

European Commission
Directorate-general for financial stability, financial
services and capital markets union

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FIA¹ welcomes the opportunity to respond to the European Commission's **Targeted Consultation** on the review of Regulation on the Markets in Crypto-Assets (MiCA). Our response provides feedback on a number of issues raised in the consultation, as set out in our responses to the questions below.

Question 1. Should crypto-assets that qualify as financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council, continue to be governed by sectorial legislation (MiFID/MiFIR/MAR/Prospectus Regulation, etc.), or should all assets that are recorded and transacted on distributed ledgers and that meet the definition of a crypto-asset, or the services provided on such assets, in principle be covered by MiCA?

☒ Yes, they should remain under the main sectoral legislation

☐ No, all crypto-assets, or the services provided on such assets, should be covered by MiCA

There is broad consensus among our members that crypto-assets that qualify as financial instruments should continue to be regulated under applicable sectoral legislation. Activities in respect of such crypto-assets should be subject to the same standards as activities in respect of financial instruments in traditional form. This approach is consistent with the principles of “technology-neutrality” and “same-risk, same regulatory outcome” that have historically underpinned EU regulation.

While there may be certain boundary issues and clarifications to consider (as discussed below) the established approach of having a clear carve-out from MiCA for crypto-assets that constitute financial instruments provides an important source of legal certainty for the market. Changing this approach would send a confusing signal to the market that risks undermining existing legal certainty and market confidence.

FIA members do, however, welcome refinements or clarifications to applicable sectoral legislation, and / or level 2 or 3 measures, where appropriate either to facilitate the deployment of novel technologies in regulated and supervised markets or to address any incremental risks or challenges that may arise through novel structures (where those risks are not already adequately addressed through existing regulation). In this regard, FIA members welcome the initiative of the European Commission to explore innovation-related amendments to sectoral legislation as part of the Market Integration and Supervision Package (MISP) and would encourage the European policymakers to continue to engage with the market in relation to those proposals and take on board industry feedback.

¹ FIA is the leading global trade organization for the futures, options and centrally cleared derivatives markets, with offices in Brussels, London, Singapore and Washington, DC. Our membership includes clearing firms, exchanges, clearinghouses, trading firms and commodities specialists from about 50 countries as well as technology vendors, law firms and other professional service providers.

FIA members also encourage the European authorities (together with relevant national competent authorities) to focus efforts towards ensuring that applicable rules are applied and enforced evenly across the market. Providers of infrastructure and services in respect of MiFID financial instruments should be held to equivalent standards so as to ensure a level playing field and avoid undermining regulatory objectives. As alluded to above, it may be necessary and appropriate in some cases to adjust or clarify how particular standards can be met in light of novel technologies or market structures. Policymakers may also wish to highlight examples of models they see as incompatible with applicable standards.

If the answer is “Yes”, is the distinction between financial instruments governed by MiFID and crypto-assets governed by MiCA sufficiently clear, also taking into account ESMA’s guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments?

☐ Yes, sufficiently clear

☒ No, clarification is needed

If the answer to the previous question is “No” please explain your response and suggest any policy actions for clarification if needed.

While in principle the distinction is clear, how it applies in the context of different tokenisation models is not always well understood, which can lead to perceptions of uncertainty. Further guidance on the following points would be helpful in order to send a positive signal to the market that the EU authorities understand the different models for tokenising regulated (and unregulated) instruments and provide a clear and coherent framework for their regulatory characterisation. As well as providing a helpful tool to market participants, clarifications and guidance in this area would help ensure there is alignment in approach across national competent authorities.

Definition of “crypto-asset”

It is clear on the face of the crypto-asset definition that a digital representation of value or rights must be capable of being “transferred and stored electronically” in order to qualify as a crypto-asset. The market generally interprets this to mean that a deployment of distributed ledger technology merely to record or register interests in an underlying asset would not be characterized as a crypto-asset, one key reason being that the digital representations under such deployments would not themselves be things that are capable of transfer. That said, it would be helpful to have explicit guidance on this point to remove any perceptions of uncertainty. It is acknowledged that in depth legal analysis will often still be required in practice to determine whether a particular deployment gives rise to a mere record / register in respect of an underlying asset or a transferable crypto-asset. It is also acknowledged that this issue interacts with matters of private law, as discussed in response to question 80 below.

Even though there are specific carve-outs for crypto-assets that are regulated instruments in Article 2(4), the boundaries of the crypto-asset remain important in the context of tokenized financial instruments, including in contexts where the MiCA definition of crypto-asset is applied under other frameworks without the Article 2(4) carve-outs (e.g. under the Capital Requirements Regulation and Directive) and in light of the drafting of the Article 2(4) carve-out, which only applies where the crypto-asset is *itself* the regulated instrument (as discussed further below).

The boundaries of the crypto-asset definition are also important in relation to arrangements concerning the tokenization of unregulated assets, such as commodities and real estate, for which there is no carve-out under Article 2. We understand that the deployment of distributed ledger technologies merely to record or register the transfer of unregulated assets falls outside the scope of MiCA, but it would be helpful to have clarity in relation to this.

Alternative models for tokenizing financial instruments

The carve-out for regulated instruments in Article 2(4) applies only where the crypto-asset itself is the regulated instrument. There are various tokenization models in the market under which this is not the case. In particular, a “token” (which may be a digital “thing” rather than a mere record) may be used as a means of transferring interests in a regulated instrument without itself constituting a component of the underlying regulated instrument or being treated as a separate asset by the market. For example, the token could be used solely as a means of instruction in relation to an underlying asset. In such circumstances, the market ascribes no value to the token in and of itself, but uses it as an operational tool to facilitate transfers in a separate underlying asset (entitlements to which may be evidenced on the books and records of an issuer or central operator). It would be helpful to have clarity that such tokens also fall outside the scope of MiCA, either because they would not meet the definition of crypto-asset (on the basis that they do not constitute a representation of *value or rights*) or under the carve-out in Article 2(4). This guidance could also provide a helpful building block for guidance in other areas, including in relation to settlement, collateral and prudential frameworks or the boundaries between deposits and e-money tokens (as discussed further below).

Treatment of MiFID financial instruments under other legal and regulatory frameworks

Aside from the addressing boundary between MiCA and MiFID, it would be helpful for European policymakers to provide further clarity as to the treatment of cryptoassets that are characterised as financial instruments for the purposes of other frameworks, including settlement, collateral and prudential frameworks, including under CSDR, EMIR and related margin eligibility rules, SFD, FCD and CRR / CRD, among others. While certain helpful clarifications have been proposed under the MISP, these are largely clarificatory and aimed at tokenisation models that use distributed ledgers as mere records or registers. Uncertainties remain as to the treatment of financial instruments in the form of crypto-assets as defined in MiCA, i.e. digital bearer instruments capable of being transferred peer-to-peer by way of a change of control rather than by way of an update to a register or record maintained by an issuer, registrar or operator. As well as considering register and record based models, it would be helpful to have a thorough review across financial regulation to clarify the treatment of financial instruments in digital bearer form, in a way that is coherent and risk-based.

Question 2. To what extent have ESMA's MiCA Article 2(5) guidelines and the joint ESA standardised classification test reduced uncertainty in practice? Which borderline cases remain difficult? Please explain your response and suggest any policy actions for clarification if needed.

In practice, challenges often arise in determining how a crypto-asset, or instrument recorded on a distributed ledger, should be treated in circumstances where it appears to fall within the scope of more than one category of MiFID financial instrument. Notably, the boundaries of the concept of “transferable securities” (and therefore the precise scope of the requirement for recording of transfers of transferable securities in a CSD under Article 3 of the Central Securities Depositories Regulation (CSDR)) are often difficult to interpret with a high degree of certainty in the context of novel structures and markets. The ESMA guidelines in respect of Article 2(5) of MiCA emphasize, in many respects, the breadth of the definition without providing the market with sufficient confidence that certain structures, including those involving other types of financial instrument (such as fund interests) will not be characterized as transferable securities. This type of uncertainty can have a chilling effect and inhibit institutions from investing into developing projects. To the extent that clarification of this issue requires amendments to the definition of “transferable securities” under MiFID, such amendments could be considered as part of the MISP.

Question 7. Which specific categories remain most difficult to classify in practice? (e.g. hybrid tokens, wrapped assets, tokenised fund interests, tokenised money-market instruments, governance tokens, synthetic exposures, or assets marketed as NFTs but issued in series)?

As outlined under question 1 above, in some cases there can be challenges in determining whether tokens used to facilitate the transfer of an underlying financial instrument could be characterized as crypto-assets that fall within the scope of MiCA, notwithstanding that the underlying instrument does not. Further guidance in this area would be welcome.

Likewise, as outlined under question 2 above, there are some uncertainties around the circumstances (if any) in which tokenised financial instruments will also be characterized as transferable securities, particularly for the purposes of CSDR. Further guidance in this area would also be welcome.

In addition, there are also perceptions of uncertainty in relation to the scope of the definition of “asset-referenced tokens” (ARTs). While it is clear that crypto-assets that are financial instruments will not be characterized as ARTs (given the carve-out and guidance in this area), the breadth of the ART definition coupled with the onerous, one-size-fits-all compliance framework for ARTs raises questions as to whether the policy intent is really to capture within this category all other arrangements that appear on their face to fall in scope. For example, it is not clear whether the policy intent is to capture under this category certain forms of “wrapped” or “bridge” tokens, i.e. digital representations of crypto-assets on other blockchains, to which they are not native, that are used to facilitate cross-chain transfers. Similarly, market participants are not clear on whether certain forms of “liquid staking tokens” that are issued by providers of staking services to participants under certain pooled staking arrangements, and which reference an underlying staked cryptoasset, are intended to be treated as ARTs. Both may at face value fall within the ART definition (although, in some cases, they are issued through decentralized protocols and there may be no person that can be identified as the “issuer” for the purposes of MiCA). The effect of this framework appears to be that issuers of crypto-assets that reference other cryptoassets are held to a much higher standard than issuers of the underlying cryptoassets.

Question 14. MiCA requires issuers of ARTs to establish, maintain, and prudently manage a reserve of assets and appropriate liquidity arrangements to ensure orderly redemptions and mitigate financial stability, liquidity, and operational risks. Additional and enhanced requirements apply to ARTs classified as “significant” under Article 45. How do you think, if at all, each of the following elements of the MiCA liquidity and reserve regime for ARTs should be adjusted?

Please explain your responses, including your reasoning and any suggestions for recalibration or alternative approaches (e.g. greater risk sensitivity, differentiation by business model, or interaction with reserve and liquidity requirements).

As outlined above, the ART framework under MiCA creates a one-size-fits-all framework to cover a very broad range of crypto-assets. The ART framework is particular to the EU and not something that many other jurisdictions have sought to replicate. Moreover, to date, no entities have sought authorization under this framework, so this remains an empty category. Maintaining this framework could stifle innovation in the EU, and put the EU at a competitive disadvantage. For example, it could potentially stifle innovations in digitizing unregulated assets, such as commodities, including for collateral purposes and in relation to development arrangements to support cross-chain transfers.

EU authorities should consider whether there are more risk-sensitive ways to regulate this area. For example, the authorities could consider a lighter touch framework, including disclosure requirements, risk warnings and certain operational resilience requirements. Alternatively, the authorities could consider adapting the ART framework into an optional framework that issuers can choose to adhere to as a quality

indicator, rather than a mandatory framework. If EU policymakers are concerned about systemic or financial stability risks associated with widespread use of ARTs as a means of payment, these could potentially be addressed through systemic oversight (for example, through further development of the Eurosystem oversight framework for electronic payment instruments, schemes and arrangements (PISA)), where appropriate.

Question 15. MiCA sets out liquidity and reserve requirements for issuers of EMTs to ensure immediate redemption of tokens, mitigation of credit and operational risk, and resilience under stress scenarios. Additional requirements apply to EMTs classified as “significant” (Article 56).

Should any of the following aspects of the MiCA regime for EMTs issued by e-money institutions be adjusted?

FIA members are supportive of measures that facilitate the use of e-money tokens for settlement, collateral and prudential purposes within the EU, subject to appropriate safeguards. In this regard, members recommend that the European authorities consider the following.

Cross-border coordination

FIA members welcomed the UK-US Joint Statement on Stablecoins² which indicated that the US and UK governments will be working together to promote convergence of national stablecoin regimes and clear pathways for stablecoins issued in each jurisdiction to access the market of the other. FIA members would encourage the European authorities to engage in similar cross-border coordination in order to influence global standards, support global markets and ensure that the EU is not left at a competitive disadvantage.

Reserve requirements for non-bank issuers

Under the current MiCA framework, issuers of electronic money tokens (EMTs) that are not themselves credit institutions must hold at least 30% of their reserves in deposits with EU credit institutions. This rises to 60% for “significant” stablecoins. While this requirement helps mitigate the risk that there is insufficient liquidity in the reserve to meet redemption requests promptly, it also introduces concentration risks that could undermine the core function of stablecoins as secure, liquid payment instruments. In particular, by mandating that a large share of reserves are held in accounts at a limited number of banks, MiCA amplifies exposures to a handful of financial institutions. In periods of stress, this concentration risk could fuel contagion and lead to de-pegging events across multiple stablecoins, compromising the integrity of the stablecoin, and broader payments, landscape.

Besides financial stability concerns, this deposit requirement also undermines the commercial benefits of issuing stablecoins in the EU relative to other markets. The restriction on holding a higher proportion of backing assets in assets that generate higher yields for issuers disincentivises EU-licensed stablecoin issuance. It is not clear whether this reflects the policy intent.

The more flexible approaches contemplated in the UK and US, including the ability for issuers to hold a greater portion of reserve assets in high-quality, short-term financial instruments (e.g., Treasury bills, sovereign bonds, or cash-equivalent repos) could enhance financial stability while improving the commercial incentives for issuers to locate themselves in the EU. Greater alignment in regulatory approaches would also support the use of stablecoins in global markets, including for settlement and collateral purposes.

² <https://www.gov.uk/government/publications/recommendations-of-the-transatlantic-taskforce-for-markets-of-the-future/uk-us-joint-statement-on-stablecoins>

Prudential treatment of reserve deposits held with commercial banks

Members would encourage the European authorities to consider and provide clarity as to how banks that provide deposit reserve accounts to stablecoin issuers should treat them for prudential purposes, including for liquidity coverage ratio (LCR) purposes. If reserve banks are required to assume a 100% LCR outflow treatment for stablecoin reserve deposits, the resulting liquidity and balance sheet costs could significantly reduce the attractiveness of providing stablecoin reserve banking services at scale. This could hinder the development of a viable European stablecoin ecosystem.

Effective signalling and support

The MiCA framework for e-money tokens already provides a well-established, clear and credible stablecoin regime, which provides a degree of regulatory certainty that is still missing in other jurisdictions. This is a strategic advantage that the EU should seek to capitalise on more effectively. The EU should become more vocal in promoting its regulatory model and actively invite market participants to establish robust and credible business models in the EU. This could be complemented by a regulatory “concierge” service to help firms navigate the rules and set up compliant activities more efficiently.

2.5. Interest payment

Question 20. In your view, should the MiCA prohibition on granting interest or any interest-equivalent remuneration be modified?

FIA members do not consider that there should be any modification to the existing prohibition on granting interest or any other benefit related to the length of time during which the EMT or ART is held.

Question 30. MiCA does not currently prohibit multi-issuer models, nor does the EU have jurisdiction to determine how third country entities, that also have licensed entities in the EU, should be regulated in third country jurisdictions. Given your assessment of the advantages or disadvantages of global stablecoins and multi-issuance models, do you think that MiCA should continue to be open to multi-issuance models?

☒ Yes, the multi-issuance model for stablecoins should be permitted under MiCA

☐ No, MiCA should disallow the multi-issuance model for stablecoins

Please explain the reasons for your response and describe the potential implications for the EU market and relevant stakeholders.

FIA members agree that, in the absence of highly uniform and joined up cross-border regulatory, supervisory and insolvency approaches, multi-issuance stablecoin models could potentially pose significant investor protection and financial stability risks in the EU, depending on their systemic importance. We would encourage the European authorities to adopt a proportionate, risk-sensitive approach that seeks to manage applicable risks while avoiding unnecessarily fragmenting or burdening the market. Each of the policy approaches outlined by the Commission presents benefits and drawbacks. While there is not a uniform view among FIA members as to the optimal approach, members do agree that any policy approach adopted should be supported by in depth legal, regulatory and commercial analysis and / or modelling, which tests the potential impact and effectiveness of proposed measures including in an insolvency scenario. FIA welcomes ongoing engagement with the European policymakers on this matter.

2.11. Potential additional safeguards

Question 37. In a multi-issuance model, reserve assets may be located across jurisdictions and legal entities. Concerns have been expressed that in times of market stress, the transfer or rebalancing of reserves between issuers may be delayed or restricted. Is this concern valid or substantiated in your view?

- ☐ Valid-substantiated
- ☐ Not valid-not substantiated

Please explain your response

Members agree that these are valid concerns. Please see our response to Question 30 above.

Question 38. How effective would the following possible additional measures be in mitigating such concerns?

If your answer is “Others”, please elaborate.

Please see our response to Question 30 above.

Question 60. What do you consider to be the main risks associated with DeFi?

Please explain your answers.

Members would highlight that the concept of decentralisation is not a binary or linear concept and applicable risks will depend on exactly what elements of an arrangement are decentralised and how. For example, it may be possible to develop systems that utilise public blockchain infrastructure in a way that ensures that risks are mitigated or managed within acceptable risk tolerances. This model should be supported under the EU regulatory framework. For example, just because a system is built on public blockchain infrastructure should not automatically mean that all assets are treated in the same way as unbacked cryptoassets for prudential purposes.

One ongoing concern for the market is whether and how authorised entities can meet their regulatory obligations, including in respect of money laundering and terrorist financing, in relation to services in respect of crypto-assets or stablecoins that are capable of being transferred peer-to-peer among pseudonymous wallets or addresses. While there is helpful guidance in relation to certain aspects, such as the travel rule, in general compliance in this area relies on a risk-based approach and it is not always clear what measures would satisfy the relevant regulators or whether regulators in different Member States may take a different view. Further guidance in this area would be welcome.

Relatedly, members are supportive of maintaining strong AML / CFT safeguards throughout the crypto-asset ecosystem, including during periods of market stress or large-scale redemptions. The European authorities should consider whether current rules and supervisory practices are sufficient to mitigate risks in this area.

4.2. Staking, lending and borrowing of crypto-assets

Question 66. Do you think the current approach whereby staking services are not separately regulated is adequate? If not, what specific requirements should be applied to staking service providers?

FIA does not express a view on exactly how staking services should be regulated.

As a related matter, members note that staking services are sometimes (but not always) provided as an ancillary service to the custody of crypto-assets. In this regard, ESMA has said that MiCA does not allow

the staking of clients' crypto-assets by CASPs for their own account, even in cases where the client has explicitly provided consent (see ESMA_QA_2607). CASPs and clients may, however, mutually agree on the terms under which staking-as-a-service is provided by the CASP, provided that the profits from staking do not solely benefit the CASP. The position under MiCA is significantly stricter than the position under MiFID where investment firms may use client financial instruments for their own account, provided the client has given his prior express consent to the use of the instruments on specified terms and the use of that client's financial instruments is restricted to the specified terms to which the client consents. It is not clear why MiCA is more restrictive than MiFID, not least since MiCA does not distinguish between retail clients and professional clients and, therefore, also prohibits CASPs from agreeing to a right of use over client assets where the deal with experienced or institutional clients. FIA members suggest that the European authorities consider the position and ensure that any divergence in approach is justified by a clear policy rationale.

4.4. Prediction markets and perpetual futures

Question 70. Should prediction markets, where they are DLT enabled and facilitated through smart contracts be governed by MiFID or MiCA?

The regulatory characterisation of assets and products should not turn on the use of particular technologies, *per se*. Members consider that if a particular product has the features of a MiFID financial instrument, such as a derivative, it should be regulated as such. The perimeter of certain categories of MiFID financial instruments, including derivatives and contracts for difference, is not always easy to determine in the context of novel instruments and arrangements, and **further perimeter guidance** in the context of prediction markets would be welcome. In providing this guidance, the European authorities should be mindful of the **significant regulatory burden** that may follow such characterisation, such as margining and reporting obligations for OTC derivatives, and seek to draw an appropriate line, taking a proportionate approach. In many areas it may be more appropriate to rely on gambling regulations rather than financial regulations.

If the product is in the form of a crypto-asset (as we interpret that term to apply, as outlined in response to Question 1 above) and is not carved out of MiCA (for example, because it qualifies as a financial instrument), it should generally be regulated under MiCA, due to the particular nature of the asset as a crypto-asset.

Question 71. What substantive requirements should be considered for service providers that provide prediction market services?

See response to question 70 above.

Question 72. Should perpetual futures on crypto-assets and services towards such perpetual futures be governed by MiCA or MiFID.

Perpetual futures on cryptoassets that are characterised as derivatives (including contracts for difference) under MiFID, should continue to be regulated in the same way as other such derivatives. As outlined in response to question 1 above, there is broad consensus among FIA members that financial instruments (including derivatives) should continue to be regulated under applicable sectoral legislation and that amending the boundary between MiCA and MiFID could damage established legal certainty and market confidence.

That said, the market would welcome further engagement with the specificities and novel market structures that are emerging in connection with perpetual futures – beyond the mere characterisation of perpetual futures as MiFID financial instruments or otherwise – including in connection with continuous settlement structures and novel exchange arrangements that are particular to perpetual futures. While the question of characterisation is important therefore, a more extensive assessment of the genuine novelty of related

market structures is required for the market to understand whether the EU is amenable to the introduction of further innovations in this space. Echoing our comments in question 1 above, members generally consider that activities in respect of particular classes of derivatives should be held to equivalent standards so as to ensure a level playing field and avoid undermining regulatory objectives.

Question 73. What substantive requirements should be considered for perpetual futures on crypto-assets and service providers providing service for such perpetual futures?

See response to question 72 above.

4.5. Tokenised deposits

Question 74. Tokenised deposits could be deployed in support of a range of use cases across payments, capital markets, and on-chain financial activities. Based on your experience and expectations, please assess the potential relevance and benefit of tokenised deposits for each of the following use cases in the EU.

Scale used:

- 1. = Not relevant / no meaningful benefit**
- 2. = Low relevance / limited benefit**
- 3. = Moderate relevance / moderate benefit**
- 4. = High relevance / high benefit**
- 5. 5 = Very high relevance / transformative benefit**

POTENTIAL USE CASE OR BENEFIT	1	2	3	4	5
Person to person payments	☐	☐	☐	☐	☐
Retail POI payments (domestic, day-to-day point of interaction transactions)	☐	☐	☐	☐	☐
Intra-EU cross-border payments (non-POI)	☐	☐	☐	☐	☐
International payments and remittances (third countries)	☐	☐	☐	☐	☐
Settlement of tokenised securities and other financial instruments	☐	☐	☐	☐	X
Delivery-versus-payment (DvP) and atomic settlement	☐	☐	☐	☐	X
Intraday liquidity management (real-time funding and liquidity optimisation)	☐	☐	☐	☐	X
Treasury and liquidity management services for corporates and financial institutions	☐	☐	☐	☐	X
Programmable payments and smart-contract-based use cases	☐	☐	☐	X	☐

On-chain collateral or margining in regulated markets	☐	☐	☐	☐	X
Improved settlement speed and operational efficiency	☐	☐	☐	☐	X
Reduction of counterparty and settlement risk	☐	☐	☐	X	☐

Question 75. Please select one or two use cases and benefits above that you consider most promising in the EU and explain why.

For the cleared derivatives industry, FIA members consider the most relevant use cases to be on-chain collateral and margining in regulated markets, and related intraday liquidity management for firms posting and receiving collateral. Tokenisation of deposits could potentially help improve the speed and efficiency of cash collateral management, for example if it enables transactions to be settled outside traditional payment windows. Tokenised deposits could also support the use of other types of tokenised collateral. For example, members see a strong use case for enabling tokenised money market funds to be used for collateral purposes, to enable collateral providers and takers to post and receive collateral in the form of money market fund interests, without the need for conversion into cash and out of cash as part of the collateral management process. Tokenised deposits could support the development of markets in these products, by providing a mechanism for DvP settlement.

For collateral-related use cases to add value, it must be possible to transfer, realise and liquidate tokenised collateral with at least the same legal certainty as traditional collateral, including in the context of a counterparty or member default and across jurisdictions. Among other things, it needs to be possible for transactions to be settled with finality (from a contractual and insolvency perspective) and on a delivery-versus payment basis. It also needs to be possible for collateral takers to realise their collateral efficiently and flexibly, including in an insolvency scenario.

Question 76. What factors, if any, constrain the development and uptake of tokenised deposits in the EU?

As a starting point, members emphasise that tokenised cash arrangements that replicate the fundamental legal and regulatory characteristics of a deposit relationship should be regulated as deposits and remain outside MiCA. These characteristics include that there is a bilateral, account-based, relationship between a bank and a holder, and that the payment process replicates the existing settlement process in the core banking system (including ultimate inter-bank settlement on a central bank's balance sheet). Such instruments are fundamentally different from stablecoins which are, by their nature, "digital bearer instruments" that can legally be transferred both electronically and peer-to-peer through a change of control, without any update to the balance sheet or accounts of the issuer.

One of the challenges that the market has been grappling with is uncertainty around the boundaries between tokenised deposits and bank-issued e-money tokens. While it is clear what a deposit is, uncertainties around the scope of the definitions of "e-money" and "e-money token", including the definition of crypto-asset (as discussed under question 1 above) have raised concerns around recharacterization risk, which have a chilling effect on innovation. While the characterisation may be clear for certain structures (and arrangements can be structured to provide a high degree of certainty as to the legal and regulatory outcome), it may not be in others. In practice, there is often a trade-off between exploring more innovative structures with greater scope for operational benefits on the one hand and achieving a high degree of legal and regulatory certainty on the other. There is also often a risk that regulators in one Member State may take a different view as to characterisation to those in another. It would be very helpful to have clearer EU-wide guidance as to the scope of the "e-money" and "e-money token" definitions to clarify that arrangements that are structured as deposits are not vulnerable to being characterised as e-money or e-money tokens.

Question 77. If you identify any regulatory issue(s) in your answer to the previous question, please indicate what regulatory action is appropriate to address the issue(s) identified.

See response to Question 76 above.

Question 78. Do tokenised deposits raise any specific issues under the CRD/CRR framework? If so, please indicate what issues arise and what regulatory or supervisory action may be appropriate to address the issue(s) identified.

Particular concerns arise where tokenised bank liabilities are, or are at risk of being, characterised as e-money, rather than as deposits. While the interim CRR framework clarifies that e-money tokens (like other tokenised traditional asset) will be treated in the same way as the traditional asset it represents, it would be helpful to have further clarity as to exactly what this means in the context of e-money, including for capital, liquidity and operational purposes.

4.6. Legal treatment of tokens

Question 80. Is there **legal uncertainty** as to the private law treatment of issuance, holding and transfers of tokens, under national law?

☒ Yes

☐ No

If you believe **there is material legal uncertainty in issuing, holding and transferring tokens** (i) which of the following issues are most significant and (ii) what is the urgency with which each issue should be addressed by regulators?

Please explain your reply and **provide examples** from national law. In particular specify if any of the answers is specifically referring to native or non-native tokens and specify if any of the answers would be different depending on if the token is recording a tokenised financial instrument or crypto-assets.

There are a number of private law issues that need to be analysed on any cross-border crypto-asset or tokenisation initiative. Often these require analysis in each Member State which is costly, inefficient and undermines the benefits of a single market. Some examples as outlined below (noting that not all of these are well suited to being addressed at a pan-European level).

Conflicts of laws

One notable area of ongoing uncertainty is in relation to conflicts of laws.

For example, different jurisdictions may take different approaches to identifying the location of crypto-assets or other assets which are rooted in a distributed ledger that is maintained across several jurisdictions. While certainty on these issues is starting to emerge at a national level, there remains uncertainty as to the degree of alignment in approach between different jurisdictions.

In addition, while there are clear European frameworks in relation to the applicable law governing certain matters (for example, as provided for under the Settlement Finality Directive, Financial Collateral Directive and Rome I and II Regulations), other matters require further State-by-State analysis, including in respect of national private international law frameworks, to determine whether arrangements that are valid under the laws of one Member State would be recognised as valid in other jurisdictions. For example, determining whether a novel form of security has been validly created as a transferable instrument, and the legal nature of the instrument and entitlements in it, often requires analysis under the governing law of the securities, the jurisdiction in which the operator or registrar is located, the jurisdiction in which the issuer is established and the jurisdiction in which the custodian(s) are located, among other things. In some cases, it may not be

clear how a security that is validly constituted under the laws of one jurisdiction in a novel form would be characterised or treated under the laws of another jurisdiction, including as to the nature of investors' entitlements in respect of it. While it may be possible to develop structures under which there is a high degree of certainty as to applicable law and related treatment, the process is often highly time consuming and expensive.

Clarification and expansion of EU conflicts of laws frameworks could help address some of these types of issues.

Record vs asset

The private law analysis in relation to the issuance, holding and transfer of tokens typically flows from the initial question of whether a token is an asset in and of itself (and, if so, what is the legal nature of that asset) or a mere record (which may or may not record or register entitlements to an underlying asset).

While it is clear under many legal systems that crypto-assets such as Bitcoin are capable of attracting property interests, this question still requires consideration across all relevant jurisdictions, which is highly burdensome.

In certain tokenisation arrangements, the commercial intention is not to create a separate crypto-asset, but rather for an issuer or central operator to use distributed ledger technologies to record or register interests in a traditional asset (such as a security or claim) in circumstances where it has control and oversight in respect of the ledger. In many jurisdictions, there is a degree of legal uncertainty as to precisely where the boundaries lie between a transferable crypto-asset and a mere record or register, particularly where certain aspects of ledger maintenance are automated.

It would be beneficial for there to be a harmonised approach across the European Union to clarify that crypto-assets under MiCA are capable of attracting property interests across all Member States. It would also be very helpful to have guidance or principles that help determine whether a token will be characterised as a crypto-asset under MiCA, or as a mere record, as discussed under question 1 above.

Harmonising these matters across Europe is a complex matter, which would require in depth consideration, including as to the competence of the European authorities to legislate in this area and interaction with national property laws.

Legal characterisation and rules applicable to assets in the form of crypto-assets

In some areas there remain uncertainties as to the legal nature and treatment of crypto-assets (including stablecoins) and the legal mechanisms that apply in relation to creating or transferring proprietary interests in them. Some of these issues arise through national law frameworks while others arise through pan-European frameworks. For example, in relation to the Financial Collateral Directive, it is not clear whether stablecoins (including bank issued stablecoins) would be capable of qualifying as cash, or how concepts of "possession" or "control" will be interpreted in the context of assets that are in the form of crypto-assets and / or controlled through protocols or smart contracts, or how the conflicts of law principles apply in relation to securities that are not in book-entry form. The MISP proposals in respect of the Financial Collateral Directive are very targeted and do not address all areas of concern. This is a key issue in relation to various tokenised collateral initiatives.

Question 81. Would you recommend increasing the legal certainty in the treatment of tokens through EU law?

Certain matters are better suited to being addressed at an EU level than others. In particular, amendments to existing EU-wide private law frameworks (such as the Financial Collateral Directive and Settlement

Finality Directive) and conflicts of laws matters are well suited to being addressed at an EU level. Matters that interact heavily with national corporate, property or insolvency laws may be challenging to address at an EU level. However, it may be possible to address certain matters in a targeted way, including in relation to the property status of crypto-assets.

Question 81.1 If YES, what are the **3 most important elements that should be addressed in EU law?** Please explain your answer and provide examples.

See our responses to questions 80 and 81 above.

Question 81.2 If you believe there is a lack of legal certainty regarding tokens, **can legal certainty** (ownership or entitlement, transfer and enforceability of rights recorded as tokens) be achieved under EU law in one of the following manners?

Please **explain your response** and provide examples, in particular from national law. Where you favour full or partial harmonisation or the introduction of a conflict of laws regime, please specify which legal instrument would be most appropriate for that purpose (a new Regulation or the use of existing regimes, such as MiFID or MiCA). Also consider if there are risks with establishing an ownership regime at EU level and how these risks could be mitigated.

Full or partial harmonisation of the private law treatment of crypto-assets and other tokens is likely to be a challenging endeavour, particularly if the proposal is to create a framework for tokenising underlying assets that works across asset classes, through the types of models outlined under question 82. It is more likely to be achievable to address issues through clarifying conflicts of laws and recognition frameworks and / or by developing a parallel 28th regime that can be opted into by market participants. That said, there may be certain targeted areas where it may be worth considering full harmonisation, for example in relation to the property status of crypto-assets, as discussed above.

As alluded to above, these matters are highly complex and could, if poorly implemented, lead to unintended and undesirable consequences. We would encourage the European authorities to establish a supervisory college or other cross-border committee to analyse these issues in depth, with detailed input from legal experts and market participants across all Member States. FIA would be delighted to feed in to further proposals in this area.

Question 82. There are different “**ownership models**” that could be used to increase legal certainty over tokens. Please **indicate maximum two models** listed below that you think EU law could apply if it were to improve the legal certainty of tokens in the EU.

See our responses to questions 80 and 81 above.

Question 83. Comparing national laws of Member States, what are the main differences in how national laws governs the issuance, holdings and transfers of tokens? Please explain your answer and provide examples.

Some examples of differences are outlined below:

- the property status of the token (i.e. whether it is characterised as a thing capable of attracting property interests and being transferred between holders);
- legal mechanisms for stapling rights or interests to crypto-assets or to tokens that are mere records, and applicable formalities or requirements that need to be satisfied to ensure that interests in the underlying asset are effectively transferred through a transfer of the crypto-asset or a state change in the distributed ledger;

- whether crypto-assets, including crypto-assets that are stapled to other rights or interests, are capable of being characterised as negotiable instruments in the sense that they can be effectively transferred by delivery (or the digital equivalent) and that a transferee takes free of any defects in title of the transferor or of prior transfers³;
- legal mechanisms for creating security interests in crypto-assets or underlying assets, including any formalities or requirements that need to be satisfied upon creation or enforcement;
- custody and holding structures, including whether it is possible to establish proprietary interests in crypto-assets or underlying assets that fall short of legal title;
- corporate requirements for issuers of securities, including as to the circumstances in which they are required to maintain a register in respect of those securities and whether a distributed ledger could be used for such purposes.

We note that this is not by any means an exhaustive list. In relation to arrangements designed to tokenise other assets, specific considerations will typically turn on the nature of those assets, including formalities and requirements applicable in relation to the issuance, transfer and holding of those assets.

³ Provided that is consistent with the intention of the transferor and the transferee is a bona fide purchaser for value without notice of the defects