Payment Tokens and the Path Towards MiCA

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Abstract

The Regulation for Market in Crypto-assets is still underway. The European Commission submitted a proposal in September 2020 and now this proposal is going through the legislative procedure collecting the opinion of issued by the ECB on the 19 February 2021 and the Opinion of the European Economic and Social Committee of the 24 February 2021. This paper shall analyse the main aspects of MiCA regulation proposal from the standpoint of EU money and payments law. More specifically, it focuses on the scope of MiCA, policy priorities pursued, asset-referenced and electronic money tokens, and the statute for issuers and crypto-related service providers. The close link between the value of payment tokens and the business plan behind an initial coin offering (ICO) ends up deeply influencing the normative approach, raising questions about the nature of 'alternative' payment instruments.

I. Money and Payment Tokens

'Money is a legal institution',[1] argued Christine Desan, since

> 'societies engineer money rather than discovering it. Their work is constant and collective, a matter that involves both public initiative and individual decision-making. (...) Money's function as a "unit of account" sounds, at first glance, like a simple matter: we choose an abstract measure, like an inch or an ounce, one that measures value rather than length or weight. But at second glance, the challenge is evident. An inch represents, in fact, a substantive length; it can be transpose over space. An ounce represents a substantive weight; it can be transpose across matter. But what is the substantive value captured by a dollar, one that convinces people with different needs and means to understand it as a common measure? And how, if they do, can it be applied to assess goods, labour, and even time?'.[2]

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[1] C. Desan, *Making money: coin, currency, and the coming of capitalism* (Oxford: Oxford University Press, 2015), 1-34.

[2] C. Desan, 'The constitutional approach to money: monetary design and the production of the modern world', in N. Bandelj et al eds, *Money talks*, 5 *Harvard Public Law Working Paper*, 1-29

In addition, as a legal institution, money calls for policy-making choices regarding the design as a means of exchange in the process of discharging monetary obligations. This requires European lawmakers to establish, for example, the irrefutable settlement assets in the process of discharging monetary obligations, the contents of the contract relationship between users and service providers, the extent to which users' payment transaction data are protected, how risks and responsibilities are allocated between payee and payer as well as between payers' and payees' payment service providers in cases of non-execution, late or defective execution of payment transactions, the extent to which payment service providers must bear the costs of giving information to payment service users, and so on. In other words, money as a legal institution looks like a two-tier normative structure where the dialectical relationship between the two tiers of the regulatory issue may greatly influence community identity and peer community participation.

In the European Union, the construction of an internal market for payments concerns money as a means of exchange and covers all Member States; while money as a unit of account concerns those Member States joining the Eurozone. What happens with the growth of virtual currencies (or crypto-currencies or payment tokens)?[3] These are private monies that, crossing jurisdictions, provide for not only a payment infrastructure or payment system,[4] but also for a settlement asset other than the legal tender.

(2016).

[3] Virtual currencies or crypto-currencies or payment tokens are a species of crypto-assets. Crypto-assets (or tokens) may be defined as 'private digital assets that a) are recorded on some forms of a digital distributed ledger secured with cryptography, b) is neither issued nor guaranteed by a central bank or a public authority, and c) can be used as a means of exchange and/or for investment purposes and/or to access goods or services' (R. Houben and A. Snyers, 'Crypto-assets. Key elements, regulatory concerns and responses' *Study requested by the ECON Committee of the European Parliament,* 1-73 (2020). Within this broad *genus*, virtual currencies, such as Bitcoin, represent a general-purpose means of payment. However, it is worth noting that there is a great deal of literature on virtual currencies. With no claim of being exhaustive, I have found the following studies interesting and useful for legal analysis: A. Ferreira et al, 'Cryptocurrencies, DLT and Crypto Assets – the Road to Regulatory Recognition in Europe', in M. Thai et al eds, *Handbook on Blockchain* (Berlin: Springer Nature), available at SSRN; A. Walch, 'Cryptocurrencies: what are they good for?' *Testimony before U.S. Senate Committee on Banking, Housing, and Urban Affairs* (27 July 2021), 1-10; J. Lee and F. L'Heureux, 'A regulatory framework for cryptocurrency' 3 *European Business Law Review*, 423-446 (2020); C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019); H. Nabilou, 'Bitcoin governance as a decentralized financial market infrastructure' 4(2) *Stanford Journal of Blockchain Law and Policy* 177-202 (2020); N. Vardi, 'Bit by bit: assessing the legal nature of virtual currencies', in G. Gimigliano ed, *Bitcoin and mobile payments. Constructing a European Union framework* (London: Palgrave-Macmillan, 2016), 55-71; P. Tasca, 'Digital currencies: principles, trends, opportunities, and risks' *ECUREX Research Working Paper*, October 2015, 1-110; H.Y. Jabotinsky, 'The regulation of cryptocurrencies – Between a currency and a financial product' 31 *Fordham Intellectual Property Media & Entertainment Law Journal*, 118 (2020).

[4] Art 4(7) European Parliament and Council Directive 2015/ 2366 of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35 (thereafter, 2015 PSD2): 'a funds transfer system with formal and standardised arrangements and common rules for the processing, clearing and/or settlement of payment transactions'.

Virtual currencies are challenging money design and the European harmonisation process for payments because they are simultaneously both settlement assets and a payment infrastructure; in other words, they are both unit of account and means of exchange. Despite the fact that payment tokens are still a niche business experience, the economic and legal literature has shown a great interest in this topic since the publication of Satoshi Nakamoto's manifesto. Legal scholars focus mainly on: i) the legal status of crypto-assets, ie, whether they are comparable to investment instruments, funds, securities, or intangible assets, with a view to identifying the rules and regulations most suitable among those in force;[5] ii) the positive and negative aspects of the decentralised system of crypto-governance;[6] iii) the financial stability as well as the reputational risks associated with the integration of the crypto-system into the traditional banking and financial system due to widespread institutional investments and venture capital fund investments in crypto-assets, as well as the crypto custody services provided by traditional financial institutions.[7]

This paper has a much narrower scope, aims to investigate payment tokens within the framework of the regulation proposal for a market in crypto-assets (known as the MiCA regulation proposal).[8] It consists of a further six sections focusing on the following aspects of the MiCA proposal from the standpoint of European money and payments law. After analysing the scope (Section II) and the legal basis (Section III), this study then offers an insight on the policy priorities (Section IV), focusing on asset-referenced and electronic money tokens (Section V) and the authorisation process for crypto-issuers and service providers (Section VI). Lastly, the paper draws a conclusion (Section VII).

II. Crypto-Assets and the Scope of the MiCA Proposal

The legal literature tends to deal with tokens (or crypto-assets) as 'digital assets that are recorded on a distributed ledger and can be transferred without an intermediary, and the structuring of the issuance, the pricing of the offer, and the distribution of these instruments do not involve the participation of any regulated entity such as, for example, an investment bank'.[9] They feature cryptography and

[5] J. Lee and F. L'Heureux, ibid 430; B. Geva, 'Cryptocurrencies and the evolution of banking, money, and payments', in C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019) 20-22; N. Vardi, ibid 60-66.

[6] A. Walch, 'Deconstructing "Decentralization": Exploring the core claim of crypto systems', in C. Brummer ed, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University Press, 2019), 50-55; H. Nabilou, n 3 above, 180-185.

[7] A Walch, n 3 above, 8.

[8] Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 of 24 September 2020 [COM/2020/593 final] (thereafter, MiCA).

[9] A. Gurrea-Martinez and N.R. León, 'The law and finance of Initial Coin Offering', in C. Brummer, *Cryptoassets. Legal, regulatory, and monetary perspectives* (Oxford: Oxford University

DLT.

While cryptography is a technique used to protect sensitive information, either in storage or in communication, DLT stands for distributed ledger technology – the blockchain is a type of DLT – and it works as a decentralized database or ledger, but the information is stored on multiple computers (or nodes) with no middleman performing a function of validating transfers of digital assets. It is argued that

> 'In a DLT arrangement, nodes are the devices running the DLT software that collectively maintain the database records. In this design the nodes are connected to each other in order to share and validate information. At its extreme, this structure enables any entity (...) with a node to share database management responsibilities directly with each other on a peer-to-peer basis'.[10]

Therefore, the 'distributed ledger of transactions becomes the 'single version of the truth' on which a very large sample of participants can rely but which none of whom can unilaterally control'.[11] Accordingly, the DLT platform backing the use of virtual currencies is characterised by decentralization, immutability and a trust-less system.[12]

In the construction of an internal market for payments,[13] crypto-assets look like the last step of the electronification process for payments. As economists have emphasized, there is a continuum between two extreme – public and private, permissionless and permissioned – blockchains.[14] Visa-like platforms are proprietary and private platforms, but like bitcoin-type value transfer systems, they apply

Press, 2019) 117-156.

[10] D. Mill et al, *Distributed ledger technology in payments, clearing, and settlement*, 95 (2016), available at https://tinyurl.com/5nu7rbu8 (last visited 30 June 2022). In addition, the Expert Group on Regulatory obstacles to financial innovations, 30 *Recommendations on regulation, innovations and finance. Final report to the European Commission* (December 2019), argued that the DLT entails four characteristics: 'shared record keeping, multi-party consensus, independent validation, tamper evidence and resistance'.

[11] F. Fleuret and T. Lyons, n 3 above, 15.

[12] With no middleman.

[13] Concerning the definition of internal market, see Art 26(2) of the Treaty on the Functioning of the European Union (TFEU).

[14] Pilkington draws the distinction between public and private platforms with regard to the extent to which they are decentralized or ensure anonymity. In fully private platforms, read – and write – permissions are fully managed by a central decision-making player (permissioned validator) and, with a permissioned ledger, platform access is based on *know-your-business* and *know- your-customer* rules. By contrast, fully public platforms apply non-discretionary access standards, while the validation of DLT transactions works according to a distributed consensus mechanism, either a *proof-of-work* or *proof-of-stake* validation mechanism (permissionless validators), both of which are rooted in a cooperative behavioural dimension. See: M. Pilkington, 'Blockchain technology: principles and applications', in X. Olleros and M. Zhegu eds, *Research handbook on digital transformation* (Cheltenham: Edward Elgar, 2016), 1-39.

> ‘the concepts of value storage, encryption, and cryptographic public/ private key pairing, at the heart of modern crypto-currencies. The real novelty is the decentralization feature: the main difference between blockchain technology and these crude predecessors is the level of decentralization of the network’.[15]

It is worth remembering that the electronification of payment transactions is far from new in terms of the construction of an internal market for payments, since the harmonisation process for payments, operating at the Union level since the 1980s, has always aimed to facilitate the straight-through processing of funds transfers by means of direct debits, credit transfers, electronic money and card payments, in domestic and cross-border transactions.[16]

From a functional standpoint, a distinction is drawn between payment tokens, utility tokens and asset tokens, but they may sometimes perform more than one function together, ie hybrid tokens.[17] Payment tokens may serve only as a means of exchange and unit of account; utility tokens allow holders to access or to purchase services provided or products sold; and asset tokens are to some extent comparable to equities, bonds, or participatory financial instruments. However, the functional classification does not necessarily correspond to the legal construction; this depends on the legal approach taken to the concepts of security and money, which varies according to the jurisdiction.[18]

This functional definition is not fully followed by MiCA. Indeed, The MiCA proposal provides a catch-all definition of crypto-assets but without covering crypto-assets already regulated by other pieces of European legislation, such as those considered to be financial instruments according to the MiFid regulatory package. Indeed, according to Art 3(2) MiCA, the concept of crypto-assets comprises ‘a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology’, while DLT means, within the framework of this regulation proposal, ‘a type of technology which support the distributed recording of encrypted data’.[19] This normative approach has raised critical remarks, not only from academics,[20] but also from

[15] H Dong et al, ‘Virtual currencies and beyond: initial considerations’ *IMF Staff Discussion Note* (2016), 1-42.

[16] In contrast, since 2007, paper-based negotiable instruments as well as coins and notes fall beyond the scope of the harmonising directives and regulations in that they are deemed to belong to the past of the social and economic system. See Art 3, 2015 Payment Services Directive.

[17] The European Union Blockchain and Observatory Forum, ‘Blockchain and the future of digital assets’ (2019), 3-37.

[18] A. Gurrea-Martinez and N.R. León, n 9 above, 121.

[19] Art 3 (1) MiCA.

[20] The legal literature has critically emphasized the limits of an overarching definition of crypto-assets without clear boundaries with MiFiD-based investment instruments. See G. Ferrarini and P Giudici, ‘Digital offerings and a mandatory disclosure: a market-based critique of MiCA’ *Law Working Paper* no 605/2021, 1-31; D.A. Zetzsche et al, ‘The markets in crypto-assets regulation (MICA) and the EU digital finance strategy’ *Law Working Paper Series* no 2020-018, 22, analysing the MiCA proposal

the ECB and the European Economic and Social Committee. Indeed, giving their official opinion on the legislative proposal, the two European institutions called for more detailed specifications of the various sub-categories of crypto-assets and their scope, with a view to drawing a clear distinction from MiFID-based financial instruments, and due to uncertainties raised by hybrid tokens, those crypto-assets performing different functions.[21]

To be precise,[22] Title II concerns any crypto-assets not considered to be asset-referenced or electronic money tokens. This is a broad category comprising (but not limited to) utility tokens dealt with 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'.[23] In contrast, asset-referenced tokens and e-money tokens are regulated in Title III and IV of the MiCA regulation proposal. The asset-referenced tokens are crypto-assets

> 'whose main purpose is to be used as a means of exchange and that purport 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',[24]

while the e-money tokens are a

> 'type of crypto-assets whose main purpose is to be used as a means of exchange and that purport to maintain a stable value by being denominated in (units of) a fiat currency'.[25]

However,[26] it is worth keeping in mind that MiCA does not cover crypto-assets qualified as electronic money according to the 2009 E-Money Directive,[27] financial instruments in compliance with the MiFiD regulatory package,[28] and

from the standpoint of MIFID regulatory package; V. Ferrari, 'The regulation of crypto-assets in the EU – investment and payment tokens under the radar' 27(3) *Maastricht Journal of European and Comparative Law* (2020) 325-342.

[21] Opinion of the European Economic and Social Committee, (OJ) C 155/2021; Opinion of the European Central Bank of 19 February 2021.

[22] In addition, Title V on the authorisation of crypto-assets service providers (Arts 46-68); Title VI on market abuse involving crypto-assets (Arts 69-73); Title VII on the competent authorities, ESMA and EBA (Arts 74-108); Title VIII on delegated acts and implementing acts (Art 109); Title IX on transitional and final provisions (Arts 110-114).

[23] Art 3(5) MiCA.

[24] Art 3(3) MiCA.

[25] Art 3(4) MiCA.

[26] Art 2(2) MiCA.

[27] European Parliament and the Council Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC [2009] OJ L267/7 (thereafter, 2009 EMI Directive).

[28] European Parliament and the Council Directive 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ

deposits consistent with the meaning in the 2014 Deposit Guarantee Scheme Directive,[29] or that fall within the 2019 European Regulation on securitisation.[30]

Art 1 defines the MiCA regulated field providing that the proposed regulation comprises uniform rules on the following aspects:

- transparency disclosure requirements for issuing and admitting to trading crypto-assets;

- the authorisation, supervision, and governance of crypto-asset service providers, establishing a closed list of crypto-asset services, namely, 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 either for legal currency or for other crypto-assets; the execution of orders as well as the reception and transmission of orders for crypto-assets on behalf of third parties respectively meaning entering into agreements or receiving and transmitting to a third party an order issued by a person to buy, sell, or 'subscribe' (*rectius*, underwrite) one or more crypto-assets; the placing of crypto-assets; the providing advice on crypto-assets;[31]

- the issuance of asset-referenced and electronic (or e-money) tokens as well as the operation, organization, and governance of both of them;

consumer protection for the issuance, trading, exchange, and custody of crypto-assets;

- finally, measures to prevent market abuse.

III. MiCA and the Legal Basis

MiCA sets the legal requirements for the taking-up, the pursuit and the supervision of business entities engaged in the issuance of crypto-assets and the services related to them operating in the Union.[32]

This is one of the legislative pieces of the Digital Finance Strategy launched by the European Commission.[33] In fact, MiCA is matched up with the regulation

L173/349.

[29] European Parliament and the Council Directive 2014/49/EU of 16 April 2014 on deposit guarantee schemes [2014] OJ L173/149.

[30] European Parliament and the Council Regulation 2017/2402/EU of 12 December 2017 laying down a general framework for securitization and creating a specific framework for simple, transparent and standardized securitization, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012 [2017] OJ L 347/35.

[31] Art 3(9) MiCA.

[32] Art 1 MiCA.

[33] COM (2020) 591 final. In the Digital Finance Strategy, the European Commission pointed to the following policy priorities: i) tackling fragmentation along the national border; ii) facilitating digital innovation; iii) creating a European financial data space in order to promote data-driven innovation; iv) addressing new challenges and risks associated with digital transformation. Despite the fact that the Commission Communication refers to financial services in general, it gives significant attention to payment services because, quoting the Commission, 'Payment services play a key role among digital financial services, being at the cutting edge of innovation and instrumental to support the digital

for a pilot regime for market infrastructure based on distributed ledger technology,[34] or DLT infrastructure, and to the regulation proposal on digital operational resilience for the financial sector.[35] However, it is worth mentioning that MiCA is the first compulsory legal act tailor-made for crypto-assets,[36] but it is far from being the first legal act concerning virtual currencies at the EU level. Indeed, the V Anti-Money Laundering Directive[37] had already pointed to virtual currencies, dealing with them as

> 'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status as a means of exchange and which can be transferred, stored and traded electronically'.

In other words, this Directive compelled custodian wallet providers and providers engaged in services between virtual currencies and fiat currencies to fulfil due diligence duties with a view to identifying, assessing, understanding and mitigating money laundering risks.

Since this legislative proposal concerns the construction of the internal market for payments, both the Union and Member States are entitled to take regulatory initiatives. Indeed, any regulatory proposal put forward by European institutions must comply not only with the principle of conferral but also with the principles of subsidiarity and proportionality.

According to the principle of conferral, any European legislative act is legitimate as long as it is properly based on the Treaty provision. This calls upon the reference to a proper legal basis in European treaties. With regard to MiCA,

economy. Digital payment solutions enable individuals and companies to transact safely and efficiently'. Accordingly, around the same period, the Commission issued a different communication (COM (2020) 592 final) providing for a four-year strategy on retail payments. There, the Commission considers how, despite the steps forward made in terms of digitalisation of retail payments, consumers and firms prefer traditional payment instruments, such as bank transfers and card-payments, in addition to cash, rather than innovative means of payment. Within this framework, a four-pillar strategy for payments is set forth, focusing on: i) digital and instant payment solutions enjoying a pan-European reach; ii) innovative and competitive retail payment markets; iii) efficient and interoperable payment systems and technical infrastructures; iv) efficient international payments, especially money remittance. A comparison between this Commission Communication and the ones issued in the past points to some recurring features: interoperability of and access to payment systems as well as fragmentation along national borders.

[34] European Parliament and the Council Regulation of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L151/1.

[35] COM (2020) 595 final.

[36] On 30 June 2022, the Council and the European Parliament reached a provisional agreement on MiCA regulation proposal.

[37] European Parliament and the Council Directive 2018/843/EU of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L156/43.

the legal basis is Art 114 TFEU: the harmonisation process aims to establish an internal market (for goods, services, persons, and capital/payments), but a State-based approach to regulation and financial supervision may impair the proper functioning of the internal market due to the global nature of crypto-assets.[38]

Concerning the principle of subsidiarity, MiCA introductory remarks point to divergent frameworks, rules, and approaches to crypto-assets as obstacles to the cross-border business activities of crypto-asset issuers since these divergencies force them to be familiar with different national legislations and submit multiple authorizations. The proportionality principle is ensured by a risk-based approach, namely, drawing a distinction among the different types of services and activities in accordance with their risk-profiles, but imposing more stringent requirements on the issuers of stablecoins, because they are more likely to grow.[39] There is no definition of stablecoin in the MiCA proposal. However, the common understanding of stablecoins suggests that they are

> 'digital units of value that are not a form any specific currency (or basket thereof) but rely on a set of stabilisation tools which are supposed to minimise fluctuations of their price in such currency(ies)'.

Within this broad definition of stablecoins, a distinction is drawn between tokenised funds, on-chain and off-chain collateralised stablecoins, and algorithmic stablecoins,[40] while asset-referenced tokens may be considered on-chain collateralised stablecoins and e-money tokens are a form of tokenised funds. MiCA does not seem to cover off-chain collateralised and algorithmic stablecoins.

European policymakers prioritized a regulation over a directive since even full harmonisation directives leave room for Member States' legislative leeway, and this would be difficult to reconcile with the global reach of the crypto-asset business and the demand for a higher level of legal certainty for fintech businesses as well as retail users.

However, the MiCA legislative process still suffers from the drawbacks of the

[38] MiCA, n 8 above, 3.

[39] However, there is no stablecoin definition in Art 3 MiCA.

[40] D. Bullman et al, 'In search for stability in crypto-assets: are stablecoins the solution?' *ECB Occasional Paper Series* no 230, 9-16 (2019). Tokenized funds are 'units of monetary value that are stored electronically in a distributed ledger to represent a claim on the issuer and are issued, on receipt of funds, for the purpose of making payment transactions to persons other than the issuer'; in fact, they are often called fiat-backed stablecoins and are not a new type of asset. As for collateralized stablecoins, 'the price of a stablecoin in the currency of reference is supported by units of an asset (or multiple assets), against which users can redeem their holdings'. Off-chain collateralized stablecoins require the cooperation of a custodian in the process of issuance, transfer, and redemption of the tokens because collateral is made up traditional asset classes; in contrast, on-chain collateralized tokens exhibit as collateral assets in digital form and their value does not depend on the intervention of a responsibile party and may be kept in a decentralized manner. Finally, we have algorithmic stablecoins where the price of stablecoins is supported only by 'users' expectations about the future purchasing power of their holdings, which does not require the accountability of any party, nor the custody of any underlying asset'.

first e-money directive experiences, namely, the Directives nos 28 and 46 of 2000 adopted in the early stages of e-money development. While European policymakers – the ECB rather than the Commission – envisioned an imminent and widespread growth of e-money business that might impair the role of unit of account, the central bank's ability to manage monetary policy and the affordability of the payment system,[41] a review of the 2000 EMI directives revealed how some of the provisions – such as those on the business scope and the initial capital and own funds requirements – had *de facto* hindered the growth of a true market for e-money services.[42] As for crypto-assets – a new business activity –, European lawmakers were concerned with taking regulatory initiatives before a large number of Member States set their own legal framework but not too early to hamper the growth of virtual currency businesses, with a view to a trade-off between the principle of technology and business-model neutrality and the policy priorities of preserving the affordability and stability of the financial system.

IV. MiCA and the Policy Priorities

The MiCA regulation proposal tries to attain a trade-off among the regulatory issues raised in the preliminary debate, begun in 2013 with studies and reports delivered by the European Central Bank (ECB) and the European Banking Authority (EBA).

The ECB[43] studies on virtual currencies and crypto-assets focused on the risks to price and financial stability as well as to the soundness of the payment system, since the ECB is in charge of defining and implementing the European monetary policy and promoting the smooth operation of payment systems.[44] Despite these risks, the ECB refrained from suggesting any *ad hoc* regulatory initiative due to the lack of general user acceptance, the low volume in VCSs, and the limited connection to the real economy, while giving priority to monitoring

[41] ECB, 'Issues arising from the emergence of electronic money' (November) *ECB Monthly Bullettin* 49-60 (2000).

[42] Preamble (2) 2009 EMI Directive.

[43] Well before the Commission submitted the MiCA regulation proposal, the ECB published some studies and reports referring to virtual currencies as virtual currency schemes. It stated that 'a virtual currency is a type of unregulated, digital money, which is issued and usually controlled by its developers, and used and accepted by the member of a specific virtual community'. Only three years later, in 2015, it tried to clearly delineate the difference between electronic money and virtual currencies, addressing the latter as a 'digital representation of value' other than money and currency. In 2019, the ECB preferred to make reference to virtual currencies within the broad category of crypto-assets comprising 'any asset recorded in digital form that is not and does not represent either a financial claim on, or a financial liability of, any natural or legal person, and which does not embody a proprietary right against and entity'. See ECB, *Virtual Currency Schemes* (October) 2012, 1-55; ECB, *Virtual Currency Schemes – a further analysis* (February) 2015, 1-37; ECB, *Crypto-assets: implications for financial stability, monetary policy, and payments and market infrastructure* (May) 2019, 1-40.

[44] Art 3, Protocol no 4 on the statute of the European System of Central Banks and of the European Central Bank. 26-27.

activity. However, according to the ECB, any regulatory strategy for virtual currency schemes should consider:

- taking into account the reputational risks: loss of trust in virtual currency schemes might undermine users' confidence in payment systems;[45]

- focusing on the intersection with the regulated financial system, namely gatekeeping services, such as crypto-asset custody, trading, and exchange services: they provide an access point to the traditional financial system;[46]

- drawing the distinction between centralized and decentralised ledgers: as far as virtual currency holders and crypto-assets investors may rely on third parties service providers or gatekeepers, the traditional regulatory approach may be applied; conversely, if a fully decentralised gatekeeping activity is concerned that does not imply the involvement of an identifiable intermediary, the ECB suggested considering a principle-based approach, complemented by a formal mechanism to validate the observance of such principles.[47]

EBA[48] provided for an interesting list of regulatory drivers of risk. Some of them are common to any new business, such as the legal uncertainty regarding legal treatment and the lack of definitions and standards; some other risks are peculiar to any new financial activity, for example, the opaque process of price formation, and the lack of funds separation between the exchange's own funds and the exchange users' funds. With a view to dealing with both sets of risks, the EBA took a case-by-case approach in applying European payment and financial services legislation to crypto-assets. This is the case of the 2009 e-money directive whenever the electronically-stored token is issued on receipt of funds for the purposes of making payments, pegged to a given currency according to a one-to-one ratio, redeemable at any time, accepted by persons other than the issuer and, in the end, confers on the holder a claim on the issuer.[49] Finally, some drivers of risk are peculiar to virtual currencies, such as the possibility of creating and making changes to the protocol anonymously, and the lack of refund or payment guarantees, as well as the lack of an incorporated legal person subject to regulatory standards and governance and probity conduct rules.[50] Concerning the latter group, the EBA suggested imposing the creation of an entity accountable

[45] ECB, Virtual Currency Schemes – a further analysis n 43 above, 28-29.

[46] ECB, ibid 32; ECB, *Crypto-assets* n 43 above, 28-30.

[47] ECB, *Crypto-assets* n 43 above, 29-30.

[48] EBA, Warning to consumers on virtual currencies, 12 December 2013, 1-3; EBA, Opinion on 'virtual currencies', 4 July 2014, 1-46; EBA, Report with advice for the European Commission on crypto-assets, 9 January 2019, 1-30. In 2013 virtual currencies were addressed as 'unregulated digital money' neither issued nor guaranteed by a central bank, while in 2014 the EBA dealt with them as a 'digital representation of value' which may work as a means of exchange. In 2019, the EBA made no change to the regulatory definition of virtual currencies as a monetary token but put them into the broader category of crypto-assets which also covers investment or security tokens representing debt or equity claims on the issuer, as well as utility tokens enabling the holders to access applications or services.

[49] EBA, *Report* n 48 above, 13.

[50] EBA, *Opinion* n 48 above, 38.

for the virtual currency scheme, namely, the scheme governance authority, set up as a legal person and in charge of maintaining the integrity of central transaction governance and complying with authorisation requirements. On this point, the 2014 EBA Opinion argued that 'A governance authority may, at first, appear incompatible with the conceptual origins of VCs as a decentralised scheme that does not require the involvement of a central bank or a government. However, the mandatory creation of a scheme governance body does not imply that VC units have to be centrally issued. This function can remain decentralised and be run through, for example, a protocol and a transaction ledger. If it is true that the decentralised VC schemes are secure, it should be possible for market participants to establish themselves as scheme governance authorities'.[51] Who would be in charge of setting up and running this governance authority?

While, in the next steps, this legal analysis shows to what extent MiCA follows EBA and ECB advice, it is worth noting here the two leading policy priorities on which MiCA preambles focus: establishing a trade-off between, on the one hand, streamlining capital-raising processes and improving cross-border payments to foster users' confidence in alternative payment instruments, and consumer protection and market integrity, on the other hand.[52] This is based on the two-tier nature of crypto-currencies as both payment systems and settlement assets, but also on the double connection between the issuance of crypto-currencies and the mechanism of Initial Coin Offering (ICO), meaning a 'process in which businesses (usually start-ups) or individuals issue tokens to the public to raise funds for their projects, in exchange for fiat money or other crypto-assets'.[53] Indeed, with an ICO, issuers deliver utility, asset, or payment tokens, and may receive as monetary consideration not only legal currencies but also (and in most cases) virtual currencies, especially generally accepted ones like Bitcoin and Ether. Therefore, market or user expectations of an ICO business plan may influence not only Bitcoin-like or Ether-like value, but also any newly-issued ICO payment tokens. This connection may increase the value of crypto-currencies despite the fact that there is no certainty of the actual development of the business project or its profitability.[54]

[51] ibid 39-40.

[52] Preambles (2) and (4), MiCA. The Commission also considers the advantages of payment tokens in terms of programmable money: payment tokens may hold the key to 'programmable money' ('delivery vs. payment' or 'invoice vs. payment'), by enabling the functioning of smart contracts. A simple example of programmable money could be blocking the funds for a transaction, which are then automatically released to the recipient only when specific conditions are met (for example the confirmed delivery of goods). See: Commission Staff Working Document, Impact Assessment, SWD (2020) 380 final, of 24.9.2020, 26-30.

[53] R. Houben and A. Snyers, n 3 above, 23-24.

[54] This is what happened in the US in March 2017, where 'Ethereum cofounder Vitalik Buterin revealed that an investor in the ICO of BAT spent $2,210 as a transaction fee for one payment to receive the advantages and discounts granted to early investors'. See, A. Gurrea-Martinez and N.R. León, n 18 above, 122-126.

This context may explain why MiCA compels crypto-asset issuers to publish a white paper replicating the prospectus contents in accordance with Regulation 2017/1129, because the holders of a money-like payment instrument are first and foremost investors. Here, information concerns not only the rights and obligations of payment users and service providers with regard to payment transactions, but also the objectives and contents of the business plan underlying the ICO token. Consistently, the white paper is comparable to the prospectus. Indeed, ICO issuers must notify the national competent authority of a white paper before an ICO is issued or admitted for trading on a trading platform for crypto-assets. As for asset-referenced or e-money tokens, no offering, trading, or marketing activity can begin before the competent authority has approved the white paper.[55]

Arts 5, 17, and 46 specify the contents of the white paper for asset-referenced tokens and e-money tokens. Specifically, the white paper addresses average investors, providing them with information on (1) the main features of the crypto-asset issuer and of the major participants involved in the project's design and development; (2) the issuer's business plan for the crypto-asset offering or admission to trading, ie the 'planned use of the fiat currency or other crypto-assets collected via the offering'; (3) the terms and conditions of the offering, together with the rights and obligations of crypto-assets holders; (4) the underlying technology and standards; and finally (5) the risks concerning the issuer, the crypto-asset offering and the implementation of the plan.[56] As for asset-referenced tokens, Art 17 establishes that, in addition to the information set in Art 5, the white paper comprises a detailed description of: i) the issuer's governance arrangements; ii) reserve assets; iii) custody arrangements; iv) the enforceability rights; v) the complaint handling procedure; vi) disclosure items. As for e-money tokens, in comparison with the general requirements as established in Art 5, the white paper also covers a detailed description of the rights and obligations attached to e-money tokens with regard to the holding, storing, or transferring of said e-money tokens.

While the binding structure of white papers may help prospective token holders to compare offerings, the point is whether the structure of the white paper is adequate for rectify the information asymmetry between token issuers and prospective token holders.

European lawmakers are taking tentative steps towards a new trade-off between public and private enforcement.[57] Indeed, MiCA provides that token issuers and their management bodies are subject to the national legislation on civil liability

[55] No preliminary approval is required for the offering, trading, or marketing activity of crypto-assets other than asset-referenced and the e-money tokens.

[56] Art 5 MiCA.

[57] Some critical remarks by: G. Ferrarini and P. Giudici, 'Digital offerings and public disclosure: a market-based critique of MiCa' 605 *ECGI Law Working Paper* 20-25 (2021) argued that '(…) grandiose regulatory frameworks aimed to protect investors without offering the protected parties effective instruments of private enforcement of their rights'.

rules for information given in a white paper with regard to the offering of crypto-assets or the admission of such crypto-assets to trading on a trading platform for crypto-assets.[58] Furthermore, token issuers must publish a brief summary of the white paper on their website in non-technical language providing the public with basic information about the offering as well as about admission to trading.[59] However, this non-technical report – *de facto* extremely important for the type of prospective users it addresses – plays only a complementary role: indeed, Art 22 (3) provides that token holders are not entitled to sue the issuer for damages for information provided in the summary, except when '(a) the summary is misleading, inaccurate or inconsistent when read together with the crypto-asset white paper; (b) the summary does not provide, when read together with the other parts of the crypto-assets white paper, key information in order to aid consumers and investors when considering whether to purchase such asset-referenced tokens'. Considering the policy priorities of payment tokens, it would be advisable to draw a distinction between public enforcement based on information given in the white paper and private enforcement based on information given in the non-technical summary.

V. Asset-Referenced and E-Money Tokens

Asset-referenced and e-money tokens are respectively subsumable within the category of off-chain collateralised tokens and tokenised funds. The first case requires an issuer and a third party trusted with keeping the commodity (or other non-digital asset) safe, and delivering it when requested. In the second case, the tokenisation of units of monetary value is carried out, while the issuer itself or a custodian stores the funds received. For both forms, there is a business entity – the issuer – in charge of offering and redeeming the tokens, while their transfer is based on a typical DLT platform where the network participants may validate the token transfer.[60]

MiCA covers asset-referenced tokens and electronic (or e-money) tokens and deals with them (also) as a means of payment. Thinking of traditional commercial instruments, payment tokens are negotiable if they contain an unconditional promise or order to pay a sum of money. This means that it is important to ascertain whether asset-referenced and e-money tokens confer on their holders a claim over the issuers or a redemption right on the reserve assets backing the value of the payment tokens. Indeed, while the e-money token holders are provided with a redemption right (on the issuer) at any moment and at par value, the holders of asset-referenced tokens may or may not hold a direct claim or redemption rights on the issuer or on the reserve assets. It depends on the terms and conditions set in the asset-referenced token white paper. If the

[58] Art 11(1) MiCA.
[59] As for e-money tokens, please, see Art 47(3) MiCA.
[60] D. Bullman, J. Klemm, and A. Pinna, n 40 above 12-14.

issuers of asset-referenced tokens do not grant any redemption rights to all the holders, they must establish mechanisms to ensure the liquidity of such asset-referenced tokens, by means of written agreements with the crypto-asset service providers requiring them to 'post firm quotes at competitive prices on a regular and predictable basis'.[61] However, this policy choice to leave asset-referenced token issuers to decide whether or not to grant holders redemption rights has raised strong concerns on the part of the ECB.[62] In its opinion on the MiCA regulation proposal, the ECB underscored that e-money and asset-referenced tokens are likely to be used as money-substitutes, therefore it would be advisable that both of them entitle holders to a right to redemption on the issuer or, more appropriately, that a single payment token sub-category be created comprising both of them and applying the same set of normative requirements.[63]

The above-mentioned parallel between MiCA payment tokens and negotiable instruments leads us to the stabilisation mechanism, a second feature of payment tokens. Traditionally, commercial instruments entitle the holder to get paid a sum of money, where money is the settlement asset or, in order words, the legal currency. However, the discharging of monetary obligations follows the nominalistic principle, and this principle is based on the stability of legal currency thanks to a central bank mandate. Therefore, the point is that if asset-referenced and e-money tokens claim to be means of exchange, they need to stabilise their value, pegging it to a different asset. E-money tokens claim to maintain a stable value referring to a precise 'fiat currency that is used as legal currency', while asset-referenced tokens purport to maintain a stable value referring to 'several fiat currencies that are legal tender', to one or several commodities, one or several crypto-assets, or a basket of such assets. The stabilisation mechanism implies the constitution and maintenance of a reserve of assets backing those crypto-assets all the time owing to an adequate investment policy against the risk of a decrease in the value of the asset backing the value of the tokens.[64]

However, the value of payment tokens depends not only on the value of the reserve assets but also on the ICO business plan, whether it was brought about, and to what extent it turns out to be a successful business initiative. This is why, considering the ups and downs of the ICO business plan, holders are in any case entitled to redeem the asset-referenced tokens directly from the issuer where the market value of the asset-referenced crypto-assets varies 'significantly' from the value of reference or the reserve assets.[65]

Keeping all of this in mind, one wonders whether the definition of funds, as set out in the 2015 Payment Services Directive, should be amended to include asset-referenced and e-money tokens. This definition comprises banknotes and

[61] Art 35 (4) MiCA.
[62] See above Section IV.1.
[63] See preamble (32) MiCA.
[64] Preambles (35) and (37) MiCA.
[65] Art 35 (4) MiCA.

coins, scriptural money, and e-money as defined in the 2009 EMI Directive. While some of these confer on holders a claim on the central bank, some others confer a claim on a commercial bank, but they have in common the value of the settlement asset, ie the legal currency, which is based on the credibility of the community (state or international organization) project, as Christine Desan argued.[66] In contrast, the value of both asset-referenced and e-money tokens depends not only on the stability of the reserve asset value, but also on the credibility of the issuers' business plan. For this reason, at best, the definition of funds might be amended to include e-money tokens.

1. The Interest Clause

No interest or other benefit related to the length of time during which the holder holds asset-referenced or e-money tokens may be granted to their holders.[67] This is explained, from a policy standpoint, as necessary to ensure that such tokens are used as a means of payment rather than a reserve of value;[68] otherwise, they might run in competition with central bank monies.

From a normative standpoint, a different explanation could be suggested based on the fact that both the issuers of asset-referenced tokens and e-money tokens hold no title over reserve assets. Indeed, this builds a bridge between the MiCA provision, the 2015 Payment service Directive and the 2009 EMI directive. As for electronic money, it is established that

> 'Electronic money issuers should not, moreover, be allowed to grant interest or any other benefit unless those benefits are not related to the length of time during which the electronic money holder holds electronic money',[69]

while no clear-cut choice is made for payment accounts provided by payment institutions. Vittorio Santoro argued that payment institutions do not take title on the sum of money placed in payment accounts; for this reason, they are not entitled to use them on their own, for example for extending credit or performing different business activities, but at the same time no interest should be accrued on the account balance.[70]

2. Consolidating the Functional Theory of Money?

In the MiCA regulation proposal, the Commission seems to embrace a functional and contract-based approach, consistent with the construction elaborated

[66] See, above, Section I.

[67] Arts 36 and 45 MiCA.

[68] Preambles (41) and (46) MiCA.

[69] See preamble (13) and Art 12, 2009 EMI Directive.

[70] In fact, thinking of the Italian legal system, Vittorio Santoro compared the position of the payment institution to the custodian of a deposit agreement (Art 1782 Italian Civil Code) or the agent of a mandate contract (Art 1703 Italian Civil Code). See: V Santoro, 'I conti di pagamento degli istituti di pagamento' *Giurisprudenza Commerciale*, 855-872 (2008).

by the European Court of Justice in the Mr Hedvist case.[71] Indeed, the MiCA proposal makes reference to 'fiat currencies' as well as to 'fiat currencies that are legal tenders' as if they were on the same footing. This is the case in the preambles (12) and (15), and also in the definition of asset-referenced crypto-assets and reserve assets, respectively in Art 3(3) and Art 3(4).

However, the ECB, in the opinion delivered on the MiCA proposal, critically emphasized how it is more appropriate in a Union legal text to make reference to official currencies 'of which legal tenders are expressions', in accordance with Council regulation No 974/1998 on the introduction of the euro, and the European Parliament and Council directive 2014/62 on counterfeiting.[72] While the 2014 directive defines currency as 'notes and coins, the circulation of which is legally authorised, including euro notes and coins, pursuant to Regulation (EC) No 974/98', the 1998 Regulation provides that

> 'Banknotes and coins denominated in a national currency unit shall retain their status as legal tender within their territorial limits as of the day before the entry into force of this Regulation'.

This seems much more important because, as the *Häring & Dietrich* v *Rundfunk* case[73] demonstrated, the singleness of the legal tender depends rather on the monetary settlement than on the means of exchange, either banknotes, coins or scriptural money. While Member States may match the use of cash with the use of scriptural money, any choice regarding settlement assets is pre-empted, at least for the Eurozone.

Indeed, the European Court of Justice held that Art 128 (1) TFEU and Art 16 SEBC Statute

[71] In 2015, the European Court of Justice was asked to issue a preliminary ruling on the construction of the Value Added Tax (VAT) Directive. Specifically, the Swedish tax authority wondered whether Arts 2 and 14 of the VAT directive should be interpreted as covering business activities of exchanging traditional currency for units of bitcoin and vice-versa in return for a remuneration fee. The Court held that, in the context of Art 135 (1) (e) of the VAT Directive, the concept of currency was to be dealt with as comprising traditional and non-traditional currencies, namely currencies not issued by one or more countries, accepted by the contracting parties as an alternative to legal currency and having no purpose other than being a means of payment. Therefore, according to the ECJ analysis, the legal concept of currency should comprise any fiat currency, both traditional and non-traditional, deemed as a settlement asset by the contracting parties, apart from the centralised or decentralised payment system behind. Within the context of the case, this conclusion was based on the difficulties connected to the divergent language transposition of VAT: this prompted the Court to go beyond the wording of the provisions concerned and make a functional interpretation, consistent with its teleological approach. Indeed, Art 135 (1) (e) aimed to alleviate the difficulties connected with the taxable amount and the VAT deductible in the context of taxation of financial transactions.

[72] See, especially: Art 9, Council Regulation 974/1998/EC of 3 May 1998 on the introduction of euro [1998] OJ L139/1, and Art 2(a), European Parliament and the Council Directive 2014/62/EU of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law and replacing Council Framework Decision 2000/383/JHA [2014] OJ L151/1.

[73] Joint Cases 422/19 and 423/19 *Häring & Dietrich* v *Rundfunk*, Judgement of 26 January 2021, available at www.eur-lex.europa.eu.

> '(...) preclude the adoption of a national rule the object or effect of which is to abolish, in law or in fact, cash in euro, in particular by calling into question the possibility, as a general rule, of discharging a payment obligation in cash',[74]

but – the Court continued –

> 'the recital 19 of Regulation No 974/98 states that limitations on payments in notes and coins, established by Member States for public reasons are not incompatible with the status of legal tender of euro banknotes and coins, provided that other lawful means for the settlement of monetary debts are available'.[75]

In other words, Member States enjoy a certain degree of leeway concerning any restrictions imposed on the use of coins and banknotes as long as these restrictions are proportionate to the public interest objective pursued, with no margin on settlement assets. This normative approach to legal tender singleness may put a distance between the Commission's approach in the MiCA proposal and the ECB's official opinion, or in other words, between virtual currencies as units of account and settlement assets on the one hand and the 'official currencies of which legal tenders are expressions' on the other.

VI. A Statute for Crypto-Asset Issuers and Service-Related Providers

No offering, admission to trading, or provision of crypto-asset services is allowed without the proper authorisation. The MiCA proposal applies a traditional normative approach to crypto-asset issuers and service providers. Indeed, both economic activities are dealt with as regulated businesses.[76] Authorisation is issued by the national competent authorities according to the principle of single license and home country control,[77] but no authorisation is needed for a crypto-asset service provider, if the services are provided to persons established in the Union by their own initiative.[78]

1. Asset-Referenced and E-Money Token Issuers

With regard to asset-referenced token issuers, MiCA provides that, apart from notifying the competent authority of the white paper, any applicant must: set up a legal entity holding a proprietary DLT-platform (at least for issuers of asset-referenced tokens) and having its legal seat in a Member State; meet

[74] EBA, *Opinion* No 48 above, 20.
[75] ibid 21.
[76] Arts 15, 43, 53, MiCA.
[77] Art 58 MiCA.
[78] See preamble (51) MiCA.

prudential stability requirements, in terms of capital ratio and own funds thresholds; set up a management body whose members are persons with good repute, appropriate knowledge and experience; act in the best interest of asset-referenced tokens preventing, identifying, managing and disclosing any conflict of interests; and maintain robust governance arrangements.[79] These arrangements range from setting sound and prudent management policy to establishing a process for identification, management, monitoring and reporting of the risk to which it might be exposed, as well as maintaining the security, integrity and confidentiality of information and establishing a business continuity policy.[80] With regard to the offering of e-money tokens, there is no-newly established type of financial intermediary: indeed, the issuer must be authorised either as a credit institution or as an electronic money institution, in accordance with the authorisation and prudential supervision requirements set in their own legal statute, unless MiCA establishes otherwise.

For both types of issuers, MiCA applies two types of exemptions: one based on the nature of crypto-asset holders and the other based on ICO size; authorisation is not required if asset-referenced and e-money tokens are addressed only to qualified investors, nor when the average outstanding amount of the tokens concerned does not exceed a certain threshold. There is no specific reference to consumer protection or market integrity. However, although there is no authorisation process, issuers must notify the national competent authority of a white paper, one paper for each type of crypto-asset issued.

For both types of issuers, the MiCA statute provides some new elements in comparison with the regulation of payment institutions in the 2015 Payment Services Directive or of electronic money institutions in the 2009 EMI Directive. The applicant must:

- submit a project in terms of business plan backing the ICO;
- enter into affordable liquidity arrangements with third parties in order to grant crypto-holders a right to exchange their token holdings, as well as provide a reserve asset policy with a view to ensuring crypto-holders the right to token redemptions;
- give information on the underlying technology and standards: as Angela Walch emphasized,

> '(...) it is relatively easy to count nodes in a network, but much harder to identify and understand how miners, nodes, and software developers interact

[79] According to the preamble (26) MiCA, issuers of asset-referenced tokens are at the centre of a network of entities which ensures the issuance of such crypto-assets, their transfer and their distribution. The question is: will this network raise the same regulatory concerns raised by two-sided/multi-sided traditional payment systems?

[80] Art 16 MiCA.

in governing a blockchain'.[81]

MiCA tries to make these governance dynamics apparent: in fact, the home state competent authority must be notified of any modification to the business model and to the white paper that might 'have a significant influence on the purchase decision of any actual or potential holder of asset-reference tokens'. According to Art 21(1) MiCA, this concerns, among other things, any material changes to

> '(d) the mechanism through which asset-referenced tokens are issued, created and destroyed; (e) the protocols for validating the transactions in asset-referenced tokens; (f) the functioning of the issuer's proprietary DLT, where the asset-reference tokens are issued, transferred and stored on such an DLT'.

In a much more general way, MiCA rules and regulations for e-money token issuers also make reference to the same point;[82] these issuers must:

- provide a legal opinion explaining why the asset-referenced tokens do not qualify as financial instruments, electronic money, deposits or structured deposits (Art 16, lett d, MiCA);
- finally, meet tougher prudential supervisory rules on higher capital thresholds, interoperability requirements, and liquidity management policy, as they are qualified as issuers of significant asset-referenced and e-money tokens. This is the case of global fintech firms and the Diem case.[83] Indeed, for significant token issuers, MiCA takes into account the potential large customer base of their promoters or shareholders, but also the potential high market capitalisation, number of transactions, cross-border use, and interconnectedness with the financial system, as well as their market capitalisation and the potential size of the reserve assets backing the value of asset-referenced and e-money tokens.[84] When significant asset-referenced and e-money tokens are concerned, the EBA is in charge of releasing authorisation as well as establishing, managing, and chairing a consultative supervisory college.[85]

The MiCA statute for payment tokens leaves some questions open. First, the distinction between issuing and offering to the public. A license is required for the second rather than for the former activity, but this distinction is material to establishing any normative asymmetry between the offering of payment tokens and the monetary function reserved for credit institutions in the process of taking up reimbursable funds from the public. According to Art 3(7) MiCA, 'offer to the public' means 'an offer to third party to acquire a crypto-asset in exchange for fiat currency or other crypto-assets'; conversely, there is no definition either of 'public' or

[81] A. Walch, n 6 above, 59.

[82] See Art 46 (10) MiCA.

[83] Preambles (41), (45), (49), and (66).

[84] See: Arts 39, 41, 50-52 MiCA. An issuer may be classified as an issuer of significant asset-referenced or e-money tokens by the competent authority or on a voluntary basis.

[85] Arts 98-99 MiCA.

of 'issuing'.[86] Second, following EBA advice, MiCA compels the issuers to set up a legal entity having their legal basis in a Member State and this entity is accountable for acting in the best interest of the crypto-token holders in the issuance, redemption, and transfer of crypto-assets, despite the validation mechanism of token transfers is based on a competitive works according to a typical DLT and involves a network of participants verifying that the transfer complies with the platform rules.[87] This means that a MiCA takes a closed-system approach, where the platform is wholly-owned by a firm or set of firms, proprietary, and controlled by a single party.[88] In the end, whether it is possible to set up asset-referenced token issuers as hybrid business entities is unclear. This is allowed for payment institutions and electronic money institutions respectively in the 2015 Payment Services Directive and in the 2009 EMI Directive. If issuers were entitled to be authorised as hybrid business entities, they might match the offering of the crypto-tokens concerned with a different business activity, either financial or non-financial, a possible business case for global e-commerce platforms, big retailers, or social networks. There is no clear-cut law-making choice on this aspect in MiCA. However, since e-money token issuers must be authorised as electronic money institutions in compliance with the 2009 EMI Directive, one might infer that they will be able to set up a hybrid financial intermediary.

2. Crypto-Asset Service Providers

The authorisation process and requirements for crypto-asset service providers is in line with the legislative statute for issuers of asset-referenced and e-money tokens. In addition, Title V of the MiCA seems to give voice to some of the institutional concerns raised. In fact, the crypto-asset service providers, that the ECB has called gatekeepers are regulated in a traditional way, in compliance with ECB advice.[89] It is established that they must make public the price, volume and time of transactions executed regarding the crypto-assets traded on their trading platforms, as well as details of all such transactions, as close to real-time as is

[86] D.A. Zetzsche et al, n 20 above, 24, put forward same critical remarks but different supporting arguments. It is worth noting that the 2017 Prospectus Regulation, which has more than one material aspect in common with MiCA, not only made a distinction between issuers and offerors, but also laid down a qualitative distinction within the concept of public.

[87] D. Bullmann, J Klemm, and A Pinna, n 40 above, 11-12.

[88] M. Zachariadis and P. Ozcan, 'The API economy and digital transformation in financial services: the case of open banking' (1) *Swift Institute Working Paper Series*, 10-11 (2016). It is worth noting that Council and Parliament Regulation 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology has recently been approved, but this allows only certain types of DLT platforms for financial instruments to be exempted from the regular legal framework.

[89] It is interesting to note that, according to preamble 58 MiCA, whenever crypto-asset service providers are authorized as payment institutions, they are also entitled to operare payment transactions in connection with the services they offer. One might assume that, in such cases, they are hybrid payment institutions, offering professional provision of payment services with both financial and non-financial business.

technically possible, responding to the EBA's regulatory concern about the opaque process of price formation.[90]

Crypto-asset services mimic investment services and financial activities as set out in the MiFiD regulatory package. The main difference seems to be the object: they deal with crypto-assets assumed to perform as a means of exchange rather than as financial instruments. However, MiCA establishes that not only those business entities provided with ad hoc authorisation are allowed to operate such business, but also those firms providing financial services according to EU law, and no further authorisation is needed.[91] This sounds odd because MiFiD clearly established that payment instruments are *other than* transferable securities. One might sensibly conclude that this law-making choice depends on the fact that asset-referenced and e-money tokens are both means of exchange and tools for raising capital within the ICO framework.[92]

VII. Conclusions

In the MiCA framework, payment tokens are asset-referenced and e-money tokens. The MiCA proposal establishes a tentative comprehensive framework for issuance, admission to trading, and related services, taking a traditional regulatory approach with few new aspects. Despite the aim of levelling up legal certainty and crypto-user protection along with market integrity, the broad definition of crypto-asset does not seem to live up to expectations, leaving outside the regulated field various forms of DeFi (Decentralized Finance) applications, from on-chain and algorithm tokens to Decentralised Autonomous Organizations (or DAOs), without putting forward any other form of regulatory initiatives, like an EU-based regulatory sandbox. In addition, since asset-referenced and e-money tokens are dealt with as means of raising capital and operating payment transactions, MiCA raises delicate coordination issues, not so much with money laundering framework, but with the 2015 Payment Services Directive, as well as crowdfunding and banking rules and regulations.

[90] On ECB and EBA policy priorities and regulatory concerns, see Section IV above.
[91] Preamble (54), (55) MiCA.
[92] Above, Section IV.