European Commission Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937. International Bulletin, March 2021.

The proposal for a regulation on markets in crypto-assets is **part of the digital finance package that the European Commission (EC) published on 24 September 2020**, which also includes the following initiatives: a) a new digital finance strategy to advance towards a European financial data area, promote new ways to channel finance to SMEs and bring about better financial products for consumers; b) a retail payments strategy to provide secure, fast, reliable and affordable payment services; c) a legislative proposal on digital operational resilience of financial institutions to close the door to cyber attacks and improve the supervision of outsourced services (including cloud services) and d) a legislative proposal for market infrastructures wishing to trade and settle transactions with financial instruments in the form of crypto-assets based on decentralised ledger technology, with a pilot regime following a sandbox approach that allows temporary exceptions to existing rules.

This proposal regulates the issuance of and services relating to crypto-assets that fall outside the current legislation on financial services in the EU and aims to promote innovation in financial markets while at the same time mitigating potential risks in order to protect investors, market integrity and financial stability.

According to its explanatory memorandum, the proposed Regulation on Markets in Crypto assets (MiCA) has **four interrelated general objectives**: 1) to create a harmonised legal framework that ensures the legal certainty necessary to favour the development of crypto-asset markets in the EU; 2) to promote the development of crypto-assets and distributed ledger technology (DLT) within a framework of fair competition; 3) to establish adequate levels of consumer and investor protection and market integrity and 4) to ensure financial stability given that crypto-assets are constantly evolving and that "stablecoins" could become widely accepted and potentially systemic.

EU legislation on financial services should not favour any particular technology, so crypto-assets that can be considered financial instruments or electronic money should continue to be regulated by current European legislation regardless of the technology used for their issue or transfer. Legislation adopted in the field of crypto-assets should be specific, forward-thinking, and ready to keep pace with innovation and technological advancements. (Recitals 6 and 8)

The most significant aspects of MiCA are the following:

Title I: Subject Matter, Scope and Definitions

MiCA's scope of application includes **any person who issues crypto-assets or provides services related to crypto-assets in the EU, except when these are considered financial instruments, electronic money,**

deposits, structured deposits or securitisations in accordance with current EU legislation on financial services. The Regulation establishes uniform rules on the following aspects: a) transparency and disclosure requirements for the issuance and admission to trading of crypto-assets; b) the authorisation and supervision of crypto-asset service providers and issuers of asset-referenced tokens and electronic money tokens; c) the operation, organisation and governance of the entities referred to in b; d) consumer protection rules and e) measures aimed at preventing market abuse. (Articles 1 and 2)

Crypto-assets are digital representations of value or rights which may be transferred and stored electronically using DLT or similar technology. Within this general category of crypto-assets the proposed legislation distinguishes the following t**hree classes or subcategories**: a) asset-referenced tokens, which purport 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; These are often called "stablecoins" if they are referenced to the value of several fiat currencies; b) electronic money tokens, the main purpose of which 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; and c) utility tokens, which are intended to provide digital access to a good or service, available on DLT, and are accepted only by the issuer of the token in question. (Article 3 and Recital 9)

Title II: Crypto-assets, other than asset-referenced tokens or e-money tokens

Issuers of crypto-assets other than asset-referenced tokens or electronic money tokens (that is, those that can be understood as being within the general category of crypto-assets, such as utility tokens) **are not subject to authorisation** and may publicly offer the crypto-assets in the EU or request their admission to trading on a crypto-asset trading platform providing they meet a number of requirements, notably including the following: a) be incorporated as legal entities in the EU or in third countries; b) have drawn up a white paper with the information described in Article 5 and Annex I, c) have notified this white paper to their competent authority (CA), d) have published it together with the marketing communications where applicable, and e) comply with the obligations of conduct contained in Article 13. It will not be necessary to prepare the white paper for offers of less than €1 million over a 12-month period, offers addressed solely to qualified investors or to fewer than 150 natural or legal persons per Member State, offers made free of charge, offers of crypto-assets created automatically through mining as a reward for the maintenance of the DLT or the validation of transactions, or where the crypto-assets are unique and not fungible with other crypto-assets. (Articles 4 to 8)

Before any public offer of crypto-assets in the EU or before those crypto-assets are admitted to trading in the EU, issuers of crypto-assets must notify their crypto-asset white paper and, where applicable, their marketing communications, to the CA of the Member State where they have their registered office or a branch. If it is established in a third country, the notification will be made to the CA where the crypto-assets are intended to be offered or where admission to trading is first requested. (Recital 18)

CAs will not require approval of white papers or marketing communications prior to their publication. The notification of the white paper must explain why the crypto-asset described therein is not to be considered a financial instrument as defined by Directive 2014/65/EU (MiFID II) or any other regulated asset. After notification and publication on the website of the issuer of the white paper: 1) **CAs have the supervisory powers** set forth in Article 82, which include, among others, suspending or prohibiting the offer, requiring that additional information be included in the white paper or making public the fact that the issuer does not comply with the regulations, and 2) issuers may make offers and request admission to trading on a platform within the EU without being subject to any additional information requirements (**passport regime**). (Articles 7, 8 and 10)

Consumers will have a **right of withdrawal** for 14 days from the day they undertake to acquire the assets without incurring costs and without the need to provide reasons, except if the crypto-assets have been admitted to trading on a trading platform. (Article 12)

Title III: Asset-referenced tokens

Issuers are subject to authorisation by the CA of the home Member State to offer this type of token to the public and request their admission to trading. The authorisation will be granted only to legal entities established in the EU. Authorisation will not be necessary for public offerings in which the average amount of the tokens does not exceed €5 million over a 12-month period, or the equivalent amount in another currency, or that are addressed exclusively to qualified investors, although it will be necessary to notify the white paper to the CA, together with the marketing communications where applicable. Nor will authorisation be necessary for issuers authorised as credit institutions, although they must also notify the white paper to the CA.

The **white paper**, which will have the minimum content described in Article 17 and Annexes I and II, **is subject to prior approval by the CA**. When authorisation is granted to a requesting issuer, its white paper will be deemed approved. The CAs of the Member States shall grant or deny the request for authorisation taking due account of the prior non-binding opinion of the EBA, ESMA and the ECB. The authorisation (and approval of the white paper) will be valid throughout the EU and will allow the issuer to make offers and request admission to trading on a platform within the EU. (Articles 15 to 19)

Issuers are subject to the supervision of the CAs, who will ensure compliance with the following obligations: a) to act honestly, fairly and professionally, in the best interest of the holders of asset-referenced tokens (Article 23); b) to publish the white paper and, where applicable, the marketing communications (Articles 24 and 25); c) to provide regular information to holders of asset-referenced tokens through their website about certain aspects or events that refer to or may have an impact on the value of these tokens (Article 26); d) to establish and maintain a procedure for handling complaints (Article 27); e) to establish policies and procedures on conflicts of interest (Article 28); f) to notify the CA of any changes in their management body (art. 29); g) to meet the governance and own funds requirements – which are, at a minimum, the greater of €350,000 or 2% of the average amount of the reserve assets – (Articles 30 and 31); h) to inform holders of the rights conferred by the tokens and, in particular, of any direct claim on the issuer or on the reserve assets (Article 35). Issuers shall not provide for interest or any other benefit related to the length of time during which a holder of asset-referenced tokens holds such assets. (Article 36). In addition, CAs must be informed of the intended acquisition or sale of a qualifying holding in an issuer of asset-referenced tokens (10% and multiples thereof, or such that the issuer would become a subsidiary of the acquirer), and the CA shall have the right to oppose any such transaction (Articles 37 and 38).

To preserve the value of asset-referenced tokens, issuers are required to establish and maintain a **reserve of assets**, which can be invested only in highly liquid financial instruments with minimal market and credit risk, and to adopt a clear and detailed policy describing the **stabilisation mechanism** of such tokens. Among other aspects, this policy must describe the reference assets for stabilising the value of the tokens and their composition, a detailed assessment of the risks resulting from the reserve assets, the consequences of the creation and destruction of tokens on the increase or decrease of the reserve assets, whether the reserve assets are invested and, where a portion of the reserve assets is invested, the investment policy and an assessment of the possible impact of the investment policy on the value of the reserve assets. The issuer must ensure the appropriate custody of the reserve assets. (Articles 32 to 34)

When, at the initiative of the issuer at the time of the request for authorisation, or at its own initiative, the EBA classifies **asset-referenced tokens as significant**, the supervisory responsibilities will be transferred to the EBA. The EBA will classify such tokens as significant when at least three of the criteria listed in Article 39.1 are met (size of the customer base of the issuer, the issuer's shareholders or entities that manage the reserve, value of the asset-referenced tokens issued or their market capitalisation, number and value of transactions, volume of the reserve of assets, the significance of the issuer's cross-border activities and the interconnectedness with the financial system). Issuers of significant asset-referenced tokens (also referred to

globally as ‘stablecoins’) will be subject to more stringent requirements, for example in remuneration policy, supplementary own funds, liquidity management policy and interoperability. (Articles 39 to 41)

Title IV: Electronic money tokens

Electronic money token issuers may not publicly offer crypto-assets in the EU or request their admission to trading unless: a) they are **authorised as credit institutions or electronic money institutions**; b) they comply with the requirements of Titles II and III of Directive 2009/110/EC and c) they draw up, notify to the CA and publish a white paper in accordance with Article 46, together with marketing communications where applicable. Therefore, **issuers are not subject to specific authorisation, although it will be necessary to notify the white paper to the CA**.

An e-money token which references an EU currency will be considered to be offered to the public in the EU. The white paper, which must have the minimum content described in Article 46 and Annex III, must be notified to the CA along with the marketing communications, if applicable. After notification of the white paper, **CAs will have the supervisory powers** of Article 82 (see above). (Articles 43 to 46)

Electronic money tokens must be issued at par with and upon receipt of funds and, at the request of the token holder, the issuer is subject to the **obligation to redeem** them at any time and at the nominal value of the reference fiat currency (Article 44). No issuer of e-money tokens or crypto-asset service provider may grant interest or any other benefit related to the length of time during which a holder holds such tokens (Article 45).

When at the initiative of the issuer at the time of the request for authorisation, or at its own initiative, the EBA classifies e-money tokens as **significant**, the supervisory responsibilities will be transferred to the EBA. The provisions for asset-referenced tokens are applicable in terms of the strictest requirements that issuers must meet. (Articles 50 to 52)

Title V: Authorisation and operating conditions for Crypto-asset service providers

A crypto-asset service provider is a legal person whose activity or business consists of the professional provision of one or more crypto-asset services to third parties (custody and administration of crypto-assets, operation of a crypto-asset trading platform, exchange of crypto-assets for a legal tender fiat currency or for other crypto-assets, reception, transmission and execution of third party orders, placement and advice on crypto-assets). (Article 3)

Only **legal persons that have their registered office in a Member State and that have been authorised by the CA of that Member State** may be crypto-asset service providers. The authorisation must indicate the crypto-asset services for which it is authorised and will be valid throughout the EU, allowing the service provider to provide its services in other Member States either under the right of establishment, including through a branch, or through the freedom to provide services, by communicating the information contained in Article 58 to the CA of the host Member State. ESMA will keep a record of all authorised crypto-asset service providers with the services that they can provide as well as any revocations of authorisations granted. (Articles 53 to 58)

This proposal does not affect the possibility for persons established in the EU to receive, on their own initiative, crypto-asset services from companies from third countries, and such services should not be considered as having been provided in the EU. Where a third-country firm solicits clients or potential clients in the EU or promotes or advertises crypto-asset services or activities in the EU, this is not considered to be a crypto-asset service provided at the own initiative of the client and the third-country firm must be authorised as a crypto-asset service provider. (Recital 51)

CAs shall not require an applicant crypto-asset service provider to provide any information they have already

received prior to the entry into force of this Regulation pursuant to sector rules or national law applicable to crypto-asset services, providing such information or documentation is still up-to-date and accessible to the CAs. (Article 54.3)

The proposal contains a set of **general obligations** for all crypto-asset service providers. The following stand out, among others: to act honestly, fairly and professionally in the best interest of clients and inform clients, as well as complying with prudential safeguards (higher of minimum own funds or a quarter of fixed overheads of the preceding year) and with organisational requirements. Annex 4 lists the minimum capital requirements according to the type of service, ranging from €50,000 to €150,000. When their business models require holding clients' funds, crypto-asset service providers must have adequate arrangements in place to safeguard the rights of clients and prevent the use of clients' funds for their own account and must place such funds with a credit institution or a central bank in one or more identifiable accounts. They may provide payment services related to the crypto-asset service they offer, providing they are authorised as payment institutions. These entities must also have a complaints management procedure, rules on conflicts of interest as well as rules on delegation. (Articles 59 to 66)

Crypto-asset service providers will also be subject, depending on the particular services they provide, to **specific obligations** such as the custody of crypto-assets, the operation of a crypto asset trading platform, the exchange of crypto-assets for fiat money or other crypto-assets, the receipt, transmission and execution of orders and placement of or advice on crypto-assets. (Articles 67 to 73)

Title VI: Prevention of Market Abuse involving crypto-assets

The scope of application includes crypto-assets admitted to trading on a platform or for which an application for admission to trading has been submitted. Issuers are required to disclose inside information as soon as possible and insider trading, unlawful communication of inside information and market manipulation are prohibited. (Articles 76 to 80)

Title VII: Competent Authorities, the EBA and ESMA

Member States shall designate the CAs responsible for performing the functions and duties provided for and shall inform the EBA and ESMA accordingly. Where Member States designate more than one CA, they shall determine their respective tasks and designate one as the single point of contact for cross-border administrative cooperation between CAs, as well as with the EBA and ESMA. (Article 81)

The **CAs** will have a set of powers of investigation, supervision and sanction on the issuers of crypto-assets and on the crypto-asset service providers. Given the cross-border nature of the crypto-asset markets, CAs will exchange information and cooperate in investigation, supervision and compliance control activities, with ESMA and the EBA having a coordinating role. (Articles 82, 83 and 92)

ESMA, in addition, will have the powers to coordinate on-site inspections or investigations when requested by one of the CAs, except in the case of issuers of asset-referenced tokens or e-money tokens as well as the provision of services related to these, in which case the coordination powers will correspond to the EBA if requested by one of the CAs. ESMA, whenever possible and in collaboration with the EBA, will coordinate the cooperation agreements between the CAs and the authorities of third countries. (Articles 84 and 90)

EBA will have powers of investigation, supervision and sanction on issuers of significant asset-referenced tokens and significant electronic money tokens. The EBA will create, manage and preside over a **consultative supervisory college** for each issuer (of which ESMA and the ECB will form part, in addition to the relevant CAs) to facilitate the exercise of their supervisory tasks. Without prejudice to other responsibilities, the colleges will issue non-binding opinions in the cases mentioned in Articles 100 and 102 (Articles 98 to 120). Annexes V and VI contain the lists of infringements for issuers of significant asset-referenced tokens and

significant electronic money tokens respectively.

Title IX: Transitional and final provisions

The EC shall prepare a report on the application of the Regulation three years after its entry into force. (Article 122)

Title II will not apply to crypto-assets other than asset-referenced or electronic money tokens issued or admitted to trading before the date of application of this Regulation. (Article 123)

The Regulation will be applicable 18 months after its entry into force, but Titles III and IV (provisions relating to the authorisation of issuers of asset-referenced and electronic money tokens) will be applicable with immediate effect. (Article 126)

Useful links:

Proposal for a Regulation on markets in cryptoassets and amending Directive 2019/1937

Annexes to the proposal for a Regulation on markets in cryptoassets and amending Directive 2019/1937