FESE Position Paper on the proposal for a Markets in Crypto-assets (MiCA) Regulation

Brussels, 15th December 2020

FESE fully supports the work of the European Union (EU) and its institutions aimed at making the EU fit for the digital age and developing a harmonised regulatory regime. We welcome the proposal by the European Commission on a Regulation on Markets in Crypto-assets (MiCA); however, key aspects should be refined to preserve market integrity and the level playing field of financial markets, and the rights of investors/consumers.

Technology neutrality and "same business, same risks, same rules"

As a general remark, we would highlight that technology neutrality and "same business, same risks, same rules" principles should apply to uphold the values of transparency, fairness, stability, investor protection, and market integrity. We support a legally binding approach, based on existing EU financial market practices, as this would provide legal certainty to reduce regulatory arbitrage, inconsistencies, market fragmentation, and ensure scalability of services within the EU.

EU Taxonomy of crypto-assets

The proposal establishes separate frameworks in respect of three distinct categories of crypto-assets: e-money tokens, asset-referenced tokens and other crypto-assets. Issuers of crypto-assets that meet the criteria under the proposed applicable regime will be permitted to offer those crypto-assets to the public or admit them to trading anywhere in the EU. This is the same idea as "passporting", which we believe can be relevant for a Single Digital Finance market; however, further details are needed to fully assess the feasibility of the proposed regime.

We appreciate that the European Commission already included DLT into the MiFID II definition in the Amending Directive accompanying the Digital Financial Package. Harmonisation across Member States should be a priority. This inclusion clarifies that, if a category of crypto-assets falls within the definition of a financial instrument included in MiFID II, then these crypto-assets should be treated as the defined instrument in MiFID II (e.g. if the represented value is a share, then all rules applicable to shares should apply). In this context, the treatment of "hybrid" crypto-assets might require further clarification. Bearing in mind the developments in the UK on these issues, monitoring to what extent the UK's approach will follow the EU's will be key.

Scope limited to non-financial crypto-assets

To safeguard the integrity of financial markets and to guarantee investor protection, we believe that MiCA should further clarify that crypto-assets, which will be defined as "financial instruments" under MiFID II, should not fall in the scope of the bespoke regime. The MiCA Regulation should make clear in its definition (Art. 3) that it applies solely to non-financial crypto-assets. Furthermore, to maintain a level playing field and to ensure consistency, we consider that the so-called "hybrid tokens" containing financial characteristics should be excluded from the scope of MiCA. These instruments should be subject to the same set of rules as financial instruments.

The publication of White Papers (e.g. on the issuance of crypto-assets and asset-referenced tokens) should be subject to an ex-ante authorisation process from NCAs to identify whether crypto-assets qualify as financial instruments. If that is the case, the MiFID II/R framework should then apply accordingly.

Relevance and status of FMIs

Financial Market Infrastructures (FMIs), such as Trading Venues, CCPs and CSDs, provide important functions to markets as they ensure resilient and transparent markets, and deliver the highest levels of investor protection and ensure market integrity. Markets serve the needs of participants to raise capital, manage investments, access cash, and manage the risk that affects both retail and institutional investors. These functions have been fulfilled during and after the financial crisis of 2008, the current Covid-19 crisis and will continue to do so in the future. FMIs should explicitly be allowed to handle all forms of "digital assets" as this fosters trust in the markets in a new digital or DLT environment. To this end, FMIs should be included among the "crypto-assets service providers" listed in Art. 3 of MiCA, together with further guidance to ensure the consistent application of similar provisions under MiFID II and MiCA (e.g. conflict of interests).

Art. 2 of MiCA indicates that an authorisation is required to be a crypto asset service provider. However, there are exceptions which do not require authorisation or license to do so. We believe that FMIs should be included in the exemption list, as banks and investment firms are mentioned already. In fact, CCPs, CSDs, and Trading Venues are also authorised entities by ESMA and NCAs.

Furthermore, we believe that the issuer or sponsor of crypto-assets marketed to EU investors/consumers should not be obliged to be established or have a physical presence in the EU. Third country issuers or sponsors should be able to access the EU crypto-assets market in line with the existing EU regulatory framework. To this end, Art. 15(2) of MiCA should be rephrased to allow third-country providers to offer asset-referenced tokens (so-called "stablecoins") to EU customers also in case these do not have a legal entity established in the Union.

Regarding crypto-asset service providers, authorised service providers must comply with a list of general requirements as well as the additional specific requirements applicable to the services they provide. The details of these requirements and their implementation in practice need to be fully assessed. Further clarity on the supervision of issuers and service providers is also needed, as NCAs may differ at the national level according to the underlying products and activities.

Clear and coordinated market abuse rules

Finally, the proposal seeks to establish market abuse rules for crypto-asset markets. Under the proposal, crypto-assets that are admitted to trading on a crypto-asset trading platform would be subject to the new rules. The proposal includes requirements relating to the disclosure/unlawful disclosure of inside information, prohibitions of insider dealing, and market manipulation. It would be useful to garner the experience gained from the implementation and enforcement of the Market Abuse Regulation (MAR). This regime is currently under review and it is important to take a coordinated approach between the two.

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