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Die Deutsche
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Comments

on the "Proposal for a Regulation on Markets in Crypto-assets" as part of the European commission's Digital Finance Package

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General comments

With the regulation on Markets in Crypto-assets (MiCA), the EU has the potential to become a global setter of standards in the field of crypto-assets. The EU Commission proposes standardised regulation for all kinds of crypto-assets. As soon as this regulation is rolled out to all Member States, then uniform rues will apply to *crypto-asset service providers and* dealings in crypto-currencies. The legal instrument of a regulation can quickly establish a legally watertight EU legal framework in which the stakeholders can manoeuvre when developing new business models. In this way, a unified market for crypto-currencies can develop in the EU. Besides legal certainty, the regulation will also address the substantial consumer and investor protection risks relating to the emergence of alternative digital "currencies", market integrity and the stability of the financial system. On the other hand, it should be borne in mind that in dealing with this subject matter the EU lawmakers cannot rely on the experiences of the legislative experience of EU Member States to the usual extent – they are entering unchartered territory in a big way. An in-depth legal-policy discussion of the proposals and a high degree of preparedness for legislative recalibration should take this into account.

In this regard, the Commission's draft can be seen as positive since this proposes rules for a hitherto widely unregulated sector and henceforth also sets standards for issuers of so-called stablecoins in the EU. To this extent, in applying the principle "same risks, same rules", the European lawmaker envisages that from the investor's perspective a minimum level of binding mandatory information and transparency requirements should apply. Whether the path being taken to create a level playing field between existing providers and procedures suffices remains to be seen.

The German Banking Industry Committee (GBIC) welcomes the proposed application of the principle "same risks, same rules". A circumvention of existing regulations such as for e-money, deposits or securities custody business can be guaranteed only through the implementation of comparable regulatory requirements and supervision. In addition, so-called stablecoins involve risks for consumer protection and financial market stability. The regulatory permission requirement for *crypto-asset service providers* and issuers of *e-money tokens* and *asset-referenced tokens* and the custody obligation for token-referenced reserve assets at CRR credit institutions or supervised *crypto-asset service providers* proposed in the draft are from the GBIC's perspective the right approach. This applies also with regard to the proposed requirement of a domicile in the EU, without which an effective enforcement of the regulations cannot be ensured.

The proposed regulation looks like a blend of core elements of EU supervisory regulations in the areas of banking supervision, capital markets supervision (including investor protection), money laundering prevention and data and consumer protection. In view of the diversity of token models, this approach appears to be basically appropriate. The principles of host-nation control and EU passport, moreover, are also taken from financial market supervision. From the point of view of creating a genuine financial internal market both of these points are to be welcomed.

It should be noted, however, that because of the numerous (hitherto still not yet discussed and inevitably still unknown) uses of distributed ledger technology (DLT), it is currently not yet entirely foreseeable exactly which (future) application cases will be included in the draft regulation. Owing to the numerous concerns in the European Commission's draft delegated act and the call for the establishment of technical standards by the European Banking Authority (EBA) / European Securities and Markets Authority (ESMA), moreover, it cannot be conclusively determined whether the specific regulations are reasonable and appropriate. Regulatory developments in other jurisdictions must be borne in mind too in order not to jeopardise the EU as an innovation bubble with a too restrictive environment compared with other legal regimes. In this regard, too, it should be emphasised that because of the diversity of technically possible, but currently not entirely transparent token models definitive conclusions on all elements of the proposed regulation can still not be made at this time. In any case, at present, a high level of significance will certainly be attached to the definitions and the scope of application of the draft.

Specific comments

- The regulation should not be worded too technically. While it cannot be technologically neutral because of its DLT focus, free competition must nevertheless be possible even within the DLT market. This affects, for example, the consensus mechanisms that have now become available for the validation/confirmation of transactions.

- The exemptions from the scope of application detailed in Art. 2 (Scope) para. 2 are correct and of particular relevance. The (investor-protecting) regulations in the Markets in Financial Instruments Directive (MiFID) are adequate. Overlapping regulations / “multiple regulation” should be avoided at all costs.

- In a first step, the draft regulation differentiates crypto-assets by means of whether financial stability should be achieved through the referencing of other assets (legal tender, commodities and/or other crypto-assets). In a second step, the crypto-assets that should achieve a financial stability are distinguished by means of the specific assets to be referenced. This differentiation appears prima facie to be expedient, but, considered empirically, is difficult to reconcile with the crypto-assets already on the market. The overwhelming number of *asset-referenced tokens* has with different methods to achieve the target of financial stability in relation to a national currency. They thus have money or at least quasi-money character. The transition between *asset-referenced tokens* and *e-money tokens* is likely to be fluid. The evolution of US American money market funds to near-money instruments with a link to credit cards is probably a good reference for this. This poses the question whether in the regulation environment the proposed form of differentiation would not lead to attempts to circumvent the more strictly regulated *e-money tokens*.

- In the distinction between *asset-referenced tokens* and *e-money tokens*, the way in which the issuers (want to) invest the monies received for the subscribers is not taken into account. It is to be expected, however, that precisely the investment policy regarding the monies received will be crucial in whether a crypto-asset will in future be financially stable. While Art. 34 and Art. 49 stipulate how monies received (reserve assets) are to be invested and potential losses borne, however, these provisions depend on whether an *asset-referenced token* or an *e-money token* is involved. It should be considered, particularly in view of the already existing crypto-assets, whether the distinction of the regulation regimes should be linked solely to which assets the crypto-assets are referenced for financial stability or whether the planned investment strategy for the reserve assets must also be taken into account. Above all this should be discussed prior to the question what consequences would result for the crypto-asset, its financial stability and the investors, if the issuer can no longer offset the losses from the investment of the monies taken in (especially in a low/negative interest rate environment.

- When regulating crypto-assets, the draft regulation always uses issuer as its starting point. However, the currently most popular crypto-asset "Bitcoin", for example, was not brought into circulation by an issuer within the meaning of the draft regulation. Rather, the "Bitcoin" was developed by an unknown network of programmers and can basically be created ("mined") by any person. Crypto-assets which are created in this way and are not actively marketed in the European Union but are in demand by consumers and investors because of their attractiveness, do not currently appear to be covered by the draft regulation. Here, consideration should be given to whether this approach adequately takes into account the existing risks associated with such crypto-assets

- Currently, it does not yet seem understandable why business models based on DLT should be more strictly regulated (e.g. the need to create and submit a white paper) than materially equivalent business models based on a "traditional" technological basis. Specifically, the question arises whether, in view of the proclaimed target of innovation-friendliness of the regulation, the rules for simpler or non-financial market-related tokens are sufficiently liberal.

- We welcome the fact that CRR institutions are granted relief so that they do not have to undergo the approval procedure for the issuance of asset-referenced tokens. For German promotional banks, however, this means that they have to undergo a separate approval process. In view of this, an additional regulation would seem reasonable that also expedites the requisite authorisation within an equivalent national supervisory framework.

- Not only should, according to the draft regulation, white papers once submitted and published claim validity throughout the EU; also, an authorisation to provide services relating to the crypto-assets covered must be applied for and granted only once - starting from a (single) establishment in the EU. What specific expectations the supervisory authorities will place in this context for suitable business managers, risk management, compliance, etc. and which capital requirements will apply in each case is still open. The "same risks, same rules" approach should be adopted in the implementation of the regulations too.

- The separation of issuer and client monies appears reasonable and is already familiar from other regulations (e.g., as a principle of PSD2). According to Art. 34 (3), losses shall be borne by the issuer of the *asset-referenced tokens*. An over-collateralisation of issued *asset-referenced tokens* does not appear to be required by the draft regulation. With current the low/negative interest rate environment, there arises the question whether the envisaged own funds requirement of at least EUR 350,000 or 2 % / 3 % (with significant *asset-referenced tokens*) of reserve assets is appropriate for the targeted financial stability and hence consumer and investor confidence. While there are already comparable regulations in the e-money directive, which should apply to *e-money tokens* too, the question of the adequacy of the own funds requirements, however, arises there too in connection with the now changed market environment.

- Based on the European Commission’s expected market penetration and acceptance of *e-money tokens*, it is to be welcomed that these may be issued only by credit institutions and e-money institutions. It is understandable here that no own form of “e-money token institutions” should be created, rather the already regulated credit and e-money institutions are being involved. It is to be welcomed that also for *e-money tokens* – as already applicable to e-money – a right of redemption from the issuer at par value and at any time is to be created for the referenced currency. In this way, circumvention of the existing e-money regulations will be prevented. This is reasonable and appropriate particularly to ensure consumer protection and financial market stability.

We reserve the right to make additional comments on the draft regulation during the course of the legislative process.

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