

# Position Paper

## Bitkom Position Paper on the European Commission's proposals on Markets in Crypto-Assets (MiCA) and a pilot regime for market infrastructures based on distributed ledger technology

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### Proposal for a regulation on markets in crypto-assets (MiCA)

We see the MiCA as a political milestone for crypto-adoption. It creates a fully harmonized market and establishes legal certainty for crypto-asset issuers and service providers. Thanks to MiCA, we expect the crypto-market to further mature and more and more institutional investors to enter the market. In several public consultations and political meetings during these last two years, we have been calling for a binding and unified European regulation in this area. We therefore highly appreciate the comprehensive EU Commission's proposal as a whole.

Due to the size and relevance of the EU single market, MiCA could potentially set global standards, shape crypto-regulation internationally, and attract market participants from all over the world. We are fully committed to supporting the EU on its way to becoming a global vanguard with regards to crypto-regulation and to offering our advice along the way as largest European digital trade association and biggest and most active German crypto network. In the following, we provide a first initial feedback and position from our members to several general and specific aspects of MiCA and the pilot regime for DLT market infrastructure. This position will get complemented and refined in the coming weeks and months and should not be considered exhaustive at this point.

- Designing MiCA as a binding and directly applicable regulation is a crucial precondition to make these new asset classes trustworthy. It harmonizes the EU-crypto-market, ensures a level playing field for issuers and service providers, and creates legal certainty for businesses and consumers alike.
- We highly appreciate the extension of the passporting regime to new crypto-asset service providers. It enables growth and competitiveness and opens up a large and attractive market for innovative market participants.
- We support the differentiation of crypto-asset-categories as well as the clear distinction between financial and non-financial crypto-assets. Over-regulation in the form of several applicable regulation-regimes should be prevented. We invite the EU Commission and the supervisory authorities to publish supervisory guidance and examples as soon as possible in order to make the classification criteria even more tangible and account for hybrid forms of tokens (see below).
- The treatment of possible "hybrid" crypto-assets requires further clarification.

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From our point of view it is still unclear how the MiCA would interact with MiFID II 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 live-cycle). In our view, it should be dealt with within the scope of the respective financial instrument rules.

- Especially the token category of utility tokens needs some further clarification in our view. How exactly does it differ from crypto-currencies and what kind of Blockchain-based digital representations of assets are not under its scope?
- In order to prevent regulatory uncertainties about MiCA’s scope, we think that definitions and guidance about crypto-currencies such as Bitcoin and their applicability within MiCA as well as clarification on constituent criteria of security tokens are necessary.
- Also, we suggest a more precise differentiation of the individual types of stablecoins (asset-referenced tokens and e-money tokens). The definitions of asset-referenced tokens and e-money tokens both provide the following formulation: “...that purports to maintain a stable value by referring to the value of...”. We do not consider the term “referring” 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 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 recognized by MKR (MakerDAO governance token) holders as eligible assets as collateral. In our interpretation, a Dai would be an asset-referenced token and not an e-money token, even if it refers to the value of a US dollar. However, Recital 10 of the MiCA draft could also suggest a different understanding, which would provide for an E-Money Token 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 commission to create clarity here for issuers and the application of the law.
- With regards to e-money tokens it is important to note that certain e-money tokens might need to fulfil requirements from both, the MiCA regulation and at the same time Directive 2009/110/EC. For the sake of clarity, we suggest to reconsider a clear regulation of e-money within one regulatory framework only in order to prevent overregulation.
- It is unclear to us how the proposed regulation would affect entirely decentralized financial services (DeFi). Who would be in charge for issuing a white paper and does the requirement of having a legal entity in the EU apply? Will those services be no longer accessible to EU citizens once the proposal is adopted? To make our questions more palpable: If Bitcoin was to be launched after MiCA came into force, would crypto-asset service providers be allowed to offer services based on it, even without a legal “Bitcoin-entity” in the EU and without a white paper sent to a supervisory authority? Further, what happens if a non-EU based issuer publishes a whitepaper, but not according to MiCAs requirements? A European crypto-asset service provider (e.g. when operating a trading platform) might not be able to admit to trading such crypto-assets, when the issuer has not

notified a whitepaper according to MiCA with a NCA. We see the need for sufficient investor information based on a whitepaper, but would also suggest that similar whitepaper or information documents might be considered equivalent to MiCA-based whitepapers. Otherwise we see the risk that EU-based crypto-asset service providers might have a competitive disadvantage with non-EU market participants.

- We encourage the EU to further making sure that the regulatory requirements for crypto asset service providers don't overburden startups and young industry players with too costly and complex requirements, but measures proportionate to the financial risks and volumes dealt with and to the EU's policy objective of enabling and fostering innovation.
- Regarding the new crypto-asset service providers licenses, it is unclear to us whether those licenses will be transferable to subsidiaries the same way MiFID-licenses are. Regulatory clarity here would be helpful.
- Regarding 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 DLT. 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.
- Financial Market Infrastructures (FMIs) should be considered in the MiCA as a relevant entities to handle assets in scope (Art 63 and Art 64). FMIs should be permitted to deal with the assets in scope of the MiCA (asset-referenced tokens and e-money tokens), alongside banks and crypto-asset service providers. FMIs should also explicitly be allowed to deal with crypto-assets in future (e.g. CCPs to accept crypto-assets as margins or CSDs to offer services on crypto-assets).

**Proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology**

- As already stated in our position paper on the German legislative proposal for the introduction of electronic securities, we consider the planned EU pilot regime for market infrastructures based on distributed ledger technology to be an important and reasonable way to both enable a young innovative market to develop and obtain necessary regulatory insights into how to develop an appropriate legal framework in the future, while at the same time ensuring consumer protection and security standards.
- Approval of public and private DLT market infrastructures: the draft regulation only explicitly mentions private permissioned DLT systems ("proprietary DLT") in Recital 28 and in Art. 7 (2). Public DLT is not mentioned. In Art. 4 (2) subparagraph 1 of the draft regulation, a DLT MTF distributed ledger is mentioned: "recorded on the DLT MTF'S distributed ledger". According to Art. 6 (2) of the draft regulation, a DLT MTF shall establish rules for access to the DLT and for the participation of validator nodes. With a view to technology neutrality, we strongly advocate within the framework of a pilot regime that, in addition to closed DLT systems, public DLTs should also be permitted and that operators of a DLT market infrastructure should be able to use them.
- Wide scope for action by national authorities: We consider it a sensible move to try out new possibilities for securities delivery and settlement based on DLT as part of the pilot regime. For example, we welcome the fact that DLT MTF operators will be able to obtain an exemption for the operation of a DLT MTF, whereby no entry with a central securities depository is required. Nevertheless, we are critical of the opportunity given to national supervisory authorities under Art. 4 (1) of the draft regulation to impose additional requirements for the granting of a DLT MTF license that the supervisory authority considers appropriate to achieve the regulatory objectives of the standards from whose application an exemption is granted or to ensure the objectives of investor protection, market integrity or financial stability. We can understand the objectives. However, we would argue for a certain degree of legal certainty for market participants and for clearer powers of intervention by national supervisory authorities.
- Approval of further intermediaries: Under the pilot regime, a DLT MTF will have the opportunity to create a DLT ecosystem from the issuance of a DLT-transferable security, through trading, trade settlement and custody. We consider this proposal to be reasonable. In the interest of market openness and with a view to the intermediaries that have already established themselves in the market, such as crypto-custodians and crypto-custodian depository banks, issuers of own issues or also with a view to the introduction of crypto-security register operators in the recent German legislative proposal, we would plead for openness within the DLT ecosystem, so that these participants can also assume roles within these DLT security ecosystems.

- Overall, we highly appreciate the goal of facilitating DLT-based innovation and thereby acquiring the necessary regulatory expertise. The proposed exemptions (e.g. Art. 3 (2) CSDR) have the potential to disrupt and reorganize today's market infrastructures and systems by making use of the latest technological developments. Generally, the success of the pilot regime will depend on its practical implementation. However, with regard to the proposed volume thresholds, the uncertain continuation of the pilot after maximum 6 years, and the missing interoperability with other market infrastructures due to its closed nature we are not sure whether the pilot's current conception is economically attractive enough for market participants. We urge the EU Commission to interact and communicate with potential participants in order to ensure the pilot regime's practical success.

Bitkom represents more than 2,700 companies of the digital economy, including 2,000 direct members. Through IT- and communication services alone, our members generate a domestic annual turnover of 190 billion Euros, including 50 billion Euros in exports. The members of Bitkom employ more than 2 million people in Germany. Among these members are 1,000 small and medium-sized businesses, over 500 startups and almost all global players. They offer a wide range of software technologies, IT-services, and telecommunications or internet services, produce hardware and consumer electronics, operate in the digital media sector or are in other ways affiliated with the digital economy. 80 percent of the members' headquarters are located in Germany with an additional 8 percent both in the EU and the USA, as well as 4 percent in other regions of the world. Bitkom promotes the digital transformation of the German economy, as well as of German society at large, enabling citizens to benefit from digitalisation. A strong European digital policy and a fully integrated digital single market are at the heart of Bitkom's concerns, as well as establishing Germany as a key driver of digital change in Europe and globally.