Annex IV MiCA. Own funds are required in an amount of EUR 50,000 to 150,000 plus a quarter of the preceding (or, if not available, projected) annual fixed costs (in particular staff costs) plus an insurance policy for operational risk (Article 60 MiCA).

[39] See the definitions in Art. 3(1) No. 10-17 MiCA.

[40] See Dirk Zetzsche, John Lore & Roberta Consiglio, *Digital Asset Funds*, in Dirk Zetzsche (ed), *The Alternative Investment Fund Managers Directive*, (3rd ed., Kluwer 2020), 627.

Articles 67 to 73 MiCA set bespoke requirements by type of service provider. The most stringent of these rules relate to custody services. Pursuant to Article 67 MiCA crypto-custodians, that is the entities safeguarding crypto-assets, must:

- maintain a register of positions in the name of each client;
- set up and implement a custody policy with internal rules and procedures to ensure the safekeeping or control of such crypto-assets, or the means of access to the crypto-assets, such as cryptographic keys, to ensure that the crypto-asset service provider cannot lose clients' crypto-assets or the rights related to those assets due to fraud, cyber threats or negligence;
- facilitate the exercise of the rights attached to the crypto-assets, and record any event likely to create or modify the client's rights in the client's position register as soon as possible;
- provide clients at least every three months and upon request from them, a statement of positions including crypto-assets, their balance, value and transfers made during the relevant period; and
- segregate holdings on behalf of their clients from their own holdings, and ensure that, on the DLT, their clients' crypto-assets are held on separate addresses from those on which their own crypto-assets are held.

Article 67 (8) MiCA addresses the wide-spread losses in the crypto industry in rigorous terms, providing that '[CASPs] that are authorized for the custody and administration of crypto-assets on behalf of third parties shall be liable to their clients for loss of crypto-assets (…) resulting from a malfunction or hacks up to the market value of the crypto-assets lost.' This is an extremely strict rule as to liability. As laid out above, even UCITS depositaries and custodians safeguarding ART and EMT funds and reserve assets (that is assets other than crypto-assets) need not cover losses when the depositary/custodian can prove the loss has arisen as a result of an external event beyond its reasonable control the consequences of which would have been unavoidable despite all reasonable efforts to the contrary (*force majeure*).

Such a strict liability rule will make crypto-custodianship a risky business and render the establishment of well-funded crypto-custodians within EU/EEA territory difficult. We thus recommend that liability for losses beyond the custodian's reasonable control be limited, in line with established *force majeure* principles.

IV. Room for Improvement

We see room for improvement in three respects: the scope, the integration into the existing body of financial law and the supervisory approach to global stablecoins.

1. Scope

As was pointed out, MiCA relies on the distinction between investment tokens (being subject to general EU financial law on financial instruments), payment tokens (subject to Title III and IV MiCA) and utility tokens (subject to Title II MiCA).

a. Limits of the Categorization

In fact, the classification works for many tokens:

(i) if a token qualifies as a (mere) instrument of payment, it is clearly *not* a financial instrument for MiFID purposes;

(ii) many tokens will readily be classified as "transferable securities",[41] as this is typically an issue of ascertaining whether a token is functionally similar to a share, debenture, or another like instrument. Since the comparison benchmark is usually identifiable under general company or securities law of that Member States, the exercise, most of the time, is not overly difficult, and the results usually acceptable;

(iii) some tokens might, ultimately, qualify as units of collective investment undertakings (CIUs) referred to in Annex I, Section C(3) MiFID, particularly when the capital collected through the token is invested in an underlying pool of assets, similar to that of an undertaking for collective investments under the UCITS and the AIFM Directives.

However, there are limits. In its Advice to the EU Commission from January 2019,[42] ESMA found that the boundaries of the notion of "transferable securities" as archetype financial instruments under Annex I, Section C(1) MiFID II are not entirely clear: first, the requirement of being "negotiable" (as part of 'transferability') is open to interpretation, and second, defining what is "similar" to shares or bonds may vary under the corporate laws of Member States. In turn, the results may diverge from one Member State to another, especially when one considers instruments that are "similar" to traditional shares or bond.

Another concern relates to the notorious distinction between

[41] See Annex I, Section C(1) MiFID II. Art. 4 (1) No. 44 MiFID II, that provides the following definition of 'transferable securities'.

[42] ESMA, Advice - Initial Coin Offerings and Crypto-Assets, 9 January 2019, ESMA50-157-1391.

financial and *commodity* derivatives under MiFID II.[43] Commodity derivatives in Article 2 (19) No 30 MiFIR are defined as "those financial instruments defined in point (44)(c) of Article 4(1) [MiFID II]; which relate to a commodity or an underlying referred to in Section C(10) of Annex I [MiFID II]; or in points (5), (6), (7) and (10) of Section C of Annex I thereto".[44] These commodity derivatives fall within MiFID's scope if they have a "financial nature": one the most important factors that may lead in that direction is whether the derivative is traded on a regulated trading venue (i.e. a regulated market, an MTF or an OTF), regardless of the way in which it is settled. The same conclusion should apply if the trading platform is not formally registered as a trading venue under the MiFID regime, but has essentially the same features. This the case for quite a few crypto-trading platforms. Then a "pure" utility token with a *derivative* component may fall within MiFID's scope, and the platform on which it is traded might need to be registered as a MiFID trading venue. The details of what constitutes a derivative component are not specified by EU financial law. In turn, its application varies across Member States.

This reiterates the need to ensure *a harmonized application of EU financial law*.

b. The MiCA approach

While MiCA establishes fairly precise definitions for payment tokens (ART and ERT), it provides only two alternative treatments for investment and utility tokens. Pursuant to Article 2(2) MiCA, if the token is identifiable as falling within categories already contemplated by existing EU financial law, it will *not* fall within the scope of MiCA if the token is a financial instrument, i.e. similar to a share, debenture, units of a collective investments scheme, or a derivative (as identified in MiFID). If a token is *not* similar to a share or to a debenture, or if it is similar to a share or a debenture, but is *not* "negotiable", it will fall under MiCA and will be considered by MiCA to be a "utility token".

If it is a utility token, it will be subject to the bespoke disclosure rules set out supra (at III.1.). It seems therefore odd that MiCA does not take a clear position as to the scope of the bespoke regulation for utility tokens: the definitions that MiCA sets out, in particular that of utility tokens, are insufficient, because MiCA identifies its scope by referring generically to tokens that are not yet regulated by existing EU financial legislation.

One will still struggle to determine whether the asset falls within the definition of financial instruments covered by MiFID (in particular transferable securities, units of collective investment undertakings or

[43] *Financial* derivatives do not pose particular issues: if a token qualifies as transferable security, or as unit of a collective investment scheme, and if it is employed as underlying a derivative contract, the latter will obviously be a "financial" derivative.
[44] Art. 2 (1) No. 30 MiFIR.

derivatives). MiCA is thus far from being conclusive, or effectively capable of providing legal certainty. MiCA must inevitably come to grips with the problem of clearly setting utility tokens within, or outside, the framework of existing EU financial legislation. This cannot be done by simply providing a negative scope for the application of the intended legislation, as MiCA does in Article 2 (2).[45] In particular, mixed with the ex-post approach of supervision, risks of re-characterization and re-qualification of tokens remain excessively, and the consequences of this approach will have a significant, negative impact on market integrity and efficiency.

Even looking at ARTs and ERTs, the proposed solution is not entirely satisfactory: the qualification of the asset is, in fact, to be supported by a legal opinion, setting out and confirming that the proposed activity does not fall within the scope of existing financial legislation (Article 16(2)d) MiCA).

From the outset, one wonders why no similar legal opinion is required in relation to utility tokens under Title II MiCA: as these other tokens can be issued into the market without prior review or authorization by Supervisors, subject only to mandatory disclosure.

Further, leaving the definition of the scope to the private sector (e.g. to a legal opinion in support of the qualification of the crypto-asset) does not solve the issue, and exacerbates the risk of promoting explosive conflicts of interests and regulatory arbitrage. This proposed private-sector-led approach risks a race-to-the-bottom among European jurisdictions as token issuers migrate to those jurisdictions in which practicing lawyers are most inclined to write accommodating legal opinions. Such developments will serve none but the exploitative.

Supervisors will need to effectively carry out their investigation as to the nature of the token, so as to ascertain whether the intended activity should be otherwise licensed. In the absence of such an inquiry, the operation of these legal opinions may result in a transfer of competencies to the private sector in a way inimical to EU financial law. That increases the risk of re-qualification particularly in areas where crossing the boundaries into regulated activities might result in criminal offences under national law of the Member States.

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[45] As example of how complex and confusing this approach may be, we refer to the definition of 'Alternative Investment Funds' (AIF) in Art. 4(1) lit. a AIFMD 2011/61/EU, that identifies its scope by referring broadly to all collective investment schemes that fall outside the scope of the UCITS Directive. For the complex interpretative issues that this approach triggered see High Level Forum on the Capital Markets Union, "A New Vision for Europe's Capital Markets", <https://ec.europa.eu/info/files/200610-cmu-high-level-forum-final-report_en>; Dirk A. Zetzsche & Christina D. Preiner, *Scope of the AIFMD*, in Dirk Zetzsche (ed), *The Alternative Investment Fund Managers Directive*, (3rd ed., Kluwer 2020), 25.

c. Improving MiCA

We suggest that the upcoming legislative process better coordinate between MiCA and EU financial law, in two major ways.

On the one hand, the scope of MiCA needs clarification: regulators should clearly identify which assets will fall within its scope and which fall outside the scope of MiFID and EU prospectus rules. As both utility tokens and EU securities law are within ESMA's remit, ESMA shall be granted implementing powers to delineate financial instruments from utility tokens regulated as crypto-assets in Title II MiCA. This shall go hand in hand with smaller adjustments: if the legal opinion is retained, the requirements of the legal opinion, and of the entity providing it, should be better specified in order to resolve, for example, issues of conflicts of interest. We further ask to clarify that the legal opinion does not bind competent authorities, but merely functions as a supporting document for the final supervisory decision.

As an alternative MiCA could be re-assessed such that all crypto-assets that are neither ARTs or ERTs are included in a revised MiFID II, but subject to different and less restrictive regimes defined by carefully crafting proportional exemptions from several requirements. One such approach has already been provided by ESMA in its 2019 Advice to the Commission.[46]

2. In Search of a System of EU Financial Law

In its current form, we are concerned with the impact of MiCA on the 'system' of EU financial law. Some rules are written in particular ways that will render the practical application of MiCA difficult. A few examples will suffice.

a. "Issuance" as a Key Term

MiCA prescribes rules for the "issuance" of crypto-assets and applies to persons engaged in such "issuance". Compare this with Article 1 of the Prospectus Regulation (EU) 2017/1127 where the key term is the "offering to the public"; AIFMD 2011/61/EU where regulation attaches to the "management" of an AIF or the "marketing" of an AIF, respectively; and MiFID 2015/65/EU which governs the performance of investment services defined in Annex I.A. MiFID, and in particular seeks to regulate dealing on one's own account, and underwriting and placing of financial instruments as activities very similar to what MiCA tries to regulate for crypto-assets.

When MiCA introduces a new term to EU financial law we would expect it to be defined. Yet MiCA does not define the term 'issuance', and the term is not self-explanatory. In the crypto-context multiple entities together may well operate the distributed ledger on which the token

[46] See n 59.

application runs. In the U.S., where the same discussion has occurred in the context of the U.S. Securities Act, the terms 'issuer' and 'issuance' have created significant legal uncertainty.[47]

We thus recommend either defining the term by reference to, or replacing it with, established terms of EU financial law, with the terms "offeror" and "offerings" the most inclusive alternatives.

b. Small Issuer Exemptions

The general white paper/ prospectus requirement for utility tokens does not apply if over a period of 12 months, the total consideration of an offer to the public of crypto-assets in the Union does not exceed EUR 1 million, or the equivalent amount in another currency or in crypto-assets (Article 1(2) MiCA). At the same time, Article 15(3)(a) and 43(2)(b) MiCA provides for a small ART and EMT issuer exemption if over a 12 month period the average outstanding amount of ART does not exceed EUR 5 million. That exemption seems to be modelled on Article 9 E-Money Directive. In this case, ART and EMT issuers do not need to be authorized, but need to issue a white paper pursuant to Article 17 and 46 MiCA. Yet, those provisions do not list a small issuer exemption at all, so a white paper must be issued no matter how small the issuance.

The treatment of small issues is inconsistent both within MiCA (as shown above), but also with regard to existing EU financial law. For instance, Article 3 (2) lit. b Prospectus Regulation exempts issues of transferable securities from a prospectus requirement if the volume of the issuance of transferable securities does not exceed EUR 8 million. One wonders why a security token is exempted up to EUR 8 million while a simple utility token under MiCA, is only exempted up to EUR 1 million. These low thresholds are harmful for innovation and such small amounts pose no systemic risks. It has been extensively discussed in the context of the Prospectus Regulation that investor protection does not justify lower thresholds. And while the Prospectus Regulation has been updated very recently, MiCA disregards inflation by taking the lower EUR 5 million threshold from the E-Money Directive.

We would thus propose, similar to the Prospectus Regulation, an overall small issuer exemption of up to EUR 8 million across all token types for crypto-assets under MiCA, ART and EMT. That exemption should cover both disclosure and authorization requirements.

c. Regulatory treatment of CBDCs

Central bank digital currencies (CBDCs) are exempted from MiCA if crypto-assets are issued by central banks acting in their monetary authority

[47] See SEC Statement on Cryto-assets under the Securities Act, available at https://www.sec.gov/news/public-statement/digital-asset-securites-issuuance-and-trading.

capacity or by other public authorities.[48] This exemption is in line with other exemptions in EU financial law relating to central bank functions including public currency systems and systemically important payments infrastructure. The rationale behind these exemptions is that bespoke regulation[49] is a better way to ensure such crucial monetary functions than subjecting participants to general financial legislation.

The MiCA exemption, however, does not extend to intermediaries acting in the issuance of CBDCs or providing services to CBDCs. In turn, only if a central bank adopts a CBDC model under which retail currency holders have direct contact with the central bank are the CBDCs exempted. Such CBDC models would be very difficult to establish on a pan-European level with several hundred million potential users. Models where well-qualified and resourced intermediaries function as links between central banks and retail currency holders are much more likely and far less burdensome on the central banks.[50] This explains why such two-tier CBDC structures have been adopted, for instance, by China in its Digital Yuan project.

For these two-tier CBDC models cooperation and interaction between public and private actors in the currency system at the lowest possible costs is key. MiCA is not written with a public purpose in mind, but as regulation addressing private actors seeking to mimic public currency functions. As presently proposed, MiCA will obstruct the sound development of a Digital Euro or other European CBDC strategy. We thus recommend that, subject to further rules stipulated by the respective central bank, private entities acting on behalf of a central bank or in cooperation with a central bank in the context of a CBDC system be exempted from MiCA.

3. Supervisory Cooperation: Only Regional Stablecoins?

The project that triggered MiCA was Libra - a *global* stablecoin. A closer look reveals MiCA only provides a legislative framework for a regional stablecoin, thus setting legal limits upon an innovation that could provide a much-needed solution to the many issues faced in cross-border payments.

In particular, MiCA requires the legal entity to be established in the

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[48] Rec. 7 and Art. 2(3)a) MiCA.

[49] See for instance, Decision (EU) 2019/1349 of the European Central Bank of 26 July 2019 on the procedure and conditions for exercise by a competent authority of certain powers in relation to oversight of systemically important payment systems (ECB/2019/25), OJ L 214, 16.8.2019, p. 16–24.

[50] For these reasons, those of us who have written on this topic suggest such hybrid models are by far the most likely to be adopted, see Anton Didenko, Dirk Zetzsche, Douglas Arner & Ross Buckley, *After Libra, Digital Yuan and COVID-19: Central Bank Digital Currencies and the New World of Money and Payment Systems*", EBI Working Paper 65/2020, <www.ssrn.com/abstract=3622311>.

EU/EEA[51] and vests jurisdiction over any significant ART or EMT issuer in EBA: Article 99 (2), 101 (2). MiCA defines EBA as chair of the supervisory college for issuers of SARTs and SEMTs (that is global stablecoins). Relevant supervisory authorities of third countries with whom the EBA has concluded an administrative agreement in accordance with Article 108 MiCA may participate in the supervisory college, yet according to Article 100(4) and 102(4) MiCA, will have no voting rights on non-binding opinions that form the basis of many college decisions. Under those conditions no competent authority of a third country currency will likely accept the EBA lead. Further, MiCA does not foresee cooperation rules where EBA or national competent authorities sit in supervisory colleges set up by authorities of third countries.

Given that MiCA applies whenever there is an issuance in the EU (supra, IV.2.a), even the smallest amount of stablecoin issuance in the EU would require the EBA to demand the lead in the college since the EBA lead is the sole way to allow for any cooperation with third countries. This is at odds with the very concept of a global stablecoin.

We thus suggest the introduction of further modes of supervisory cooperation with third countries. While mutual recognition may well find little appeal in this critical field of EU financial law, at least in stablecoins where currencies of EU/EEA countries are of minor importance and EU intermediaries are not involved, or where the reserve function relating to European currencies is vested solely in the ECB or European central banks, allowing participation in a supervisory college where European authorities accept the lead of other (large) third countries' authorities (such as the U.S., Japan and potentially China) seems to be a necessity for a well-functioning, mutual supervisory cooperation.

V. Conclusion

MiCA is an ambitious legislative project that responds to an urgent policy need. Yet the need was entirely different for "simple" crypto-assets on the one hand, and payment tokens on the other hand.

Simple crypto-assets under MiCA will, in principle, be primarily utility tokens (perhaps with some monetary component), as other tokens will be subject to the existing body of EU law. For these types of tokens, investor protection may warrant legislative intervention, with a strict application of existing EU financial law – and the definition of "financial instrument", in particular – providing the alternative. While MiCA clearly fills any (perceived) gap, it fails to meet the second policy goal in the European Single Market: a harmonized application of EU financial law

[51] Articles 15(2) MiCA. The same follows from Art. 43 (1) MiCA where EMT issuers must be credit institutions or e-money institutions under the CRD or E-money-Directive since both pieces of legislation require the legal entity to be located in the EU/EEA.

concepts across all EU and EEA Member States. The MiCA route is apparently easy, but its practical repercussions may well enrich lawyers and infuriate market participants for years. Thus we propose to confer some guideline issuing competence to ESMA (as authority in charge of financial instruments) to ensure a harmonized application of EU financial law.

The regulation of payment tokens, on the other hand, is well justified from a financial stability perspective given that a well-functioning payment infrastructure lies at the heart of all financial systems. In this regard, MiCA has indeed filled a gap, by often leaning on existing rules of the E-Money Directive. While this approach may be justified for small token offerings it does not provide a suitable legal environment for truly large global stablecoins of global importance. We recommend the insertion of cooperation mechanisms similar to systemically important market infrastructures of international importance.

More broadly, MiCA does not stand on its own but is part of an ambitious and comprehensive approach of the sort we view as essential.[52] However, further substantial revision of its detailed provisions, in the ways outlined here, will be necessary if MiCA is to achieve its various goals.

[52] See Dirk Zetzsche, Douglas Arner, Ross Buckley & Rolf Weber, "*The Evolution and Future of Data-Driven Finance in the EU*" (2020) 57(2) CMLR 331.

Address

European Banking Institute e.V.

TechQuartier (POLLUX)

Platz der Einheit 2

60327 Frankfurt am Main

Germany

For further information please visit our website www.ebi-europa.eu or contact us at info@ebi-europa.eu

www.ebi-europa.eu

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