

Position Paper

Bitkom Position Paper on Finalization of the Markets in Crypto-Assets Regulation (MiCA)

13. June 2022

Clear legal definitions and avoidance of regulatory overlaps

Bitkom suggests to refine definitions to provide greater clarity as to which tokens are outside scope of MiCA, particularly in instances where they qualify as Markets in Financial Instruments Directive II (MiFID II) financial instruments or e-money under E-Money Directive 2 (EMD2). Further clarity and clearer drafting is also needed to ensure that Decentralized Finance (DeFi) services, utility tokens and Non-Fungible Tokens (NFTs) remain outside of scope of MiCA.

In relation to NFTs and utility tokens, definitions should be updated to clearly reflect that those tokens which i) are non-fungible or ii) provide access to goods or services and are provided by the issuer or a limited network should be exempt from MiCA scope, even if offered publicly – regardless of whether they are available on an exchange platform. In the case of NFTs, non-intrinsic value/subjective value should not be the basis on which they are deemed “financial” assets, requiring inclusion under MiCA. Otherwise, this would extend the scope of regulated “financial” assets beyond reason, just because someone believes in a subjective value or an increase in value, which was not promised by the issuer. We propose to delete the amendment to recital 2 of MiCA in the Council version as it will not provide sufficient clarification. For the same reason any NFT Anti Money Laundering (AML)-related proposals should be removed from MiCA.

Scope of liability for custodians and exchanges

We understand that there is a particular concern around adequate investor protection measures for crypto-asset holdings which are intended to be ensured through a dedicated liability regime for the custody of crypto-assets in Art. 67 (8) and Art. 4 & 14. Yet we would like to highlight two remaining concerns with the compromises currently negotiated:

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Overall, Art. 67 (8) introduces a guarantee-like regime which does not exist in any other financial services regulation. Liability is typically based on national civil law frameworks. However, the scope of the liability for individual incidents in the civil laws of the majority of EU Member States is linked to misconduct and negligence. In the interest of a same risk same rules approach, Bitkom proposes that the EU legislators replicate this wording in the legal text of Art. 67 (8), which would avoid a disproportionate liability up to the full market value. This will be not insurable and prevents the EU economy from benefiting from EU-based custody services.

Additionally, from the Bitkom point of view more clarity is needed for the market value to be applied for calculating the loss, i.e. “at the time when the loss deemed to have occurred”. Crypto Asset Service Providers (CASPs) operating a trading platform should not have the same role and obligations of an offeror when it admits a crypto-asset to trading on its own initiative. This would impose implausible responsibilities on the platform operator with regard to the issuance of a whitepaper, liabilities under the whitepaper, and for the crypto-asset product itself, which will be beyond the CASPs contractual and literal control. This may result in an indirect trading ban and weakens consumer protection aims, as exchanges will be unwilling to accept this unmanageable liability for assets they have no control over and consumers will be pushed to unregulated service providers.

Redemption of asset-referenced token (ART) and e-money token (EMT)

A platform operator or an exchange service provider shall not be obliged to offer redemption in funds/wire transfer, if a customer wishes to redeem EMT and ART, as a platform operator or exchange service provider that only offers the listing and trading of these crypto-assets would not provide agent services for the issuer of EMT/ART.

The redemption of ART shall include redemption in funds as well as in the assets that are referenced or that were paid by the holder to receive the ART. The issuer of ART shall have a right to decide in which crypto-assets or funds he will offer redemption. The redemption rights as proposed by the Council are more in line with the concept of ART. A redemption only in funds as proposed by the European Parliament (EP) would go against the concept of ART and disregard any differentiation from EMT. Additionally, to a redemption in the (crypto-)assets referenced by an ART, we would add redemption in the assets paid in exchange for the ART, as the asset referenced might differ from the asset paid in exchange for the ART.

Clarity on ability of crypto custodians to store EMT

The Council version mentions in recitals 63a - 63d that some of the crypto-asset services may overlap with payment services in particular custody services, placing of crypto-assets, and services from custodians associated to the transfer of crypto-assets. Bitkom supports that e-money issuers shall be allowed to provide custody services to their clients. Apart from that, it should be made clear that a custody service provider that has a MiCA licence is allowed to provide custody services also for EMT and shall not need an additional payment services or banking licence.

Clarity on the scope of „transfer of crypto-assets“

The crypto-asset service of „transfer“ was introduced by the EP version. The Council version mentions that „the transfer of crypto-assets is a service difficult to define due to the technology used, including in relation to e-money tokens.“ For a regulatory framework, the „transfer of crypto-assets“ would need to be defined more clearly as the definition in TFR/MiCA is unclear and too vague for a crypto-asset service, where the provider faces severe consequences when providing a service without a licence. It should be made clear if, e.g. the provider of a validator node would also be in scope of „transfer“ service.

Sustainability/ESG and AML to be treated under their respective frameworks

Bitkom wants to highlight the importance of treating sustainability and AML criteria in their respective frameworks. We support the EPs proposal to link crypto assets to the EU taxonomy. Similarly, the regulation of AML-requirements should be dealt with in AMLD6 and not within MiCA. Otherwise, it could lead to more inconsistency and potentially create conflict between the different frameworks.

Authorization Regimes for licensed service providers under the Payment Services Directive (PSD2) and MiFIDII

Bitkom sees the need for further clarity on authorization regimes for service providers. It is important to clarify that licenced service providers, e.g. under PSD2 or MiFIDII can transfer their licence to MiCA.

Transitional Measures

Bitkom supports the proposal to allow crypto-asset service providers, which provided their services in accordance with applicable in the past, to continue to do so until 18 months after application of MiCA.