

Position Paper

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

2022 January 27

Page 1

Summary

Bitkom supports the European Union's efforts in harmonizing the market for crypto-asset issuers and service providers. Bitkom believes that MiCA has the potential to shine beyond the EU single market and set a landmark on a global scale. As Europe's largest digital association and crypto network, we want to support policy makers by providing the industry's perspective on current developments.

For Bitkom, concerns remain around the extensive and guarantee-like scope of the liability attributed to crypto-asset service providers. Further, we would like to stress the importance of maintaining a clear scope based on the principle of technology neutrality. Particularly, negotiations in European Parliament appear to widen the scope of MiCA (e.g. including considerations of EU's Green Deal). Thus, we ask to put the focus on resolving existing unclarity within the EU Commission's draft rather than adding further aspects to the draft that could not only increase MiCA's complexity but also cause overlaps with existing or ongoing regulatory processes.

Moreover, Bitkom wants to stress that it is necessary to focus on "financial functions" and less on "technical functions" of crypto-assets and DLT-based assets. This would allow to render the MiCA text future-proof for a field with fast technological developments. Moreover, it helps overcome the problem of unintended side-effects: e.g. NFTs may not qualify in every context or function as crypto-asset, which highlights the importance of focusing on financial and not technological functions.

In the following section we will focus on some specific issues in greater detail that are essential to a) ensure that the EU is not falling behind other jurisdictions and b) achieve the European Union's ultimate goal which is to "promote the development of crypto assets and the wider use of DLT and support innovation".

Bitkom e.V.

Benedikt Faupel

Project Manager Blockchain

P +49 3027576-410

b.faupel@bitkom.org

Kevin Hackl

Head of Digital Banking & Financial Services

P +49 3027576-109

k.hackl@bitkom.org

Albrechtstraße 10

10117 Berlin

Germany

President

Achim Berg

CEO

Dr. Bernhard Rohleder

Definitions and legal certainty

- **A clear scope and clear-cut definitions are required for legal certainty:** The scope of MiCA must be clear for market participants. Bitkom advocates not to widen the existing scope which would add further complexity. The provided definitions within MiCA are still subject to many uncertainties and do not provide enough clarity for market participants to differentiate, e.g. if certain DLT-based assets qualify as MiCA crypto-assets or are out of scope. As pointed out in the introduction, a focus on financial functions rather than technological functions could substantially aid in rendering MiCA a clear-cut regulatory framework.
- **Legal definitions must provide clarity:** Clear definitions are necessary to provide legal clarity on which type of crypto-currencies or tokens are out of scope of MiCA, as they qualify either as MiFID II financial instruments or as e-money under EMD2. With regards to the distinction of the different types of stablecoins, a definition should be provided for when they qualify as e-money tokens (EMT) or asset-reference tokens (ART). It should be clearly defined when a crypto-asset would qualify as a utility token, where we would suggest to include more examples.
- **Resolve unclarity regarding the right to withdraw from contracts:** With regard to the right for withdrawal as an obligation for the issuer of the crypto-assets, other than EMT and ART, the exemption defined under Art. 12(4) creates legal uncertainty as there is no clear definition of “trading platform for crypto-assets”. The issue could be resolved by clearly stating that the exemption applies to crypto-assets where the price volatility is subject to financial market activities outside the control of the issuer and the service provider. This would also include the purchase and sale of the crypto-asset via service providers that provide the exchange of crypto-assets against funds or crypto-assets, and the execution of orders.
- **Overcoming regulatory overlaps by addressing issues in their respective frameworks:** In order to ensure that MiCA does not interfere with other frameworks – which are partially still in progress – we suggest reducing the scope respectively: with the disclosure regulation, the taxonomy regulation, and the AMLD6 and funds transfer regulation, we see no specific need for additional provisions within MiCA that touch upon the respective acts. For reasons of consistency and to ensure to no create conflicting frameworks, we would suggest regulating for instance AML-requirements within AMLD6 and not within MiCA.

- **Non-fungible token (NFT) is not yet defined consistently:** NFT is often used to refer to the underlying ERC721 token standard and cannot be separated from its use as a marketing term. It is important to look at the underlying function of non-fungible assets and assess them, so that they either qualify as crypto-assets under MiCA or other financial instruments, regulated in the in the AML Directive or MiFID II.
- **The “offeror” remains unclear:** For Bitkom, while we appreciate the introduction of the concept of an “offeror” or “operator”, it is essential to clearly define the scope of the role and responsibilities of an offeror with regard to the different types of crypto-assets. It is unclear, whether an offeror that is not the issuer of a crypto-asset other than an ART or EMT would actually need to draft and publish a whitepaper. Apart from that, it is unclear if an offeror would become liable for the information given in the whitepaper. Further, it must be clarified if an offeror for ART or EMT shall be included as well.
- **Support for the Council proposal to evaluate DeFi first:** We support the Council proposal in Art. 122a (Report on latest developments on crypto-assets) to assess and evaluate the developments of decentralized-finance in the crypto-assets markets and to assess, if certain DeFi-services (Lending, Staking etc.) should be regulated and how. Therefore, we support that the regulation of decentralized products and decentralized exchanges should be kept out of scope of MiCA for now. Decentralized finance products and services are still developing and are a vibrant driver of innovation. Thus, premature regulatory efforts under MiCA could cause unintended outcomes.

Supervision and liability

- **A balanced and proportionate approach to the scope of custodial liability in line with the principles of same risk-same rules:** The scope of liability regarding malfunction and hacks for crypto-asset service providers remains unclear. Therefore, Bitkom proposes to respectively apply the approach under the MiFID II regime and only make crypto-asset service providers liable if wilful misconduct or gross negligence can be attributed to them or if losses, resulting from malfunction or hacks can be traced back directly to the provision of relevant services and the operation of crypto-asset service providers.
- **Liability of crypto-asset service providers is unclear:** A further issue with regards to liability relates to exchange operators for crypto-asset whitepapers. With respect to the former, it remains unclear if exchange operators can be liable for incorrect information provided within the crypto-assets whitepaper. Bitkom sees that this expansion of liability on the issuer and exchange operator might hinder EU exchange operators from listing crypto-assets and constitutes an indirect trading ban from EU platforms.

- **Overcoming potential frictions between ESMA and NCAs:** Bitkom appreciates any efforts for more harmonization. This particularly holds true as crypto-asset services are reliant on a functioning cross-border level playing field. Yet, we suggest implementing supervisory mechanisms that rely on the well-entrenched network of NCAs and the ESA's. The ongoing supervision of crypto-asset service providers should stay with the NCAs as it is a common practice also in financial services and banking regulation. To achieve harmonization and raise efficiency, ESMA and EBA should provide clear guidelines in the MiCA Level-1 text and Level-2-regulations should not provide leeway for national "gold-plating" and deviations.
- **Safekeeping of EMT with a MiCA license must be ensured:** For a service-provider, it must be clear if they are allowed to provide custody services for EMT based on MiCA and not require an additional license as a payment services provider. The term "funds"¹ is defined in the MiCA Draft Compromises on behalf of MEP Berger of 19.10.2021 and includes of course e-money. Yet, it should be made clear that the safekeeping of EMT is covered by a MiCA license.
- **Redemption right requirements for stablecoins should be adapted:** The concrete specifications of product design features of ART within MiCA would constitute a significant and potentially disproportionate market intervention. Prohibiting ART token which do not provide all holders with a permanent redemption right reveals a clear misunderstanding of the stablecoin market. Most stablecoins that would qualify as ART, are not backed by a fiat currency but a crypto-currency or other. To require a redemption at market value in cash or by credit transfer from the issuer of the ART is not only a significant product intervention but also blurs the lines between an ART and an EMT., The redemption should rather refer to the actual underlying backing the stablecoin and not a fiat currency per default. Bitkom suggests reverting to the original Art. 35 of the MiCA draft of the European Commission.

¹ "Funds" means funds as defined in Article 4, point (25), of Directive (EU) 2015/2366.

Further Aspects

- **Recognition of existing licenses to reduce unnecessary burden:** Certain existing regulated service providers are already offering services similar to crypto-asset-services, such as security trading; i.e. they fulfill the needed set of criteria to offer crypto assets as well. Thus, such entities shall not be in need to apply for an additional CASP authorization. We appreciate the considerations of Council and the European Parliament to exclude other actors besides credit institutions and specific investment firms from the obligation to seek a CASP license. The proposal of the European Parliament seems more appropriate as it includes more actors offering similar services (see Recital 54 and Art 3). Overall, Bitkom asks to exempt entities operating under either the MiFID II or comparable national frameworks, such as the crypto custody authorization under BaFin in Germany, which offer services comparable to crypto-asset services.
- **Consensus mechanisms should not be limited:** Security of DLT infrastructures is often based on consensus mechanisms. Within a proof-of-work based infrastructure, the energy consumption of mining nodes is part of the network safety regime itself. Bitkom agrees that the energy consumption of DLT networks should be taken into consideration for further developments, which is already the case for several DLT infrastructures, based on a Proof-of-Stake consensus mechanisms and rely on much lesser energy consumption. However, Bitkom does not see the need for the European Commission to identify and limit the application of certain consensus mechanisms and therewith indirectly prohibit the use of certain products and services built on such DLT infrastructures.

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.