coinbase

FINAL SUBMITTED

To:

Michael McGrath
Minister of Finance
Department of Finance
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Ireland

Date:

12 September 2023

Public Consultation by the Irish Department of Finance on the Exercise of National Discretions under MiCA

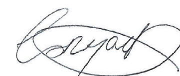
Coinbase Global, Inc. and its EU subsidiary Coinbase Europe Ltd. (together, Coinbase) welcome the opportunity to respond to the Department of Finance's *"Public Consultation on the Exercise of National Discretions"* under MiCA.

Coinbase started in 2012 with the idea anyone, anywhere, should be able to send and receive Bitcoin easily and securely. Today, we are publicly listed in the US and provide a trusted and easy-to-use platform relied on by millions of verified users in over 100 countries around the world to access the broader crypto economy.

We are committed to the EU, where we have a significant presence reflecting its importance as one of our largest international markets outside of the US. Coinbase has an EMI licence in Ireland, a crypto licence in Germany and a number of registrations in national markets across the EU, including in Ireland. We are seriously considering our EU strategy in terms of where we will establish our MiCA entity and we are assessing countries against a range of criteria. We have identified a handful of member states that we are currently considering, all of which have significant experience and expertise in regulating financial services. We are also looking for a member state that recognises and supports the potential of this technology, has a flexible labour market and access to talent. Ireland has - over many years - recognised the importance of tech and innovation as a driver of the country's economic growth, and for this reason is high on our list of potential MiCA entity locations.

At Coinbase, we believe we are well positioned to transition to a MiCA licence and we are excited by the opportunities in Europe as it transitions to Web3. We look forward to supporting the Department of Finance and Central Bank of Ireland as they move forward with their work on MiCA.

Your sincerely,



Tom Duff Gordon
VP, International Policy

Cormac Dinan
Country Director, Ireland

Introduction

Blockchain technology is the backbone of a new financial architecture. While nascent, it is already bringing efficiency, transparency, and resiliency to the existing financial system.

Blockchain applications enable people to transfer value quickly and at lower cost, particularly for cross-border transfers. Stablecoins that put fiat currencies on digital rails will drive competition in the payments space. Decentralised finance, smart contracts, and related new technologies will drive further innovation and exponentially expand opportunities for the financial system. Yet, cryptoassets are more than a financial innovation; they have the potential to transform every sector of the economy. Today's internet is dominated by a handful of companies that profit from monetising their users' personal data. The next phase of the internet's development, Web3, will be owned by builders and users and will be driven by tokens, creating a more decentralised and community-governed version of the internet, with a transformative impact on society.

In the 1990s, the EU missed out to the US on the first wave of technological change towards Web2, but is well positioned to capitalise on the next phase of the Internet, known as Web3. MiCA is a critical landmark in the journey towards on-shoring Web3 investment and achieving the EU's strategic autonomy ambitions in the tech sector: MiCA provides legal and regulatory certainty to the market, giving firms the confidence to onshore, invest and grow, whilst also raising standards across the industry to drive the development of a legitimate and trusted industry of Crypto Asset Service Providers (CASPs). Within the EU, Ireland is well positioned to become a capital of Web3 investment, building on its position as a leading centre for fin tech innovation, and driving future growth and job creation for the Irish economy.

Executive Summary

The Department of Finance is consulting on areas of potential national discretion, and we answer the specific questions in more detail below. We would also like to take the opportunity to raise further areas where we foresee potential challenges to the EU single market for crypto asset services with regards to (1) the path to a MiCA licence, (2) issues that raise level playing field risks and (3) implementation challenges where further clarity is needed. We deal with each of these in turn:

(1) Path to a MiCA Licence

We are concerned about potential differences in timing for awarding MiCA licences across member states. MiCA allows up to 18 months grandfathering, during which CASPs should be able to retain access via national registrations to the same national markets as before "entry into application" of MiCA. However, member states can unilaterally shorten the grandfathering period, and it remains possible that they do so in a manner that results

in firms not being able to serve those markets until they have a MiCA licence. This means that there is a competitive advantage for firms that choose a member state for their MiCA entity location that moves quickly to award MiCA licences early, as this will guarantee them access to national markets across the EU; this is in contrast to firms that may apply for a MiCA licence in a country where it will take more time. We believe all firms that become MiCA compliant should be provided the same opportunities for market access, regardless of which member state they choose.

In this context, we ask that Ireland moves swiftly to award MiCA licences to firms that choose Ireland as their MiCA entity location and that meet the regulator's standards, so that they do not lose access to national markets in other member states that shorten the grandfathering period. We also ask that Ireland sets out a clear timeframe and path to a MiCA licence for firms that choose Ireland, which will provide helpful clarity to the market.

We also note that divergences in the application of the "simplified procedure" across member states could further exacerbate this issue. As set out in more detail in our answers to Question 4 below, we believe that member states should apply the simplified procedure to firms with national crypto asset registrations, and other financial services authorisations. This will promote a level playing field and result in fewer challenges/disputes over which regimes fall in scope of the simplified procedure.

(2) Level Playing Field Risks

We note the following areas where we believe there is risk of unlevel playing field:

- **MiFID vs MiCA:** We see this as uncontroversial in terms of what is a financial instrument versus what is a crypto asset, the latter falling within MiCA. However, we believe it is crucial for the EU single market that a consistent approach is taken across member states and ESMA's guidelines will be critical to this. We believe this should be a priority for Ireland's engagement with ESMA.

- **Custody Requirements:** MiCA requires that where CASPs make use of third parties to provide custody and other administration of crypto assets, that these third parties are also licensed/authorised under MiCA. We have discussed this with a number of member state authorities and understand that this requirement does not prevent CASPs from leveraging technology and infrastructure provided by affiliates or third parties under appropriate inter-company or outsourcing arrangements, in the course of providing custody and administration services to their clients, but these arrangements should be set out as part of their MiCA application. We believe it is important that this approach is taken consistently across EU member states.

- **Conflicts of Interest:** We support the approach set out in MiCA, and subsequently in ESMA's proposed/draft Regulatory Technical Standards, that CASPs are

responsible for identifying, managing and disclosing conflicts of interest. We believe it is important that member states do not gold plate or deviate from this approach for example by introducing entity separation requirements, as this would significantly distort the EU single market.

- **Penalties:** We believe strongly that firms should be subject to the same penalties and measures for breaches in compliance with MiCA, regardless of where they establish their MiCA entity. If differences between member states exist, this will incentivise firms to seek out lighter touch supervisory regimes in different member states, and to jurisdiction shop for their MiCA entity location. Consistency in approach is critical.

(3) Implementation Challenges Where Further Clarity is Needed

Finally, we wish to raise two significant implementation challenge in MiCA:

- **Asset Segregation:** We note that MiCA requires CASPs providing custody services to "segregate holdings of crypto-assets on behalf of their clients from their own holdings'' and to "ensure that, on the DLT, their clients' crypto-assets are held on separate addresses from those on which their own crypto-assets are held". This requirement could be read to prohibit CASPs from holding a de minimis buffer of firm assets in trading wallets; implementation of this requirement should provide an exception to allow CASPs to hold firm assets in omnibus client wallet addresses in circumstances where the CASP reasonably determines this is in the legitimate interests of its clients (e.g. to use firm funds to pay gas fees on behalf of the customer) and provides appropriate disclosures. We believe ESMA and/or national authorities should provide clarity on this point to the market.

- **White Paper Liability:** CASPs are required to publish white papers for assets they list where one does not exist. However, Annex 1 of MiCA requires a large volume of information to be included in the white paper for which it would be liable. This makes sense for a white paper that the issuer will create, but an exchange will not have access to all this information, such as the requirement to give views on the financial position of the issuer and upcoming milestones in the project. This makes it impossible for CASPs to produce these whitepapers and to accept liability for information that cannot be obtained or verified. We believe the intention of the text is for exchanges to only be required to publish white papers on the basis of reasonable efforts based on publicly available information, and it is important that ESMA clarifies this for the market.

We realise there are many important issues under discussion at ESMA, and we urge Ireland to play an active role in this work to ensure a sensible and proportionate outcome in Level 2 rule-making, and to ensure a level playing field across the EU.

Questions

Question 1 – Public disclosure of inside information

a) Should Ireland exercise this discretion?

We believe an explanation on any delay related to the disclosure of inside information should always be provided to the regulator, rather than the disclosure occurring only at the request of the CBI. We understand that this is the same approach the Department of Finance took when it chose not to exercise the equivalent national discretion in the transposition of MAR in 2016, and would therefore provide consistency across market abuse law.

b) How should this discretion be transposed in Ireland?

As set out above, we do not believe Ireland should exercise this discretion.

Question 2 – Administrative penalties and other administrative measures

a) Should Ireland exercise this discretion?

With supervision left at national level, one of the risks is divergence in supervisory approach and lack of supervisory consistency. We believe strongly that firms should be subject to the same penalties and measures for breaches in compliance of MiCA, regardless of where they establish their MiCA entity. If differences between member states exist, this will incentivise firms to seek out lighter touch supervisory regimes in different member states, and jurisdiction shop for their MiCA entity location. On this basis, we encourage Ireland to adhere to the MiCA provisions on penalties, rather than gold plating the requirement with additional criminal liability.

We note that there is precedent for this approach. When the Department of Finance has transposed EU financial services law in the past, it has chosen not to gold-plate criminal penalties set out in EU law but has availed itself of an enabling provision that allows the CBI to make full use of its supervision and enforcement powers. Given this, it makes sense for the Department of Finance to adopt a similar approach.

b) How should this discretion be transposed in Ireland?

As set out above, we believe that Ireland should not exercise its discretion to increase administrative penalties and other administrative measures.

Question 3 - MiCAR transition period for existing CASPs

a) Should Ireland exercise this discretion?

We believe that Ireland should not exercise its discretion to shorten the transition period. It should retain the full 18 month transition period to ensure that firms have sufficient time to become MiCA compliant, and for regulators to assess applications. MiCA is a significant uplift for the industry and for authorities, and it is important that CASPs are given adequate runway to meet the requirements, and for regulators to have sufficient time to assess them against the requirements set out in MiCA.

During the 18 months grandfathering period, MiCA allows CASPs to retain access to the same EU member state markets as before the entry into application of MiCA, via national registrations. However, member states can unilaterally shorten the grandfathering period, and it is possible that they do so in a manner that results in firms not being able to serve these markets using national registrations while they await a MiCA licence. This means that there is a competitive advantage for firms that choose a member state for their MiCA entity location that is willing to move quickly to award MiCA licences, as this will guarantee them access to national markets across the EU, in contrast to firms that may apply for a MiCA licence in countries that take more time. We believe that all firms should be provided the same opportunity for EU market access, regardless of which member state they choose.

We urge Ireland to move swiftly to award licences to MiCA-compliant firms that choose Ireland as their MiCA entity location, so they are not disadvantaged in other member states that shorten the grandfathering period and thereby lose access to national markets while awaiting a MiCA licence.

b) How should this discretion be transposed in Ireland?

As set out above, we believe that Ireland should not exercise its discretion to shorten the transition period.

MiCA provides a transition period of 18 months for CASPs that are providing crypto asset services in accordance with "applicable law" prior to MiCA entering into force. This suggests that VASPs that are AML registered in Ireland can benefit from the grandfathering period (subject to the Department of Finance deciding to shorten it, which we advise against). However, we note that almost all of the global groups operating in this sector in Ireland have structured their Irish operations across two legal entities; an EMI entity (on/off ramp) and a VASP entity that provides crypto asset services. This means that firms may only benefit from the grandfathering period if they apply for the MiCA licence with their VASP entity. We believe that firms should be given flexibility over which entity they choose to apply for a MiCA licence, and this will require the

grandfathering period to be available to both entities. Over time, we expect firms to simplify their legal entity structure and to create one MiCA entity in Ireland.

This should be accommodated as part of the transposition of the grandfathering provisions by allowing any company or "group of companies" established in Ireland and either registered as a VASP or authorised to provide regulated e-money services to benefit from the 18 month transition period.

c) How long should the transition period last?

As set out above, we believe that Ireland should not exercise its discretion to shorten the transition period. It should retain the full 18 month transition period to ensure that firms have sufficient time to become MiCA compliant. MiCA is a significant uplift for the industry and it is important that firms are given adequate runway to meet the requirements. However, as set out in our answer above, Ireland should move swiftly to award licences to MiCA-compliant firms, so that they are not disadvantaged in other member states that shorten the grandfathering period, and thereby lose access to these national markets whilst awaiting a MiCA licence in Ireland.

Question 4 – Simplified procedure

a) Should Ireland exercise this discretion to implement a simplified regime?

As we understand it, the simplified regime allows national authorities to use information that has already been provided to them in the context of other national regimes, in effect speeding up the MiCA licence application process. MiCA also suggests firms that have authorisation under national regimes should be prioritised for a MiCA licence. In the absence of a national crypto asset licensing regime, we believe member states should apply the simplified regime to national crypto asset registrations, and other national financial services authorisations, such as e-money and MiFID licences. We believe Ireland should exercise its discretion in this regard.

We do not believe that the simplified procedure should be an "easy" route to a MiCA licence. There is a risk that some member states with "light touch" licensing regimes may seek to attract firms by offering a "fast track" to a MiCA licence and single market access, where the firm may not be fully MiCA compliant. We note that there are few (if any) national crypto asset licensing regimes within the EU that are close to MiCA, and therefore it is important that all firms are required to adhere to the same standards. Even where information has been gathered in the context of a crypto asset licensing regime, it is important to ensure all the requirements set out under MiCA have been fulfilled before a MiCA licence is awarded.

If there is a narrow scope to which national regimes the simplified procedure can be applied, this could make the path to a MiCA licence a competitiveness issue, introducing level playing field challenges; firms that choose member states without a national crypto asset licensing regime should not be disadvantaged.

b) How should current regimes be evaluated and by whom?

We believe there are few (if any) national crypto asset licensing regimes within the EU that are consistent with MiCA. There is a spectrum of national licensing regimes that currently exist, in terms of how comprehensive they are, and it will be very challenging to define the perimeter of which regimes fall in and out of scope of the simplified procedure, if it is only applied to national "licensing" regimes.

As set out above, if limited to crypto asset licensing regimes, we are also concerned that the path to a MiCA licence could become a competitiveness issue, introducing level playing field challenges, whereby member states with "light" licensing regimes may seek to attract firms by offering a "fast track" to a MiCA licence and single market access. Firms that choose member states without a national crypto asset licensing regime should not be disadvantaged.

As we understand it, the simplified procedure allows national authorities to use information that has already been provided to them in the context of other national regimes, and provides a "fast track" to a MiCA licence, but does not give "easier" access to a MiCA licence. On this basis, we believe that in the absence of a national crypto asset licensing regime, member states should apply the simplified regime to firms with national crypto asset registrations, and other financial services authorisations, such as e-money licences. Of course, the information that will have already been provided to supervisors under various national regimes will differ, and the MiCA standard must always be applied. We believe this takes away the challenge of defining the scope or perimeter of the simplified procedure regime. Clarity on this point from ESMA is important, to ensure a consistent approach across the EU.

c) How should divergent opinions on the compliance of current regimes be challenged?

As set out above, we believe there are few (if any) national crypto asset licensing regimes within the EU that are close to consistent with MiCA, and instead vary considerably in their rigour; there is also a blurred distinction between crypto asset licensing and registration regimes across member states. Therefore, if a strict reading of the scope of the simplified procedure is taken (applying the simplified procedure only to crypto licensing regimes), less than a handful of member states and firms stand to benefit. Alternatively, if all member states are able to apply the simplified procedure to firms that have a national crypto asset registration and other financial services licences, we believe

this will promote a level playing field and result in fewer challenges/disputes over what regimes are compliant with regards to falling in scope of the simplified procedure. ESMA should provide clarity to member states and the market on this point.