

YPOG Briefing:

The Markets in Crypto-Assets Regulation (MiCA) is here - EU framework for crypto assets with global role model potential (I)

Berlin, Hamburg, November 28, 2022 | Dr. Anika Patz, Dr. Carola Rathke

In September 2020, the first draft of MiCA was published - after more than two years, the uniform EU framework has now taken its final shape. What's missing is only the final approval of the European Parliament and the publication in the official journal. MiCA creates an EU-wide legal framework for crypto assets, stablecoins, crypto markets and crypto asset service providers (CASPs), which were previously not regulated, at least not regulated uniformly throughout the EU. The regulation thus provides legal certainty and replaces individual member state regulations, thereby promoting innovation and fair competition in the EU while ensuring a high level of consumer protection and market integrity. MiCA thus has the potential to become a blueprint for a global regulatory standard.

In the course of the legislative process, MiCA has undergone numerous changes. We want to give you an overview and answer the most important questions: what kind of crypto assets are covered, when is a whitepaper to be prepared and what regulations apply to stablecoins?

Which crypto assets are covered?

The starting point for the application of MiCA regime is the notion of crypto-assets. According to the legal definition, a crypto-asset is a digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology. This includes, for example, cryptocurrencies such as Bitcoin (BTC) or Ether (ETH). MiCA contains a detailed set of regulations for the following categories of cryptocurrencies:

- (Significant) asset-referenced token (ART)
- (Significant) electronic money or e-money token (EMT)
- All other crypto-assets, that are not ART or EMT, including
- utility token.

EMT and ART are often referred to as stablecoins, even though MiCA does not use this terminology. An EMT is a crypto-asset that purports to maintain a stable value by referencing to the value of one official currency - in other words, a government-issued currency such as the EUR or USD. Therefore, stablecoins such as USDC and EUROCC are likely to qualify as EMTs. An ART is considered to be a crypto-asset that is not an EMT 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.

In addition, utility tokens are now also subject to regulation, whereas previously they were not regarded as crypto-assets within the meaning of the German Banking Act (Kreditwesengesetz), but will qualify as crypto-assets within the meaning of MiCA. A crypto-asset is deemed to be a utility token if it is only intended to provide access to a good or a service supplied by the issuer of that token. If a token contains additional rights, functions or serves other purposes, it must be examined in each individual case whether it also qualifies as an ART or EMT or as a financial instrument within the meaning of Directive 2014/65/EU (MiFID II). In general, if a crypto-asset (also) qualifies as a financial instrument within the meaning of MiFID II or as an investment fund, deposit, structured deposit or securitisation, the relevant specific EU directives (and corresponding transposition legislation) and regulations must be applied instead of MiCA.

When is a white paper required and who needs to draft and publish a white paper?

MiCA introduces a general obligation to publish a white paper for all types of crypto-assets. For crypto-assets other than ART and EMT that will be offered to the public or for which admission to a trading platform is sought, the white paper must be notified to the national competent authority (in Germany, this would be the Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin). However, no (prior) authorisation by the respective national competent authority is required. Offerors or persons seeking admission to trading of a crypto-asset must notify their national competent authority in which other EU member states they intend to offer the crypto-asset or seek admission to trading. The national competent authority will then inform the authority/ies of the other EU member state(s) accordingly so that the white paper can be passported, i.e. also used in these EU member states.

Not only the issuer or offeror is responsible for the drafting and notification of a white paper, but also the operator of a trading platform seeking admission to trading of crypto-assets or the person applying for admission to trading. Thus, if a trading platform, on its own initiative, intends to offer a crypto-asset on its platform for which no white paper has been published in accordance with MiCA requirements, it would be obliged to draft and notify a white paper prior to listing. The respective creator of a white paper is liable for incomplete or misleading information in the white paper. This means that the operator of a trading platform may also be liable for the information in the white paper, as the case may be together with the person who sought admission to trading. White papers and marketing communications must also be kept up to date during the entire period of the public offering or the listing of the crypto-assets.

What rules apply to stablecoins and stablecoin issuers?

In order to be able to offer or seek admission to trading of ARTs in the EU, the issuer of such stablecoins must be a legal person or undertaking established in the EU and must either have been granted MiCA authorisation by its national competent authority or be a credit institution. Exemptions apply if over a period of twelve months, calculated at the end of each calendar day, the average outstanding value of all ARTs does not exceed EUR 5 million or its equivalent in another currency, or if the public offer of the ART is directed solely at qualified investors and can only be held by such qualified investors. In any case, a white paper shall be produced in accordance with the MiCA and notified to the competent authority.

The authorisation as ART issuer and the white paper are valid throughout the EU. In addition, the ART issuer must comply with certain organisational and compliance requirements. In addition to capital requirements, MiCA contains provisions on the reserve assets with which ARTs are backed, as well as provisions on the redemption of ARTs. The holder of an ART may at any time request the

issuer to redeem an ART in funds or in the form of the referenced assets. Certain limits are placed on the issuance of ARTs so that they do not become a generally accepted means of payment. For example, an ART issuer must cease further issuance of ARTs if the estimated quarterly average number and value of transactions per day in connection with the use as means of exchange would exceed 1 million transactions or EUR 200 million within a single currency area.

In addition, MiCA establishes requirements for EMT issuers. Only those who are authorised as credit institutions or electronic money institutions may be EMT issuers. The specific requirements under MiCA therefore apply in addition to the general requirements for electronic money institutions or credit institutions. Holders of EMTs have a right to redeem the EMTs against the issuer at any time for money (that is not e-money). As is the case for ARTs, an EMT issuer must prepare a white paper, which must be notified to, but not approved by, the competent national authority. An EMT issuer is liable for the information in the white paper to EMT holders. In addition, MiCA contains rules on how the funds received upon issuance of EMTs may be invested (esp. only in highly liquid financial instruments).

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