BAI feedback statement

Targeted consultation on the review of the Regulation on Markets in Crypto-Assets (MiCAR)

I. Preliminary Note

The German Alternative Investments Association (Bundesverband Alternative Investments e.V. - **BAI**) welcomes the opportunity to give feedback on the review of the Regulation on the Markets in Crypto-Assets (MiCAR).

As an industry association we represent more than 300 national and international members active in the institutional alternative investments sector (i.e. infrastructure, private equity, private debt, liquid alternatives), representing the entire value chain (asset manager, funds, banks, service providers, etc.). Likewise institutional investors (insurance companies, pension funds, occupational pension schemes, etc.) are represented in our investor board so that our activities have a dedicated focus on the asset owner side and their investment topics and needs as well.

We strongly welcome the fact that the European Union has, through MiCAR, established for the first time a comprehensive and largely harmonised legal framework for crypto-assets, and we support the objective of strengthening legal certainty, investor protection and market integrity in this area. However, the practical experience of our members with the application of the Regulation has highlighted a number of points, that, in our view, require adjustment, clarification or fine-tuning.

II. Clarifications

While many definitions in MiCAR help to navigate the regulation of digital assets, some questions arising from the creation of new digital and hybrid products remain unclear.

1. <u>Crypto-asset classification</u>

MiCAR defines a crypto-asset as „*a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology*". This technologically broad definition has generally proven effective but creates room for interpretive difficulties at the margins — for example in relation to tokenized traditional assets (e.g. tokenized securities, tokenized fund units, tokenized commodity certificates), governance tokens with predominantly non-financial functions, and utility tokens whose economic character may change over time.

In our opinion, crypto-assets that qualify as financial instruments as defined in Directive 2014/65/EU of the European Parliament and of the Council (MiFID II) should continue to be governed by sectoral legislation.

The nature of tokenized assets does not change through tokenization but remains the same. Additionally, the risks of tokenized assets vary due to different use cases: for example, Stablecoins have a totally different risk profile as DeFi-Governance-Tokens, even though both are tokenized assets.
We believe that regulation should focus on the risk posed by an asset instead of the technology used to issue it. However, there should be a clearer separation between crypto assets and crypto services to strengthen the sovereignty of Europe and its competitiveness.

Additionally, we propose that the delineation between crypto-assets within the meaning of MiCAR and financial instruments within the meaning of MiFID II be further specified through binding interpretive criteria, and that clarity be provided as to how tokens that change category over the course of their lifecycle are to be treated (e.g. tokens moving from a purely utility function to one with investment characteristics). This would considerably improve legal certainty for issuers and service providers both at the point of initial classification and in the ongoing monitoring of their products.

2. <u>Scope</u>

a) <u>NFTs</u>

Currently, MiCAR does not apply to crypto-assets that are unique and not fungible with other crypto-assets (Art. 2 para. 3). In recital 10, the legislator states that *"the value of such unique and non-fungible crypto-assets is attributable to each crypto-asset's unique characteristics and the utility it gives to the holder of the token"* which limits the extend to which those crypto-assets can have financial use and justifies their exclusion from the scope. However, fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible because the issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility.

However, it remains unclear, what “unique” and “non-fungible” means since MiCAR does not present a definition. We therefore advocate for a definition of “unique” in Art. 2 para. 3 MiCAR to establish more clarity, based for example on actual substitutability, the size of a given collection and any attached pecuniary rights. It should further be clarified that a substance-over-form approach is decisive, so that the exemption cannot be used to circumvent MiCAR requirements through formal characterisation as an "NFT", while preserving legally certain guardrails for genuinely unique digital collectibles. For instance, “fungibility” may be defined as whether a reasonable holder would regard units within a series as interchangeable for the purposes for which they are held or traded, irrespective of the fact that each unit carries a distinct token identifier.

b) (True) DeFi

MiCAR excludes fully decentralised financial services provided without any intermediary (true DeFi) from its scope of application but does not specify clear criteria as to when an application is to be regarded as fully decentralised: In practice, this results in considerable legal uncertainty, as many protocols combine decentralised and centralised elements (e.g. centralised governance majorities, centralised front ends, upgrade keys or administrative rights).

We propose that workable characteristics of "genuine" DeFi should be defined, such as the absence of a controlling natural or legal person, the non-custodial holding of client assets, and the immutability or decentralised governance of the underlying protocol. Such clarification would serve both investor protection and legal certainty for developers and users of genuinely decentralised protocols, who would otherwise be effectively compelled to voluntarily place themselves within a regulatory framework that does not fit their circumstances and for which no identifiable responsible party exists.

III. Stablecoins

Strict caps on (US-)Stablecoins

MiCAR imposes restrictive requirements on E-Money-Tokens (EMT) and Asset-Referenced-Tokens (ART) classified as "significant", including a cap on the daily transaction volume (EUR 200 Mio. per day) or number of transactions (1 million transactions per day) in the EU. These caps are based on a blanket threshold that does not adequately consider actual usage, purpose (means of payment vs. store of value vs. trading instrument within crypto ecosystems) or the actual risk profile of the token in question. However, EMT denominated in a currency that is an official currency of a Member State are excluded from these caps.

In practice, this means that economically successful and from the market's perspective, stable, well-collateralised Stablecoins may be subject to de facto usage restrictions once the thresholds are reached, even though they do not pose any elevated systemic risk.

Since the end of the transitional period on 1 July 2026, this threshold has become an operative reality rather than a theoretical constraint. Major non-EU-currency Stablecoins that have not sought MiCAR authorisation (most notably Tether's USDT) have been withdrawn from listing by leading EU-facing trading venues for retail clients, while EU-authorised issuers of non-EU-currency EMTs, such as Circle's USDC (authorised as an EMT in France) and Quantoz Payments' USDQ (authorised in the Netherlands), now operate under the direct constraint of the Art. 23/58 para. 3 MiCAR cap. Given that USD-denominated Stablecoins continue to account for the substantial majority of global Stablecoin usage and that the daily transaction volume of even a single mid-sized European payment service provider can already exceed EUR 200 Mio, the threshold is likely to bind on successful, EU-authorised issuers well before it curtails the largely unauthorised third-country Stablecoins the regime was originally designed to address.

This asymmetry points to a further design flaw: Because the cap under Art. 22–23 and 58 para. 3 MiCAR attaches to the currency in which a token is denominated rather than to the issuer's place of establishment, EU-authorised and third-country issuers of comparable non-EU-currency tokens are, in principle, subject to exactly the same threshold. In practice, however, only EU-authorised issuers, as directly supervised entities, face immediate and effective enforcement of the resulting cessation-of-issuance obligation, whereas equivalent enforcement action against a third-country issuer with no EU establishment or assets is considerably more difficult to obtain. The practical effect is that the cap falls hardest on precisely the compliant, EU-supervised issuers the framework should be encouraging, while its original target, large, unauthorised third-country Stablecoins, remains comparatively insulated from effective enforcement.

We propose reviewing the caps on a risk-based approach and aligning them more closely with actual stability and liquidity metrics of the reserve assets, rather than relying solely on transaction volumes. For instance, a graduated response mechanism — enhanced reporting and supervisory scrutiny, followed by a partial restriction on further issuance and only thereafter a full cessation — would avoid the abrupt cliff-edge effect of the current binary threshold and align the regime with the graduated approach already used for "significant" token status under Art. 43 and 56 MiCAR.

<u>Eligibility for UCITS portfolios and valuation</u>

Additionally, there should be no differentiation between EMTs and Stablecoins in the broader sense regarding the classification as eligible assets for UCITS funds. Under the current UCITS eligible-assets framework, Stablecoins and EMTs generally do not qualify as eligible assets, as they meet neither the criteria for transferable securities nor those for money market instruments within the meaning of Art. 50 of the UCITS Directive and the Eligible Assets Directive. As a result, UCITS funds are currently unable to hold Stablecoins in their portfolios, even where such tokens are fully backed, well-collateralised and issued by a MiCAR-authorised issuer, while T-bills or units of tokenized money market funds are eligible assets for UCITS funds despite their risk profile.

This exclusion is closely linked to the valuation methodology applicable to Stablecoins. Unlike money market instruments, which are typically valued on an amortised-cost basis on the assumption of a stable net asset value, Stablecoins are exchange-traded instruments whose market price is determined by supply and demand on secondary markets and can deviate materially from the nominal peg during periods of stress. The depegging of USDC to approximately USD 0.87 during the banking-sector turmoil in

March 2023 illustrates that Stablecoins, notwithstanding full reserve backing, remain subject to market-price risk that is incompatible with the valuation principles and investor-protection standards applicable to UCITS.

This has a further, practical implication for asset managers even outside the context of direct portfolio holdings: Where a Stablecoin is used as a settlement instrument to pay for other assets, an asset manager may incur a loss if the market price of the Stablecoin falls below par between the point of receipt and the point of conversion or onward use, even though the transaction was economically intended to be conducted at parity with the underlying fiat currency.

We consider it important that the review of MiCAR takes this settlement-risk dimension into account, alongside the traditional portfolio-holding perspective. For instance, a definition of "settlement-only holding" — the holding of an EMT or ART for a limited maximum period (e.g. T+2 business days), with immediate or automated onward conversion and no investment intent or interest accrual — could be introduced, for example as an additional point in Art. 3 para. 1 MiCAR. Additionally, the significance criteria under Art. 43 and 56 could be extended to include a metric reflecting the average holding period, or the proportion of settlement-related transactions relative to the transaction data already reported under Art. 22, allowing a more risk-sensitive classification of significant tokens.

<u>Interest income on reserve assets for stablecoins</u>

Under MiCAR, issuers of EMTs are prohibited from granting interest or any other benefit related to the length of time the token is held. This rule serves the purpose of preventing EMTs from being effectively structured as an interest-bearing deposit product, thereby avoiding circumvention of deposit-guarantee and banking supervisory law. In practice, however, the prohibition means that issuers must retain in full the interest income generated from the investment of reserve assets without being able to pass it on to token holders.

This raises, on the one hand, a competitive question in relation to traditional, interest-bearing payment and deposit products, and, on the other hand, a question of proportionality in relation to the actual protective purpose of the rule.

We propose that the review draws a distinction between passing on interest income as a core element of the business model (which may genuinely amount to circumvention of banking supervisory law) and a moderate, transparent participation of users in returns generated by the reserve backing, which does not constitute circumvention of deposit-taking business.

Alternatively, at the very least, clarity should be provided as to how interest income is to be treated where it is passed on to users through separate products that are clearly distinct from the token issuance itself.

IV. Additional aspects

1. Staking and Lending

MiCAR does not contain any express and conclusive rule on the regulatory classification of staking and lending services relating to crypto-assets. This concerns both the question of whether and under what conditions staking and lending services are to be classified as a crypto-asset service within the meaning of MiCAR and the question of how they can be distinguished from deposit-taking business, investment services, or collective investment activities.

This legal uncertainty makes it difficult for market participants to structure staking and lending offerings in a MiCAR-compliant manner and results in divergent supervisory assessments across Member States. We propose that, as part of the review, a dedicated, risk-based legal framework for staking and lending services shall be established.

As a less preferred option, we suggest that the existing crypto-asset services under MiCAR be expressly extended to cover these activities, including clear requirements regarding transparency, custody, risk disclosure, and - in the case of lending - appropriate counterparty credit risk management.

2. Relation to other frameworks

As we look into the future, it is conceivable that the use of distributed ledger technology will, over time, become the new normal for recording, transferring and safekeeping value, to a point where a dedicated regulatory regime for crypto-assets such as MiCAR may no longer be necessary because the "traditional" legal frameworks themselves will have been adapted to a fully digitalised environment.

However, we wish to stress, that this remains a long-term prospect rather than a near-term policy option and that its realisation will require considerable time, technological maturation and sustained legislative effort across the wider body of financial services law.

Meanwhile, MiCAR exists in tension with established frameworks of the traditional financial sector, in particular the Payment Services Directive (PSD2, and in future PSD3/PSR), the E-Money Directive, MiFID II and banking supervisory law (CRR/CRD). In practice, this gives rise to delineation and dual-regulation issues: For example, if crypto-asset service providers also provide payment services in fiat currencies or custody services for EMTs, they need a MiCAR licence as well as a licence as a payment service provider according to PSD2. Whilst payment service providers may make use of the simplified notification procedure under PSD2, this option is not available to e-money institutions.

The regulatory conflict at the MiCAR/PSD2 interface is a well-known problem: the interface between MiCAR and PSD2 gives rise to significant interpretation issues. Whilst the draft of PSD3/PSR provides for new exemptions, in particular for payment transactions involving all types of monetary amounts between CASPs, even under the new rules, there will still be many areas in which firms will have to be subject to supervision under both the provisions of MiCAR and those of the applicable payment services supervisory law – in Germany, this would mean authorisation under Art. 59 et seq. of MiCAR and a licence under section 10 para. 1 of the German Banking Act (ZAG), provided that no other exemptions apply.

We propose that the coherence between MiCAR and the remainder of financial markets law should be systematically examined and, where necessary, improved through clarifying recitals, interpretive guidance from the European Supervisory Authorities or targeted amendments to the neighbouring frameworks. The objective should be a coherent overall system that treats comparable risks consistently, without subjecting market participants to divergent, overlapping or contradictory supervisory regimes depending on the technical design of an economically comparable product.

V. Conclusion

We support the European Commission's objective of using the MiCAR review to take on board the practical experience gained during the first years of application and to fine-tune the legal framework in a targeted manner, without calling into question its fundamental structure or its well-established broad scope of application.

The points set out in this feedback statement aim to strengthen legal certainty, proportionality and the international competitiveness of the European crypto-asset market, without weakening the high level of protection afforded to investors and financial stability.

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The **Bundesverband Alternative Investments e.V. (BAI)** is the cross-asset and cross-product lobby association for the alternative investment industry in Germany and we consider ourselves as a catalyzer between professional German investors and suppliers of Alternative Investment products worldwide. The overarching goal is that German institutional and professional investors must be able to diversify their investment with regard to Alternatives better and more easily. The BAI is promoting a broad diversification which includes Alternative Investments as indispensable, in particular in terms of safeguarding long-term retirement pensions and the provision of money for construction, maintenance, and development of public infrastructure and renewable energies.

BAI members are recruited from all areas of the Alternative Investments' industry, e.g., AIF managers and banks as well as service providers. At present, the BAI counts more than 300 national and international member companies and is growing continuously.