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Cologne, 29 September 2026

Targeted Consultation on the Review of the Regulation on Markets in Crypto-Assets (MiCA)

Subject: Response of the Bundesverband für elektronische Wertpapiere e.V.

The following sets out the response of the Bundesverband für elektronische Wertpapiere e.V. (the "Association") to the targeted consultation of the European Commission (Directorate-General for Financial Stability, Financial Services and Capital Markets Union) on the review of Regulation (EU) 2023/1114 on markets in crypto-assets ("MiCA"), as submitted through the Commission's online questionnaire.

Consistent with the Commission's invitation to respond only to those questions that are relevant to the respondent, the Association limits its response to Questions 1, 1.1 and 1.2 in Part 1 of the consultation (Scope and definitions, Title II crypto-assets), which concerns the boundary between MiCA and the securities acquis. The Association is the German industry association for electronic securities under the German Electronic Securities Act (Gesetz über elektronische Wertpapiere, "eWpG"). Its members include BaFin-licensed crypto securities registrars (Kryptowertpapierregisterführer), issuers, custodians, trading venues, paying agents, and technology providers whose business is the issuance, registration, custody, and trading of financial instruments recorded on distributed ledgers. Together, the Association's members have registered several hundred crypto securities since 2021, including bonds issued into the German framework by issuers from other Member States. The Association's members therefore operate under exactly the arrangement the Commission describes in the introduction to Part 1: tokenized financial instruments that remain outside MiCA and are governed by securities law. This response is based on several years of supervised, live market practice rather than on a conceptual assessment alone.

Part 1 — Scope and definitions, Title II crypto-assets

1.1 MiCA scope & crypto-asset classification

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
☐ Don't know / no opinion / not applicable

Question 1.1

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
☐ Don't know / no opinion / not applicable

Question 1.2

Please explain your answer to question 1.1 and suggest any policy actions for clarification if needed:

Summary of the Association's position. Crypto-assets that qualify as financial instruments must continue to be governed exclusively by the securities acquis. The technology used to record and transfer an instrument does not change its legal nature, and MiCA was deliberately designed to complement the securities framework, not to replace it. At the same time, the boundary between the two regimes is not yet workable in practice, because whether a tokenized instrument qualifies as a financial instrument is determined by national law and therefore differs from one Member State to another. The Association recommends a binding, Union-wide harmonization of the qualification of DLT-based instruments as financial instruments, combined with relocating the financial-instrument exclusion from Article 2(4) MiCA into the definition of a crypto-asset in Article 3(1)(5) MiCA. The remaining gap, which concerns the issuance and registration of DLT-based securities, lies in securities law and should be closed there, not by extending the scope of MiCA.

I. Financial instruments must remain within the securities acquis

Financial instruments must remain governed by the sectoral framework, namely MiFID II/MiFIR, the Market Abuse Regulation, the Prospectus Regulation, the Central Securities Depositories Regulation

(CSDR) and, for DLT market infrastructure, the DLT Pilot Regime (Regulation (EU) 2022/858) or its successor as a permanent framework. This is the correct architecture, and MiCA already reflects it: Article 2(4)(a) MiCA deliberately excludes crypto-assets that qualify as financial instruments, and Article 8(4) MiCA requires every offeror to explain why its crypto-asset is not a financial instrument. MiCA thus presupposes the very boundary that Question 1 places in doubt. Reversing that design and bringing every asset recorded on a distributed ledger within MiCA would be a mistake for three reasons.

1. **Technology neutrality requires regulating the instrument, not the rail.** A bond remains a bond whether it is recorded in a CSD-operated book-entry system or on a distributed ledger. Where the legal rights, the obligor, and the economic substance are unchanged, the product classification and the core sectoral rules must remain unchanged as well. Subjecting the same instrument to a different regime because of the recording technology is the opposite of the technology neutrality the Commission itself identifies as a guiding principle of this consultation, and it contradicts the principle of "same activities, same risks, same rules" in recital 9 of MiCA and in the FSB and IOSCO recommendations of 2023. Operational and infrastructure risks arising from the recording and transfer arrangement can and should be assessed separately, which is precisely what the DLT Pilot Regime and DORA already do. Every major jurisdiction with a functioning tokenized securities market has reached the same conclusion: Switzerland, the United Kingdom, the United States, Singapore, and Hong Kong all regulate tokenized securities as securities and exclude them from their crypto-asset regimes, as the SEC staff most recently confirmed in its statement of January 28, 2026 that the format in which a security is issued does not affect the application of the federal securities laws.

2. **It would lower investor protection and invite regulatory arbitrage.** The Title II white paper regime of MiCA (notification without prior approval under Article 8 MiCA) is deliberately lighter than an approved securities prospectus. Allowing an instrument that is economically a security to be offered under MiCA instead would permit issuers to opt out of prospectus liability, the more comprehensive market-abuse regime under MAR, and the settlement discipline of CSDR and the DLT Pilot Regime. The more fundamental point concerns the proprietary position of investors. Under the eWpG, an electronic security is deemed to be a thing (Sache) within the meaning of Section 90 of the German Civil Code (Section 2(3) eWpG), the register entry is constitutive for transfers of title (Sections 24 and 25 eWpG), good-faith acquisition is protected (Section 26 eWpG), and the holder is presumed to be the owner (Section 27 eWpG). As the German legislature stated in the explanatory memorandum, this creates comprehensive protection of ownership, in particular in the event of insolvency and enforcement, so that investors have a right of segregation (Aussonderung) under Section 47 of the German Insolvency Code. MiCA does not, and by design cannot, deliver this. Article 75(7) MiCA requires client crypto-assets to be segregated from the service provider's estate only "in accordance with applicable law," MiCA contains no rule on ownership or on good-faith acquisition, and none of its recitals addresses national property law. Reclassification would also cut tokenized securities off from institutional demand: ESMA confirmed in its technical advice of June 26, 2025 on the UCITS Eligible Assets Directive that crypto-assets are not eligible for direct investment by UCITS, whereas financial instruments issued by means of DLT are assessed like any

other instrument, and the Eurosystem’s Pontes pilot and collateral framework likewise admit DLT-based assets only as financial instruments.

3. **It would duplicate a mature framework and create dual licensing.** The securities acquis already covers disclosure, conduct of business, market integrity, custody, and settlement, and the EU has, correctly, chosen to extend that framework to DLT through the DLT Pilot Regime rather than to build a parallel regime inside MiCA. Bringing financial instruments within MiCA would require investment firms, credit institutions, and CSDs that already issue, hold, or trade tokenized securities under MiFID II, CRD, and CSDR to obtain an additional crypto-asset service authorization or notification, and would subject the same activity to two supervisory regimes. Article 60 MiCA, which provides a notification procedure for such entities precisely because the two regimes were designed to be separate, illustrates the point. MiCA also has no interface with corporate law and could not accommodate shares, which since December 2023 may be issued in Germany as crypto shares (Kryptoaktien) whose membership rights, general meetings, and share register remain governed by the German Stock Corporation Act. The remaining gaps, which lie at the level of issuance, registration, and private law, should be closed within securities and private law and not by applying MiCA cumulatively.

II. Why the boundary nonetheless requires clarification

The conceptual split is right, but the boundary is not yet workable in practice. The definitions of “transferable security” and “financial instrument” in Article 4(1)(44) and Annex I, Section C of MiFID II are transposed and applied at the national level, and ESMA itself acknowledges in its guidelines on the qualification of crypto-assets as financial instruments (ESMA75-453128700-1323) that Member States have not defined the term in a fully harmonized way. The consequences are documented in ESMA’s compliance table for those guidelines of July 17, 2026: the Czech National Bank and the National Bank of Slovakia reported that the guidelines are not applicable in this respect because tokenized transferable securities cannot be issued or classified as such under their national securities law, and Latvijas Banka intends to comply only once the necessary legislation has been enacted. The same tokenized instrument can therefore qualify as a security in one Member State and as a MiCA crypto-asset, or as nothing at all, in another.

The Association’s members encounter this every day. Cross-border issuances into the German crypto securities register by issuers from other Member States regularly require a separate qualification analysis for each jurisdiction concerned, and the outcome of that analysis, rather than the economics of the instrument, determines which regime, which disclosure obligations, and which supervisory authority apply. The ESMA guidelines and the joint ESA standardized classification test are useful analytical tools and have helped at the margin. They cannot, however, cure a divergence that is rooted in national civil law and that non-binding guidance cannot override.

A second, structural defect compounds the problem. Because the financial-instrument exclusion sits in the scope provision of MiCA (Article 2(4)) rather than in the definition of a crypto-asset (Article 3(1)(5)), every other Union act that borrows the MiCA definition inherits the broad, technology-based concept without the carve-out and must decide separately whether to reintroduce it. The result across the acquis is inconsistent. The Anti-Money Laundering Regulation (Article 2(1)(7) of Regulation (EU) 2024/1624) and the Transfer of Funds Regulation (Article 3(14) of Regulation (EU) 2023/1113) adopt the definition together with the Article 2(4) exclusion. DAC8 (Council Directive (EU) 2023/2226) and its German implementation in the Crypto-Asset Tax Transparency Act (Kryptowerte-Steuertransparenz-Gesetz) adopt it without the exclusion, which has created uncertainty as to whether operators of crypto securities registers are subject to crypto-asset reporting obligations even though the instruments they register are financial instruments beyond any doubt. CRR III (Article 5a of Regulation (EU) 575/2013 as amended) treats tokenized financial instruments formally as crypto-assets but prudentially as the traditional assets they represent.

III. Suggested policy actions

1. Harmonize the qualification, not the perimeter, and relocate the exclusion into the definition. The EU should move toward a genuinely common determination of when a DLT-based instrument is a financial instrument, for example through binding classification criteria in Level 1 or Level 2 legislation or through an ESMA-level determination mechanism, so that the classification no longer depends on the Member State of issuance. In the same step, the financial-instrument exclusion should be relocated from Article 2(4) into Article 3(1)(5) MiCA, so that an instrument qualifying as a financial instrument is not a crypto-asset for any purpose of Union law. This would close the definitional gap at its source, align DAC8 and CRR III with the AML Regulation and the Transfer of Funds Regulation, and leave the substantive scope of MiCA untouched.

2. Close the remaining gap in securities law, not in MiCA. The EU has already decided, correctly, to bring DLT-based securities within securities law rather than MiCA, but it has done so only halfway. The DLT Pilot Regime harmonizes DLT trading and settlement infrastructure and is silent on how a security is validly issued and recorded natively on a distributed ledger. That issuance-and-register layer remains purely national, as ESMA's compliance table confirms, and an investor's proprietary position depends on which national regime, if any, applies. This is the actual obstacle to a single market in tokenized securities, and it is a securities-law gap, not a MiCA-scope gap. It should be addressed in a dedicated securities-law instrument that establishes a common legal status for DLT register entries (constitutive effect, effect against third parties, and good-faith acquisition) and a passportable, supervised registrar function, modeled on the German eWpG, under which several hundred crypto securities have been issued, registered, and supervised since 2021, including bonds by issuers from other Member States. MiCA regulates a different asset class and by design does not address the ownership or proprietary treatment of the assets within its scope. Locating that framework in MiCA would re-import the very category error this response rejects. The Association notes that the Commission raises the underlying question of legal certainty for DLT financial instruments in Part 4 of this consultation and would welcome the opportunity to contribute to that work.