

Digital Operational Resilience Act (DORA)

Together with the adoption of its Digital Finance Strategy in September 2020, the European Commission published its [proposal for a Regulation on digital operational resilience for the financial sector](#) (Digital Operational Resilience Act - DORA). **Insurance intermediaries were included in the scope of the Commission's proposal for DORA, together with much larger financial entities like insurers or credit institutions.** The DORA proposal also introduced an EU oversight framework for critical ICT (Information and Communication Technology) service providers (such as Big Techs which provide cloud computing to financial institutions).

According to the Commission's proposed rules, financial entities in the scope of DORA would have to respect strict common standards to ensure they can withstand ICT-related disruptions and threats. They will have to put in place:

- dedicated ICT risk management capabilities,
- harmonised reporting of major ICT-related incidents,
- digital operational resilience testing,
- management by financial entities of ICT third-party risk,
- information sharing among financial entities.

The DORA proposal also introduced an EU oversight framework for critical ICT (Information and Communication Technology) service providers (such as Big Techs which provide cloud computing to financial institutions).

The Commission also proposed amendments to the Solvency II, AIFM, IORPs MiFID II, PSD and the Prudential Supervision Directive to clarify certain provisions on operational risk in these existing financial services Directives. No amendments to the IDD were proposed.

■ BIPAR's position

While BIPAR welcomes DORA's objective to increase the digital operational resilience of the financial sector, it is of the opinion that the financial sector is not uniform in scale and structure. The incidents experienced by different financial services entities, as well as their consequences (for the financial stability, consumers etc..), differ from one financial services sector to another. BIPAR believes that DORA's requirements would simply not be operationally and financially sustainable for insurance or financial intermediaries. DORA's regulatory architecture is not adapted to the insurance distribution sector, and proportionate application of its numerous and detailed requirements will be difficult to ensure in practice (this will be further complicated by the Levels 2 and 3 measures). **For BIPAR and its members, insurance and financial intermediaries (and, in particular, SMEs) should, therefore, be completely exempted from DORA. This message has been relayed to MEPs, the Council and the Commission over the last year.**

■ EP and Council readings /Trilogue

In early 2022, following the adoption of their respective positions on the DORA proposal, the European Parliament and the Council of the EU, together with the Commission, started their negotiations (trilogue) to reach an agreement on the final text of the DORA Regulation. The negotiations took place under the French presidency of the Council (January-June 2022). During this time, BIPAR has been in contact with the EU legislators to explain its concerns and discuss its proposed amendments regarding the scope of DORA, and in particular the exclusion of micro and SMEs insurance intermediaries from it. At the beginning of May 2022, the EU co-legislators reached a political agreement on the final text of DORA, but further technical meetings are necessary before the final version of DORA is published.

MiCA (legislative proposal for a regulation on markets in crypto-assets)

Crypto-assets are defined as “a digital representation of value or rights, which may be transferred and stored electronically, using distributed ledger technology or similar technology” (Article 3.2, MiCA proposal). There are many different types of crypto-assets; a basic taxonomy distinguishes between:

- payment tokens (means of exchange or payment)
- investment tokens (have profit rights attached) and
- utility tokens (enable access to a specific product or service).

The majority of crypto-assets are not covered by EU financial regulation, while some Member States have put in place bespoke rules at national level for crypto-assets that fall outside current EU regulation. To address this gap which leads to regulatory fragmentation and distorts competition in the Single Market, in September 2020 the European Commission published a [legislative proposal for a regulation on markets in crypto-assets](#) (the so-called MiCA proposal).

Insurance undertakings have been explicitly excluded from the scope of MiCA (Article 2(3)), unlike **insurance intermediaries who are in the scope of the MiCA proposal** and who will need to comply with MiCA requirements when selling with advice unit-linked life insurance products with crypto-asset funds as underlying investments.

Moreover, according to the EIOPA paper on blockchain and smart contract in insurance, “*some innovative types of parametric insurance business models using smart contracts based on DLT or similar technology (e.g. crop insurance or flight delay insurance) could also potentially be considered as utility tokens, as well as other utility tokens (other than intra-group transactions) potentially offered by pension schemes or insurance intermediaries (e.g. gym voucher tokens). Moreover, decentralised insurance-like business models operating with DLT or similar technology such as some innovative types of peer-to-peer (P2P) insurance or those offering ‘protection’ to consumers by betting on the occurrence of a particular event (e.g. flight cancellation) could also potentially fall under the scope of MiCA*”.

The Commission’s proposal applies to persons that are engaged in the issuance of crypto-assets or provide

services related to crypto-assets, including advice on crypto-assets. Crypto-asset service providers that are authorised to provide advice on crypto-assets shall assess the compatibility of such crypto-assets with the needs of the clients and recommend them only when this is in the interest of the clients. They shall request information about the client or prospective client’s knowledge of, and experience in crypto-assets, objectives, financial situation including the ability to bear losses and a basic understanding of risks involved in purchasing crypto-assets. They shall warn clients that, due to their tradability, the value of crypto-assets may fluctuate and, where relevant, they shall inform clients that the crypto-assets or crypto-asset services may be inappropriate for them.

MiCA does not apply to crypto-assets that qualify as financial instruments under Article 4(1)(15) of MiFID II. Investment firms authorised under MiFID II do not have to be authorised as crypto-asset service providers where they only provide one or several crypto-asset services equivalent to the investment services and activities for which they are authorised under MiFID II, except when they provide custody and administration of crypto-assets.

The European Parliament and the Council of the EU have just started negotiations to reach an agreement on the final text of the MiCA proposed Regulation.

On the EP side, the ECON Report adopted in April 2022, amends in particular Article 73 on advice on crypto assets as follows: “*Crypto-asset service providers that are authorised to provide advice on crypto-assets or portfolio management of crypto shall not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by an issuer or any third party or a person acting on behalf of a third party in relation to the provision of the service to their clients.*” They “*shall in good time before providing advice on crypto-assets inform potential clients of the following:*

- (a) *whether the advice is provided on an independent basis;*
- (b) *whether the advice is based on a broad or on a more restricted analysis of different crypto-assets and, in particular, whether the range is limited to crypto-assets issued or offered by entities having close links with the crypto-asset service provider or any other legal or economic relationships, such as contractual relationships, that are so close as to pose a risk of impairing the independent basis of the advice provided.*

Crypto-asset service providers shall also provide potential clients with information on all costs and associated charges, including the cost of advice, where relevant, the cost of crypto-assets recommended or marketed to the client and how the client is permitted to pay for it, also encompassing any third-party payments."

On the Council side, the respective Council position adopted in November 2021 does not propose similar changes to the Commission proposal. Both EP and Council propose including in the scope of MiCA the portfolio management services for crypto-assets.

BIPAR will monitor the trilogue actively and, in particular, the discussions on advice on crypto-assets.

In May 2022, BIPAR contacted the people in charge of the trilogue on MiCA and expressed its concerns regarding the amendment proposed by the EP ECON Report in relation to Article 73 on "advice on crypto-assets". BIPAR explained that the proposed amendment introduces a remuneration ban in the case of advice and stated the reasons why we are not in favour of this ban. BIPAR also highlighted that the proposed ECON amendment is not consistent with the current IDD and MiFID II rules, which offer a choice between independent advice, with a consequent prohibition on receiving commissions, and advice that allows for payment via commissions. BIPAR called for the deletion of the ban.

A pilot regime for market infrastructures based on distributed ledger technology (DLT)

At the end of 2021/beginning of 2022, the **EP and the Council reached an agreement** on a pilot scheme based on distributed ledger technology (DLT). The **Commission's [proposal for a Regulation on "a pilot regime for market infrastructures based on distributed ledger technology"](#)** was part of the Commission's Digital Finance Strategy and was presented together with the proposal for MiCA (and the proposal for DORA).

The DLT pilot regime aims to help EU regulators and market participants to gain experience using distributed ledger technology (i.e. the technology used for the trading and settlement of "tokenised" financial instruments), while ensuring that they can deal with risks to investor protection, market integrity and financial stability. The DLT pilot regime follows the "sandbox" approach, allowing for temporary derogations from certain requirements under the EU's financial services legislation that could otherwise prevent them from developing solutions for the trading and settlement of transactions in crypto-assets that qualify as financial instruments.

The DLT pilot regime is likely to start applying at the beginning of 2023. ESMA will issue a non-binding opinion and make recommendations on the application of the exemptions requested.