

MiCA - Comments on ongoing Council discussions

April 29, 2021

The table below summarizes our views.

Positive	Neutral	Issues / Missing
<i>Clarification of the scope - exclusion of NFTs, tokenized vouchers and other use cases with limited financial application.</i>	<i>Clarification of the scope - Introduction of the notion of "offeror" and subsequent clarifications.</i>	<i>Settlement rules - inappropriate daily on-chain settlement requirement for centralized exchanges is still present.</i>
<i>Clarification of the scope - exclusion of decentralized use cases that are not controlled by a natural or legal person.</i>	<i>Distinction between "payment ARTs" and "investment ARTs". Remark: A presumption of payment for all ARTs would not appropriately qualify the actual asset class use cases.</i>	<i>Electronic money tokens: lack of regulatory clarity. Still lacks clarity on permitted uses cases with EMTs and required licenses.</i>
<i>Equal treatment for all - no special treatment for regulated financial entities under MiCA.</i>		<i>Significance thresholds - Proposed thresholds remain too low, disproportionate and not sufficiently defined. Would classify all stablecoin as significant even where there is no systemic risk.</i>

On the scope (Recitals, Title I)

The clarification on the scope of MiCA with effect to exclude NFTs, decentralized assets (see below) and other use cases with limited financial application is overall very positive. This will give more clarity to the market participants and allow non-financial use cases of blockchain to grow in the EU.

On decentralization specifically, the recognition of decentralized use cases (assets and protocols alike) being outside of the scope of the regulation is well drafted. As recognized, MiCA would not have been suitable to regulate decentralized use cases and their inclusion would have seriously harmed Europe's competitiveness in the crypto-assets market.

However, the recital needs to be transposed into the articles of the text. Example:

Proposal

Align articles with proposed recital (12a):

- Article 2, §3, add "(h) Decentralised exchanges and other crypto-asset trading or custody activities that are not provided and controlled by a service provider."
- Add Article 3 bis "Provisions of Titles II, III and IV do not apply to crypto-assets that have no issuer or offeror, for example because they emerge on the market exclusively as the result of mining or the application of a computer protocol not under the control of an identifiable legal or natural person."

In addition to this exclusion, **a future reassessment of the decentralized use cases is needed** in the report and legislative proposal of Article 122.

The non-discriminatory treatment of financial and non-financial institutions is also welcome. Previously there was preferential treatment granted to financial institutions.

On EMTs and ARTs (Title III & IV)

Regarding the definitions, the frontier between EMTs and ARTs raises significant questions, notably with respect to ARTs that are referencing one or more currency. A proposal made a distinction between investment ARTs and payment ARTs, the latter being regulated the same way as the EMTs. While any clarification that helps to distinguish between asset classes with significantly different risk profiles is a net positive, **such distinctions must always be based on factual differences, and not on broad presumptions.** Therefore, the proposal to consider all ARTs as payment instruments by default would significantly reduce the utility and diversity of this asset class in Europe. ARTs are mostly used as either interoperability instruments between blockchains (crypto-assets backed ARTs) or passive investment vehicles. Their treatment as EMTs would not only fundamentally miscategorize them but impose disproportionate regulatory supervision relative to the role they play in the markets. **We therefore recommend leaving the default categorization of ARTs as investment instruments.**

With regards to regulatory clarity, the current drafting is still lacking. EMTs are used today for multiple functions in the market. We need legal clarity that the services offered globally on those tokens will be similarly available in Europe. For the EU to remain competitive in this regard. MiCA needs to clarify that the following services can continue:

- **Custodians can offer custody services for EMTs** without additional requirement (and notably without being registered as an EMI).
- **EMTs can be used by crypto-assets service providers** without limitation for the settlement of the transactions they conduct and without additional regulatory requirement.
- **EMTs can be used in peer-to-peer transactions.**

On significance thresholds, improvements have been made with the removal of the size of the reserve assets (art. 39.1.d) and the significance of the cross-border activities of the issuer (art. 39.1.e) criteria. The first one is redundant with criteria b and the second one makes no sense as crypto-markets are essentially global and such a provision would substantially limit the development of EU markets.

However, other criteria raise the following issues:

- **Criteria such as “customer base”, “number of transactions” and “value of transactions” should be further defined.** The thresholds are targeting flows that give rise to significant risks with regards to “financial stability, monetary policy transmission or monetary sovereignty” (recital 4). The transactions that occur on trading platforms or for use as deposits (whether those uses occur on centralized or decentralized platforms) should therefore not count into threshold calculations as they do not create such risks.
- **The interconnectedness with the financial system criteria** (art. 39.1.g) - as not being defined clearly - could also be detrimental to the growth of markets in crypto-assets.
- Finally, thresholds for significant criteria defined in art.39.6.a are too low as all the main existing stablecoins would immediately qualify as “significant”, despite a very low risk profile with regards to their actual use (no systemic risk). **To this end, minimum thresholds needs to be raised:**

Minimum thresholds for:	Text’s current levels	Proposed amendments <u>(combined with exclusion of trading & deposits volumes)</u>	Proposed amendments <u>(without exclusion of trading & deposits volumes)</u>
(i) Customer base	2 million	10 million	10 million
(ii) Value of stablecoins issued or market capitalisation	EUR 1 billion	EUR 20 billion	EUR 20 billion
(iii) Number of transactions in stablecoins	500 000 transactions per day	1 million transactions per day	100 million transactions per day
(iii) Value of transactions in stablecoins	EUR 100 million per day	EUR 200 million per day	EUR 200 billion per day

On settlement rules (Article 68)

Daily on-chain settlement requirement for centralized exchanges is still present. This requirement would represent a disproportionate burden. No centralized trading platform settle trades on the blockchain. The blockchain is only used for deposits or withdrawals. **Registering all the transactions on the blockchain would make it impossible for trading platforms to operate in Europe because of the cost (transaction fees) and complexity associated with such settlement.**

Proposal

Article 68, remove “6. Crypto-asset service providers that are authorised for the operation of a trading platform for crypto-assets shall complete the final settlement of a crypto-asset transaction on the DLT on the same date as the transactions has been executed on the trading platform.”