

NEWSLETTER DIRITTO BANCARIO E DEI MERCATI FINANZIARI



THE PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON MARKETS IN CRYPTO-ASSETS

The Proposal for a Regulation of the European Parliament and of The Council on Markets in Crypto-Assets and amending Directive (EU) 2019/1937 (“MICA”), (which you can find [here](#)), accompanied by the Commission Impact assessment (which you can find [here](#)) is a regulatory framework developed to regulate currently out-of-scope crypto-assets and their service providers in the EU and to provide a single licensing regime across all member states. Indeed, crypto-assets are one of the major applications of blockchain technology in finance and since the publication of its Fintech Action plan, in March 2018, the Commission has been examining the opportunities and challenges raised by crypto-assets.

SUBJECT MATTER

As to the subject matter, MICA applies to persons engaged in the issuance of crypto-assets or provide services related to crypto-assets in the Union. In particular, MICA does not apply to the following entities and persons: (a) the European Central Bank, national central banks of the Member States when acting in their

capacity as monetary authority or other public authorities; (b) insurance undertakings or undertakings carrying out the reinsurance and retrocession activities as defined in Directive 2009/138/EC of the European Parliament and of the Council when carrying out the activities referred to in that Directive; (c) a liquidator or an administrator acting in the course of an insolvency procedure, except for the purpose of Article 42; (d) persons who provide crypto-asset services exclusively for their parent companies, for their subsidiaries or for other subsidiaries of their parent companies; (e) the European investment bank; (f) the European Financial Stability Facility and the European Stability Mechanism; (g) public international organisations.

SCOPE

As MICA aims to regulate every digital representation of value or rights, which may be shared or stored electronically, using distributed ledger technology (DLT) – (defined as “a type of technology that support the distributed recording of encrypted data”) or similar, its scope is limited to crypto-assets which do not qualify as financial instruments, deposits or structured deposits under EU financial services legislation. Specifically, it does not apply to crypto-assets that qualify as: (a) financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU (MiFID II); (b) electronic money as defined in Article 2, point (2), of Directive 2009/110/EC (“E-Money Directive”), except where they qualify as electronic money tokens under this Regulation; (c) deposits as defined in Article 2(1), point (3), of Directive 2014/49/EU of the European Parliament and of the Council (Deposit Guarantee Schemes Directive); (d) structured deposits as defined in Article 4(1), point (43), of MiFID II; (e) securitisation as defined in Article 2, point (1), of Regulation (EU) 2017/2402 of the European Parliament and of the Council (Securitisation Regulation).

Thus, MICA’s scope of intervention is limited to those called utility tokens and the so-called “Stablecoins”, which in turn includes the two sub-categories of “asset-referenced tokens” and “e-money tokens”. In particular, as specified in the introductory report, Stablecoins are a relatively new subset of crypto-assets which recently emerged and attracted the attention of both the public and regulators around the world. While the crypto-asset market remains modest in size and does not currently pose a threat to financial stability, this may change with the advent of ‘global stablecoins’, which seek wider adoption by incorporating features aimed at stabilising their value and by exploiting the network effects stemming from the firms promoting these assets.

DEFINITIONS

Coming to the key terms and definitions, MICA clarifies that:

- i. **crypto-asset** as a “digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology”;
- ii. **Distributed ledger technology** (DLT) as a type of technology that support the distributed recording of encrypted data;

- iii. **Utility tokens** as “a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token”. In other words they are issued with non-financial purposes to digitally provide access to an application, services or resources available on DLT networks;
- iv. **Asset-referenced tokens** as “a type of crypto-asset that purports 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” and as such they subsequently act as a means of payment to buy goods and services and as a store of value; and
- v. **“E-money tokens”** as a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender; they are therefore crypto-assets with a stable value based on only one fiat currency that aims to function similar to electronic money (replacing fiat currency in payments), as defined in the EU’s Directive 2009/110/EC.

THE ISSUE OF UTILITY TOKENS AND STABLECOINS

As said, the regulation proposed in relation to Utility Tokens and Stablecoins (Asset referenced and e-money tokens), has, in general, as its specific scope the "issue" of, and the provision of services connected to, these types of Tokens, from any entity in the territory of the Union.

In relation to the **issue of Utility Tokens**, the prefigured discipline essentially has as its objective that of information transparency (disclosure) focusing on the information safeguards to be adopted in the offer and marketing. Moreover, as to the minimum requirements for the issuer (or anyone requesting admission to trading on a trading platform), the latter must be a "legal entity" complying with certain behavioral rules (general rules of fairness, professionalism, prevention of conflicts of interest, equal treatment). In other words, neither a prior authorization regime, or an ongoing supervisory regime are set out. In fact, everything revolves around (i) the publication of a “White Paper” with certain specific contents, that ought to be notified in advance to the national competent authority, and (ii) compliance with a set of rules regarding bidding, marketing communications and advertising and promotional documentation.

By contrast, the regulatory regime designed in relation to the **issue of Stablecoins** (or admission to trading) appears quite different. Indeed, not only a strong and articulated authorization regime is drawn up, with the involvement of the competent authority in the Member State, but also a detailed ongoing supervisory regime is set out. Rigid and detailed operational, organizational, prudential and governance requirements are then provided, (more importantly for the so-called "significant asset-referenced tokens" or, "significant e-money tokens") as well as an authorization procedure for transactions acquisition that concerned the "issuers".

CRYPTO ASSET SERVICE PROVIDERS REGULATION

The discipline of Crypto Asset Service Providers (CAPS) is also based on a complex authorization regime. Notably, within the definition of crypto-asset service, MICA includes:

- a. the custody and administration of crypto-assets on behalf of third parties;
- b. the operation of a trading platform for crypto-assets;
- c. the exchange of crypto-assets for fiat currency that is legal tender;
- d. the exchange of crypto-assets for other crypto-assets;

- e. the execution of orders for crypto-assets on behalf of third parties;
- f. placing of crypto-assets;
- g. the reception and transmission of orders for crypto-assets on behalf of third parties; and
- h. providing advice on crypto-assets.

Specifically, the provision of such services is reserved only to entities (legal persons) having their registered office in a Member State and that have been authorized by the competent authority. Such authorization will operate with the usual mechanism of the European passport and will therefore allow to operate in all Member States either in the free provision of services regime, or through the establishment of a branch.

Furthermore, MICA sets out an additional number of articulated and detailed provisions regarding (i) general obligations of correctness, honesty and professionalism; (ii) prudential requirements; (iii) organizational and information safeguards; (iv) rules for the prevention and management of conflicts of interest; (v) rules on the outsourcing of functions and; (vi) on handling complaints.

Finally, specific attention is paid to the activity of "safekeeping" and "custody and administration" of the tokens and funds pertaining to the client, as these represent the most critical activities of the process since have appeared so far the most exposed to fraudulent conduct to the detriment of investors

The forthcoming regulation appears to be, on one hand, very detailed and keen to guarantee investors' protection but, on the other hand, it will make token and stablecoins less simple and flexible, as they will be broadly subject to regulatory requirements akin to those that apply to financial instruments.

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