

ECB issues opinion on Markets in Crypto Assets Regulation (MiCA) and European Parliament Rapporteur tables own changes

March 16, 2021

On February 19, 2021, the European Central Bank (**ECB**) published a 42-page Opinion (30 pages of which are suggested drafting changes) on the current proposed form of MiCA.¹ The ECB periodically is requested to deliver opinions on proposed EU and national legislation and this Opinion follows from requests of the Council of the EU and the European Parliament on November 18 and 30 respectively. ECB opinions on matters of proposed law generally signal future policy recommendations and provide a good indication of the future direction of travel of MiCA. Some of what the ECB is proposing was to be expected. For further background on MiCA, including analysis of what might change, please see our coverage here.

The following week, on February 26, 2021, the European Parliament's Rapporteur, Stefan Berger (**MEP**)² published a Draft Report (originally only in German) with 14 targeted proposals to amend MiCA. These proposals generally aim to grant greater powers to the ECB, including for it to give binding opinions on white papers, set prudential requirements for certain stablecoin issuers and generally improve anti-money laundering and financial crime prevention measures.

The efforts of the ECB and the Rapporteur are part and parcel of the policymaking and legislative process in the EU but do give an indication of the future direction of travel. However, unfortunately the Rapporteur's proposals seem to have been put together independently of the efforts of the ECB in its own review, which is somewhat regrettable given the need to find consensus amongst institutions and stakeholders to move the draft forward. An overview of minor and substantive changes by the Rapporteur and the ECB follows below.

On March 3, the European Parliament's Research Service (**EPRS**) published a comprehensive Briefing Note setting out its initial appraisal on the strengths and weaknesses of the European Commission Impact Assessment.³ The EPRS generally confirmed that the Impact Assessment provided a complete overview of the current problems regarding the regulation of crypto assets and that the policy options advanced under MiCA are well linked to the problems and objectives while pointing to some further work, in the Impact Assessment and work flowing from it, should give consideration to MiCA's effect on and opportunities for small-to-medium sized enterprises. The EPRS' conclusions also may influence the direction of MiCA as it completes the legislative process.

This Client Alert should be read together with our existing coverage on MiCA available here, and on the EU's Crowdfunding Services Provider Regulation (CSPR) – details of which are available in our dedicated series available here and here as well as here.⁴

The ECB expresses its views and calls for changes

The ECB is generally in favor of MiCA's aims and its contribution to harmonization but suggests several adjustments and clarifications, including for interoperability with the CSPR. It specifically calls for improvements that can be

grouped together under the following themes:

1. Greater scope of which tokens and what activity will fall under and be regulated by MiCA and by which regulatory authority under MiCA and what activity will be subject to the MiFIR/MiFID II framework. Specifically the ECB has requested a number of changes concerning the supervision of stablecoins – i.e., what MiCA defines Asset-Referenced Tokens (**ARTs**);
2. Which activity, while being regulated under MiCA, will have touchpoints with other regulatory requirements and supervisory expectations that co-exist in other components of the EU's Single Rulebook for financial services – notably PSD2; and
3. What financial stability and prudential supervisory aspects (including own funds, stress testing etc.) will require greater regulatory and supervisory oversight by the ECB – and how this will interact with oversight from the other European Supervisory Authorities, (**ESAs**) such as the European Banking Authority (**EBA**), as well as dual-supervision by national competent authorities (**NCA**s)⁵, or in the context of the Banking Union, tri-party supervision, which the ECB proposes is simplified at the EU level.⁶

Notably the ECB has suggested that MiCA might benefit from a clearer delineation between the responsibilities of the EBA, which receives oversight powers in MiCA, and the existing powers of the ECB in its role at the head of the Banking Union's Single Supervisory Mechanism (**SSM**). This is particularly the case where a “significant issuer” for purposes of MiCA is also subject to ECB-SSM direct supervision.

Furthermore the ECB has called for changes to provide a clearer definition of what constitutes a crypto-asset and thus falls into MiCA, so that this would “...avoid diverging interpretations at national level on what may or may not constitute a crypto-asset under the proposed regulation, to help support the provision of crypto-asset services on a cross-border basis and to establish a truly harmonized set of rules for crypto assets”.

The ECB has equally expressed a call for additional safeguards in respect of ARTs under MiCA, including prudential and liquidity requirements for such issuers which are proportionate to the risks they potentially pose to financial stability. More generally the ECB has suggested a distinction between crypto-assets that would be classified and thus treated as MiFID II financial instruments and those that would fall under the scope of MiCA's regulatory regime.

Interestingly, the ECB has said that EU policymakers may wish to consider strengthening the ban on crypto-assets that bear interest⁷ and which are similar to e-money.⁸ This approach is presumably being advanced because, with a prevailing zero or negative interest rate environment⁹, there is a school of thought that holding e-money that is interest bearing could become more attractive and compete with traditional bank deposits, thus raising the costs of funding for the banking sector as well as affecting monetary policy transmission. The ECB and the Eurosystem of central banks will decide by mid-2021 whether to press ahead with their own central bank digital currency (**CBDC**) project.¹⁰ CBDCs of central bank money issued by central banks will not be covered by MiCA.

The ECB also calls for powers so that where ARTs are “tantamount to a payment system or scheme, the assessment of the potential threat to the conduct of monetary policy, and to the smooth operation of payment systems, should fall within the exclusive competence of the ECB (or the national central bank of issue of the relevant Union currency).” The ECB expresses its view that its powers, and indeed those of any non-euro central bank in the EU-27 in this respect, should not, as is the case in the current MiCA proposal, be limited to powers to issue a non-binding opinion but instead should include the power to issue binding opinions. The ECB points to its and national central banks' roles in conducting oversight of clearing and payments systems as part of its mandate, and providing facilities to such systems to “...promote the smooth operation of payment systems...”.

The ECB concludes, in para. 2.2.4, that the potential interplay between MiCA and PSD2 would need further consideration by the co-legislators, as would the issue of whether crypto-asset service providers (**CASPs**) contracting with a payee to accept crypto-assets other than e-money tokens would need to “...meet the same requirements on

consumer protection, security and operational resilience as regulated [PSD2] payment service providers. Ultimately, it would need to be clarified whether such activities can be tantamount to the ‘acquiring of payment transactions’, as defined under PSD2.” This marks a change in the ECB’s thinking of where the PSD2 regulatory perimeter and crypto-assets come together and a possible change in supervisory tone.

Before delving into a comparison of those substantive changes that the ECB and the Rapporteur are proposing to the text of MiCA, it is worth noting that the ECB has in its Opinion proposed that after some mentions of the ‘EBA’, the following formulation of words be added, in order to give central banks of Member States whose currency is not the euro, the same control and/or conferral rights as those powers that MiCA proposes are allocated to the EBA. The ECB has suggested that the wording “after consultation of the ECB and the relevant central banks of Member States whose currency is not the euro” be inserted in several recitals and articles.

Comparison of MiCA’s text, suggested substantive changes from the ECB Opinion and Rapporteur’s amendments

Please see the comparison in a table, available [here](#).

Outlook

The ECB is likely to gain a significant amount of supervisory powers in respect of MiCA, and in many ways given its growing focus, both in the SSM and central bank financial stability oversight role, on championing cyber and operational resilience (see our dedicated series [Central Bank of Cyber](#) and [on TIBER](#)), this may work well with the proposal for a Regulation in the form of EU’s Digital Operational Resilience Act (**DORA**)¹¹, which complements MiCA.

If you would like to discuss any of the items mentioned above, in particular how to forward-plan and benefit from changes that are being proposed as well as how these developments fit into the 2021 supervisory priorities of the ECB-SSM, EBA and other ESAs, or how they may affect your business more generally, please contact any of our key contacts or the wider team from our Blockchain and Distributed Ledger Technology Team or our Financial Regulatory Team.

1. Available [here](#).↩

2. Details available [here](#). Stefan Berger was appointed on October 15, 2020, by the European Parliament’s Economic and Monetary Affairs (ECON) Committee.↩

3. Available [here](#).↩

4. See also further coverage from our participation at the European Crowdfunding Network’s 9th Crowdfunding Convention held on December 16, 2020, and available [here](#).↩

5. In a quite direct statement in para. 3.1.3, the ECB states that “dual supervision is subject to significant shortcomings, and both significant e-money, as well as asset-referenced, tokens would be better supervised at the European level. There does not seem to be any economic reason to justify different supervisory arrangements between significant asset-referenced tokens (subject to a harmonized EBA supervision) and significant e-money tokens (subject to dual supervision by the EBA together with the NCA). Dual supervision may blur responsibilities and add complexity to the arrangements. It may also lead to duplicative or even conflicting supervisory tasks, for example where NCAs supervise issuers of significant asset-referenced or e-money tokens providing other crypto-assets services. The ECB believes that significant asset-referenced and e-money tokens would be better supervised at the European level, as this would ensure a comprehensive overview of risks and coordination of

- supervisory actions and, at the same time, avoid regulatory arbitrage.”↵
6. In paras. 3.1.4 and 3.1.5 the ECB points to a need for greater clarification and a more streamlined approach as to which EU-level authority is in the lead and how this interoperates with the relevant NCA – notably the structures within the Banking Union when compared to outside of the Banking Union. ↵
 7. Recitals 36 and 45 as well as Articles 36 and 45 of the original published proposal of MiCA prohibit interest. ↵
 8. By stating: “Under the proposed regulation, crypto-assets, in particular the two sub-categories of asset-referenced tokens and e-money tokens, have a clear monetary substitution dimension, having regard to the three functions of money as a medium of exchange, store of value and unit of account. The definition of ‘asset-referenced token’ refers to the store of value function (‘...purports to maintain a stable value...’), while the definition of ‘e-money token’ refers to both the medium of exchange and store of value functions (‘...the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value...’). The proposed regulation emphasizes the medium of exchange function of e-money tokens, noting that these are ‘intended primarily as a means of payment aim[ed] at stabilizing their value by referencing only one fiat currency’, and that ‘like electronic money, such crypto-assets are electronic surrogates for coins and banknotes and are used for making payments’. ” Other considerations include the ECB suggesting that issuers of ARTs grant redemption rights to holders either on the issuer or the reserve assets or to create an ad hoc category of payment tokens and level the playing field in applying E-Money Directive principles to such issuers.↵
 9. See our coverage available here.↵
 10. See further coverage following the policy outputs from the ECB’s CBDC proposal, which is available here.↵
 11. See our most recent updates in this dedicated series available here and here.↵

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