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To: Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union

Subject: OPINION of the European Economic and Social Committee
- Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937
[COM(2020) 593 final - 2020/0265 (COD)]
- Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology
[COM(2020) 594 final - 2020/0267 (COD)]

Delegations will find attached the opinion mentioned above.

Other language versions of the opinion will soon be available on the EESC's website :

<https://dmsearch.eesc.europa.eu/search/opinion>

Encl.



ECO/535
Crypto-assets and distributed ledger technology

OPINION

European Economic and Social Committee

**Proposal for a Regulation of the European Parliament and of the Council
on Markets in Crypto-assets, and amending Directive (EU) 2019/1937**
[COM(2020) 593 final - 2020/0265 (COD)]

**Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for
market infrastructures based on distributed ledger technology**
[COM(2020) 594 final - 2020/0267 (COD)]

Rapporteur: **Giuseppe GUERINI**

Referral	European Parliament, 13/11/2020 Council of the European Union, 18/11/2020
Legal basis	Articles 114 and 304 of the Treaty on the Functioning of the European Union
Section responsible	Economic and Monetary Union and Economic and Social Cohesion
Adopted in section	12/02/2021
Adopted at plenary	24/02/2021
Plenary session No	558
Outcome of vote for/against/abstentions)	235/1/8

1. Conclusions and recommendations

- 1.1 The EESC endorses the two European Commission initiatives on the proposal for a regulation on markets in crypto-assets amending Directive (EU) 2019/1937 and the proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT).
- 1.2 The EESC considers that the action taken by the Commission is urgently needed to regulate a technology which is becoming increasingly widespread, whose practical application is growing and which is constantly and rapidly changing.
- 1.3 The EESC therefore endorses the usefulness of quickly implementing the various regulatory adjustment measures envisaged by the Commission which are needed to modernise financial services, without losing sight of consumer protection and prudential rules.
- 1.4 One pressing reason for European action stems from the fact that in the last few months several Member States have adopted national regulatory instruments either through legislative acts or by means of recommendations and guidelines issued by regulatory authorities in this sector. These tools risk creating a fragmented regulatory framework which could undermine the consolidation of the internal market and increase the compliance costs borne by businesses.
- 1.5 The EESC accordingly supports the objectives pursued by the Commission within a single regulatory framework which seek to: i) protect the end-users of digital finance; ii) safeguard financial stability; iii) protect the integrity of the EU's financial sector; iv) ensure a level playing field among the different operators in the economic and financial system.
- 1.6 The EESC also agrees with the objective of ensuring that issuers of "global stablecoins" are subject to stricter requirements in terms of capital, investor rights and supervision, owing to the potential systemic relevance of these instruments.
- 1.7 The EESC would like to see measures to ensure that consumers and small-scale investors are provided with suitable information and made aware of the situation so as to reduce the information asymmetry which could have a disproportionate impact on them due to the new and highly technical measures explored in this opinion.
- 1.8 The EESC recommends that special attention be paid to checks performed in advance of the authorisation measures set out in the proposals examined in this opinion, especially as regards the reliability of operators subject to authorisation, in order to avoid the negative consequences of opportunistic and harmful behaviour.
- 1.9 As a level of standardisation and interoperability of DLT that can safely guide the assessment of the technological reliability and cyber-resilience of the infrastructures adopted by operators has yet to be achieved, the EESC recommends that the regulatory system to be applied to these instruments, which are constantly evolving, be made as clear as possible, as a change in their nature could call for different regulatory provisions.

- 1.10 In view of the potential technological risks, the EESC has high hopes of the pilot regime for market infrastructures based on distributed ledger technology. This scheme will identify a test space in a controlled environment that allows for temporary derogations from the current rules, enabling regulators and operators to gradually build up experience of using DLT in market infrastructures while safeguarding market integrity and financial stability.
- 1.11 However, despite endorsing the proposal on the pilot regime, the EESC believes that the 5-year deadline for ESMA to submit its report to the Commission is too long given the speed with which digital finance technology evolves. It would also be useful to look at the arrangements for leaving the pilot scheme in order to safeguard the users involved in this phase.
- 1.12 Lastly, with regard to the application of the MiCA regulation, the EESC has serious concerns regarding the transitional measures, which provide for permanent exemption from MiCA requirements for crypto-assets that were already on the market before the regulation came into force. When it comes to a crypto-asset which has already been issued, that exemption is liable to lead to a sort of regulatory exemption derogating from the principle of fair treatment whereby the same risk and the same asset are dealt with in the same way.

2. Commission proposals

2.1 This opinion examines two European Commission initiatives: i) the proposal for a regulation on the market in crypto-assets, amending Directive (EU) 2019/1937; ii) the proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT). These proposals are part of a package of Commission initiatives which includes the communication on the digital finance strategy and the proposal for a regulation on digital operational resilience (DORA). These two initiatives were considered by the EESC in its opinions on *A Digital Finance Strategy for the EU*¹ and *Digital operational resilience*² respectively.

2.2 Proposal for a regulation on markets in crypto-assets (amending Directive (EU) 2019/1937)

2.2.1 The MiCA regulation aims to ensure legal certainty for crypto-assets not covered by existing EU legislation and to establish uniform rules for crypto-asset issuers and Virtual Asset Service Providers (VASPs). The regulation aims to replace existing national frameworks, which currently fall outside the scope of existing European legislation, thereby providing the desired level playing field.

2.2.2 The Commission has emphasised that its proposal stems from the need to adopt "a common approach with Member States on cryptocurrencies to understand how to make the best use of the opportunities they create and address the new risks they may pose".

¹ EESC opinion on [A Digital Finance Strategy for the EU](#) (ECO/534), not yet published.

² EESC opinion on [Digital operational resilience](#) (ECO/536), not yet published.

- 2.2.3 The proposal has four objectives: i) to guarantee legal certainty; ii) to support innovation in a sector with huge potential; iii) to instil appropriate levels of consumer and investor protection and market integrity; iv) to ensure financial stability.
- 2.2.4 The proposal covers not only issuers of crypto-assets, but also companies providing crypto-asset related services such as firms holding clients' crypto-assets, entities that enable customers to buy or sell crypto-assets for money, and firms operating trading platforms. For this reason, the safeguards introduced include capital requirements, governance requirements and investor rights vis-à-vis the issuer.
- 2.2.5 In particular, in cases where certain asset-referenced tokens and e-money tokens are recognised as being "significant" (counting as "global stablecoins" in terms of volume, value or customer base), issuing operators will be subject to stricter requirements.
- 2.2.6 Thus, considering the very real possibility that "stablecoins" could become widely accepted and potentially systemic in the future, the Commission proposal also includes safeguards to address potential risks to financial stability and orderly monetary policy that they could pose.
- 2.2.7 These instruments are crypto-assets which, for instance, unlike the well-known bitcoin, have a relatively stable price because they are tied to an equally stable medium of exchange (i.e. an institutional currency) and could therefore, in the not so distant future, become widespread payment and investment systems.
- 2.2.8 More specifically, Title II of the proposal regulates the offerings and marketing to the public of crypto-assets other than asset-referenced tokens and e-money tokens. It stipulates that an issuer shall be entitled to offer such crypto-assets to the public or seek admission to trading on a trading platform if they comply with: i) the requirements set out in Article 4, such as the obligation to be established in the form of a legal person; ii) the obligation to draw up an information document, also referred to as a white paper, on the crypto-assets (Article 5); iii) the further obligation to notify the competent authorities of the white paper and to publish it (Articles 7 and 8).
- 2.2.9 The information document (white paper) will not be necessary if the total consideration of the offering of crypto-assets is less than EUR 1 000 000 over a period of 12 months, to avoid creating an excessive administrative burden for small and medium-sized enterprises (SMEs).
- 2.2.10 The Commission also proposes to clarify that the current definition of "financial instruments" – laying down the scope of the MiFID Directive – includes financial instruments based on DLT. It also proposes a specific regime for crypto-assets and currency tokens that are not covered by existing financial services legislation.
- 2.2.11 The rules also focus on the issuance of crypto-assets (or tokens) by operators intending to act in the European single market, who will have to comply with:
- transparency and publication requirements in relation to the issuance and admission to trading of the relevant tokens;

- arrangements for authorising and supervising service providers and stablecoin issuers;
- operational, organisational and governance requirements in relation to stablecoin issuers (again, it should be noted that this does not apply to the other tokens concerned, i.e. essentially utility tokens) and service providers;
- consumer protection rules relating to crypto-asset issuance, trading and storing;
- measures to prevent market abuse and ensure the integrity of the markets where crypto-assets are traded.

2.3 Proposal for a regulation on a pilot regime for market infrastructures based on distributed ledger technology (DLT)

2.3.1 The proposal for a regulation on a pilot regime for DLT market infrastructures has four general objectives: i) to provide legal certainty; ii) to support innovation, eliminating obstacles to the application of new DLT technologies in the financial sector; iii) to guarantee consumer and investor protection, as well as market integrity; iv) to ensure financial stability.

2.3.2 In order to achieve these objectives, the pilot scheme introduces appropriate safeguards, for example by limiting the types of financial instrument that can be traded, with provisions specifically aimed at ensuring financial stability and consumer and investor protection.

2.3.3 By introducing a pilot scheme for testing DLT market infrastructures, the proposal for a regulation seeks to enable EU companies to exploit the full potential of the existing framework, allowing supervisory authorities and legislators to identify obstacles to regulation, while regulatory authorities and companies themselves will gradually be able to gain valuable knowledge about the use of DLT.

2.3.4 It is precisely for these reasons, and because a gradual approach is needed, that the pilot scheme must be considered the most proportionate instrument in relation to the objectives to be achieved. At present, there is insufficient evidence to justify introducing permanent, more significant and more far-reaching regulatory change.

2.3.5 The proposal aims to guarantee legal certainty and flexibility for market participants wishing to operate a DLT market infrastructure by laying down uniform operating requirements. Authorisations granted under the regulation would also allow market participants to operate a DLT market infrastructure and to provide their services in all Member States with appropriate supervision.

2.3.6 On a more detailed note, Article 1 defines the subject matter and scope of the proposal, while Article 2 sets out the relevant terms and definitions, including those relating to the concepts of "DLT market infrastructure", "multilateral DLT trading facility" or "DLT MTF", "DLT securities settlement system" and "DLT transferable securities".

2.3.7 Article 3 describes the limitations imposed on DLT securities that can be admitted to trading on, or recorded by, DLT market infrastructures. For shares, the market capitalisation or the tentative market capitalisation of the issuer of DLT transferable securities should be less than EUR 200 million; for public bonds other than sovereign bonds, covered bonds and corporate bonds the

limit is EUR 500 million. DLT market infrastructures should not admit to trading or record sovereign bonds.

2.3.8 Article 4 sets out the requirements for a DLT, which are the same as for an MTF under Directive 2014/65/EU, and specifies the possible exemptions under this regulation. Articles 7 and 8 lay down the specific authorisation procedure to operate a DLT MTF and a DLT securities settlement system and list in detail the information to be submitted to the competent authority. Article 9 defines the cooperation between the DLT market infrastructure, the competent authorities and the European Securities and Markets Authority (ESMA). Article 10 specifies that, at the latest after a five-year period, ESMA shall produce a detailed report on the pilot scheme for the Commission.

3. **General and specific comments**

3.1 The EESC agrees with the European Commission's objectives and in this opinion endorses the usefulness and importance of implementing, by mid-2022, the various regulatory adjustment measures needed to modernise financial services, without ever neglecting consumer protection or market integrity.

3.2 More specifically, the legislative proposals aim to ensure legal certainty with regard to crypto-asset regulation. A clear regulatory framework applying to all types of crypto-assets, as well as to all providers of related services, is a prerequisite for creating innovative value-added solutions in this market. In particular, opting for a regulation rather than a directive will help to achieve uniform content and application of the new rules on the internal market.

3.3 The EESC stresses that the Commission's long-awaited regulatory intervention is now urgently needed to comprehensively regulate a constantly and rapidly changing technology.

3.4 The EESC deems useful the measures envisaged to: i) protect the end-users of digital finance; ii) safeguard financial stability; iii) protect the integrity of the EU's financial sector; iv) ensure a level playing field among the different operators in the economic and financial system.

3.5 The EESC agrees with and supports the proposal to ensure that issuers of significant crypto-assets known as "global stablecoins" are subject to stricter requirements in terms of capital, investor rights and supervision. Regulatory intervention is crucial to prevent money flows emerging outside the oversight of central banks, sectoral authorities and democratic institutions.

3.6 The EESC is pleased that the Commission's work on classifying and defining the concepts of crypto-assets and distributed ledger technology has embraced the different types of crypto-assets in the definitions used, thereby enabling them to cater for possible future technological and market developments.

3.7 However, the EESC believes that a greater degree of clarity could be achieved by developing more detailed specifications on the various sub-categories of crypto-assets and their scope. This could avoid risks related to interpretation of the rules on types of crypto-assets in the residual category "other than asset-referenced tokens and e-money tokens".

- 3.8 The EESC welcomes the care taken in the proposal for a regulation to avoid duplicating rules, evident in the exemptions from the scope of the MiCA regulation set out in Article 2(2) of the proposal. These measures are appropriate and relevant, as it is necessary to avoid overlapping requirements and rules being duplicated in the MiCA proposal and, for example, the MiFID Directive.
- 3.9 Regulatory frameworks must not conflict with each other, as this would increase regulatory uncertainty and create excessive compliance costs and burdens for operators, potentially limiting innovation. In order to achieve a clear separation between the two areas, and thus the necessary legal certainty, a definition of "security token" is needed, along with clear guidance on the distinctive features of a crypto-asset that can be classified as a financial instrument.
- 3.10 The EESC therefore welcomes the involvement and expertise of the EBA³ and the ESMA⁴ both prior to the publication of the proposals covered by this opinion and in the context of the expected administrative cooperation between these European authorities and the competent national authorities once the new rules apply.
- 3.11 By choosing to limit the application of the proposal essentially to utility tokens and stablecoins, the Commission is limiting regulatory intervention to activities other than financial instruments and investment products which can be defined as 'digital representations' of rights deriving from investments and business activities, managed by means of distributed ledger technologies. In this way, tokens or crypto-assets must be linked to tangible values and are therefore less exposed to the risk of opportunistic use that could lead to savings being built up without the necessary safeguards for investors.
- 3.12 The EESC considers that hybrid tokens need to be classified more clearly. After the issuance phase some crypto-assets may perform different functions, changing their nature under predetermined conditions. It is therefore necessary to clarify the regulatory system to be applied to these evolving hybrid instruments, as a change in their nature could call for different regulatory provisions.
- 3.13 The EESC also supports EU action to remove potential barriers to innovation that may be caused by new digital technologies and which could be attributed to financial services legislation, which is not always able to keep up with the rapid succession of technological innovations.
- 3.14 Among the innovations with disruptive potential for the financial and monetary sectors, specific attention must obviously be paid to distributed ledger technology (DLT); the well-known blockchain technology is one example, as this is the infrastructure behind the success of bitcoin and other forms of crypto-assets.

³ European Banking Authority.

⁴ European Securities and Markets Authority.

- 3.15 The EESC believes that through the proposed amendments adapting Directive (EU) 2019/1937, the EU will be able to ensure that existing rules are applied properly in this new environment. European rules can also guarantee the safe development of a new regulatory framework, such as that set out in the pilot proposal regulating market infrastructures based on DLT.
- 3.16 These actions should ensure regulatory clarity, enabling the institutional financial sector to achieve greater efficiency through the wider use of DLT, including in response to the sometimes uncontrolled dissemination of alternative crypto-currencies or payment systems developed by unregulated operators.
- 3.17 One pressing reason for European action also stems from the fact that several Member States have started adopting regulatory instruments either through legislative action or by means of recommendations and guidelines issued by secondary regulatory authorities or institutions, such as central banks or financial market control and supervisory authorities.
- 3.18 Whilst sharing the same basic aims and objectives, they risk creating a fragmented and uneven regulatory framework in the internal market. Conversely, some Member States have not taken any initiatives to date, also contributing to an uneven and piecemeal regulatory scenario where differentiated regulatory measures and lack of regulatory intervention exist side by side.
- 3.19 The EESC believes that the interpretation of the regulation and the decisions taken by the relevant national authorities during the authorisation process should be as consistent as possible in order to ensure a level playing field and avoid regulatory arbitrage between the different Member States, considering the option of using the EU-wide portability regime for authorised entities.
- 3.20 With this in mind, the EESC supports the Commission's decision to take action by means of a specific regulation to ensure uniform and simultaneous EU-level rules: uniform and standardised rules are undoubtedly more effective than a proliferation of state interventions, in line with the subsidiarity principle laid down in the Treaties.
- 3.21 The EESC is pleased that the main objective of the proposed regulation is transparency of information and establishing an appropriate authorisation system. Prior to the present proposals, the regulatory set-up lacked an authorisation filter for DLT-based activities, as well as effective supervision of operations.
- 3.22 The EESC would like to see measures to ensure that consumers and small-scale investors are provided with suitable information on and made aware of the new rules which will shortly be approved. Both the risks and benefits of and the opportunities offered by the new technologies used in the financial and investment sector must be made clear in order to reduce the information asymmetry characteristic of the financial sector. This asymmetry could have a disproportionate impact on consumers and small-scale savers due to the measures explored in this opinion: they are new and, being highly technical, are not easy to understand.

- 3.23 The EESC recommends that special attention be paid to prior checks on authorisation measures, especially as regards the corporate reliability of authorised entities, in order to avoid opportunistic and harmful behaviour.
- 3.24 There still does not seem to be a level of standardisation and interoperability of DLT that can safely guide the assessment of the technological reliability and cyber-resilience of the infrastructures adopted by operators. Attention should therefore be paid to ensuring a high level of consumer and investor protection.
- 3.25 The EESC would like to see real progress being made with regard to digital operational resilience, a subject covered by the DORA proposal which is part of the digital finance package. This package tackles critical aspects flagged up by the financial sector and aims to bring legal clarity to the provisions on risks related to information and communication technology (ICT), reducing legislative complexity and alleviating the administrative burden on businesses, as pointed out by the EESC in its opinion on *Digital operational resilience*⁵.
- 3.26 With this in mind, the EESC welcomes the proposal for a regulation on a pilot scheme for market infrastructures based on DLT, in which the Commission takes into account the market infrastructures intended to allow trading and settlement of transactions in financial instruments in the form of crypto-assets, specifies in detail the prior requirements and conditions for obtaining specific authorisation to operate a DLT MTF and embeds these requirements in a supervisory framework run by sectoral authorities.
- 3.27 Moreover, through the pilot scheme, the decision has been taken to adopt a 'sandbox' approach, identifying a test space in a controlled environment that allows for temporary derogations from the current rules. This approach will enable regulators and operators to gain experience of using DLT in market infrastructures, thus ensuring sufficient time to adequately manage risks to investors, market integrity and financial stability.
- 3.28 By adopting a pilot scheme (or sandbox), an empirical approach based on practical and temporary experiments can be followed in order to proceed, at a subsequent stage and in the light of experience, with more robust regulatory adjustment, without hampering the introduction and full roll-out of DLT and the innovation that it may bring about. Particular attention should be paid to the exit phase at the end of the pilot scheme in order to safeguard users and individuals who have participated in the trial.
- 3.29 Despite endorsing the Commission proposal, the EESC believes that the 5-year deadline for ESMA to submit its report to the Commission is too long given the speed with which digital finance technologies evolve.
- 3.30 In addition, the option of ending the pilot scheme following the ESMA report should be considered, phasing it out in a way that allows operators to gradually leave the pilot scheme and recoup as many of the costs incurred during the trial as possible. Moreover, the EESC believes

⁵ EESC opinion on [Digital operational resilience](#) (ECO/536), not yet published.

that the pilot regime model could also be applied in order to recognise the role played by investment firms and banks carrying out activities related to the operation of DLT infrastructure for trading and securities custody and administration services.

3.31 Lastly, with regard to the overall application of the MiCA regulation, the EESC has serious concerns regarding the transitional provisions, which provide for permanent exemption from MiCA requirements for crypto-assets that were already on the market before the regulation came into force and which fall into the residual category "other than asset-referenced tokens and e-money tokens" (Article 123).

3.32 The EESC therefore calls for careful assessment of the possibility of this exemption being permanently applied to a crypto-asset, so as not to undermine the principle of fair treatment, whereby the same risk and the same asset are dealt with in the same way. It would in fact be more appropriate to make this provision properly transitional by establishing an adjustment period for crypto-assets in that category already on the market.

Brussels, 24 February 2021

Christa SCHWENG

The president of the European Economic and Social Committee
