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| From: | Presidency |
| To: | Working Party on Financial Services (Crypto Assets)<br>Financial Services Attachés |
| Subject: | Markets in Crypto-Assets (MiCA)<br>- Discussion note for an initial exchange on selected issues – Titles I, III, IV |

Working Party on Financial Services

Crypto-assets proposals

Meeting 29 October 2020

# MiCA – Discussion NOTE for an initial exchange on selected issues – Titles I, III, IV

## I. Introduction

This note aims at structuring the discussion on selected points in the initial walk-through of the MiCA proposal.

Following the presentations of the MiCA and DLT proposals by the Commission and a initial discussion at the first CWG meeting on 29 September, the Presidency sought written comments by the MS. 15 MS[1] have commented on the proposals or parts thereof. Based on the interventions and comments of the MS, it is the view of the Presidency that MS are generally supportive of both proposals.

[1] So far, the presidency received comments from AUT, SVN, LVA, CYP, NDL, IRL, FRA, DNK, ESP, POL, GRC, SWE, ITA, EST, LUX.

However, there are numerous issues raised by MS. For this CWG the Presidency would like to focus the discussion on Titles I, III and IV, because the definition and handling of asset-referenced tokens and e-money tokens and their issuers clearly are the most pressing issues.

With regard to MiCA Titles I, III and IV the Presidency holds the view that the following topics warrant a deeper reflection and discussion among MS.

## II. Subject Matter, Scope and Definitions (Title I)

With the MiCA proposal, the Commission aims at providing a dedicated and harmonised framework at Union level to provide specific rules for the issuance of crypto-assets and related activities and services and to clarify the applicable legal framework. To this end, Title I of the proposal includes provisions on the personal and material scope of MiCA, as well as various definitions on relevant terms, including crypto-assets, utility token, asset-referenced token and e-money-token.

In this title, MS commented on a range of topics, addressing issues such as further clarification and consistency in terminology as well as proposing amendments on certain definitions. A number of comments raised in the context of scope and definitions reference to specific articles in other Titles and will be discussed accordingly in conjunction with these provisions.

## 1. Scope (Art. 2)

a) Issuance of Asset Referenced Token (ART) by Credit Institutions

According Art. 2 (4) of the Commission proposal, credit institutions issuing ART or significant ART (sART) shall not be subject to the authorisation requirements of chapter 1 of Title III (Art. 15 to 21) and the own funds requirements of Art. 31 and presumably also from the increased capital requirements for sART issuers under Art. 41 (4).

According to the Commission, the rationale is that credit institutions are already subject to a harmonised authorisation procedure at EU level set out in the CRD.

In their comments, some MS question these exemptions, against the background that activities related to crypto-assets may pose new challenges and risks to incumbent financial institutions. This applies in particular to those ART that reference crypto-assets and commodities: Unlike ART that reference a basket of currencies, these are not comparable with e-money in the meaning of Directive 2009/110/EC (EMD2), so it cannot necessarily be assumed that credit institutions already have experience in issuing commodity or crypto-asset-linked ARTs.
sARTs present potentially more significant challenges for financial stability, monetary policy transmission or monetary sovereignty. In view of these risks, the draft contains in Art. 19 the possibility to deny authorisation for issuers of (s)ARTs which do not qualify as credit institutions.

MS are asked for their views on the following:

- Do MS believe that credit institutions should be required to seek separate authorisation to issue ART?

## 2. Definitions (Art.3)

MS offered numerous constructive remarks regarding the definitions that the Presidency will analyse first within the work on technical level. However, some definitions raise fundamental questions, since they have direct implications of the applicable regulatory regime in Chapters III and IV. In this regard, the definition of crypto assets has a direct impact of the scope of application of MiCA in general, whereas the definition of ART and EMT are directly linked to the question which regulatory requirements of Chapter III and IV applies.

a. Definition of crypto-assets

The Commission proposal defines crypto-assets broadly, so as to capture all the different permutations of crypto-assets that are emerging on the market and that do not qualify as financial instruments. According to the Commission, a differentiation between certain types of crypto-assets or their functions is only made in the proposal when substantive requirements applying to them should be differentiated in view of the specific policy issues and risks they present.

A number of MS considered the proposed definition of crypto-assets in Art. 3 (2) as too broad, pointing out that be that business models that are currently not covered by financial regulation in the traditional financial sphere could be covered if they are offered through DLT. One MS suggested that the criteria to be used for the distinction of crypto-assets, as defined in this regulation, from financial instruments, electronic money, deposits and structured deposits should be further specified in the delegated act foreseen in Art. 3 (2), to provide for more clarity in scope. It was noted that the notion of 'crypto-assets' should correspond more closely with the definition of 'virtual assets' set out in the recommendations of the Financial Action Task Force (FATF).

Against this background, MS are asked for their views on the following:

- Do MS consider the definition of "crypto-assets" as being too broad? If so, what concrete proposals do MS have to make the definition more specific?

<u>b. Definition of asset-referenced token and e-money token</u>

The Commission proposal establishes two categories of so-called 'stablecoins': asset-referenced tokens and e-money tokens. The Commissions' reasoning was to ensure a regulatory treatment of so-called 'stablecoins' depending on their likelihood to be used for payment purposes and their similarity - or not - to e-money.

The definitions of asset-referenced token and e-money token have raised fundamental questions for a large number of MS. A number of MS emphasised that the definitions in their current wording may provide leeway for regulatory arbitrage. For example, issuers could easily circumvent the requirement of granting a claim on the issuer for EMTs by referring to a second currency or other assets with insignificant influence on the EMTs value but resulting the token to qualify as an ART instead, whose regulation in Title III does not provide for this requirement.

In this context, MS stressed that both EMT and ART could be used as means of exchange/payment. To the extent that they reference fiat currencies, the risks associated with ARTs referencing a fiat currency basket are largely comparable to those associated with EMTs that reference the value of one fiat currency.
Other MS raised the question of whether certain innovative forms of stablecoins should not be regulated or should be subject to a more proportional regulation.

MS are asked for their views on the following questions:

- Do MS agree with the COM approach of different definitions (and regimes) for ARTs and EMTs?
- Are there specific ARTs that should fall under the EMT regime?
- Should the intended use of a crypto-asset as means of payment determine how its issuance should be treated?

# III. Asset-referenced Tokens (Title III)

1. Own funds requirements

Concerning own funds requirements for issuers of ART, Art. 31 (1) b of the Commission proposal foresees 2% of the average amount of the reserve assets referred to in Article 32 or at least 350.000 EUR, inspired by Art. 4 and Art. 5 (3) EMD2. In Art. 41 (4) the requirement is set at 3% for issuers of sARTs. At the same time, it is proposed in Art. 31 (3) that competent authorities may require issuers of asset-referenced tokens to hold an amount of own funds which is up to 20 % higher or permit such issuers to hold own funds up to 20 % lower than required by Art. 31(1) if the criteria set out in Article 31 (3) (a) to (g) are met.

Some MS have questioned the level of own funds requirements, firstly with regard to the risks associated with ART and secondly with regard to proportionality for start-ups.

MS are asked for their views on the following:

- Do MS agree with the own fund requirements for issuer of ART and sART of the COM proposal?

2. Investment of the reserve assets

In Art. 33 (2) the Commission proposes that the reserve assets received in exchange for the asset-referenced tokens shall be held in custody by no later than 5 business days after the issuance of the asset-referenced tokens. In Art. 34 the Commission nevertheless proposes to clarify that where issuers invest part of the reserve it must be in highly liquid financial instruments and by doing this allowing issuers of ARTs to invest part of the reserve. The Commissions proposal does not directly limit the extent to which the reserves can be invested. However, an economic limit exists in Art. 34 (3), according to which the issuers bear the losses and gains from the investment.

Some MS are questioning the possibility of investing parts of the reserve with regard to the stability of the reserve and the potential impact the investments of large ART issuers and sART issuers may have on financial stability. Furthermore, the Commission's proposal contains no requirement that the funds received in exchange for the ART must be invested in the referenced assets.

MS are asked for their views on the following:

- Do MS agree with the own fund requirements for issuer of EMT and sEMT of the COM proposal?
- How should the reserve be regulated?
- Should further requirements for the investment of the reserve be included?

3. Classification of ARTs as sARTs

Article 39 (1) lays down abstract criteria for determining the significance of an ART. According to Art. 39 (6), the Commission shall be empowered to adopt delegated acts in accordance with Article 121 to further specify the criteria set out in paragraph 1. Art. 39 (6) a determines minimum thresholds for these criteria.

According to the Commission the rationale for this construct is to provide direction and set out minimum thresholds in the regulation, but leaving the technical criteria to the delegated act.

MS are asked for their views on the following:

- Should the criteria for determining the significance of an ART be defined in the regulation itself or in a delegated act?
- Do MS agree with criteria in Art. 39 (1) and thresholds in Art 39 (6) ?

# IV. (Significant) Electronic money tokens

## 1. Own funds requirements and investment of the reserve assets.

For issuers of EMTs, MiCA does not contain any requirements with regard to equity and reserves. Instead, the requirements of Art. 5 and 7 of EMD 2 apply. Only for issuers of sEMTs does MiCA contain specific capital and reserve requirements. In this respect, Art. 33 and Art. 34 and 41 apply.

MS are asked for their views on the following:

- Do MS agree with the own fund requirements for issuer of EMT and sEMT of the COM proposal?
- How should the reserve be regulated?
- Should further requirements for the investment of the reserve be included?

## 2. Classification of EMTs as sEMTs

Article 50 in connection with Article 39 (1) lays down abstract criteria for determining the significance of an EMT. According to Art. 39 (6) the Commission shall be empowered to adopt delegated acts in accordance with Article 121 to further specify the criteria set out in paragraph 1. Art. 39 (6) a determines minimum thresholds for these criteria.

According to the Commission the rationale for this construct is to provide direction and set out minimum thresholds in the regulation, but leaving the technical criteria to the delegated act.

MS are asked for their views on the following:

- Should the criteria for determining the significance of an ART be defined in the regulation itself or in a delegated act?
- If MS support a more specific definition in the regulation, what should this be?
- Do the MS agree with the thresholds in Art 39 (6) a?

## 3. Relationship to EMD2 / PSD 2

The regime for so-called stablecoins in MiCA takes into consideration the fact that they may become widely used means of payments and payment services that compete with existing means of payments and payment services. Article 43(1) states that E-money tokens are to be deemed as e-money as defined in EMD2 for the purposes stated in Art. 43(1) lit (a). Against this backdrop, a large number of MS have highlighted the importance of a smooth alignment of MiCA with EMD2 and PSD2.

MS are asked for their views on the following questions:

- Do MS agree with the approach to regulate EMT as a kind of e-money without fully integrating EMTs in the EMD2/PSD 2 regime?
- If yes, which further clarification are necessary to ensure a smooth alignment of MiCA with EMD2 and PSD2?If not, how should the regime for EMT be distinguished from the EMD2/ PSD2 regime?