

Pan-EU Markets in Cryptoassets (*MiCA*) Regulation

What is the status of the MiCA Regulation?

The MiCA Regulation is currently in draft form and is not law. The European Commission has consulted various stakeholders throughout the preparation of the Proposal and has relied on quantitative and qualitative evidence collected from recognised sources, including reports from the European Banking Authority (**EBA**) and the European Supervisory Market Authority (**ESMA**).

On current timing, it is expected that the MiCA Regulation will become law in or about 2024.

What is the MiCA Regulation replacing?

In short, not much. Subject to a couple of important exceptions (see below), there has to date been little to no regulation of the DLT sector as a matter of EU law. The lack of a pan-EU framework has meant that crypto-asset businesses in Europe have largely been left to be regulated by the whims of member state legislatures and national competent authorities. Some member states jumped quickly into the arena, though most have done little to licence or regulate the sector. The result of this has been a patchwork approach which, it could be argued, has not fostered any unified development of the markets involved.

As regards the important exceptions referred to the above, the most notable is the implementation of some crypto-asset services within the scope of “obliged entities” under the EUs’ Fifth Anti-Money Laundering Directive (**5AMLD**), for more on 5AMLD see our article [here](#).

What is a “crypto asset” under the new regime?

The regulation adopts past EBA analysis to define a crypto asset as a “digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology [DLT] or similar technology.” DLT for these purposes is “a type of technology that supports the distributed recording of encrypted data.”

There are three types of crypto assets under the MiCA Regulation:

- **Utility tokens:** intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token.
- **Asset-referenced tokens:** maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets.
- **Electronic money tokens:** a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender.

Are service providers in crypto-assets regulated?

Yes. Aside from entities issuing crypto-assets, the MiCA Regulation provides a licensing and supervisory framework for Crypto-Asset Service Providers (**CASPs**). CASPs are persons whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis.

A “crypto asset service” for these purposes includes:

- The custody and administration of crypto-assets on behalf of third parties
- The operation of a trading platform for crypto-assets
- The exchange of crypto-assets for fiat currency that is legal tender

- The exchange of crypto-assets for other crypto-assets
- The execution of orders for crypto-assets on behalf of third parties
- Placing of crypto-assets
- The reception and transmission of orders for crypto-assets on behalf of third parties
- Providing advice on crypto-assets

The CASP regime under the MiCA Regulation goes significantly further than the inclusion of similar terms under either the 5AMLD (see above) or even the Financial Action Task Force's (**FATF**) regime on virtual asset service providers (**VASPs**). This is likely to be an area of scrutiny in future as the EU regime may differ from other regime internationally, such as in the UK and offshore.

Equally interesting is that many of the terms of regulation for CASPs is similar, but not identical, to terms used under the Markets in Financial Instruments Directive (**MiFID**) such as "placing", "reception and transmission" and "providing advice".

As with MiFID firms, CASPs will be subject to a licensing requirement with national competent authorities (**NCAs**). Supervision and prudential oversight similar to those experienced by MiFID firms will apply to CASPs. Passporting is expected to become available and a stream-lined process should apply to MiFID firms and credit institutions already licensed under other single market regimes.

Are crypto issuers subject to regulation?

Yes. The MiCA Regulation dedicates a significant part of its content to the regulation of issuers of crypto assets. The rules are not dissimilar to rules on issuers of securities under the EU's Prospectus Directives: Issuers must have their prospectus (white-paper) authorised and comply with various standards of corporate governance taking a risk based approach. In many cases they will be subject to authorisation requirements as well.

- *Whitepaper publication:* The MiCA Regulation imposes an obligation on issuers to publish an information document (the **Whitepaper**) with mandatory disclosure requirements. The mandatory information to be disclosed includes a description of the key characteristics of the issuer of crypto-assets and a presentation of the main participants involved in the project's design and development, detailed description of the issuer's project, the reasons for the offering and a detailed description of the characteristics of the offering, as well as the rights and obligations attached to the crypto-assets, information on the underlying technology and standards met and relevant risks. Exemptions to this requirement apply small and medium-sized enterprises (**SMEs**).
- *Issuer standards of business and liability:* Issuers of crypto-assets must comply with the following rules of conduct:
 - To act honestly, fairly and professionally
 - To communicate with the holders of crypto-assets in a fair, clear and not misleading manner
 - To prevent, identify, manage and disclose any conflicts of interest that may arise
 - To have effective administrative arrangements
 - To maintain all of their systems and security access protocols to appropriate EU standards
- *Civil penalties:* Member states will be expected to need to implement laws providing for civil liability of issuers and their management bodies in respect of the *information* contained in the Whitepaper. Civil liability will attach to the issuer of crypto-assets or its management body on the basis of the summary contained in the Whitepaper, and any translations, where the summary is misleading, inaccurate or inconsistent when read together with the other parts of the Whitepaper; or does not provide, when read together with the other parts of the Whitepaper, key information in order to aid consumers and investors when considering whether to purchase such crypto-assets.
- *Special regimes for stablecoins:* The EU *has* highlighted the threat posed by globally dominant stablecoins such as Facebook's proposed Libra coin and it is therefore unsurprising that the MiCA Regulation dedicates significant regulation to:

- Issuers of **asset-referenced tokens (ARTs)** offered to the public within the EU, which will be subject to authorisation requirements by their NCAs, unless: the asset-referenced tokens are marketed and distributed exclusively to “qualified investors” and that can only be held by qualified investors; or where the average outstanding amount of asset-referenced tokens does not exceed EUR 5,000,000 over a period of 12 months, calculated daily. Rules are included on the conduct of issuers, capital requirements, governance arrangements, rules on assessment and conflicts of interest, provisions on stabilisation mechanisms and reserve of assets etc.
- Issuers of **electronic money tokens** offered to the public within the EU, or admitted to trading on a trading platform for crypto-assets which involve an issuer that is authorised as a credit institution or as an ‘electronic money institution’ within the meaning of the E-Money and complies with requirements applying to electronic money institutions set out in Directive 2009/110/EC, as well as publishes a Whitepaper notified to the competent authority. Holders of e-money must be provided with a claim on the issuer of such e-money tokens. Any e-money token that does not provide all holders with a claim is prohibited. Issuers of e-money tokens or crypto-asset service providers are prohibited from granting interests or any other benefit.
- ‘Significant’ stablecoins will be subject to supervision by a college of supervisors including the EBA and ESMA, with the meaning of significant being determined by the EBA.

What else is worth a mention?

It is hard to do justice to the MiCA Regulation in the space available here, but important aspects of the regime include the following:

- *Marketing restrictions:* Marketing communications relating to an offering of crypto-assets or the admission of such crypto-assets to trading on a trading platform for crypto-assets must satisfy certain criteria such as being clearly identifiable information that is fair, clear and not misleading, being consistent with the information contained in the whitepaper or containing a statement that a whitepaper has been published and indicate the address of the issuer’s website.
- *Prevention of market abuse:* Importantly, the Regulation sets out market abuse prohibitions and requirements, such as the disclosure of inside information, the prohibition of insider dealing and the prohibition of market manipulation.
- *Powers of competent authorities:* The powers to enable supervision by Member States’ competent authorities are clearly set out in the Regulation and include requests for information, the suspension of service providers, prohibitions on the provision of crypto-asset services and more.

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