

# MiCA: A new dawn for crypto-asset regulation

Following adoption by the Council of the EU and publication in the bloc's Official Journal, the long-awaited Markets in Crypto-Assets Regulation, MiCA to its friends, is finally here.

MiCA aims to bring regulatory clarity and legal certainty to the crypto-assets industry across the EU by creating a harmonised set of rules on par with the existing suite of financial services legislation. The rules extend to various parts of the industry, including the issuance of crypto-assets, the offering of crypto-assets to the public and their admission to trading platforms, and the provision of services relating to crypto-assets.

In this article, we provide an overview of MiCA's impact and attempt to bridge the gap between the upcoming regulation and industry trends and practices.

## Crypto-assets and EU regulation pre-MiCA

Prior to MiCA, the EU framework for the regulation of crypto-assets was largely limited to the following:

- AML-related obligations imposed on crypto-assets service providers (**CASPs**) under the EU's Fifth Anti Money Laundering Directive 2018/843 (**5AMLD**), including providing for a registration regime.
- Obligations emanating from traditional EU financial services legislation (principally MiFID II, the E-Money Directive, and the Payment Services Directive) covering only certain aspects of the industry, notably crypto-derivatives and stable-coins that crossed into electronic money issuances.

At a national level however, some EU Member States took the 5AMLD provisions further by creating comprehensive regulatory regimes for the registration and supervision of CASPs in their jurisdictions. Most of these regimes were heavily influenced by existing EU financial services legislation, Financial Action Task Force (**FATF**) recommendations, and the draft MiCA proposal in public circulation at the time. Other EU Member States instead adopted a more minimalist approach with little or no additional rules beyond the minimum set out in the 5AMLD provisions.

Cyprus is an example of an EU Member State that opted for much greater regulatory oversight than the minimum set out in the 5AMLD, and this may well have given it a competitive advantage in the post-MiCA world. Experiences under the national regime in jurisdictions like Cyprus should prove valuable to regulators and industry participants. Similarly, CASPs in jurisdictions where concrete economic substance requirements already apply will be able to more easily navigate the transitional periods under MiCA and comply with its provisions.

## Which types of crypto-assets does MiCA seek to regulate?

MiCA defines the term "crypto-asset" widely, as a digital representation of a value or a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology. However, MiCA sub-categorises crypto-assets into various types. Depending on its type, special rules may apply in relation to a crypto-asset or it may fall outside the scope of the application of MiCA altogether.

The table below provides an overview of the treatment of the main types of crypto-assets under MiCA.

Number	Type	Definition/description	Within MiCA scope of application?	Other relevant regimes
1	Unclassified crypto-asset	Crypto-assets that do not fall within any of the below categories (eg Bitcoin/Ether)	Yes	N/A
2	E-Money tokens	A type of crypto-asset that purports to maintain a stable value by reference to the value of one official currency	Yes. Subject to special rules	E-money tokens are deemed to be electronic money under Directive

		This category covers most standard stablecoins currently in circulation		2009/110/EC (the <b>E-money Directive</b> ).
3	Asset-Referenced tokens	A type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing to any other value or right or a combination thereof, including one or more official currencies	Yes. Subject to special rules	N/A
4	Utility token	A type of crypto-asset which is only intended to provide access to a good or a service supplied by its issuer	Yes. Subject to special rules	No
5	Tokens that qualify as other various other regulated products	Crypto-assets which qualify as financial instruments (eg tokenised securities or derivatives referencing crypto-assets), deposits, funds, securitisation positions, non-life or life insurance products, certain types of pension products, officially recognised occupational pension schemes, certain individual pension products, pan-European personal pension products, or social security schemes	No	Yes, depending on the product  Notably, crypto-assets which qualify as financial instruments are caught by Directive 2014/65/EU (MiFID II)
6	Non-fungible tokens ( <b>NFTs</b> )	Crypto-assets that are unique and not fungible with other crypto-assets  This category covers certain tokens currently labelled as NFTs but not all. Fractional parts of an NFT are not themselves considered unique and non-fungible. Certain types of NFTs issued "in a large series or collection" may not be considered fungible	No	No, but some NFTs may be considered to be financial instruments under MiFID II

## Key themes

### Offers to the public and admission to trading (excluding E-Money tokens and Asset-Referenced tokens)

MiCA introduces rules regulating the offering of crypto-assets to the public and seeking admission of crypto-assets to trading on trading platforms for crypto-assets in the EU, subject to exceptions. Issuers of crypto-assets are not subject to regulation when the issuer is not an offeror or a person seeking admission to trading. The rules are clearly inspired by EU Regulation 2017/1129 (the **Prospectus Regulation**) which applies with respect to securities offerings.

Notably, persons offering crypto-assets or seeking admission of crypto-assets to trading must draft a crypto-asset white paper in accordance with a number of specifications. The white paper is then notified to the national competent authorities and published. In contrast to the Prospectus Regulation, there is no prior approval requirement in respect of white papers.

Various other obligations are placed on offerors and persons seeking admission of a crypto-asset to trading, including rules on marketing communications.

Finally, persons offering a crypto-asset to the public must provide a 14-day right of withdrawal to retail buyers where the relevant crypto-assets have not been admitted to trading.

## Authorisation and supervision of crypto-asset service providers

Subject to exceptions, persons who provide one or more crypto-asset services which fall within the scope of MiCA must obtain authorisation as CASPs from their national competent authorities. There are 10 such crypto-asset services in total:

1. Providing custody and administration of crypto-assets on behalf of clients
2. Operation of a trading platform for crypto-assets
3. Exchange of crypto-assets for funds
4. Exchange of crypto-assets for other crypto-assets
5. Execution of orders for crypto-assets on behalf of clients
6. Placing of crypto-assets
7. Reception and transmission of orders for crypto-assets on behalf of clients
8. Providing advice on crypto-assets
9. Providing portfolio management on crypto-assets
10. Providing transfer services for crypto-assets on behalf of clients

The MiCA authorisation regime replaces the previously applicable national authorisation/registration regimes in EU member states although transitional provisions may apply (see further below). The authorisation and supervision of CASPs is the responsibility of the national competent authority of each member state under the coordination of the ESMA.

The authorisation requirements under MiCA are rigorous and are generally on par with existing authorisation regimes under EU financial services legislation with certain industry-specific additions. Similarly, CASPs will need to abide by a number of economic substance requirements and ongoing obligations, including prudential requirements, governance arrangements, conduct of business rules, and certain special rules only relevant to the provision of specific crypto-asset services.

Notably, traditional regulated institutions (eg credit institutions and investment firms) can, in certain cases, provide crypto-asset services without obtaining a CASP authorisation. Moreover, passporting provisions enable EU CASPs to freely provide crypto-asset services across the European Economic Area and rules have been put in place for the provision of crypto-asset services by third country firms to EU-based persons.

## Rules on E-Money tokens and Asset-Referenced tokens

Under MiCA, the right to offer an E-Money or Asset-Referenced token to the public or seek its admission to trading is limited to its issuer, subject to exceptions.

In the case of an E-Money token, the issuer must be authorised by its national competent authorities as an electronic money institution under the E-Money Directive or as a credit institution.

In the case of an Asset-Referenced token, the issuer must be authorised by its national competent authorities under MiCA or as a credit institution.

In both cases, offers to the public or seeking admission to trading is subject to preparing a white paper. White papers of E-Money tokens are not subject to any prior approval requirement. For white papers of Asset-Referenced tokens, a prior approval requirement applies.

Similarly, both issuers of E-Money tokens (under the E-Money Directive and MiCA), and Asset-Referenced tokens (under MiCA) are subject to extensive ongoing obligations. These crucially include rules on the composition, management, and custody of their reserves as well as governance arrangements, own funds requirements, and a prohibition on granting interest to token-holders.

Certain E-Money tokens or Asset-Referenced tokens may, on the basis of set criteria, qualify as significant, in which case they are subject to additional obligations and are directly supervised directly by the EBA.

## Market abuse rules for crypto-assets

MiCA also contains rules on market abuse covering topics such as disclosures of inside information, insider dealing, and market manipulation as relevant to crypto-assets. These are inspired by the rules in EU Regulation 596/2014 which applies in respect of financial instruments.

## Some clarity on the regulatory treatment of decentralised practices

Although arguably not to a definitive extent, MiCA does attempt to provide some clarity on the treatment of certain decentralised practices and Web 3.0. This covers the treatment of participating in a blockchain's consensus mechanism (aka "mining" or "staking"), decentralised finance, NFTs, "airdrops" and "hard-forks".

## Timelines and transition into MiCA

MiCA will enter into force on 29 June 2023. However, its provisions will become applicable on 30 December 2024, except the rules on E-Money tokens and Asset-Referenced tokens which will become applicable on 30 June 2024.

## Offers of crypto-assets

Offers of crypto-assets (excluding E-Money tokens and Asset-Referenced tokens) to the public which ended before 30 December 2024 will be exempt from certain requirements. However, crypto-assets that were admitted to trading before the date of application of MiCA must comply with requirements on marketing communications and operators of trading platforms must by 31 December 2027 ensure that the white paper requirements for such crypto-assets are complied with.

## CASPs

MiCA by default provides the option to existing CASPs, which provide their services in accordance with the law applicable in their respective Member State before 30 December 2024, to continue to do so until 1 July 2026 without obtaining any additional authorisation. However, each Member State has the discretion to reduce the duration of the transitional period or not provide it at all.

Additionally, for applications submitted during 30 December 2024 and 1 July 2026, Member States may choose to apply a simplified procedure for CASP authorisation applications provided that, as at 30 December 2024, those CASPs were authorised under national law to provide crypto-asset services. Member States, such as Cyprus which already apply extensive regulatory requirements for CASPs, should be able to use this option.

## Issuers of Asset-Referenced tokens

Entities which, before 30 June 2024, issued Asset-Referenced tokens in accordance with national law, may continue to do so:

- in the case of credit institutions, immediately, provided that they submit the notification required under MiCA before 30 July 2024, **or**
- in the case of issuers which are not credit institutions, until they are granted an authorisation under MiCA, provided that they submit an application for authorisation under MiCA by 30 July 2024.

## MiCA as part of a digital regulation ecosystem

Overall, the adoption of MiCA arguably marks a new era for the EU crypto-space. It should not however be viewed in isolation. MiCA serves a crucial role in the European Commission's wider strategy on digital finance and infrastructures and is complemented by a number of other EU legislative acts:

- The EU Regulation on information accompanying transfers of funds and certain crypto-assets (**Travel Rule Regulation**) was recently published in the Official Journal of the EU. The Travel Rule Regulation recasts Regulation 2015/847 on information accompanying transfers of funds and extends the application of the so-called "travel-rule" to transfers of crypto-assets. The travel rule essentially requires crypto-asset service providers to collect certain information about the sender and beneficiary of the transfers of crypto assets they carry out. Subject to exceptions, this information must be verified by the crypto-asset service provider and transmitted to the crypto-asset service provider of the transfer recipient. Unlike transfers of funds, the travel rule applies to all crypto-assets transfers involving a crypto-asset service provider regardless of the amount transferred.

- New crypto-asset specific rules under the proposed EU “single rule-book” regulation on AML matters aims to replace the currently applicable AML rules under the EU AML Directives and establish the European Anti-Money Laundering Authority.
- The 8th Directive for Administrative Cooperation in the field of taxation (DAC8) was also recently adopted by the Council. This aims to introduce automatic exchange of information reporting requirements for CASPs.
- The Digital Ledger Technology Pilot Regime Regulation focuses on DLT market infrastructures, their operation, and supervision.
- The Digital Operational Resilience Act (DORA) creates uniform requirements concerning the security of network and information systems supporting the business processes of financial entities.

All crypto-industry participants should be familiar with obligations stemming from the above and think of MiCA as one of the key pieces of legislation within a wider ecosystem of rules relevant to crypto-assets.

If you or your business is impacted by MiCA and require more guidance, please contact the authors or your usual Harneys contact to discuss further.



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