

Asset-backed crypto-assets used as a means of payment

As part of the draft MiCA regulation, the European Commission has proposed to distinguish between two types of asset-backed crypto-assets (so called “stablecoins”), electronic money tokens (EMT) and asset referenced tokens (ART). This paper focuses on key amendments to the proposal we deem necessary to ensure an adequate regulation of ART that serve as means of payment.

We share the ECB’s view that “stablecoin” arrangements in general incorporate a function to provide end users with a means of payment and store of value.¹ An adequate regulation of “stablecoins” must therefore aim to effectively contain risks stemming from these functions, as asset-backed crypto-assets may – by acceptance in these monetary functions – become a unit of account.²

Asset-backed crypto-assets (ART, EMT) are by design set to be technically used/ incorporated as means of payment in closed-loop digital ecosystems, going along with the well-known platform-economic effects (e.g. lock-in). Furthermore, in its recent Opinion on the MiCA proposal, the ECB observes a clear “monetary substitution dimension” of both ART and EMT. This could have significant impact on the competitiveness of existing European payment schemes, and monetary sovereignty and consumer protection. Indeed, in its report on a digital euro, the ECB states that a scenario where *“private actors [...] develop payment solutions not denominated in euro (such as global “stablecoins”) that could achieve a global footprint and become widely used for European retail payments”*³ is one which could induce the Eurosystem to issue a digital euro to prevent significant risks to materialise.

Some Member States have already emphasized that, amongst other issues, each unit of asset-backed crypto-asset created shall be pledged at a ratio of 1:1 with fiat currency and that users shall have a direct claim to redeem, at any moment and at par value, the asset-backed crypto-asset into legal tender. In its opinion on MiCA the ECB also proposes to subject asset-referenced tokens that serve as ‘payment tokens’ to an identical set of requirements as those applicable to issuers of e-money tokens.⁴

Since all “stablecoins” may serve payment functions regardless of their classification as EMT or ART, it is key to establish regulatory equivalency between these token categories and to address possible concerns on monetary policy, market integrity, financial stability, consumer protection and technological neutrality.

We therefore propose to

- 1. extend the definition of ARTs to minimize regulatory arbitrage,**
- 2. categorise ART by two functional subsets: Payment ART and Investment ART,**
- 3. introduce a statutory right of redemption for holders of EMT and Payment ART,**
- 4. align the rules for Payment ART along the EMT regime,**
- 5. introduce a mechanism to re-qualify Investment ART gaining a role as means of payment.**

We enclose corresponding draft amendments to the MiCA-proposal.

¹ ECB Crypto-Assets Task Force (2020), Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments and banking supervision in the euro area; ECB Occ Paper No 247, pg. 24.

² Brunnermeier/James/Landau, The Digitalization of Money, working paper, pg. 19 speak of “Digital Currency Areas”, accessible at https://scholar.princeton.edu/sites/default/files/markus/files/02c_digitalmoney.pdf.

³ ECB (2020), Report on a Digital Euro, p. 11.

⁴ Section 2.1.4 of the opinion 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 (CON/2021/4).

1. Define the scope of ARTs

The current definition of ART included in the MiCA-proposal exclusively relates to crypto assets that purport to maintain a stable value by referring to several fiat currencies, one or several commodities or one or several crypto-assets, or a combination of such assets.

While this reflects the vast majority of current “stablecoin” arrangements, the regulatory perimeter set by this definition might not prove to be future-proof. To avoid possible circumvention, the definition of asset-referenced tokens **should include reference to any other value or right**. The regulatory perimeter should be wide to include especially those “stablecoin” arrangements carrying an even higher risk of instability. Including such ART arrangements in the material definition which are not eligible for formal authorisation is necessary to uphold market integrity. If the definition of ART would only describe concepts eligible for a license there would be no level playing field, as riskier setups with the same functionality could not be prevented.⁵ Not qualifying as ART, they could be issued legally and from anywhere, inviting for regulatory arbitrage. We deem it expedient to include in the definition any crypto-asset that purports to maintain a stable value against any variety of assets, not limiting it to certain stabilisation mechanisms. This is of course without prejudice to such assets falling under existing regimes such as MiFID II, UCITS and AFMD, which would take precedence.

2. Categorise ART by two functional subsets

ART that serve for payment purposes have the same economic functions as EMT and entail identical or, in light of their reserve basket, even higher risks. Yet, the MiCA-proposal subjects them to lighter rules and requirements. We therefore propose to **distinguish Payment ART and Investment ART** to allow for regulatory equivalence of payment ART and EMT.

To facilitate regulatory practice and legal clarity, two options could be considered, including in light of market practice:

- Option 1: Presume that by default, **any ART would prima facie be deemed to serve payment purposes and be subject to the rules for Payment ART**. This presumption would be **irrefutable for any ART referencing the value of official currencies** (regardless of their weight within the ART basket). For all **other ART, the presumption would be refutable - provided issuers present objective grounds according to which the ART serves no payment purpose**. Ex-ante, such objective criteria could be the business model of an ART and its related ecosystem; technological definitions on the DLT or similar technology, such as denomination or restraints on buyers, technical impossibilities to use it as a means of payment, etc.; ex-post criteria may be levels of volatility; usage of the token, etc.

- Option 2: Establish a **dividing line based on a single criterion**, considering that **any ART referencing at least in part to one or more currencies would be considered a payment ART**. All other ART would be investment ARTs (with capacity to be reclassified as Payment-ARTs if they were to be used in practice as means of payment – cf. point 5).

EBA could be mandated to develop corresponding standards for level-2 regulation and should be informed of corresponding NCA decisions.

⁵ This could include Crypto-Assets referring to indices, financial measures or any index or measure related to the price, value or volume of transactions in any asset, right, service or obligation without a contract leading to a cash or physical settlement, as mere references without a contractual claim would possibly not lead to the qualification of a financial instrument, see MiFID II, Annex I C (7) and (10) and Art. 8(g), 7(3), 7(1) MiFIR (otherwise MiCA regulation for ART would be obsolete as all ART would already be financial instruments).

The prima facie presumption towards Payment ART would also support the related principles of same activities, same risk, same rules and technologic neutrality. Crypto-assets, including Investment ART, referring to assets for investment purposes are closely related to MiFiD II financial instruments or AIFMD/UCITS collective investment schemes and especially Money Market Funds. These regimes should comprehensively address such constructs irrespective of the technology used. Therefore, the applicable regimes will also need to be adapted accordingly in case they do not yet adequately cover Crypto-Assets conveying comparable functionalities and risk profiles as existing financial instruments or investment schemes without legally classifying as such. The category of Investment ART would cover primordially those types of Crypto-Assets that are not akin to contemporary financial instruments. This will guard against potential regulatory gaps and it will contribute to make European financial regulation future-proof.

3. Introduce a statutory right of redemption for holders of EMT and Payment ART

We share the ECB proposition that EMT and Payment ART that do not include a redemption right should be prohibited.⁶ We are also open to discuss restraints on the use of ART, where this would contribute to control the emergence of any unit of account next to the official currencies of EU member-states.

In designing the redemption right, our preferred option is that holders of EMT and Payment ART should be entitled to claim redemption at par value, i.e. at a ratio of 1:1 with official currency of EU member-states.

A redemption right is crucial to preserve the monetary sovereignty of the Member States and the Eurozone. IMF senior staff also have emphasised that co-existence of public and private money is only feasible where private money is **redeemable into official currency (digital or non-digital) at a fixed face value**, and hence, interoperable.⁷ To sustain holders' trust in the monetary system and to prevent centralized platform lock-in effects, their right to redeem may not be subject to fees.⁸ Redemption at any moment and at par to the value initially provided for the payment ART is a key characteristic of any private means of payment, be it scriptural money or E-Money. Hence, this requirement should also apply to Payment ART.

Our preferred option therefore is to equally subject issuers of Payment ART to a statutory redemption at a constant value in euros or official EU member-state currencies. Each unit of Payment ART created would be pledged at a ratio of 1:1 with official currency, which is common practice for MMF as well. Thus, Issuers of Payment ART would be required to issue Payment ART at par value and upon receipt of funds. Vice versa, holders of Payment ART would be entitled to redeem at all times their ART for the price for which they initially acquired it. For clarity reasons vis-à-vis users, promises to redeem at other values (higher or lower) would be prohibited. This may require the issuer to put in place hedging instruments to preserve the currency risk on the reserve.

With regard to **detailed requirements as to actively manage liquidity and solvability risks**, ongoing analysis should consider in depth, how the reserve should be structured to meet the needs that come with a strict right of redemption for Payment ART holders, as well as rules on the investment of the reserve assets, governance arrangements on the issuer and further safeguards (see below). Competent

⁶ ECB, *ibid.*, drafting on new Art. 35, p. 14.

⁷ Cf. Tobias Adrian and Tommaso Mancini-Griffoli, Public and Private Money Can Coexist in the Digital Age, accessible <https://blogs.imf.org/2021/02/18/public-and-private-money-can-coexist-in-the-digital-age/>.

⁸ This follows from strict alignment with EMD II provisions on fees (Art. 11 EMD II), which only allow for fees in circumstances that are not relevant for issuers of ART and EMT.

authorities will have to verify the robustness of the financial mechanisms put in place. This would, in the end, also address issues of consumer protection.

4. Align the rules for Payment ART with the EMT regime

In order to establish a level playing field and meet expectations especially of retail clients when dealing with private means or instruments of payment, we propose to further **align rules for Payment ART and EMT**. Next to the 1:1 redemption requirement, this would include that issuers of Payment ART would require CI or EMI authorisations as per CRR/EMD II and would have to comply with the same requirements as EMT issuers, complemented by existing MiCA provisions that cater to specific issues of ARTs not covered by EMD II. This will also provide a prudential regime that provides the instruments to supervise the payment ART issuer's ability to ensure redeemability at any moment and at par value, taking into account that standard setters are already actively discussing the prudential treatment of crypto-asset exposures (including their issuance). To enhance and converge supervisory practices as well as to reduce regulatory arbitrage, this should be combined with a corresponding EBA mandate that takes into account the differences between EMIs and CIs. Supervisory colleges should include a governance set-up to entail binding decision at the European Level, in case home and host authority dissent respectively.

Should this option be pursued, as Payment ARTs would be financially equivalent to EMTs, it will be warranted to further assess to which extent they should qualify as electronic money as defined in EMD II or funds as per PSD II.

5. Introduce a mechanism for re-qualification of ARTs

The ex-ante differentiation between Payment ART and Investment ART should be complemented by an **ex post mechanism of re-classification**, in case an Investment ART is regularly used for payment purposes.

Where competent authorities become aware that an Investment ART issued by an issuer of their home member state is regularly used for payment purposes, that issuer no longer meets the conditions for which the authorisation was granted, triggering the withdrawal of the authorisation. The issuer could then seek admission under the rules applicable to issuers of Payment ART. A transitional regime could be envisaged to allow for adjusting to the respective requirements.

To allow for proportionate supervisory action, competent authorities should at the same time be conferred with corresponding supervisory powers. First, **competent authorities should have the power to make public the fact that an Investment ART is increasingly or regularly used as a means of payment**. As ultima ratio, **competent authorities shall have the power to prohibit all regulated entities the acceptance and any services related to such investment ART**.

Where applicable, **competent authorities of other Member States should also have the power to trigger such re-classification**. ECB should issue a binding decision where home and host authorities dissent on the ART classification.

[1. Define the scope of ARTs]

Definitions

Art. 3 Para. 1 (3) 'asset-referenced token' means a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referring to any other value or right or combination thereof, including one or several official currencies of a country.

Art. 3 Para. 1 (3a) ,Payments ART' means an asset-referenced token that refers to one or more official currencies of a country or is regularly used as a means of payment;

Art. 3 Para. 1 (3b) ,Investment ART' means an asset-referenced token that is not a Payments ART;

Corresponding Recital: (10a) With the aim to establish a future-proof regulation and in order to avoid circumvention, the definition of asset-referenced token (ART) should include reference to any other value or right.

[2. Categorise ART by two functional subsets]

Art. 16a Delineation of Payment and Investment ARTs

1. An ART is deemed to be used as a means of payment in the meaning of Art 3(1)(3a).
2. Unless an ART purports to maintain a stable value by referring in part or in full, to at least the value of one or several official currencies of a country, the issuer of an ART may refute the presumption set out in Para. 1. To refute the presumption set out in Para. 1 the issuer of an ART shall present objective grounds that the ART will not be allowed or is technically unable to be used as a means of payment.
3. The Competent Authority of the home Member State shall decide whether the issuer of an ART has refuted the presumption set out in Para. 1 in the procedures established in Articles 18 to 21.
4. The EBA shall, in close cooperation with ESMA and the European System of Central Banks, develop draft regulatory technical standards specifying objective grounds that shall refute the presumption set out in Para. 1. When specifying the objective grounds referred to in Para. 1, the EBA shall take into account:
 - (a) the various types of business models of issuers of ARTs and their related ecosystem;
 - (b) technological definitions on the DLT or similar technology, such as denomination, holding constraints or other restraints on potential buyers;
 - (c) levels of volatility;
 - (d) the usage of the token;
 - (e) additional factors such as money supply, number of transactions and customers, average transaction size, marketing methods, concentration on certain financial institutions or volatility of ARTs.

The EBA shall submit those draft regulatory technical standards to the Commission by [please insert date 12 months after entry into force].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the first subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1093/2010.

[3. Introduce a right of redemption for holders of EMT and Payment ART]

Art. 43

3. By [please insert the date 18 months after date of entry into application], EBA shall, after consulting all relevant stakeholders and reflecting all interests involved, issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010 concerning the prudential treatment of payment ART issued by credit institutions or electronic money institutions.

Art. 44 issuance and redeemability of electronic money tokens

1. By derogation of Article 11 of Directive 2009/110/EC, the following requirements regarding the issuance and redeemability of e-money tokens shall apply to issuers of e-money tokens.

2. Issuers of e-money tokens shall issue e-money tokens at par value and on the receipt of funds within the meaning of Article 4(25) of Directive 2015/2366.

3. Holders of e-money tokens are entitled to claim redemption at any moment and at par value, of the monetary value of the e-money tokens held, either in cash or by credit transfer.

4. Redemption may not be subject to a fee. Issuers of e-money tokens shall prominently state the conditions of redemption in the crypto-asset white paper as referred to in Article 46.

5. Where the issuer of an e-money token does not fulfil legitimate redemption requests from holders of e-money tokens within 30 days, the holder is entitled to claim redemption of funds to any following third party entities that has been in contractual arrangements with issuers of e-money tokens:

(a) entities ensuring the safeguarding of funds received by issuers of e-money tokens in exchange for e-money tokens in accordance with Article 7 of Directive 2009/110/EC;

(b) any natural or legal persons in charge of distributing e-money tokens on behalf of issuers of e-money tokens.

Art. 23a Requirements applicable to issuers of Payment ART

1. and 2. [see below, 4. Align the rules for Payment ART with the EMT regime]

3. Each unit of Payment ART created shall be pledged at par value with an official currency unit of an EU member state.

4. Issuers of Payment ART shall issue Payment ART at par value and on the receipt of funds within the meaning of Article 4(25) of Directive 2015/2366.

5. Holders of Payment ART are entitled to claim redemption at any moment and at par value, of the monetary value of the Payment ART held, either in cash or by credit transfer.

6. Redemption may not be subject to a fee. Issuers of Payment ART shall prominently state the conditions of redemption in the crypto-asset white paper as referred to in Article 46.

7. Where the issuer of a Payment ART token does not fulfil legitimate redemption requests from holders of Payment ART within 30 days, the holder is entitled to claim redemption to any following third party entities that has been in contractual arrangements with issuers of Payment ART:

- (a) entities ensuring the safeguarding of funds received by issuers of Payment ART in exchange Payment ART in accordance with Article 7 of Directive 2009/110/EC;
- (b) any natural or legal persons in charge of distributing e-money tokens on behalf of issuers of e-money tokens.

[4. Align the rules for Payment ART with the EMT regime]

Art. 23a Requirements applicable to issuers of Payment ART

1. Issuers of Payment ART are subject to the rules and requirements set out in Title IV of this Regulation unless provided otherwise in this article.
2. Payment ART shall not be deemed to be 'electronic money' as defined in Article 2(2) of Directive 2009/110/EC.
3. et seq. [see above, 3. Introduce a right of redemption for holders of EMT and Payment ART]

[5. Introduce a mechanism for re-qualification of ARTs]

Art. 82 Powers of competent authorities

(ja) make public the fact that an Investment ART is increasingly or regularly used as a means of payment.

(jb) to prohibit all regulated entities the acceptance and any services related to investment ART, where they find that given Investment ART is regularly used as a means of payment.

Corresponding Recital: (65a) Competent authorities shall take appropriate supervisory action where they identify that an ART is used as a means of payment. Before they consider withdrawing an issuer's license, they may make public the fact that an ART is increasingly used as a means of payment. Where appropriate, they may also prohibit all regulated entities the acceptance and any services related to investment ART.

Art. 83a Request for re-assessment

1. Competent authorities of host Member States may at any time present a reasoned opinion and request the competent authority of the home Member State to re-assess its decision that the issuer of an ART has refuted the presumption set out in Art. 16a Para. 1.

2. The competent authority of the home Member State shall, within 2 months from the receipt of a request for re-assessment, present a reasoned opinion and inform EBA, ESMA, the ECB and all competent authorities of host Member State whether it intends to change its decision that the issuer of an ART has refuted the presumption set out in Art. 16a Para. 1.

3. Where the competent authority of the home Member State presents no reasoned opinion or intends not to change its decision, the competent authority of the host Member State may, within 1 month, refer the matter to the ECB to issue a binding opinion.

4. The ECB issues a binding opinion as to whether the issuer of an ART has refuted the presumption set out in Art. 16a Para. 1 and transmits its opinion to the competent authorities concerned, to EBA and to ESMA.

5. Where applicable, the competent authority of the home Member State takes appropriate supervisory action.



Council of the European Union
General Secretariat

**Interinstitutional files:
2020/0265(COD)**

Brussels, 30 March 2021

WK 4374/2021 INIT

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From:	DE FR NL ES delegations
To:	Working Party on Financial Services (Crypto Assets)
Subject:	MiCA - Joint discussion paper from the delegations of France, Germany, the Netherlands and Spain: “Asset-backed crypto-assets used as a means of payment”