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DIGITALEUROPE's Recommendations for the Markets in Crypto Assets proposal



Executive Summary

A pro innovation Markets in Crypto Assets regulatory framework is the precondition for any effort to leverage the potential of crypto and blockchain for Europe's digital transformation. It should ensure, in a timely manner, a robust and competitive European payments market as new forms of assets, services and means of payments emerge.

DIGITALEUROPE's members are at the intersect of financial services and IT, leading the digital transformation in Europe. We encourage the EU to come to a single framework that provides regulatory clarity, increases trust in the use of crypto assets, harmonises consumer protection and promotes innovation. At the same time, the regulatory framework should allow for unforeseen innovations from the rapidly developing crypto assets sector. We should proceed with caution on legislation where existing rules already provide guarantees and find reasonable definitions for crypto assets and actors.

Embracing crypto in Europe

We see the MiCA as a political milestone for crypto adoption. It creates a fully harmonised market and establishes regulatory certainty for crypto-asset issuers and service providers. MiCA addresses current regulatory fragmentation, consumer and investor protection, as well as market integrity and financial stability.

Due to the size and relevance of the EU Single Market, MiCA has the potential to set global standards, shape the global tone toward crypto-assets, and attract market participants from all over the world. The ongoing work by central banks across the European Union, including the ECB, on developing central bank digital currencies ("CBDC") provides a backdrop to the private sector's work on asset referenced tokens and e-money tokens (collectively referred to as "Stablecoins" by industry). As such, we regard this as an opportunity for public-

private sector engagement, on the intersection, interoperability and interplay between private crypto-assets and CBDCs, as well as supporting the deployment of central bank issued tokens.

DIGITALEUROPE recommends to focus on:

- ▶▶ **Designing MiCA as a binding and directly applicable regulation.** This is a crucial precondition to make these new asset classes consistent, and therefore reliable and trustworthy. It would harmonise the EU-crypto-market, establish a level playing field for issuers and service providers, and creates regulatory certainty for businesses, which benefits consumers through consumer protections, choice and competition, and technological advancement.
- ▶▶ **A more ambitious passporting regime for new crypto- asset service providers.** It enables growth and competitiveness and opens up a large and attractive market for innovative market participants. Europe needs a level playing field, which would be more realistic if the process for passporting in MiCA would be as robust as in the Payment Services Directive (PSD) and the Capital Requirements Directive (CRD).
- ▶▶ **Supervisory guidance and examples.** The European Commission and the supervisory authorities should publish supervisory guidance and examples as soon as possible. This would make the classification criteria even more tangible and account for hybrid forms of tokens (see below). The Commission should draft, consult and submit all the necessary Regulatory Technical Standards (RTS) in a timely fashion to speed up the time in which MiCA comes into force.
- ▶▶ **Further clarification of the treatment of possible “hybrid” crypto assets.** From our point of view, it is still unclear how the MiCA would interact with MiFID II¹ 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 lifecycle). Therefore, it should be dealt with within the scope of the respective financial instrument rules.
- ▶▶ **More precise differentiation of the individual types of Stablecoins (asset-referenced tokens (ART) and e-money tokens (EMT)).** The definitions of asset-referenced tokens and EMTs both provide the following formulation: "...that purports to maintain a stable value by referring to the value of...". The term “referring” is not 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

¹ Markets in Financial Instruments Directive II

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 recognised by MKR (MakerDAO governance token) holders as eligible assets as collateral. In our interpretation, a Dai would be an ART and not an EMT, even if it refers to the value of a US dollar. Likewise, with the use of the word 'purport', it is a very broad term that possibly extends scope of definition unintentionally. Recital 10 of the MiCA draft could also suggest a different understanding, which would provide for an EMT 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 European Commission to create clarity here for issuers and the application of the regulation.

- ▶ **The European Commission should be cautious not to overregulate with overlapping frameworks.** With regards to EMT it is important to note that certain EMTs might need to fulfil requirements from both the MiCA regulation and at the same time E-money Directive 2 (EMD2).² A solution could be to review these provisions holistically during the proposed review of PSD2 and EMD2, as outlined in the Retail Payment Strategy. Additionally, the definition of funds in PSD2 should be extended to also include ARTs. Such a change would ensure that consumers receive the same level of protection as EMTs. However, acknowledging that such a change may create other unintended consequences, another option could be more appropriate to apply specific relevant articles of PSD2 to asset referenced token payments.

With regards to Stablecoins (EMT & ART), there is also the danger of a major competitive disadvantage for EU-regulated trading platforms in the future. Since existing Stablecoins such as DAI or Tether are not expected (to be able) to apply for an EU authorisation, 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.

Additionally, under MiCA's current "significance" thresholds, most of the relevant Stablecoins on the market (Tether, USDT, Dai etc.) could be considered as "significant", since they easily exceed criteria such as one billion market capitalisation and/or 100 million daily trading volume. That

² Directive 2009/110/EC

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 its own funds. **The European 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.

- ▶▶ **The EU should ensure furthermore that the regulatory requirements for crypto asset service providers do not overburden or stymie startups and young industry players with too costly and complex requirements.** Rather measures proportionate to the financial risks and volumes raised by these projects would better serve the EU’s policy objective of enabling and fostering innovation. On this basis it is important to strike the right balance between principles and specific regulatory requirements. This balance is even more important when dealing with emerging business models and technologies. Ensuring a regulatory framework that has appropriate oversight but can be adaptive over time will help the EU develop as an ecosystem for crypto.
- ▶▶ **Regulatory clarity here would be helpful regarding the new crypto-asset service providers licenses.** it is yet unclear whether those licenses will be transferable to subsidiaries the same way MiFID-licenses are.
- ▶▶ **Consideration for the continued availability of 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 Distributed Ledger Technologies (DLTs). 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.

Article 68 expands and highlights this settlement must happen on the same date as the transaction has been executed on the trading platform. **The issue with this approach to daily settlement of ‘off-chain’ transactions is that this could also be understood by some Member States as applying more broadly under the current definition**, including for example to centralised ledgers that are used by custody services and wallet service providers to enable their customers to transact crypto assets between one another. Current wording, if specific

to the operation of trading platforms, will not impact such wallet and custody services. **It would be helpful however if the regulation clarified this matter given its significance, perhaps by way of a recital.**

There is need for clear definitions for crypto actors

- ▶▶ DIGITALEUROPE welcomes the proposal's ambition. Consequently, MiCA covers quite a lot of ground and as drafted has, we believe, unintended consequences in the scope of its definitions.
 - **Issuers:** As drafted this definition could require firms to obtain an authorisation both for issuing and as a CASP.
 - **Custody and administration of crypto assets on behalf of third parties:** The definition of custody and administration of crypto assets on behalf of third parties is also broad and could, because of the reference to the “safekeeping and controlling of the means of access”, include a range of hosting services (e.g. cloud hosting services or those that involve some degree of control or escrow).

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About DIGITALEUROPE

DIGITALEUROPE represents the digital technology industry in Europe. Our members include some of the world's largest IT, telecoms and consumer electronics companies and national associations from every part of Europe. DIGITALEUROPE wants European businesses and citizens to benefit fully from digital technologies and for Europe to grow, attract and sustain the world's best digital technology companies. DIGITALEUROPE ensures industry participation in the development and implementation of EU policies.

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National Trade Associations

Austria: IOÖ

Belarus: INFOPARK

Belgium: AGORIA

Croatia: Croatian Chamber of Economy

Cyprus: CITEA

Denmark: DI Digital, IT BRANCHEN, Dansk Erhverv

Estonia: ITL

Finland: TIF

France: AFNUM, SECIMAVI, Syntec Numérique, Tech in France

Germany: BITKOM, ZVEI

Greece: SEPE

Hungary: IVSZ

Ireland: Technology Ireland

Italy: Anitec-Assinform

Lithuania: INFOBALT

Luxembourg: APSI

Netherlands: NLdigital, FIAR

Norway: Abelia

Poland: KIGEIT, PIIT, ZIPSEE

Portugal: AGEFE

Romania: ANIS

Slovakia: ITAS

Slovenia: ICT Association of Slovenia at CCIS

Spain: AMETIC

Sweden: Teknikföretagen, IT&Telekomföretagen

Switzerland: SWICO

Turkey: Digital Turkey Platform, ECID

United Kingdom: techUK