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**TOWARDS AN EU LEGISLATION OF CRYPTO-ASSETS:  
REFLECTIONS ON THE MiCAR PROPOSAL**

# REASONS FOR AND OBJECTIVE OF THE PROPOSAL

- The Commission has drafted a proposal (the “**Proposal**”) for a Regulation on markets in crypto-assets (the “**Regulation**”).
- The Proposal is part of the EU Digital Finance package. The package also includes:
  - a proposal for a pilot regime on distributed ledger technology (DLT) market infrastructures,
  - a proposal for digital operational resilience,
  - a proposal to clarify or amend related EU financial services rules.



The EU Digital Finance package is a package of measures to further enable and support the potential of digital finance in terms of innovation and competition while mitigating the risks.

The advent of new types of crypto-assets (such as “**stablecoins**”) that, due to their features, aim to seek wider adoption, has stressed out the need for a common approach with Member States on cryptocurrencies, in order to “*ensure to make the most out of the opportunities they create and to address the new risks they may pose*” (Ursula von der Leyen).

The EU framework shall both enables markets in crypto-assets as well as the tokenisation of traditional financial assets and a wider use of DLT in financial services

# OPTIONS FOR THE DEVELOPMENT OF THE CRYPTO-ASSETS FRAMEWORK FOR UNREGULATED CRYPTO-ASSETS

- **Option 1 - Opt-in regime for unregulated crypto-assets**
  - Issuers and service providers can decide to opt-in or to remain unregulated (except for Member States regulations).
  - Issuers that opt-in would benefit from an EU passport to expand their activities across borders.
- **Option 2 – Full harmonisation**
  - All issuers and service providers would be subject to EU law and would benefit from an EU passport.
  - The national regimes on crypto-assets would no longer be applicable.



The Commission has adopted Option 2 to ensure a higher level of legal certainty, investor protection, market integrity and financial stability, and to reduce market fragmentation across the Single Market.

**Figure 1: Concept of MiCA**

<b>Token Type</b>	<b>Regulatory Focus</b>	<b>Tool</b>	<b>Supervision</b>
Significant ART & EMT	Systemic Risk	Additional own funds, EBA supervision	EBA
Payment Tokens (ART & EMT)	Market Integrity, Investor / Client Protection	Authorization, Reserve & Safeguarding Rules, Own Funds, Disclosure	NCA (EBA)
Utility tokens (crypto- assets)	Investor / Client Protection	Disclosure	NCA
Investment Tokens	Systemic Risk, Market Integrity, Investor / Client Protection	EU financial law	NCA, ESMA

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: SUBJECT MATTER, SCOPE AND DEFINITIONS

- **Title I** sets the subject matter, the scope and the definitions.
- The Regulation applies to **crypto-asset service providers** and **issuers**.
- The Regulation establishes **uniform requirements** for **transparency** and **disclosure** in relation to **issuance**, **operation**, **organisation** and **governance** of crypto-asset service providers, as well as establishes **consumer protection rules** and **measures to prevent market abuse**.
- The scope of the Regulation is limited to crypto-assets that, under EU financial services legislation, do not qualify as:
  - financial instruments,
  - deposits or structured deposits.
- The Regulation sets out the terms and definitions that are used for its purposes. It is important to underline that the Commission has considered the specificity of the subject and therefore intends to adopt delegated acts to specify some technical elements of the definitions, to adjust them to market and technological developments.

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: MAIN DEFINITIONS

## Crypto-assets vs. Utility Token

**Crypto-asset** means a digital representation of value or rights, which may be transferred and stored electronically, using distributed ledger or similar technology

**Utility token** means a type of **crypto-assets** which are intended to provide access digitally to an application, services or resources available on a distributed ledger and that are accepted only by the issuer of that token to grant access to such application, services or resources available

## Asset-referenced tokens

Type of crypto-assets whose main purpose is to be used as a means of exchange and that **purports to maintain a stable value by referring to the value of several fiat currencies, one or several commodities or one or several crypto-assets, or a combination of such assets** ( often described as stablecoins)

Asset referenced token may be considered **significant** if they meet certain requirements as set out in the Regulations.

## E-money tokens

Type of crypto-assets whose main purpose is to be used as a means of exchange and that **purports to maintain a stable value by being denominated in (units of) a fiat currency** ( often described as stablecoins)

E-money tokens referenced token may be considered significant if they meet certain requirements as set out in the Regulations.

The difference between asset-referenced tokens and e-money tokens shall be found in the value backing asset which for the first type can be the value of different fiat currencies, as well as commodities or other crypto-assets. E-money tokens are denominated in unit of a fiat currency only.

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: RULES FOR THE OFFERING AND MARKETING OF CRYPTO-ASSETS

- **Title II** regulates the **offerings and marketing of crypto-assets** (including utility token) to the public.
- Issuer shall be entitled to offer crypto-assets to the public in the Union or seek an admission to trading on a trading platform for crypto-assets if:
  - it complies with specific requirements;
  - it draws up a *whitepaper*;
  - it notifies such a whitepaper to the competent authorities.
- The Regulation provides for some exemptions (*i.e.* small offerings of crypto-assets – below €1 million within a twelve-month period – and offerings targeting qualified investors as defined by the Prospectus Regulation)



The **whitepaper will not be subject to a pre-approval process by the national competent authorities**; it will be notified to the national competent authorities that will be **in charge of assessing whether the crypto-asset at stake constitutes a financial instrument or electronic money**.

Such assessment shall be based on an assessment, **to be drafted and notified by the issuer together with the whitepaper**, explaining the reasons why the crypto-asset described in the whitepaper does not represent a financial instrument under Directive 2014/65/EU, electronic money under Directive 2009/110/EC, a deposit under Directive 2(1)(3) and a structured deposit under Directive 2014/65/EU

After the notification of the whitepaper, competent authorities will have the power to suspend or prohibit the offering, require the inclusion of additional information in the whitepaper or make public the fact that the issuer is not complying with the Regulation.

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: ISSUANCE OF ASSET-REFERENCED TOKENS

- **Title III** of the Regulation sets out the **requirements for issuers of asset-referenced tokens** and describes the **procedure for authorisation** of the asset-referenced token issuers.
- **The whitepaper relating to asset-referenced token shall be approved by competent authorities.**
- To be authorised to operate in the Union, issuers of asset-referenced tokens shall be incorporated in the form of a legal entity established in the EU and shall act honestly, fairly and professionally. They shall also comply with other requirements, such as capital requirements, governance requirements, rules on conflicts of interest, rules on the stabilisation mechanism and the reserve of assets backing the asset-referenced tokens and requirements for the custody of the reserve assets. Issuers of significant asset-referenced token shall be subject to further additional requirements.
- An issuer shall only invest the reserve assets in assets that are secure, low risk assets (as described by the electronic money directive) and that meets the definition of high quality liquid assets under the Capital Requirements Regulation (Regulation EU 575/2013).



# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: ISSUANCE OF E-MONEY TOKENS

- E-money tokens shall be offered to the public in the EU or shall be admitted to trading on a trading platform for crypto-assets only if their issuer:
  - **is authorised as a credit institution or as an electronic money institution** within the meaning of Article 2(1) of Directive 2009/110/EC;
  - **complies with requirements applying to electronic money institution** in accordance with Article 40out in the Directive 2009/110/EC;
  - **publishes a whitepaper notified to the competent authority.**
- Holders of e-money tokens shall be provided with a **claim** on the issuer: **e-money tokens shall be issued at par value and on the receipt of funds, and upon request by the holder of e-money tokens, the issuers must redeem them at any moment and at par value.**
- National competent authorities are in charge of supervising e-money issuers, however, when these have been deemed significant, the supervision of such e-money token issuers is conferred to the EBA.
- Within 30 calendar days of a decision to classify an e-money token as significant, EBA shall establish, manage and chair a consultative supervisory college for each issuer of significant e-money tokens.



The **college** shall consist of, among others; the competent authority of the home Member State where the issuer of the significant e-money tokens has been authorised, the EBA, ESMA, the competent authorities with supervision of the most relevant payments institutions, trading platforms and custodians providing services in relation to the significant e-money token, the ECB if the significant e-money token is referencing euro and the national central bank in case the significant e-money token is referencing an EU currency which is not the euro.

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: AUTHORISATION AND OPERATING CONDITIONS OF CRYPTO ASSET SERVICE PROVIDERS

**Crypto-asset service provider** means any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis.

The **crypto-asset services** listed in the Regulation are the following:

- the custody and administration of crypto-assets on behalf of third parties;
- the operation of a trading platform for crypto-assets;
- the exchange of crypto-assets for fiat currency;
- the exchange of crypto-assets for other crypto-assets;
- the execution of orders for crypto-assets on behalf of third parties;
- the placement of crypto-assets;
- the reception and transmission of orders for crypto-assets on behalf of third parties;
- the advice on crypto-assets;
- the execution of payment transactions in asset-referenced tokens.

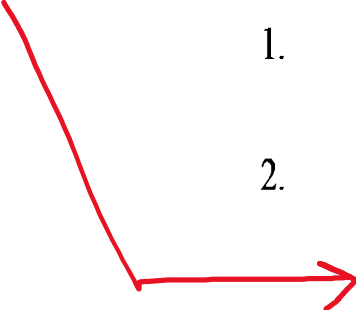
- The Regulation imposes requirements on all crypto-asset service providers, such as prudential safeguards, organisational requirements, rules on the safekeeping of clients' funds, rules on the information provided to clients, the obligation to establish a complaint handling procedure, rules on conflict of interests.
- The Regulations defines the provisions on authorisation and supervision of crypto-assets service providers.
- The Regulation also sets out requirements for the specific services included in the list of crypto-assets services.

# FUNDAMENTAL PROVISIONS OF THE PROPOSAL: MARKET ABUSE INVOLVING CRYPTO-ASSETS

- To ensure an orderly functioning of crypto-asset markets, crypto-asset service providers operating a trading platform for crypto-assets should have **detailed operating rules** and should **ensure that their system and procedures are sufficiently resilient**. They should also be subject to **pre-trade and post-trade transparency requirements adapted to the crypto-asset market**.
- Since issuers of crypto-assets and crypto-asset service providers are very often small and medium-sized enterprises, the Commission has evaluated that it could be **disproportionate to apply all the provisions of the Market Abuse Regulation**. Therefore the Regulation puts in place prohibitions and requirements to prevent market abuse involving crypto-assets.
- Such prohibitions and requirements shall apply to **acts carried out by any person and that concerns crypto-assets that are admitted to trading on a trading platform for crypto-assets operated by an authorised crypto-asset service provider, or for which a request for admission to trading on such a trading platform has been made**.
- The Regulation defines the **notion of inside information** and indicates that an issuer whose crypto-assets are admitted to trading on a trading platform for crypto-assets shall **disclose inside information**. The Regulation also bans **insider dealing, unlawful disclosure of inside information and market manipulation**.

## *Article 2*

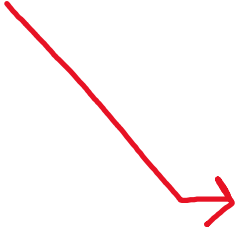
### *Scope and exemptions*

1. This Regulation applies to entities engaged in the issuance of crypto-assets and services related to crypto-assets in the Union.
  2. This Regulation shall not apply to crypto-assets that qualify as:
    - (a) financial instruments within the meaning of Article 4(1)(15) of Directive 2014/65/EU<sup>30</sup>;
    - (b) electronic money within the meaning of Article 2(2) of Directive 2009/110/EC<sup>31</sup>, except if they qualify as an electronic money token under this Regulation;
    - (c) deposits within the meaning of Article 2(1)(3) of Directive 2014/49/EU<sup>32</sup>;
    - (d) structured deposits within the meaning of Article 4(1)(43) of Directive 2014/65/EU.
    - (e) securitisation within the meaning of Article 2(1) of Regulation (EU) 2017/2402<sup>33</sup>.
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## **Chapter 2: authorisation and supervision of asset-referenced token issuers**

### *Article 30*

#### *Authorisation as an issuer of asset-referenced tokens and approval of the initial whitepaper*

1. A legal person which intends to offer asset-referenced tokens in the EU or seek their admission to trading on a trading platform for crypto-assets shall apply to the competent authority of its home Member State for authorisation as an issuer of asset-referenced tokens.
  2. The application referred to in paragraph 1 shall include, in particular, the following information:
    - (a) the address of the prospective issuer of asset-referenced tokens;
    - (b) the legal status of the prospective issuer of asset-referenced tokens;
    - (c) the articles of association of the prospective issuer of asset-referenced tokens;
    - (d) a programme of operations setting out the business model that the issuer of asset-referenced tokens intends to carry out;
    - (e) a legal opinion that the proposed activity does not fall within the scope of other financial services legislation, such as those specified in Article 2(2);
    - (f) a description of the prospective issuer's governance arrangements;
    - (g) the identity of the members of the management body of the prospective issuer of asset-referenced tokens;
    - (h) proof that the persons referred to in point (g) are of good repute and possess appropriate knowledge and experience to manage the prospective issuer of asset-referenced tokens;
    - (i) where applicable, proof that natural persons who either own, directly or indirectly, more than 20% of the issuer's share capital or voting rights, or who
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- **EU CATEGORIES:**
  
- **PROSPECTUS REGULATION:**
  
- **«TRANSFERABLE SECURITIES»:**
  
- **‘securities’ means transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months;**
  
- **MiFID : Financial Instruments**

- Under MiFID/Prospectus, transferable securities include, amongst other:
  - Shares
  - Bonds
  - Units of collective investment schemes
  - And other instruments «similar» to the above.
- **A TOKEN MIGHT FALL INTO THESE CATEGORIES, IF FOR EXAMPLE IT IS SIMILAR TO A SHARE, OR A BOND**

- **THE ISSUE OF «NEGOTIABILITY»....**



- **PAYMENT TOKENS:** outside capital markets regulation
- **UTILITY TOKENS:** outside capital markets regulation
- **ASSET TOKENS:** if financial instruments, included in the scope of MiFID and prospectus
  
- Other categories may exist under national law (ITALY – FINANCIAL PRODUCT; USA «Howey test»)