

The Distributed Ledger

Blockchain, Digital Assets and Smart Contracts

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Azad Ali

Of Counsel / London
44.20.7519.7034
azad.ali@skadden.com

Pietro Piazzi

Trainee Solicitor / London
44.20.7519.7637
pietro.piazzi@skadden.com

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One Manhattan West
New York, NY 10001
212.735.3000

40 Bank St., Canary Wharf
London, E14 5DS, UK
44.20.7519.7000

EU's Proposed Legislation Regulating Cryptoassets, MiCA, Heralds New Era of Regulatory Scrutiny

The European Union's proposed Markets in Cryptoassets (MiCA) regulation,¹ which includes new regulations for the classification, issuance and admission to trading of cryptoassets, as well as for the provision of services on crypto markets, is heading towards the final stages of its legislative approval process. On 5 October 2022, the Council of the European Union (the Council) confirmed its intention to approve the draft legislative package, which includes MiCA, assuming the European Parliament adopts the draft package at first reading. The latest agreed text of MiCA was published by the Council on 30 September 2022, following substantial negotiations between the EU's three legislative institutions, *i.e.*, the Council, the Parliament and the European Commission (the Commission).

The Council's announcement gives the Parliament a clear indication of the Council's position regarding MiCA's final compromise text. The Council, however, will only be able to formally approve MiCA once the Parliament has delivered its opinion following its first reading of the draft regulation.

MiCA is a landmark piece of legislation that heralds a new era of regulatory scrutiny of crypto markets. It provides a substantial degree of the regulatory clarity that the crypto industry has long sought, which is particularly relevant given the recent bankruptcy filings in the crypto sector. Lawmakers around the world may look to MiCA as a basis for their own legislative efforts to regulate crypto markets.

Legislative background

MiCA sets out to create a harmonised legal framework across the EU and to fill the gap in existing EU financial services legislation whose scope has proven to be inadequate to address crypto activities, notwithstanding efforts in some EU jurisdictions to extend existing legislative frameworks to cover crypto activities and services. Currently, tokenised securities, or security tokens, are the only form of cryptoassets capable of being classified as financial instruments under MiFID II,² the EU's principal legislation on financial markets, products and services, but most other cryptoassets are not easily captured under existing financial services regulatory frameworks.

¹ 2020/0265 (COD) / COM(2020) 593, final proposal for a regulation on markets in cryptoassets.

² Directive 2014/65/EU on markets in financial instruments.

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MiCA was first proposed by the Commission in September 2020 in the context of its Digital Finance Strategy, which aims to develop several legislative measures intended to support and regulate the digital transformation of the EU financial landscape. MiCA was introduced as part of a wider legislative package that included a proposal for a distributed ledger technology (DLT) pilot regime.³

Scope of MiCA

MiCA will not apply to cryptoassets that fall within existing financial services legislative frameworks, specifically those governing activities and services relating to “financial instruments” (which are covered under MiFID II), deposits or structured deposits, funds that would be captured under the Second Payment Services Directive,⁴ securitisation positions, or insurance and pension products. MiCA would, however, apply to “e-money” tokens, discussed further below, which will be required to be issued by e-money institutions or credit institutions (banking institutions) and which would therefore be regulated under both the EU’s e-money and banking regulatory frameworks, respectively, as well as MiCA.

The regulation adopts a substance-over-form approach in relation to NFTs. Unique and non-fungible tokens, including digital art and collectibles, are excluded from MiCA, but where these tokens are issued in a large series or divided into fractional parts, they can be deemed to be fungible and fall within the scope of MiCA or even count as a “financial instrument” and trigger the application of MiFID II.

Other cryptoassets falling outside the scope of MiCA include digital currencies issued by central banks (CBDCs) or by other public international organisations (such as the International Monetary Fund), and cryptoassets subject to blockchain loyalty programmes. Where a cryptoasset has no identifiable issuer, MiCA only sets out rules governing providers of services relating to such cryptoassets and subjects them to market misconduct rules.

MiCA does not extend to decentralised finance institutions (De-Fi), which provide peer-to-peer financial transactions services through platforms based on DLT, so long as their services are provided in a fully decentralised manner and without the involvement of any intermediary. MiCA provides no further elaboration of what “fully decentralised” means in this context.

³ Regulation (EU) 2022/858 on a pilot regime for market infrastructures based on distributed ledger technology. This regime, which will take effect on 23 March 2023, will create a safe environment (a “regulatory sandbox”) where financial institutions and other MiFID-regulated firms may trade and settle transactions in tokenised securities using DLT without having to comply with certain regulations under MiFID II.

⁴ Directive (EU) 2015/2366 on payment services in the internal market.

Many of MiCA’s provisions are based on concepts familiar from other existing EU financial services legislation, including MiFID,⁵ the Second Electronic Money Directive (EMD2),⁶ the Capital Requirements Directive⁷ (covering banking activity) and the Market Abuse Regulation⁸ (which sets out prohibitions against market misconduct such as insider dealing and market manipulation).

Classification of cryptoassets under MiCA

Cryptoassets are defined in MiCA as a digital representation of a value or a right that may be transferred and stored electronically using DLT or similar technology. DLT is defined as a technology that enables the operation and use of distributed ledgers, *i.e.*, information repositories that keeps records of transactions and that are shared across, and synchronised between, a set of DLT network nodes using a consensus or validation mechanism.

MiCA classifies cryptoassets under three categories:

- **E-money tokens (EMTs):** a type of exchangeable cryptoassets that purport to maintain a stable value (commonly known as “stablecoins”) by referencing the value of a single fiat currency;
- **Asset-referenced tokens (ARTs):** stablecoins that are not otherwise classified as e-money tokens, and which purport to maintain a stable value by referencing any value, right or asset class or a combination thereof, including one or more official currencies; and
- **Other cryptoassets:** a catch-all that includes all other cryptoassets that do not fall within the two categories above, including utility tokens, which are defined as cryptoassets that are only intended to provide access to a good or a service supplied by the issuer of the token.

Certain requirements apply only to the third category, whilst stablecoins that are EMTs or ARTs are subject to a specific and enhanced set of requirements. Any other type of stablecoin, such as algorithmic stablecoins, would not be permissible under the MiCA regime as they would have to conform to requirements governing EMTs or ARTs.

Classification of cryptoasset services under MiCA

MiCA establishes a regulatory framework for the provision of services in relation to cryptoassets. The framework for cryptoasset service providers (CASPs) has been largely carried over from

⁵ Directive 2004/39/EC on markets in financial instruments.

⁶ Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (the “e-money directive” or “EMD”).

⁷ Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (the “Capital Requirements Directive” or “CRD”).

⁸ Regulation (EU) No 596/2014 on market abuse (the “Market Abuse Regulation” or “MAR”).

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the provisions governing broker-dealer and related activities in MiFID II. As such, the description of services regulated by MiCA closely mirror the MiFID II framework.

MiCA specifically classifies and regulates eight services in relation to cryptoassets. These are:

- **Custody and administration of cryptoassets:** the safekeeping or controlling of cryptoassets (or of their private cryptographic key, where applicable) on behalf of third parties;
- **Operation of a trading platform for cryptoassets:** the management of one or more multilateral systems;⁹
- **Exchange of cryptoassets for funds:** the purchase or sale of cryptoassets in exchange for fiat currencies (as opposed to other cryptoassets);
- **Exchange of cryptoassets for other cryptoassets:** the purchase or sale of cryptoassets in exchange for other cryptoassets (as opposed to fiat currencies);
- **Execution of orders for cryptoassets:** brokerage or other intermediary services, such as entering into an agreement to buy or to sell cryptoassets on behalf of third parties, or agreeing to sell cryptoassets at the time of their issuance;
- **Placing of cryptoassets:** marketing, on behalf of the offeror or an issuer, of cryptoassets to purchasers;
- **Reception and transmission of orders on behalf of third parties:** the reception of an order from a person to buy or sell cryptoassets, and the transmission of that order to a third party for execution;
- **Advice on, and portfolio management of, cryptoassets:** the management of investment portfolios including cryptoassets, in accordance with mandates agreed with clients; and
- **Providing transfer services for cryptoassets:** the transfer of cryptoassets from one DLT address or account to another.

EU member states may have divergent approaches in their interpretation of the scope of such activities. Similar divergences have arisen under the MiFID regime. For instance, some jurisdictions have adopted a narrow, literal approach to the notion of “reception and transmission of orders” whereas other jurisdictions extended the remit of this activity to include arranging or brokering activities as well. These interpretational challenges may also be carried over to MiCA.

⁹ A multilateral system is one that brings together or facilitates the bringing together of multiple third-party buying and selling interests for cryptoassets in the system and in accordance with its rules in a way that results in a contract, either by exchanging one cryptoasset for another or for funds.

Requirements for CASPs

Authorisation

CASPs must be authorised in an EU member state in order to carry out a cryptoasset service. To be authorised, a CASP must have a registered office in the EU and their management must effectively take place in the EU. At least one of the CASP directors must be resident in the EU.

CASPs are exempt from the requirement to be authorised in two circumstances. The first is when a CASP is already regulated under existing EU legislation as a credit institution, an investment firm, a market operator, an e-money institution, a management company of a collective investment scheme or an alternative investment fund manager. These CASPs must notify their authorising regulator at least 40 working days before providing a cryptoasset service for the first time. These institutions will have a limit on the scope of the services they may carry out without authorisation, which will mirror the scope of services they are primarily authorised for under their respective governing legislation.

The second exemption is a “reverse solicitation-based” one available to CASPs based outside the EU whose provision of cryptoasset services takes place at the exclusive initiative of a client established in the EU. The European Securities and Markets Authority (ESMA) will clarify this exemption through specific guidelines that will set out the communications of a non-EU CASP that may be permissible or restricted.

Common with other EU-regulated financial institutions, a CASP in one EU member state will be able to carry out services throughout the entire EU under a “passport” mechanism, which is a significant benefit to authorisation as a CASP, as it obviates the need to navigate exemptions across individual EU member states and divergent national interpretations on the scope of MiCA.

General obligations

CASPs are subject to a general duty to act honestly, fairly and professionally in accordance with the best interests of their clients and potential clients. Marketing communications are required to be fair, clear and not misleading.

Governance

Members of a CASP’s management body are each required to have a sufficiently good reputation and possess knowledge, experience and skills to perform their duties. CASPs are expected to put in place policies and arrangements to ensure effective compliance with these measures. Any change in the composition of a CASP’s management body must be promptly notified to the authorising regulator before the new management carries out any activity.

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Finally, CASPs must put in place effective and transparent procedures for the handling of complaints received from clients. ESMA is currently developing the standards, formats and timeframes that CASPs will be required to implement in their complaint handling procedures.

Capital requirements

CASPs shall maintain a minimum capital that is the higher of €50,000, €125,000 or €150,000, depending on the service for which they are authorised, or one quarter of the fixed overheads of the preceding year. Operators of crypto exchanges will be subject to a €150,000 minimum capital requirement, whereas CASPs exchanging cryptoassets for other such assets or funds and providers of custody services will be subject to a €125,000 requirement. Other CASPs will be subject to a €50,000 minimum requirement.

Capital can comprise either of Common Equity Tier 1 items (which broadly is tangible equity capital),¹⁰ but without the benefit of certain threshold exemptions,¹¹ or through coverage of losses under an insurance policy.

Safekeeping measures

CASPs are required to safeguard ownership rights of clients to their cryptoassets, particularly against their insolvency and to prevent use of cryptoassets for their own account. In addition, CASPs are required to hold all money received from clients (other than EMTs) with a credit institution or a central bank.

Environmental disclosures

CASPs are required to publish on their websites information related to the principal adverse environmental and climate-related impacts of the consensus mechanism used to issue each cryptoasset in relation to which they provide services. ESMA and the European Banking Authority (EBA) have been mandated to develop regulatory technical standards setting out the specific information that CASPs will need to provide in order to comply with this requirement.

Significant CASPs

MiCA defines as “significant” CASPs those providers who in one year have at least 15 million active users on average in the EU. A CASP meeting this criterion must notify its authorising regulator within two months of meeting that threshold.

¹⁰ Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms (the Capital Requirements Regulation or CRR).

¹¹ These broadly concern the limited recognition of investments in other financial institutions, and deferred tax assets that rely on future profitability, both of which will have to be fully deducted for CASPs. See Article 46(4) and 48 of the CRR.

Significant CASPs will be subject to increased oversight and supervision by their regulator. The regulator will be required to report to ESMA at least once per year the key supervisory developments involving the significant CASP (such as the CASP’s authorisation status, the scope of services it provides, and whether any breach or infringement of MiCA has occurred or been suspected).

Key requirements for issuers of cryptoassets (except stablecoins)

Requirement for a white paper

Issuers or offerors of cryptoassets other than stablecoins do not need to be authorised by a local regulator. They must, however, publish a cryptoasset white paper and notify the local regulator prior to offering the cryptoassets to the public or seeking an admission of the cryptoassets on a trading platform. Issuers may then offer their cryptoassets across the EU.

There are a limited number of exemptions where the requirement to produce a white paper is not applicable:

- where the offer is for fewer than 150 persons per EU Member State;
- where the offer is addressed to “qualified investors” only (broadly, financial institutions or sizeable corporates);
- where the offer is for a consideration that does not exceed €1 million over a 12-month period;
- where the offer is for no consideration in exchange (note, however, that a purchase of a cryptoasset will not be considered free where purchasers are required to provide personal data to the issuer in exchange for the cryptoasset, or where the offeror receives any fee, commission or other benefit from a third party); and
- where the cryptoasset can only be used in exchange for goods and services in a limited network of merchants with contractual arrangements with the issuer.

If an issuer sets a time limit on their offer to the public during a “subscription period”, it must publish on its website the result of the offer within 20 working days from the end of the subscription period. If the issuer does not set a deadline for the subscription period, it must publish at least on a monthly basis on its website the number of cryptoassets in circulation relating to that offer.

Content of white papers

MiCA prescribes the format and content for white papers. Much like prospectuses in the context of security offerings to the public, there are required disclosures relating to the issuance of the cryptoasset and a set of statements prescribed under MiCA,

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including from the issuer's management body. A summary, setting out all relevant information in brief and non-technical language, is also required.

The information set out in the white papers and other marketing communications must be reported in a way that is clear, fair and not misleading to the general public. Issuers, offerors and trading platform operators will be liable for the content of the white papers, and no contractual exclusion of liability will be enforceable.

- In terms of specific content requirements, white papers are required to include the following:
- information about the offeror or issuer (if different from the offeror) and the operator of the trading platform;
- information about the nature of the cryptoasset and its project;
- reasons for the offer of the cryptoasset or for its admission to trading;
- explanation of the rights and obligations attached to the cryptoasset;
- information about the underlying technology;
- a description of the risks associated with the investment, transaction and technology supporting the transaction; and
- information on the principal adverse environmental impacts related to the issuance of the cryptoasset.¹²

More specific disclosure requirements are set out in the annexes to MiCA elaborating on what is required under these categories of disclosures.

If an issuer notices any inaccuracy or mistake in the white paper, or if new material information emerges that is capable of affecting the white paper's accuracy, the issuer must promptly update the white paper and disclose the amendments by making a notification to the relevant regulator.

Right of withdrawal

MiCA creates a statutory right for retail token holders to withdraw their offer to purchase a cryptoasset from the issuer or the offeror within 14 calendar days from the date of their initial agreement. Retail token holders must be able to exercise this right without incurring additional costs or providing explanations.

This right effectively establishes a "cooling-off" period for retail token holders following the purchase of a cryptoasset and is aligned with wider consumer protection legislations applicable to the sale of goods and services.

¹²This disclosure requirement is particularly intended to highlight the energy consumption and related impacts of "proof of work" consensus mechanisms.

Key requirements for issuers of stablecoins (ARTs and EMTs)

Authorisation mechanism

ARTs are subject to stricter requirements than EMTs as they are regarded as presenting a greater potential threat to the monetary stability of the EU. Issuers of ARTs require authorisation from the local regulator prior to offering ARTs to the public or admitting them on trading platforms. The application for authorisation must be accompanied by, *inter alia*:

- a detailed description of the issuer's organisation, business model, governance arrangements, internal control mechanisms and risk management protocols;
- a legal opinion confirming the nature of the ART;
- the articles of association of the issuer (if applicable); and
- a cryptoasset white paper.

The authorisation requirements for ARTs issuers is subject to two exemptions. First, when ARTs are only offered to "qualified investors" (as defined under Annex II in MiFID II); second, if the issuance is under a €5 million value threshold, assessed over a 12-month period.

As part of their application review, the authorising regulator will file a draft of their authorisation decision to the European Central Bank (ECB), ESMA and EBA, who in turn will provide the regulator with a nonbinding opinion addressing the risks posed by the ART's issuance in relation to monetary policy and financial stability in the EU. A negative review is likely to prejudice the issuer's ability to obtain authorisation.

As with CASPs, authorisation brings with it the benefit of "passporting" across the EU: if an ART issuer is granted authorisation in one member state, that authorisation will be valid throughout the EU without the need for any further authorisation in any other EU member state.

EMTs, on the other hand, can only be issued by credit institutions or e-money institutions authorised under EMD. Accordingly, they do not require further authorisation. Both issuers of EMTs and ARTs must comply with the requirements related to white papers, as described above.

Reporting obligations

For ARTs with an issued value higher than €100 million, the issuer must report quarterly to its regulator (which has granted it authorisation to issue the ART) details of the ART's customer base, the value of the issued ART, the size of its reserve assets, and the average number and value of daily transactions involving the ART.

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Issuers must also report how many of the ART's daily transactions are not associated with the issuer or the CASP. This occurs when the ART is used as "means of exchange" between token holders, typically in the context of commercial transactions. Importantly, if this figure crosses a threshold of 1 million daily transactions and €200 million in daily value, the issuer must stop issuing the ART and present a plan to its regulator to bring the ART below the threshold.

Reserve assets

ART issuers are subject to various requirements relating to the assets held in reserve that back the token issuance. Assets will have to be segregated from the issuer's estate and protected from creditor claims in an insolvency. Liquidity of assets will need to be managed so as to preserve the permanent redemption rights of the token holders (see below). The EBA is delegated the responsibility to develop more detailed rules (in the form of "regulatory technical standards") addressing the minimum maturity profile and composition of the reserve including a minimum cash component (which will need to be at least 30% per currency and deposited in a credit institution). The aggregate market value of the assets is required to exceed the aggregate value of claims of token holders on the issuer. The reserve will also have to be audited at least every six months, the results of which will have to be reported to its regulator and published.

In relation to custody, assets will have to be entrusted to credit institutions, investment firms (regulated under MiFID II) or CASPs (in the case of any cryptoassets forming part of the reserve). There are requirements relating to the proper selection of custodians and to avoiding concentration risks in the assets or in the selected custodians. Issuers are required to maintain detailed policies on the maintenance and custody of the reserve including in relation to investment of assets in highly liquid and low-risk financial instruments.

Token-holders redemption rights

ART holders will be entitled to redeem against the ART issuer at any time or against the reserve assets if the issuer is unable to fulfil such exercise of redemption. The exercise of redemption has to be met in funds other than e-money in an amount equal to the market value of the ARTs or by delivery of the reserve assets. Redemption cannot be subject to any fee.

EMT issuers will have to provide for a direct claim by holders against them and such redemption right can be exercisable at any moment and at par value with funds other than e-money.

Capital requirements

ART issuers will be required to maintain capital that is the higher of €350,000, a quarter of fixed overheads or 2% of the average amount of reserve assets. For many issuers, the latter metric is

likely to be the constraining figure and is aligned with requirements applicable to e-money issuers and issuers of EMTs, who will be subject to a 2% requirement by reference to the amount of issued e-money. This will undoubtedly affect the profitability of those stablecoin issuers who rely on interest income from reserve assets as a key source of revenue.

Prohibition of interest

There is an absolute prohibition of interest payable to a stablecoin holder by either an issuer or a CASP, and this extends to any benefit or remuneration related to the duration of the holding of a token.

Recovery and redemption planning

Issuers of EMTs and ARTs will be required to prepare a recovery plan setting out measures to address issues relating to the reserve assets. The plan will have to address how the services relating to the stablecoins will be preserved and how the issuer will meet its obligation in case of potential disruption. The plan will be expected to provide for restrictions such as liquidity fees on redemptions, limits on the amount of tokens that can be redeemed and suspension of redemptions — these are all designed to curtail a downward spiral of redemptions and fire-sale of reserve assets that can exacerbate issues arising with respect to reserve assets. The regulator will also have the power to compel an issuer to take recovery actions and may impose a temporary suspension on redemptions.

In addition, similar to bank resolution planning, stablecoin issuers will be required to draw up a plan providing for the orderly redemption of tokens where the issuer faces an insolvency event or withdrawal of authorisation, or is unable to otherwise comply with its regulatory obligations. Such a plan will have to set out how token holders will be treated in an equitable manner and paid out from remaining reserve assets and will have to ensure continuity of critical services necessary for an orderly redemption.

'Significant' stablecoins

MiCA introduces an additional category of stablecoins that are deemed to be "significant" either due to their nature, value or circulation on cryptomarkets. Significant stablecoins are subject to additional requirements (see below).

The criteria for determining whether stablecoins are significant are both qualitative and quantitative in nature. Stablecoins will be significant where they meet any three of the following criteria, either when an issuer's first report is submitted to the regulator following authorisation or in at least two consecutive subsequent reports, if the same three criteria are met:

- the number of holders of the stablecoin is larger than 10 million;

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- the value of the issued stablecoin, its market capitalisation or the issuer's reserve of assets is higher than €5 billion;
- the number of transactions in those stablecoins is higher than 2.5 million per day and with a value higher than €500 million per day;
- the issuer of the stablecoin is a provider of core platform services (as defined under the Digital Markets Act);¹³
- the significance of the activities of the issuer of the stablecoin on an international scale, including the use of the ART for payments and remittances;
- the international scale, including the use of the stablecoin for payments and remittances;
- the stablecoin's interconnectedness with the financial system; and,
- the fact that the same legal person or other undertaking issues at least one stablecoin and provides at least one cryptoasset service.

Further detail on these criteria will be set out in delegated legislation.

Enhanced requirements for 'significant' stablecoins

Issuers of significant ARTs and EMTs are required to:

- adopt a remuneration policy (although no prescriptive remuneration requirements such as those applicable to banks or investment firms are laid out);
- ensure custody of the ARTs by authorised CASPs on a fair, reasonable and non-discriminatory basis;
- monitor liquidity needs so as to be able to meet redemption requests of holders. This includes maintenance of liquidity management policies and procedures that should be designed to ensure that reserve assets are resilient under liquidity stresses;
- carry out regular liquidity stress testing; and
- maintain capital that is no less than 3% of the amount of reserve assets (as opposed to 2% applicable to nonsignificant ART issuers), noting that significant EMT issuers will also be subject to capital requirements that are applicable to ART issuers.

Importantly, if an ART is deemed significant, then each issuer of such an ART will be subject to these enhanced requirements. It would seem, therefore, that all issuers of a euro-denominated ART, for instance, would likely be treated as issuers of a significant

¹³Regulation (EU) No 2022/1925 on contestable and fair markets in the digital sector (the Digital Markets Act or DMA). Under Article 2 of the DMA, core platform services are defined as: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communication services, operating systems, web browsers, virtual assistants, cloud computing services and online advertising services.

ART even if the specific issuance would not in itself be sizeable enough to reach any of the quantitative thresholds that determine significance.

Issuers of significant EMTs are also subject to requirements relating to reserve assets, as well as custody and investment of such assets that apply to ART issuers, instead of the normal safeguarding requirements that would otherwise apply to e-money issuers. This would have the effect of aligning requirements across significant ART and significant EMT issuers. The requirements for significant EMT issuers may potentially be more stringent in comparison given the requirement to provide for redemption at par at all times irrespective of the value of the reserve assets.

National regulators will also have the ability to impose these requirements to nonsignificant EMT issuers if they consider it necessary to address some of the risks associated with significant EMT issuers.

Finally, the monitoring and reporting obligations applicable to ARTs above a certain value will apply to significant EMT issuers as well. Such issuers will be subject to the volume-based restrictions that ART issuers are subject to, including the power of the ECB or other central banks to impose limits if there is a risk to monetary policy transmission, smooth operation of payment systems or monetary sovereignty.

Market Abuse

Much of the provisions of the EU Market Abuse Regulation (which broadly address abusive behaviour with respect to financial instruments that are traded on securities exchanges and trading platforms) have now been carried over to MiCA. The market abuse rules in MiCA are similarly limited in scope to those cryptoassets that are traded on a trading platform for cryptoassets. Market abuse can occur under MiCA whether or not the relevant transaction, order or behaviour takes place on a trading platform, or whether or not it takes place inside or outside the EU. Cryptoassets that are not traded on a trading platform are outside the scope of the market abuse rules.

Accordingly, there are obligations on issuers and offerors of cryptoassets to publish inside information as soon as possible (subject to exceptions where immediate disclosure is likely to prejudice the legitimate interest of issuers or offerors, and where any delay in disclosure is not likely to mislead the public). Similarly, insider dealing, market manipulation and unlawful disclosure of inside information are prohibited. Any person professionally arranging or executing transactions in cryptoassets — a broader category than the cryptoasset services for which CASPs are required to be authorised — is also required to have in place systems and procedures to monitor and detect market abuse.

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In the pipeline: additional legislative proposals on cryptomarkets

As part of its “Digital Finance Strategy”, the Commission is also bringing forward other legislation aimed at regulating the cryptoasset environment. In particular, there are three legislative proposals that will be particularly relevant alongside MiCA.

The first proposal is a regulation on the digital operational resilience for the financial sector (DORA),¹⁴ which will require financial institutions (including CASPs) to implement robust information and communications technology systems. The European Parliament voted to adopt DORA in early November.

The second proposal is a directive¹⁵ amending certain items in MiFID II, which would also clarify the treatment and requirements applying to security tokens. The Council and the Parliament reached a political agreement on the proposed directive in May 2022, but a revised agreed draft of the directive’s text has not yet been published.

Finally, the Commission has also proposed a regulation on the transfer of funds¹⁶ that will effectively extend to cryptoasset transfers the information-sharing duties applicable to wire transfers. These requirements are commonly known as the “Travel Rule”, and were originally designed by the Financial Action Task Force (FATF) to counter money laundering and terrorist financing, as well as to enhance the traceability of funds. This proposed regulation

¹⁴ 2020/0266(COD) / COM(2020) 595, final proposal for a regulation on digital operational resilience for the financial sector.

¹⁵ 2020/0268(COD) / COM(2020) 596, final proposal for a directive amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341.

¹⁶ 2021/0241(COD) / COM (2021) 422, final proposal for a regulation on information accompanying transfers of funds and certain cryptoassets (recast).

is also due to be voted on by the Parliament, and the Council has already expressed its intention to approve it. According to the draft compromise text, there are two main elements that need to be taken into consideration.

First, CASPs providing payment services will be required to record certain information about the payer and the payee (such as their name, account numbers, date of birth and address) and make it available upon its regulator’s request. This requirement will apply to all transactions regardless of size and will exclude an exemption for transfer of funds below the value of €1,000.

Second, where CASPs process transactions over €1,000 involving a token-holder’s personal digital wallet (which, like a bank account with fiat currencies, allows for the storage of cryptoassets), CASPs will be required to verify the identity of the token holder and to ensure that they genuinely are the owner of that digital wallet. This requirement will also extend to transactions below €1,000 where a token holder does not transfer funds from their own digital wallet but rather by using a third-party wallet.

Next Steps

Following the Council’s announcement, the Parliament’s Committee on Economic and Monetary Affairs (ECON) voted overwhelmingly in favour of MiCA on 10 October 2022. ECON’s approval paves the way for the wider European Parliament vote on MiCA, which is expected to take place in early 2023, following revisions from linguists and lawyers. Once MiCA is formally approved by both the Parliament and the Council, it will be published on the Official Journal of the EU and enter into force on the twentieth day following the publication. However, MiCA provides for an 18-month transitional period between the date of its enactment and the date its regulations become applicable. Accordingly, MiCA is expected to take effect in 2024.