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COVER NOTE

From:	Ms Christine LAGARDE, President of the European Central Bank
date of receipt:	1 December 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject:	Opinion of the European Central Bank of 30 November 2021 on a proposal for a regulation to extend traceability requirements to transfers of crypto-assets
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Delegations will find attached the document mentioned above, and its technical annex.

Encl.

OPINION OF THE EUROPEAN CENTRAL BANK

of 30 November 2021

on a proposal for a regulation to extend traceability requirements to transfers of crypto-assets
(CON/2021/37)

Introduction and legal basis

On 14 and 20 October 2021 the European Central Bank (ECB) received requests from the European Parliament and the Council of the European Union, respectively, for an opinion on a proposal for a regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto-assets (recast)¹ (hereinafter the ‘proposed regulation’).

The ECB’s competence to deliver an opinion is based on Articles 127(4) and 282(5) of the Treaty on the Functioning of the European Union since the proposed regulation contains provisions affecting the basic tasks of the European System of Central Banks (ESCB) to implement the monetary policy of the Union and to promote the smooth operation of payment systems pursuant to the first and fourth indents of Article 127(2) of the Treaty; the ESCB’s contribution to the stability of the financial system pursuant to Article 127(5) of the Treaty, and the legal tender status of euro banknotes pursuant to Article 128(1) of the Treaty. In accordance with the first sentence of Article 17.5 of the Rules of Procedure of the European Central Bank, the Governing Council has adopted this opinion.

General observations

The ECB welcomes the initiative of the European Commission to extend traceability requirements to crypto-assets by means of the proposed regulation, which forms part of the Anti-Money Laundering/Countering Financing of Terrorism (AML/CFT) package² adopted by the Commission on 20 July 2020.

Since crypto-asset transfers are subject to similar money laundering and terrorism financing risks as wire funds transfers, crypto-asset service providers should be subject to the same level of AML/CFT requirements as other obliged entities. The ECB therefore welcomes the proposed regulation as a means of levelling the playing field for crypto-asset service providers.

The ECB welcomes the proposed alignment of the EU legal framework with the Financial Action Task Force (FATF) Recommendations, in particular Recommendation 16³, as it further mitigates AML/CFT risks associated with crypto-asset transfers, thereby establishing a level playing field between transfers in official currencies and transfers in crypto-assets to prevent the misuse of crypto-assets for money laundering and terrorist financing purposes. While a level playing field should be achieved in terms of the intensity of

¹ COM(2021) 422 final.

² The package also includes: (a) a proposal for a regulation on the prevention of the use of the financial system for the purposes of money laundering (ML) or terrorist financing (TF) (C(2021) 420 final); (b) a proposal for a directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849 (C(2021) 423 final); and (c) a proposal for a regulation establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010 (C(2021) 421 final).

³ See the FATF Recommendations. Available on the FATF website at <https://www.fatf-gafi.org>.

AML/CFT requirements applicable to crypto-asset service providers, the specific requirements should capture the risks associated with the technological features of crypto-assets and crypto-asset transfers. For instance, requirements regarding the traceability of crypto-asset transfers should take into account the specific features of the technologies underlying these transfers.

For the purposes of effective mitigation of AML/CFT risks, the proposed regulation should be clarified to avoid any doubt that transactions between hosted and unhosted wallets are covered, with the effect that exactly the same information as for other crypto-asset transfers must be collected and stored. In addition, market developments and money laundering activities involving crypto-assets without the use of service providers or in decentralised peer-to-peer exchanges should also be closely monitored by the Commission and relevant national authorities, and further legislative measures should be proposed, where appropriate, if a significant rise in transaction volumes and increased use of such assets for illicit activities in this segment are observed.

Lastly, given the fast pace of technological developments in the field of crypto-assets it is important to closely monitor the implementation of the framework in collaboration with the relevant authorities and, where appropriate, the private sector.

1. Definition of crypto-assets and scope of the proposed regulation

- 1.1 The proposed regulation will use the definition of 'crypto-assets' laid down in the Commission proposal for a regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937⁴ (hereinafter the 'proposed MiCA regulation'). As already noted by the ECB⁵, the proposed MiCA regulation contains a technology-specific and broad definition of crypto-assets. The ECB understands that this is intended to be a wide, catch-all definition, and that consequently the proposed regulation intends to extend traceability requirements to all crypto-assets, irrespective of the underlying technology (distributed ledger technology or other) used for their issuance.
- 1.2 Regarding the scope of the proposed regulation, the ECB understands that, like that of the proposed MiCA regulation, it is not intended to cover crypto-assets issued by central banks acting in their monetary authority capacity. However, for the sake of legal certainty and in order to fully align the scope of the proposed regulation with that of the proposed MiCA regulation, the ECB proposes to explicitly indicate this in the recitals and provisions of the proposed regulation.

2. Reference to official currencies

The proposed regulation contains references to the term 'fiat currencies'⁶. In accordance with the Treaties and Union monetary law, the euro is the single currency of the euro area, i.e. of those Member States which have adopted the euro as their currency. So far as concerns the Member States which have not adopted the

⁴ COM(2020) 593 final.

⁵ See footnote 12 to Opinion CON/2021/4 of the European Central Bank of 19 February 2021 on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (OJ C 152, 29.4.2021). All ECB opinions are available on EUR-Lex.

⁶ See recitals 8 and 27 of the proposed regulation.

euro as their currency, the Treaties consistently refer to the currencies of those Member States. Nowhere do the Treaties refer to the euro or the Member States' currencies as 'fiat' currencies. Against this backdrop, it is not appropriate to make reference in a Union legal text to 'fiat currencies'. Rather, the proposed regulation should refer instead to 'official currencies'⁷.

3. Date of application of the proposed regulation

Aligning the date of application of the proposed regulation with that of the proposed MiCA regulation would be helpful from a systemic and financial stability perspective in order to ensure that the proposed regulation applies to crypto-asset transfers sooner rather than later, instead of waiting for the coming into operation of the rest of the AML package. As noted by the Commission, until now, transfers of virtual assets have remained outside the scope of Union legislation on financial services, exposing holders of crypto-assets to money laundering and financing of terrorism risks, as flows of illicit money can be done through transfers of crypto-assets and damage the integrity, stability and reputation of the financial sector⁸. A number of Member States have already legislated on this point⁹.

Where the ECB recommends that the proposed regulation is amended, specific drafting proposals are set out in a separate technical working document accompanied by an explanatory text to this effect. The technical working document is available in English on EUR-Lex.

Done at Frankfurt am Main, 30 November 2021.

The President of the ECB

Christine LAGARDE

⁷ See paragraph 2.1.5 of Opinion CON/2021/4 and paragraph 1.1.3 of Opinion CON/2016/49 of the European Central Bank of 12 October 2016 on a proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC (OJ C 459, 9.12.2016, p. 3).

⁸ See the eighth paragraph of the first point of Section 1 of the explanatory memorandum to the proposed regulation.

⁹ For example, on 1 October 2021 an ordinance of the German Ministry of Finance on enhanced due diligence requirements for the transfer of crypto-assets (*Verordnung über verstärkte Sorgfaltspflichten bei dem Transfer von Kryptowerten vom 24. September 2021 (BGBl. I S. 4465)*) entered into force. Under the Ordinance, crypto-asset service providers transferring crypto-assets on behalf of an order taker must transmit simultaneously and securely to the crypto-asset service provider acting on behalf of the beneficiary the name, address and account number (e.g. public key) of the order giver, and the name and account number (e.g. public key) of the beneficiary. The crypto-asset service provider acting on behalf of the beneficiary must ensure that it receives and stores originator and beneficiary information. The complete traceability of the parties involved in a transfer of crypto-assets is intended as a tool in the prevention, detection and investigation of money laundering and terrorist financing, as well as the monitoring of sanctions evasion. The Ordinance also requires obliged entities to ensure that information on the beneficiary or originator of a transfer is collected where the transfer is made from or to an electronic wallet that is not managed by a crypto-asset service provider, even if there is no risk of data being transferred.

Technical working document

produced in connection with ECB Opinion CON/2021/37¹⁰

Drafting proposals

Text proposed by the Commission	Amendments proposed by the ECB ¹¹
<p style="text-align: center;">Amendment 1</p> <p style="text-align: center;">Recitals (recital 8)</p>	
<p>'Directive (EU) 2018/843 of the European Parliament and of the Council³⁹ introduced a definition of virtual currencies and recognised providers engaged in exchange services between virtual currencies and fiat currencies as well as custodian wallet providers among the entities submitted to anti-money laundering and countering terrorism financing requirements in the Union legal framework. The latest international developments, notably within the FATF, now implies the need to regulate additional categories of virtual asset service providers not yet covered as well as to broaden the current definition of virtual currency.'</p>	<p>'Directive (EU) 2018/843 of the European Parliament and of the Council³⁹ introduced a definition of virtual currencies and recognised providers engaged in exchange services between virtual currencies and fiat official currencies as well as custodian wallet providers among the entities submitted to anti-money laundering and countering terrorism financing requirements in the Union legal framework. The latest international developments, notably within the FATF, now implies the need to regulate additional categories of virtual asset service providers not yet covered as well as to broaden the current definition of virtual currency.'</p>
<p style="text-align: center;"><u>Explanation</u></p> <p><i>It is not appropriate to make reference in a Union legal text to 'fiat currencies'. Rather, reference should be made to 'currencies' or 'official currencies'. See paragraph 2 of the ECB Opinion.</i></p>	

¹⁰ This technical working document is produced in English only and communicated to the consulting Union institution(s) after adoption of the opinion. It is also published on EUR-Lex alongside the opinion itself.

¹¹ Bold in the body of the text indicates where the ECB proposes inserting new text. Strikethrough in the body of the text indicates where the ECB proposes deleting text.

Text proposed by the Commission	Amendments proposed by the ECB ¹¹
<p style="text-align: center;">Amendment 2</p> <p style="text-align: center;">Recitals (recital 27)</p>	
<p>‘Regarding transfers of crypto-assets, the requirements of this Regulation should apply to crypto-asset service providers whenever their transactions, whether in fiat currency or a crypto-asset, involve a traditional wire transfer or a transfer of crypto-assets involving a crypto-asset service provider.’</p>	<p>‘Regarding transfers of crypto-assets, the requirements of this Regulation should apply to crypto-asset service providers whenever their transactions, whether in fiat official currency or a crypto-asset, involve a traditional wire transfer or a transfer of crypto-assets involving a crypto-asset service provide.’</p>
<p style="text-align: center;"><u><i>Explanation</i></u></p> <p><i>It is not appropriate to make reference in a Union legal text to ‘fiat currencies’. Rather, reference should be made to ‘currencies’ or ‘official currencies’. See paragraph 2 of the ECB Opinion.</i></p>	