European Digital Finance Association

PROPOSAL FOR A REGULATION ON MARKETS IN CRYPTO-ASSETS

EDFA Position and Proposals for Amendments

European economy can significantly benefit from a widespread and common adoption of crypto-assets and distributed ledger technology (DLT) by citizens and enterprises. **Decentralized solutions can contribute to the digitization and automatization of companies, and help open new sources of financing**, especially for small and medium-sized enterprises. DLT implementation is even more important as a tool to bolster the post-COVID-19 recovery of European economy.

Unfortunately, the lack of universal interpretation of legal aspects pertaining to it, as well as various national laws adopted in the last years, have resulted in an unequal development of DLT solutions. Those EU countries that were bold enough to adopt more liberal laws have attracted entrepreneurs from other more conservatives jurisdictions. Others, not seeing any instant gains in endorsing DLT technologies, have adopted a wait-and-see approach or even discouraged the implementation of the technology.

European Digital Finance Association therefore **welcomes the European Commission plan to regulate markets in crypto-assets** as customers require an adequate level of protection and market players expect legal certainty across the EU, which is essential for the next stage of DLT applications. We also support the proposal to amend the existing definition of financial instruments as enclosed in the Markets in Financial Instruments Directive to explicitly include financial instruments based on DLT.

The proposal however contains **some definitions and measures** that in our opinion **would create an unnecessary regulatory burden** that is not conferred upon any other technology, i.e. the regulatory burden for DLT is higher, even in areas outside the financial services. This would impede the implementation of DLT in Europe, which - contrary to the envisaged objective - would **force the most innovative companies and projects out of the European Union.**

EDFA therefore suggests to amend the MiCA proposal as outlined below, to better enact the principles of technological neutrality, proportionality and "same activity, same risk, same rules". When regulating crypto-assets, we particularly see the need to assure three premises:

- DLT creates new services and new sources of finance for the recovery in the post-COVID-19 times;
- Consumer protection and the need for consumers' understanding of services and value that they have access to through crypto-assets — the application of DLTs *per se* should not be treated as dangerous to consumers;
- Innovation-friendly rules that do not enhance regulatory arbitrage for regulatory regimes outside the EU.

1. The scope of regulation is too broad

As it stands now, MiCA applies to crypto-asset service providers and issuers that do not qualify as financial instruments[1], electronic money[2], deposits[3] or structured deposits[4] under the EU financial services legislation, while crypto-assets are defined as "*a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*".

- The proposed scope in combination with the proposed definition of crypto-assets leads to a situation where any digital representation of rights or values could fall under MiCA, even services not intended for investment or payment purposes, e.g. festival passes issued on blockchain.
- If unchanged, the proposal would apply to areas outside the financial sector where no similar regulation applies to any other technology. In other words, **MiCA creates horizontal regulation of a specific technology - DLT, which goes against the very principle of technological neutrality**. As a result, DLT implementations beyond the financial realm would face a huge regulatory and administrative burden, which would **risk the development of the entire DLT sector, including the EU's own project, the European Blockchain Services Infrastructure**.
- Should the scope remain broad and the regulator try to amend the situation by exempting certain types of tokens from MiCA provisions beyond those already mentioned in Article 4(2), it would still create an unnecessary **burden on the crypto-asset service providers** (CASP) and issuers not covered by MiCA. CASPs and potential users of crypto-assets, including SMEs, would have to solicit legal opinion on the nature of their crypto-asset to verify if they can use the exemption, incurring unnecessary cost. This in turn would undermine the adoption of DLT in the EU and the European Commission's own policy to promote DLT, while consumers and enterprises would be forced to use a different technology. In addition, given the rapid development of the DLT applications, creating an all-encompassing list of crypto-assets exempted from MiCA is almost unattainable.

Proposed solution

- **Narrow the scope** to only include crypto-assets intended for investment and payment purposes by amending art. 3(2) *'crypto-asset' means a digital representation of value or rights* ***for direct investment or finance purposes,*** *which may be transferred and stored electronically, using distributed ledger technology or similar technology.*

[1] As defined in Article 4(1), point (15), of Directive 2014/65/EU
[2] As defined in Article 2, point (2), of Directive 2009/110/EC
[3] As defined in Article 2(1), point (3), of Directive 2014/49/EU
[4] As defined in Article 4(1), point (43), of Directive 2014/65/EU

2. The proposal does not address the nature of permissionless DLT platforms

MiCA is an attempt to regulate new decentralized business and organization models with traditional concepts that do not fit the novel technological reality of decentralized applications. Under the proposed regulation, improved access to finance as experimented in the sector of decentralised finance (DeFi) or democratic digital governance initiatives would likely no longer be accessible to European consumers.

- In specific, the **requirement to register as a legal entity** can undermine the development especially in the area of Decentralized Finance (DeFi) and decentralized autonomous organization (DAO) or similar projects, where there is no single entity to register.
- Innovative businesses would **be forced to move to non-European markets**, where they could validate their novel services.
- Moreover, the proposal defines the crypto-assets services providers as legal entities (solely), ignoring the presence of physical persons and decentralized organizations as tokens issuers.

Proposed solution

- The European Commission should take the regulation of crypto-assets as an **opportunity to define DAO and grant it a legal basis** in order to set rules and protect users and consumers. DAOs should first and foremost have internal legal structure to protect users and investors even without a single designated entity, while MiCA should in the first place regulate the public offering of tokens, not the issuer.
- At the same time, Article 3(6) defining the "issuer of crypto-assets' should be amended to include natural persons.
- Moreover, in observance with the principle of proportionality, small offerings of crypto-assets, i.d. below €1 million within a twelve-month period, should be exempted from the requirement to set up a legal entity.

3. Creating unlevel playing field between incumbents and new services providers

When providing one or more crypto-asset services (CAS) authorised credit institutions and investment firms will not be subject to many of MiCA's provisions. DLT is a highly-technical area and previous experience in the financial sector should not be the only prerequisite to provide crypto-asset services.

- Authorised credit institutions and investment firms are exempted from proving that their operations, products and management teams have the sufficient resilience, knowledge and capabilities in crypto-asset markets. This approach is not in line with the principle of proportionality.

Proposed solution

- While we understand that credit institutions and investment firms should not need another authorisation to issue or trade crypto assets, they should provide to the national competent authority (NCA) an update to their compliance documents in line with information as required in

Article 16(2)(c-o) in case of asset-referenced tokens, or art 54(2)(d-r) in case of the provision of crypto-asset services.

4. The principle of proportionality and 'same risk, same rules' is not applied in a just manner

The proposed regulation places significant and costly legal and compliance obligations on all participants, which is not in line with the principle of proportionality.

- In many cases, such requirements are comparable or even more demanding than those applied to traditional financial market participants, such as the obligation to provide legal opinion on the nature of issued crypto-asset, complex authorisation procedure for offering asset-referenced tokens. If not amended, the regulation would limit innovation which is mainly performed by smaller players.
- Full prospectus is required from DLT projects that raised above €1m within 12 months, which puts them at a disadvantage when compared to non-DLT projects for which the cap is set at €8m within a 12 months.

Proposed solution

- MiCA should clearly state that providers of wallet and custody services as well as the provision of advice on crypto-assets exempted under Article 4(2) will not require an authorisation.
- Issuers of crypto-assets should only be defined as those, who offer crypto-assets to the public for the first time, and not those that offer or seek admission to trading of crypto-assets that have already been offered by another person in the primary market. Article 3(6) should be amended accordingly.
- Align requirements in MiCA and Prospectus Regulation to fall in line with 'the same risk, same rules' principle and increase the no-prospectus ceiling to €8m.

5. Unclear relationship between national financial authorities and European financial authorities

- In the area of significant asset-referenced and e-money tokens the supervision powers of a given national competent authority (NCA) over issuer of such tokens will be transferred to the European Banking Authority. This would mean that potentially very popular means of payment in the given member state will be excluded from its supervision, even though they may not be based on euro currency.
- Moreover, EBA has, along with a college referred to in Article 100, the power to issue non-binding opinions in relation to significant asset-referenced tokens. This may lead to situations where one NCA will follow the non-binding opinions while the other(s) will not.

Proposed solution

- Exclude the transfer to the European Banking of supervision powers of significant asset-referenced and e-money tokens based solely or mostly (75%) on national currency and/or used solely or mostly (75%) in one member state.
- Deletion of the procedure for the issuing of non-binding opinions by EBA.

Attachment 1

Proposed article changes to the proposal for Regulation on Markets in Crypto-assets

Article	Text	Proposed change	Note
Article 2(4)	Where issuing asset-referenced tokens, including significant asset-referenced tokens, credit institutions authorised under Directive 2013/36/EU shall not be subject to: (a) the provisions of chapter I of Title III, except Articles 21 and 22; (b) Article 31.	*Where issuing asset-referenced tokens, including significant asset-referenced tokens, credit institutions authorised under Directive 2013/36/EU shall not be subject to: (a) the provisions of chapter I of Title III, except Articles 21 and 22; (b) Article 31. They should provide to the competent authority the information specified in Article 16(2)(c) - (o).*	
Article 2(5)	Where providing one or more crypto-asset services, credit institutions authorised under Directive 2013/36/EU shall not be subject to the provisions of chapter I of Title V, except Articles 57 and 58.	*Where providing one or more crypto-asset services, credit institutions authorised under Directive 2013/36/EU shall not be subject to the provisions of chapter I of Title V, except Articles 57 and 58.* *They should provide to the competent authority the information specified in Article 54(2)(d)-(r).*	
Article 2(6)	Investment firms authorised under Directive 2014/65/EU shall not be subject to the provisions of chapter I of Title V, except Articles 57, 58, 60 and 61, where they only provide one or several crypto-asset services equivalent to the investment services and activities for which they are authorised under Directive 2014/65/EU. For that purpose:	*Investment firms authorised under Directive 2014/65/EU shall not be subject to the provisions of chapter I of Title V, except Articles 57, 58, 60 and 61, where they only provide one or several crypto-asset services equivalent to the investment services and activities for which they are authorised under Directive 2014/65/EU. They should provide to the competent authority the information specified inArticle 54(2)(d)-(r).*	

Article 3(1)1	'distributed ledger technology' or 'DLT' means a type of technology that support the distributed recording of encrypted data	*'distributed ledger technology' or 'DLT' means a type of technology that support the distributed recording of ~~encrypted~~ data;*	
Article 3(2)	'crypto-asset' means a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology;	*'crypto-asset' means a digital representation of value or rights **for direct investment or finance purposes,** which may be transferred and stored electronically, using distributed ledger technology or similar technology.*	
Article 3(3)	'asset-referenced token' means a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets;		*The term "referring to the value of" requires definition.*
Article 3(4)	'electronic money token' or 'e-money token' means a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender;		*The term "referring to the value of" requires definition.*
Article 3(5)	'utility token' means 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;	*'utility token' means a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is accepted at least ~~only~~ by the issuer of that token;*	

Article 3(6)	'issuer of crypto-assets' means a legal person who offers to the public any type of crypto-assets or seeks the admission of such crypto-assets to a trading platform for crypto-assets;	*'issuer of crypto-assets' means a natural person, a legal person or other entity being subject of rights and obligations who offers to the public offers to the public for the first time any type of crypto-assets ~~or seeks the admission of such crypto-assets to a trading platform for crypto-assets~~;*	This change reflects the need to include natural persons and entities or organisations other than legal entities in the crypto-assets market, however the inclusion of latter (and its wording) require further consideration
Article 3(11)	'the operation of a trading platform for crypto-assets' means managing one or more trading platforms for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat currency that is legal tender;	*'the operation of a trading platform for crypto-assets' means ~~managing~~ being the owner of or the sole entity entitled to control one or more trading platforms for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat currency that is legal tender;*	
Article 4(2)		*(g)crypto-assets with no investment or finance purposes or utility tokens that are offered in compliance with e-commerce rules.* *(h) crypto-assets that are offered in exchange for other crypto-assets solely for interoperability purposes without any separate financial interest;*	
Article 5(1)f	a detailed description of the risks relating to the issuer of the crypto-assets, the crypto-assets, the offer to	*a ~~detailed~~ **brief** description of the risks relating to the issuer of the crypto-assets, the crypto-assets, the offer to the public of the crypto-asset*	

	the public of the crypto-asset and the implementation of the project;	*and the implementation of the project;*	
Article 7(2)	crypto-assets, other than asset-referenced tokens or e-money tokens, shall notify their crypto-asset white paper, and, in case of marketing communications as referred to in Article 6, such marketing communications, to the competent authority of their home Member State at least 20 working days before publication of the crypto-asset white paper. That competent authority may exercise the powers laid down in Article 82(1).	*Crypto-assets, other than asset-referenced tokens or e-money tokens, shall notify their crypto-asset white paper~~, and, in case of marketing communications as referred to in Article 6, such marketing communications,~~ to the competent authority of their home Member State at least 20 working days before publication of the crypto-asset white paper. That competent authority may exercise the powers laid down in Article 82(1).*	
Article 7(3)		*Deletion of the above mentioned provisions*	
Article 15(2)	Only legal entities that are established in the Union shall be granted an authorisation as referred to in paragraph 1.	*Only a natural person having its residence in the Union, a legal person established in the Union or other entity being subject of rights and obligations established or having seat in the Union ~~that are established in the Union~~ shall be granted an authorisation as referred to in paragraph 1.*	This change reflects the need to include natural persons and entities or organisations other than legal entities in the crypto-assets market, however the inclusion of latter (and its wording) require further consideration
Article 15(4)		*Deletion of the above mentioned provisions*	
Article 16(2)(d)	The application referred to in paragraph 1 shall contain all of the following	*The application referred to in paragraph 1 shall contain all of the following information: (d) a clear*	

	information: (d) a legal opinion that the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits;	*statement that the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits;*	
Article 17 (2)	The crypto-asset white paper shall contain a summary which shall in brief and non-technical language provide key information about the offer to the public of the asset-referenced tokens or about the intended admission of asset-referenced tokens to trading on a trading platform for crypto-assets, and in particular about the essential elements of the asset-referenced tokens concerned. (...)	*The crypto-asset white paper shall contain a summary which shall ~~in brief and non-technical language~~ provide key information about the offer to the public of the asset-referenced tokens or about the intended admission of asset-referenced tokens to trading on a trading platform for crypto-assets, and in particular about the essential elements of the asset-referenced tokens concerned. (...)*	
Article 18 (3-4)		*Deletion of the above mentioned provisions*	
Article 19 (1)	Competent authorities shall, within one month after having received the non-binding opinion referred to in Article 18(4), take a fully reasoned decision granting or refusing authorisation to the applicant issuer and, and, within 5 working days, notify that decision to applicant issuers. Where an applicant issuer is authorised, its crypto-asset white paper shall be	*Competent authorities shall, within one month after having performed the assessment referred to in Article 18(2), ~~received the non-binding opinion referred to in Article 18(4),~~ take a fully reasoned decision granting or refusing authorisation to the applicant issuer and, and, within 5 working days, notify that decision to applicant issuers. Where an applicant issuer is authorised, its crypto-asset white paper shall be deemed to be approved.*	

	deemed to be approved.		
Article 24	Issuers of asset-referenced tokens shall publish on their website their approved crypto-asset white paper as referred to in Article 19(1) and, where applicable, their modified crypto-asset white paper referred to in Article 21 and their marketing communications referred to in Article 25. (...)	*Issuers of asset-referenced tokens shall publish on their website their approved crypto-asset white paper as referred to in Article 19(1) and, where applicable, their modified crypto-asset white paper referred to in Article 21 ~~and their marketing communications referred to in Article 25~~. (...)*	
Article 27(4)	Issuers of asset-referenced tokens shall investigate all complaints in a timely and fair manner and communicate the outcome of such investigations to the holders of their asset-referenced tokens within a reasonable period of time.	*Issuers of asset-referenced tokens shall investigate all complaints in a timely and fair manner, provided the complaint notice includes all necessary information, and communicate the outcome of such investigations to the holders of their asset-referenced tokens within a reasonable period of time.*	
Article 32(5)	Without prejudice to Article 30(11), issuers of asset-referenced tokens shall mandate an independent audit of the reserve assets every six months, as of the date of its authorisation as referred to in Article 19.	*Without prejudice to Article 30(11), issuers of asset-referenced tokens shall mandate an independent audit of the reserve assets every twelve ~~six~~ months, as of the date of its authorisation as referred to in Article 19.*	
Article 36		*Deletion of the above mentioned provisions*	
Article 44(7)		*Deletion of the above mentioned provisions*	

Article 49	Funds received by issuers of e-money tokens in exchange of e-money tokens and that are invested in secure, low-risk assets in accordance with Article 7(2) of Directive 2009/110/EC shall be invested in assets denominated in the same currency as the one referenced by the e-money token.	*Funds received by issuers of e-money tokens in exchange of e-money tokens may be treated as deposits and other repayable funds ex Directive 2013/36/EU.* ~~*and that are invested in secure, low-risk assets in accordance with Article 7(2) of Directive 2009/110/EC shall be invested in assets denominated in the same currency as the one referenced by the e-money token.*~~	The change is related to the circumstance that funds received as deposit *ex Directive 2013/36/EU* are in any case safeguarded. There is not any reason to safeguard the funds received for the issuing of electronic money more than the funds received as deposit. Such an aspect could block new businesses related to the issuing of e-money tokens.
Article 53(1)	*Crypto-asset services shall only be provided by legal persons that have a registered office in a Member State of the Union and that have been authorised as crypto-asset service providers in accordance with Article 55*	*Crypto-asset services shall only be provided* ~~*by legal persons*~~ *a natural person having its residence in the Union, a legal person established in the Union or other entity being subject of rights and obligations established or having seat in the Union* ~~*and that*~~ *who have been authorised as crypto-asset service providers in accordance with Article 55*	
Article 54(1)	Legal persons that intend to provide crypto-asset services shall apply for authorisation as a crypto-asset service provider to the competent authority of the Member State where they have their registered office.	~~*Legal persons*~~ ***Entities*** *that intend to provide crypto-asset services shall apply for authorisation as a crypto-asset service provider to the competent authority of the Member State where they have their registered office.*	

Article 54(2)	*The application referred to in paragraph 1 shall contain all of the following: (a) the name, including the legal name and any other commercial name to be used, the legal entity identifier of the applicant crypto-asset service provider, the website operated by that provider, and its physical address; (b) the legal status of the applicant crypto-asset service provider; (c) the articles of association of the applicant crypto-asset service provider;*	*The application referred to in paragraph 1 shall contain all of the following: (a) the first and last name – for natural persons, or – for legal persons or other entities - name, including the legal name and any other commercial name to be used, the ~~legal entity~~ identifier of the applicant crypto-asset service provider, the website operated by that provider, and its physical address; (b) the legal status of the applicant crypto-asset service provider – if applicable; (c) the articles of association of the applicant crypto-asset service provider – if applicable;*	This change reflects the need to include natural persons and entities or organisations other than legal entities in the crypto-assets market, however the inclusion of latter (and its wording) require further consideration
Article 55	*Competent authorities shall, within three months from the date of receipt of a complete application, assess whether the applicant crypto-asset service provider complies with the requirements of this Title and shall adopt a fully reasoned decision granting or refusing an authorisation as a crypto-asset service provider. (...)*	*Competent authorities shall, within one month from the date of receipt of a complete application, assess whether the applicant crypto-asset service provider complies with the requirements of this Title and shall adopt a fully reasoned decision granting or refusing an authorisatpún as a crypto-asset service provider. (...)*	
Article 56(1)(c)	*Competent authorities shall withdraw the authorisations in any of the following situations the crypto-asset service provider: (c) has not provided crypto-asset services for nine successive months;*	*Competent authorities shall withdraw the authorisations in any of the following situations the crypto-asset service provider: (c) has not provided crypto-asset services for ~~nine~~ twelve successive months;*	

Article 68(1)(10)		Deletion of the provisions	The aim of such removal is to render possible any listing of decentralized token in the European Union. According to the current MICA regulation draft, trading platforms may not trade tokens issued with no legal entity (eg.: some DeFi tokens) because of the mandatory white paper. The tokens at stake are, inter alia, tokens deployed by a smart contract or tokens linked to any open blockchain.
Article 68(8)		Deletion of the above mentioned provisions	