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THE NEWLY INTRODUCED MARKETS IN CRYPTO-ASSETS (MiCA) REGULATION

In October 2022 the European Council approved the [Markets in Crypto-Assets \(MiCA\) Regulation](#) which marks one of the very first attempts in regulating crypto-asset-related activities.

The EU Parliament is expected to vote the MiCA bill in April 2023, a bill that forms part of a broader legislative program following the Digital Operational Resilience Act (DORA) and the DLT Pilot Regime Regulation which is set to come in force this month.

The regulation intends to close the gaps in existing EU financial services legislation by establishing a new set of rules for the prevention of market abuse while enhancing the current anti-money laundering regime which shall be adopted to the peculiarities of crypto markets, consumer protection, the accountability of crypto companies towards the consumer, as well as the market integrity in general.

MiCA is expected to start applying after a transitional period of 18 months; however, rules regulating stable-coins will start having effect after a transitional period of 12 months.

What is MiCA?

MiCA aims to promote sustainable and safe innovation in crypto-assets and underlying distributed ledger technology while addressing the risks that this new class of assets pose to investors, market integrity and financial stability. It regulates issuers of the current unregulated crypto-assets and providers of services in relation to such crypto-assets.

MiCA touches upon critical aspects of the Crypto industry that until now were considered grey areas including transparency, disclosure, authorisation and supervision of transactions emanating from crypto-assets, crypto related activities and more significantly the imposition of restrictions on the issuance and use of stable-coins.

Regulation applies to natural, legal persons and other undertakings and the activities and services performed, provided or controlled, directly or indirectly, by them, including when part of such activity or services is performed in a decentralized way.¹

¹ Recital 12(a) MiCA Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937



New definition of “crypto-assets”

MiCA imposes a new definition of “crypto-assets” naming them “a digital representation **of a value** or **a right** which may be transferred and stored electronically, using distributed ledger technology or similar technology”.²

The Regulation goes further introducing three sub-categories of crypto-assets by applying different requirements depending on how the crypto-assets stabilise their value and the risks they entail:

1. Electronic money tokens or e-money tokens (EMTs) are crypto-assets that purport to maintain a stable value by referencing to the value of one official currency.³ (like traditional e-money representing coins and bank notes usually used for payments).
2. Asset-referenced tokens (ARTs) aim to maintain a stable value by referencing to any other value or right or a combination thereof, including one or more official currencies⁴ (ARTs are usually backed by a pool of currencies, commodities or other crypto-assets).
3. All other crypto-assets, this category covers all crypto-assets which are not e-money tokens or asset-referenced tokens (this category includes the so called utility tokens/crypto-assets, which are only intended to provide access to goods or services attached to the tokens by the issuer of that token).⁵

MiCA provides for the classification of crypto-assets as significant. Crypto-assets that stabilise their value by referencing another asset or a pool of assets or a single official currency (ARTs or EMTs) may be categorised as significant.⁶

In particular, ARTs and EMTs are variants of “stablecoins” which under MiCA may be classified as significant by the European Banking Authority (EBA) by taking into consideration the number of holders, market capitalization, platform and gatekeeper status of their issuer or their interconnection with the financial system.

Once ARTs or EMTs are classified as significance, their issuers (Crypto Asset Service Providers - CASPs) will in most cases directly be supervised by EBA instead of their respective National Authorities, meaning that such issuers will be subject to more scrutiny and rigid rules as regards their minimum required capital, insurance, risk policies and supervision. CASPs who reach a threshold of 15 million active users within the EU on average in one calendar year, are automatically classified as significant.⁷

² Art. 3 (1) No. (2) MiCA

³ Art. 3 (1) No. (4) MiCA

⁴ Art. 3 (1) No. (3) MiCA

⁵ Art. 3 (1) No. (5) MiCA

⁶ Art. 39(6) MiCA

⁷ Art. 75 (a) MiCA



When is MiCA not applicable?

MiCA appears to be not applicable in certain instances:

1. MiCA does not apply to crypto-assets which are regulated under the existing MiFID II regime (security tokens or crypto-assets qualifying as financial instruments e.g. derivatives or contracts for difference-CFDs referencing crypto-assets, NFTs qualifying as securities).

MiCA ring-fences firms that mainly deal in crypto-assets, from those offering financial instruments. In this way, current MiFID firms are unlikely to be allowed to operate as both MiFID and MiCA firms. What this means for the offering of crypto CFDs remains unclear.

2. MiCA does not apply to crypto-assets which are “unique and not fungible with other crypto-assets”. That includes Non-Fungible Tokens (NFTs) or digital art and collectibles, whose value is attributable to each token’s unique characteristics and the utility it gives to the token holder”.⁸

The Regulation provides examples as to what “unique and non-fungible” means, but it is likely that NFTs in their pure form of digital art and collectibles, will not be caught within the meaning of crypto-assets.

However, NFTs that are issued in fractions (F-NFTs) or in large scales under a series of collection or may be considered fungible and thus covered by MiCA or MiFID II if qualified as financial instruments.

3. Crypto-asset services that are provided in a fully decentralized manner without any intermediary and crypto-assets without an identifiable issuer also do not fall within the scope of MiCA.⁹

The regulation does not capture Decentralized Finance (DeFi) and operations of Decentralized Autonomous Organizations (DAOs) as long as control of the operations is truly decentralized. Crypto-asset service providers (CASPs) providing services to DeFi or DAOs or to crypto-assets with no identifiable issuer are, however, fully covered.

Enforcement

Competent authorities designated by each Member State will have the responsibility to enforce the Regulation. The European Securities and Markets Authority (ESMA) and the European Banking Authority will be the supervising regulatory bodies at Union level.

Competent authorities will have the authority to impose administrative penalties and take relevant administrative measures in cases of violations, in addition to the existing criminal sanctions under domestic laws.

⁸ Art. 2 (2a) MiCA

⁹ Recital 12(a) MiCA Proposal for a Regulation of the European Parliament and of the Council on Markets in crypto-assets, and amending Directive (EU) 2019/1937



Authorisation/licensing

CASP authorisation is granted, refused or withdrawn by the competent authority of the Member State where the entity has its registered office. Such an authorisation should indicate the crypto-asset services for which the CASP is authorised and would be valid for the entire Union.¹⁰

A CASP is any person whose occupation or business is the provision of one or more of the below crypto-asset services to third parties on a professional basis¹¹ and must either be:

- A legal person or other undertaking that has been authorised to operate as a CASP,¹² have a registered office in a Member State of the Union where it carries out at least part of its crypto-assets services; have its place of effective management¹³ in the Union; and have at least one director resident in the EU.¹⁴ or
- A credit institution, central securities depository, investment firm, market operator, e-money institution, a management company of UCITS, or an alternative investment fund that is allowed and authorised to provide crypto-asset services.¹⁵

MiCA is applicable to all persons who are engaged in:

- primary market activities such as issuance - public offerings and access to secondary market listings; and/or
- the provision of crypto-related services:¹⁶
 - (a) the custody and administration of crypto-assets on behalf of third parties;
 - (b) the operation of a trading platform for crypto-assets;
 - (c) the exchange of crypto-assets for funds;
 - (d) the exchange of crypto-assets for other crypto-assets;
 - (e) the execution of orders for crypto-assets on behalf of third parties;
 - (f) placing of crypto-assets;

¹⁰ Recital 52 MiCA Proposal for a Regulation of the European Parliament and of the Council on Markets in crypto-assets, and amending Directive (EU) 2019/1937

¹¹ Art 3 (1) No. 8 MiCA

¹² Art. 55 MiCA

¹³ The place of effective management means the place where the key management and commercial decisions that are necessary for the conduct of business are taken.

¹⁴ Recital 50 MiCA Proposal for a Regulation of the European Parliament and of the Council on Markets in crypto-assets, and amending Directive (EU) 2019/1937

¹⁵ Art.53 (a) MiCA

¹⁶ Art. 3 (1) No. (9) MiCA



- (fa) providing transfer services for crypto-assets on behalf of third parties;
- (g) the reception and transmission of orders for crypto-assets on behalf of third parties;
- (h) providing advice on crypto-assets;
- (hb) providing portfolio management on crypto-assets;

The penalty for providing such services without authorization is a fine of at least EUR 5,000,000 or 5% of the total annual turnover of that legal person.¹⁷

Third-country providers and Reverse Solicitation

It is crucial to mention that MiCA should not affect the possibility for persons established in the Union to receive crypto-asset services by a third-country firm at their "own initiative".

"Own initiative" or "exclusive initiative" generally means that there must be no solicitation on the part of the third-country service provider which also cannot market new or different products that are not requested by the customer.

Where a client established or situated in the Union initiates at its own exclusive initiative the provision of a crypto-asset service or activity by a third- country firm, the requirement for authorisation under Article 53 shall not apply¹⁸ and such services should not be deemed as provided in the Union.¹⁹

ESMA is bound to (18 months after date of entry into force) issue guidelines on when third-country service providers are deemed to have solicited clients established or situated in the Union.²⁰ ESMA has traditionally interpreted reverse solicitation narrowly and in order to foster convergence and promote consistent supervision with regard to the risk of exploitation of the "own initiative" provisions from third-country providers, will also issue guidelines on supervision practices to detect and prevent unauthorised client solicitations.

Key regulatory provisions

Whitepaper

Any entity - whether an individual or a financial institution - offering crypto- assets to the public or admit crypto-assets to a trading platform must draft a white paper in respect of those crypto-assets containing mandatory disclosures and other information.

¹⁷ Art. 92 (3)(i)(iii) MiCA

¹⁸ Art.53b(1) MiCA

¹⁹ Recital 51 MiCA Proposal for a Regulation of the European Parliament and of the Council on Markets in crypto-assets, and amending Directive (EU) 2019/1937

²⁰ Art.53b(3) MiCA



Market Abuse

MiCA imposes a duty on issuers, offerors and persons seeking admission to trading to disclose inside information and prohibitions of insider dealing, unlawful disclosure of inside information and market manipulation as well as rules for the prevention and detection of market abuse.

CASP – Client Agreement

Under Article 67 of the Regulation CASPs that provide custody and administration services on behalf of third parties will be required to enter into an agreement with their clients specifying their duties and responsibilities.²¹

Liability for cyber-attacks, theft and malfunctions

CASPs that are authorised for the custody and administration of crypto-assets on behalf of third parties shall be liable to their clients for the loss of any crypto-assets or of the means of access to the crypto-assets; as a result of an incident that is attributable to the provision of the relevant service or the operation of the service provider.²²

Register of positions

CASPs that provide a crypto-asset service of custody and administration on behalf of third parties will also be required to keep a register of positions, opened in the name of each client, corresponding to each client's rights to the crypto-asset. Such CASPs must also, at least once every three months or upon request by a client, provide to each client a statement of position of the crypto-assets recorded in the name of that client.²³

Governance arrangements

MiCA will require issuers of asset-referenced tokens to maintain robust governance arrangements including a clear organisational structure with well-defined, transparent and consistent lines of responsibility, effective processes to identify, manage, monitor and report the risks to which the issuer is or might be exposed and have strong internal controls and risk assessment mechanisms.²⁴

Segregated DLT addresses

Crypto-asset service providers that are authorised for the custody and administration of crypto-assets on behalf of third parties shall segregate holdings of crypto-assets on behalf of their clients from their own holdings and ensure that the means of access to crypto-assets of their clients are clearly identified as such.

²¹ Art.67 (1) MiCA

²² Art.67 (8) MiCA

²³ Art. 67 (2) MiCA

²⁴ Art. 30 (1)(2) MiCA



They shall ensure that, on the DLT, their clients' crypto-assets are held on separate addresses from those on which their own crypto-assets are held.²⁵

Principal adverse environmental and climate impact

Crypto-asset service providers must publish, in a prominent place on their website, information related to principal adverse environmental and climate-related impact of the consensus mechanisms used to issue each crypto-asset in relation to which they provide services as well as the mechanisms used for the validation of the transactions.²⁶

As regard to crypto-assets issuers, the white paper also imposes requirements for disclosure of information on principal adverse environmental and climate related impact of the consensus mechanism.²⁷

Conclusion

While some crypto enthusiasts may well view the regulation of crypto-assets with a degree of skepticism, it goes without saying that such regulation comes with a number of advantages.

MiCA will undoubtedly increase the market's overall demand for crypto related products while making crypto-assets more attractive, safe and readily available to a broader range of consumers.

Whilst MiCA implementation is months ahead and the flow of consumers is expected to grow, it makes sense for any entity already active in the crypto industry or looking to overcome the barrier to enter the industry, to be well-advised and properly structured, not least to be compliant by the end of the transitional period, but mostly to avoid heavy administrative penalties and prevent mistakes that happened in the past (the collapse of the crypto exchange and derivatives platform, FTX).

MiCA imposes a new significant set of rules that will ultimately alter the industry's current status quo. The nature of the regulation is such that lot of technical aspects, implications and requirements need to be taken into consideration thus, professional guidance is always recommended.

The purpose of this legal briefing is to provide a general guideline on the subject and not to be considered, in any way, as legal advice. It is advisable to seek professional and legal advice on this subject before proceeding with any general information provided to you. For further clarifications and advice please contact us at legal@economideslegal.com.

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²⁵ Art.67 (7) MiCA

²⁶ Art 59(4a) MiCA

²⁷ Art 5(1)(g) MiCA