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**EU CRYPTO
REGULATION: MICAR
OVERVIEW FOR
ISSUERS AND
CRYPTO-ASSET
SERVICE PROVIDERS**



— THOUGHT LEADERSHIP

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EU CRYPTO REGULATION: MICAR OVERVIEW FOR ISSUERS AND CRYPTO-ASSET SERVICE PROVIDERS

The EU's Markets in Crypto-assets Regulation (MiCAR) introduces an EU regulatory framework for the issuance of, intermediating and dealing in crypto-assets. Parts of MiCAR impacting the issuance, offering and admission to trading of stablecoins entered into force at the end of June 2024, while equivalent provisions for other crypto-assets, new licensing and conduct of business requirements for cryptoasset service providers, and a market abuse regime with respect to crypto-assets will apply from the end of the year.

We look at what issuers of stablecoins and other crypto-assets, custodians and other crypto-asset service providers need to know now.

Overview

MiCAR creates a broad regulatory framework for crypto-assets in the EU which:

- regulates the issuance of, and admission to trading of, crypto-assets, including transparency and disclosure requirements;
- introduces licensing of crypto-asset service providers and issuers of asset-referenced tokens and electronic money tokens;
- clarifies the regulatory obligations applicable to issuers of asset-referenced tokens and electronic money tokens, and crypto-asset service providers, including consumer protection rules for the issuance, trading, exchange and custody of crypto-assets;
- strengthens confidence in crypto-asset markets by creating a market abuse regime prohibiting market manipulation and insider dealing; and
- clarifies the powers, including the co-operation and sanctions framework, available to competent authorities.

The requirements under MiCAR are broadly similar to requirements under the existing EU financial services regimes, including requirements relating to disclosures, governance and licensing. However, as there are nuances between MiCAR and the existing regime, firms engaging in crypto-asset activities will need to consider whether they will fall under the MiCAR definition of "crypto-assets" or whether they are subject to another regulation, to ensure that they adhere to the appropriate regulation, in particular for transferable securities which may constitute a financial instrument falling under the Markets in Financial Instruments Directive II (MiFID II) as further discussed below.

MiCAR is part of the European Commission's wider digital finance strategy, which also includes a Regulation on digital operational resilience (DORA) – which will also apply to crypto-asset service providers when it takes effect in January 2025 – and the Regulation on a distributed ledger technology (DLT) pilot regime focused on financial market infrastructures based on DLT which opened to applications in March 2023.

Who does MiCAR apply to?

Broadly, MiCAR applies to three categories of persons:

1. **those issuing and offering crypto-assets.** The issuer of a crypto-asset is the "natural or legal person, or other undertaking, who issues crypto-assets". Subject to compliance with the relevant conditions, it will be possible for persons other than the issuer to make offers of crypto-assets to the public or seek the admission of such crypto-assets to a trading platform. The framework that applies will depend on what type of crypto-asset is being offered;
2. **crypto-asset service providers (CASPs).** This includes any person whose occupation or business is the provision of one or more crypto-asset services to clients on a professional basis that is permitted to do so under MiCAR; and
3. any person concerning crypto-assets that are admitted to trading or in respect of which a request for admission to trading has been made.

What types of crypto-assets are in scope of MiCAR?

MiCAR applies with respect to "crypto-assets", which are defined very broadly as "a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology". This definition is deliberately wide, aimed at capturing not only cryptocurrencies, such as Bitcoin and Ethereum, but also stablecoins and utility tokens.

What is not covered by MiCAR?

MiCAR does not apply to security tokens which would qualify as transferable securities and other crypto-assets that qualify as financial instruments for the purposes of MiFID II, deposits, securitisation positions, insurance or pension products.

DeFi protocols and truly "unique" non-fungible tokens (NFTs) are largely outside the current scope of MiCAR. However, there is a review clause included in MiCAR that could lead to

specific regulatory regimes being introduced for them at a later date, if needed. The Commission is due to report setting out its position on this by 30 December 2024.

Unique NFTs are excluded unless they replicate a financial instrument or where the issuer creates a "collection" of assets for purchase. The idea behind the latter is to allow artists and firms to create individual digital assets without being buried in regulatory paperwork. Companies behind NFT collections, however, will have to provide a white paper that explains what their product is and how they operate on the blockchain.

MiCAR does not apply to the ECB and central banks of the Member States when acting in their capacity as monetary authorities, i.e. it would not apply to central bank digital currencies (CBDCs) issued by, or to services related to crypto-assets that are provided by, such entities.

My firm could be an issuer of crypto-assets. What does MiCAR mean for me?

MiCAR creates a base regime for all issuers of crypto-assets and imposes additional, or different, obligations on (i) issuers of asset-referenced tokens or (ii) issuers of e-money tokens.

Base regime

An issuer of crypto-assets will have to be incorporated as a legal entity in the EU and will be required to publish a white paper in respect of the relevant crypto-assets and to notify such white paper to its competent authority. The white paper regime under MiCAR borrows heavily from the existing Prospectus Regulation regime.

The white paper should, amongst other things:

- describe the crypto project and the main participants;
- describe the type of blockchain consensus mechanism used, e.g., proof of work (PoW) or proof of stake (PoS);
- describe the terms of the offer to the public;

MiCAR broadly applies to the following categories of crypto-assets:

Asset-referenced tokens (ARTs) are defined as a type of crypto-asset that is not an e-money token and that purports to maintain a stable value by referring to another value or right or a combination thereof, including one or more official currencies.

E-money tokens (EMTs) are defined as a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency. E-money tokens which maintain the value of a fiat currency of the Union shall be deemed to be e-money as defined in the E-money Directive.

Other crypto-assets – all crypto-assets which are not ARTs or EMTs, which may include tokens that are described as "stablecoins" but which are controlled by algorithms or other types of stabilisation mechanism.

Different rules apply for each category of crypto-asset.

- set out the rights attaching to the crypto-assets in question;
- disclose the key risks associated with the crypto-assets; and
- contain a summary,

to help potential purchasers make an informed decision regarding their investment.

Although a white paper does not need to be approved prior to publication for crypto-assets other than asset-referenced tokens, the relevant competent authority may require amendments to the white paper or suspend the offer or trading of the crypto-assets. It is essential that firms ensure that their white paper adequately covers the content required under MiCAR.

Issuers will also have to consider whether any additional EU or domestic regulatory frameworks apply in parallel, for example in relation to registration under any implementation of the EU anti-money laundering Directive (AMLDV).

What requirements apply to stablecoin issuers?

Issuers of asset-referenced tokens and e-money tokens are subject to additional regulatory requirements under MiCAR.

Issuers of asset-referenced tokens (ARTs)

Location and licensing requirements

To offer ARTs to the public in the EU or be admitted to trading on a crypto platform, an issuer of ARTs must be established **and** authorised (licensed) in the EU.

Systems and controls

An issuer of ARTs is also required to put in place "robust governance arrangements...with well-defined, transparent and consistent lines of responsibility" in order to, amongst other things, "identify, manage, monitor and report the risks to which [it is] or might be exposed". Issuers of ARTs are also required to maintain a recovery plan providing for measures to be taken by the issuer to restore compliance with the requirements applicable to the reserve of assets. Reserve assets must be held in custody on certain prescribed terms and can only be invested in highly liquid

financial instruments, or held as deposits with credit institutions.

There are also detailed requirements in respect of treating customers fairly, ongoing disclosure, complaint handling, governance, and systems and controls, as well as prudential requirements.

Exemptions

The regime envisages certain partial exemptions depending on the type of offer (e.g., to qualified investors) or if the issuer is already regulated (e.g., as an EU credit institution).

Issuers of e-money tokens (EMTs)

Permitted issuers / authorisation

The issuance of EMTs is only permitted for EU credit institutions and for electronic money institutions (authorised under the E-money Directive).

Token/investment requirements

EMTs must amount to a claim on the issuer and be redeemable at par. Funds received by issuers of EMTs in exchange for EMTs, if invested, must be invested in assets denominated in the same currency as that referenced by the EMT.

Significant stablecoins

MiCAR imposes additional rules for regulation of "significant" ARTs and EMTs, including in relation to liquidity maintenance, recovery, redemption planning and remuneration.

In relation to remuneration, on 6 June 2024, the EBA published final draft regulatory technical standards (RTS) on minimum governance and remuneration requirements for issuers of "significant" ARTs and EMTs, and Member States can extend these requirements to non-significant issuers of EMTs. The requirements are similar in approach to those that currently exist under other EU regulatory remuneration regimes. Broadly, the RTS establishes a framework for the governance of remuneration, structure of remuneration policies, identification of material risk takers, and prescribes detailed payout process rules for the variable pay of material risk takers (but does not set a bonus cap).

Competent authorities will also be granted MiFID-like product intervention powers and a separate empowerment to require an issuer of an ART widely used as a medium of exchange, or of an EMT

denominated in a non-EU currency, to introduce a minimum denomination or to limit the amount issued in order to decrease the use of such tokens.

The limits on use of USD-pegged stablecoins under MiCAR were subject to debate amongst EU co-legislators and this position appears to be driven by a desire to avoid USD-pegged stablecoins becoming a global reference currency for crypto-assets. Indeed, the thresholds set for the daily number and value of transactions for ARTs when used as a means of exchange within a single currency area (1 million transactions and EUR 200 million, respectively) are not high in the context of USD-denominated stablecoins currently used in the market.

My firm provides crypto-asset services. Does it need to be licensed?

Generally, yes - the provision of any crypto-asset service will trigger an authorisation requirement.

However, authorised credit institutions and authorised MiFID investment firms may provide crypto-asset related services without having to obtain a separate authorisation. Note that these firms would still need to notify their competent authorities that they intend to provide services under MiCAR and would also have to comply with the relevant supervisory framework imposed under MiCAR, including conduct of business obligations and governance arrangements, which may vary from existing applicable standards.

What requirements apply to crypto-asset service providers (CASPs)?

Legal form and governance requirements

A CASP should be a legal person who has a registered office in a member state and has been authorised by the relevant competent authority. A CASP will have to comply with detailed requirements in respect of its governance arrangements and risk management, including systems and controls requirements. CASPs are required to monitor and disclose conflicts of interest and have in place internal 'know your customer' policies.

Disclosure and prudential requirements

CASPs will be subject to various disclosure requirements, including on

services and pricing and what type of blockchain consensus mechanism they use, e.g., PoW or PoS. CASPs should maintain prudential safeguards, either in the form of own funds regulatory capital or by taking out insurance.

Activity-specific requirements

MiCAR provides details on the terms on which various crypto-asset services are to be provided, including, for example, the custody and administration of crypto-assets on behalf of third parties, the operation of trading platforms for crypto-assets, the placing and execution of orders for crypto-assets on behalf of clients, and the provision of advice on crypto-assets.

Firms will need to undertake a detailed review of the requirements they are subject to under MiCAR which relate to the particular crypto-asset service they provide.

Jurisdictional scope

MiCAR does not provide for a separate third country regime. This means that persons located in a non-EU jurisdiction and wishing to actively promote and/or advertise their services to clients in the EU will have to obtain full authorisation (as illustrated in the practical examples below). One of the requirements for becoming licensed as a CASP under MiCAR is that the CASP has a registered office in an EU member state where they carry out at least part of their crypto-asset services. They must also have an effective place of management in the EU and at least one director shall be EU resident.

My firm provides crypto custody services – is it liable for losses?

MiCAR introduces specific liability requirements for custodians of crypto-assets in relation to losses, in contrast to the position under existing legislation for more traditional assets, where liability for loss is not generally imposed.

A custodian holding reserve assets for an issuer of ARTs must, if financial instruments or crypto-assets are lost, return identical assets or their value to the issuer without undue delay, unless it can prove the loss arose from an external event beyond its reasonable control, the consequences of which were unavoidable despite all reasonable efforts to the contrary. This resembles depositary liability wording in AIFMD and UCITS V,

Crypto-asset service means any of the services and activities listed below relating to any crypto-asset:

- (a) providing custody and administration of crypto-assets on behalf of clients;
- (b) operation of a trading platform for crypto-assets;
- (c) exchange of crypto-assets for funds;
- (d) exchange of crypto-assets for other crypto-assets;
- (e) execution of orders for crypto-assets on behalf of clients;
- (f) placing of crypto-assets;
- (g) reception and transmission of orders for crypto-assets on behalf of clients;
- (h) providing advice on crypto-assets;
- (i) providing portfolio management on crypto-assets; and
- (j) providing transfer services for crypto-assets on behalf of clients.

Significant stablecoins

To be classified as **significant**, an ART or EMT must meet at least three of these requirements:

- (a) Have more than 10 million holders.
- (b) Market capitalisation or size of reserve assets higher than EUR 5,000,000,000.
- (c) Average number of transactions per day is higher than 2.5 million and average aggregate value of transactions is higher than EUR 500,000,000.
- (d) Issuer is a provider of core platform services designated as a gatekeeper in accordance with the Digital Markets Act.
- (e) Significance of activities of the issuer on an international scale, including use for payments and remittances.
- (f) Interconnectedness of the ART or EMT or its issuer with the financial system.
- (g) Issuer issues at least one additional ART or EMT, and provides at least one crypto-asset service.

Applicant issuers may also voluntarily request that their ART or EMT be classified as significant.

suggesting that ARTs are viewed as similar to funds.

A custodian will also be liable for loss of crypto-assets (or means of access) resulting from an incident attributable to them, capped at the market value of the crypto-assets lost, at the time the loss occurred.

Note, "providing custody and administration of crypto-assets on behalf of clients" is defined as "safekeeping or controlling, on behalf of clients, crypto-assets or of the means of access to such crypto-assets, where applicable in the form of private cryptographic keys". The inclusion of "controlling" makes this much wider than normal definitions of custody.

Custodians providing or considering providing crypto custody services in the EU should carefully consider their risk appetite in relation to these liabilities and the broad definition of custody, and ensure that they have robust systems and controls in place as well as appropriate insurance to mitigate the effect of such rules.

How does supervision work under MiCAR?

Competent Authorities (CAs) at member state level will be responsible for supervising CASPs and enforcing requirements under MiCAR.

CASPs that have more than 15 million active users will be classified as "significant" CASPs. Significant CASPs will remain supervised by the relevant CA(s), but the European Securities and Markets Authority (ESMA) will have an "intervention power" to prohibit or restrict the provision of crypto-asset services by CASPs if there are threats to market integrity, investor protection or financial stability. Additionally, ESMA will be able to issue opinions on how to promote supervisory convergence; ESMA already has these powers for the wider financial market.

The European Banking Authority will supervise "significant" ARTs and EMTs. The European Central Bank will also have veto rights in respect of any stablecoin in relation to which it has concerns. Stablecoin issuers will be obliged to maintain reserves 1:1 to cover all claims and provide permanent redemption rights

to holders. Reserves will need to be structured to be protected in the event of insolvency.

ESMA will be empowered to take "precautionary measures" to effectively operate a crypto blacklist in which it can name and warn investors of any crypto-asset issuer or CASP that fails to comply with the requirements in MiCAR. For example, any company that refuses to register in an EU member state or that purposely avoids having to register by operating outside legal structures might be included in such blacklist.

Do market abuse restrictions apply?

As a new type of asset class, crypto-assets that do not qualify as financial instruments under MiFID II fall outside the scope of the EU Market Abuse Regulation (MAR). However, MiCAR sets out new market abuse rules for crypto-asset markets to guarantee market integrity. These rules apply to any person concerning crypto-assets that are admitted to trading or in respect of which a request for admission to trading has been made. They notably include requirements relating to the disclosure of inside information, the prohibition of insider dealing, the prohibition of unlawful disclosure of inside information and the prohibition of market manipulation.

When and how does MiCAR apply?

MiCAR was published in the Official Journal on 31 May 2023, and takes effect in two parts. Provisions in relation to ARTs and EMTs have been in force since 30 June 2024, although some of the detail is set out in delegated regulations which remain to be adopted in the coming months. The remaining provisions under MiCAR, including requirements in relation to the issuance of other crypto-assets and obligations in relation to CASPs that introduce licensing requirements, will enter into force on 30 December 2024.

For firms already providing crypto-asset services in accordance with national laws in the EU when CASP provisions start to apply, there are grandfathering / transitional provisions which will give firms

more time to become authorised under MiCAR. For example, existing CASPs may continue to provide their services in accordance with national law for an additional 18 months after MiCAR comes into effect. In some cases, such firms may also benefit from a simplified authorisation procedure.

Additional technical guidance will be finalised and adopted throughout 2024 and there is also scope for MiCAR to be extended in the future. For example, as outlined above, MiCAR includes a provision for EU authorities to review its application in relation to DeFi and NFTs that could lead to specific regulatory regimes being introduced for them. The Commission is due to report setting out its position on this by 30 December 2024.

What should my firm be doing now to comply with MiCAR?

My firm is already authorised as a financial institution

Firms that are already authorised will not generally need to seek another authorisation under MiCAR, provided that they meet certain disclosure requirements, including a requirement to notify their competent authorities of the services they intend to provide with respect to crypto-assets. However, requirements under MiCAR are nuanced from equivalent requirements under MiFID and other existing legislation so such firms must still undertake a detailed analysis of their crypto activities to see what is caught by MiCAR vs other existing legislation, and to consider where changes to existing policies are needed or additional requirements might apply accordingly, e.g., location-based requirements for issuers of ARTs.

My firm issues ARTs within the EU and is not currently authorised

Since 30 June 2024, issuers of ARTs must be both established and authorised within the EU. Non-EU firms that wish to continue issuing ARTs in the EU should seek legal advice and act now to establish an undertaking in an appropriate member state and secure the relevant authorisation given the time that such processes can take.

My firm is based in the EU and currently provides crypto-asset services but is not currently authorised

Firms should undertake a detailed analysis of the extent to which their activities are caught by MiCAR and what restrictions will apply and consider whether seeking an authorisation in their home or any other appropriate member state ahead of CASP provisions under MiCAR taking effect would be worthwhile to benefit from the transitional arrangements. Firms that wish to do so must act swiftly as authorisations can take many months to secure.

My firm currently provides crypto-asset services into the EU but is based outside the EU

MiCAR does not provide for a separate third country regime, so non-EU firms will have to obtain full authorisation to offer services within the EU. Firms should undertake a detailed analysis of the extent to which their activities are caught by MiCAR and what restrictions will apply and consider whether seeking an authorisation in an appropriate member state ahead of CASP provisions under MiCAR taking effect would be worthwhile to benefit from the transitional arrangements. Firms that wish to do so must act swiftly as authorisations can take many months to secure.

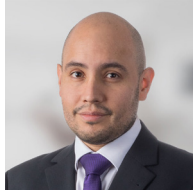
For more detail on the obligations for issuers of stablecoins and other crypto-assets, see **what does MiCAR mean for issuing and offering stablecoins and other crypto-assets?**



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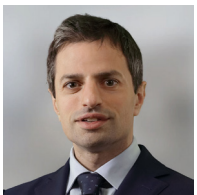
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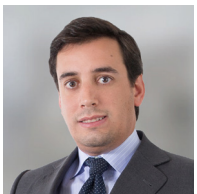
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