

Crypto Asset Regulation - Markets in Crypto-Asset (MiCA)

Introduction

Markets in Crypto-Assets Regulation (EU 2023/1114) (“MiCA”) published on 9 June 2023 brings issuers of crypto tokens and the provision of crypto asset services under the umbrella of harmonised financial regulation across the EU for the issuance, operation, organisation and governance of crypto-asset service providers.

MiCA introduces new categories of regulated activities:

- Crypto Asset Service Providers (CASP's)
- Issuing of Utility Tokens (UT's)
- Issuing of E-Money Tokens (EMT's)
- Issuing of Asset-Referenced Tokens (ARTs)

MiCA lays down uniform rules for (i) the authorisation of CASPs, (ii) issuers of EMT's and ARTs, (iii) requirements, in respect of the offering of crypto-assets to the public and lays down minimum consumer protection rules.

Why is it being introduced?

- Most crypto-assets fall outside the scope of existing EU financial services legislation;
- To instil appropriate levels of consumer or investor protection, market integrity and financial stability;
- Require that all crypto-asset service providers act honestly, fairly and professionally;
- Prohibitions and requirements to prevent market abuse involving crypto-assets; and
- Create powers for national regulators to authorise, supervise and impose administrative sanctions on CASPS.

Any offer of crypto-assets to the public must be made by a legal entity located in the EU, and be accompanied by a whitepaper unless the crypto-assets:

1. are free;
2. are automatically created through mining as a reward or for validation of transactions;
3. are unique and non-fungible;
4. are offered to less than 150 people;
5. total consideration over 12 months does not exceed €1,000,000.00 (One Million Euro); and
6. the offer is only to qualified investors.

What is a Crypto-asset? A digital representation of value or rights which may be transferred and stored electronically, using DLT (Distributed Ledger Technology) or similar technology.

What are Crypto-asset services? Any person or entity whose occupation or business is the provision of one or more specified crypto-asset services to third parties on a professional basis

What is a Utility Token? A type of crypto- asset intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token.

What is an E-Money Token? A type of crypto-asset whose purpose is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender.

What is an Asset Referenced Token? A type of crypto-asset (that is not an EMT) that purports to maintain a stable value by referring to the value of one or several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets or combination of such assets.

Contents of Crypto Asset Whitepapers

A Crypto-asset whitepaper must contain the following:

Subject Matter/Core Characteristics

- the main participants;
- the project – type of crypto-asset – use of proceeds;
- the characteristics of the offer – number and issue price of crypto-assets;
- the rights and obligations attaching to the crypto-assets;
- the underlying technology and standards for holding, storing and transfer of crypto-assets; and
- the risks relating to the issuer of crypto-assets.

Disclosure/Governance Requirements

- all information must be fair, clear and not misleading, with no material omissions;
- inclusion of a specified warning that the white paper has not been verified by the regulator;
- not contain any assertions of future value;
- further warnings must be included stating that *“crypto-assets may lose their value in part of full, may not be transferable or liquid. That utility tokens may not be exchangeable”*;
- include a management statement *“that the information is correct and there are no significant omissions”* and *“that the crypto-asset is not covered by either investor compensation schemes or deposit guarantee schemes”*; and
- shall contain a summary of key information and be dated.

The whitepaper will not be approved by any regulator but must be notified to the regulator 20 days in advance of publication stating any jurisdictions the offer is to be made in.

Consumer Protection

- all marketing communications must be fair, clear and not misleading and consistent with the whitepaper;
- include a 14 day “cooling off” period for consumers;
- must include a statement on the first page that *“any marketing communication has not been reviewed or approved by the Central Bank of Ireland or other authority”*; and
- no marketing is permitted before publication of whitepaper.

Standards for Crypto - Asset Issuers

- act honestly, fairly and professionally;
- communicate fairly, clearly, and not in a misleading manner;
- identify, manage and disclose conflicts of interest;
- maintain appropriate systems and security access protocols;
- act in best interest of crypto-asset holders and treat them equally;
- issuers to be liable in damages for information that is not clear, fair or is misleading.

Asset Referenced Tokens (ART's)

ART and EMT Whitepapers are subject to greater scrutiny by regulators.

ART Issuers

- must publish an ART whitepaper; and
- must be authorised and established in the EU unless the average outstanding amount of ARTs is less than €5,000,000.00 (five million euro) over 12 months, or the offer is solely addressed to qualified investors or are authorised as a credit institution.

Contents of ART Whitepaper

- governance arrangements;
- reserve of assets;
- custody and segregation of reserve assets;
- nature and enforceability of rights including redemption;
- recovery of reserve assets and liquidity of ARTs;
- complaint handling procedures; and
- specified disclosures.

ART whitepapers are subject to a 3 month consideration period for regulators to issue draft decision subject to 2 month approval by EBA, ESMA and ECB for non-binding opinion.

Central Banks have 1 month to issue final decision taking into account EBA opinion.

Disclosure/Governance

- ESMA (European Securities and Markets Authority) to publish a register of Crypto-assets and CASP's;
- issuers will be liable in damages for information that is unfair, unclear, incomplete, or misleading and communicate;
- issuers of ARTs must act fairly, honestly, professionally and act in the best interest of the holders of crypto-assets;
- issuers must publish the ART whitepaper on their website; and
- at least monthly disclose the number and value of ARTs in issue and value and composition of reserve assets and any event having a significant effect on the value of the ARTs or reserve assets.

Consumer Protection/Governance

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Standards for ART Issuers

- act honestly, fairly and professionally;
- communicate fairly, clearly, and not in a misleading manner;
- identify, manage and disclose conflicts of interest;
- maintain appropriate systems and security access protocols;
- act in best interest of crypto-asset holders and treat them equally;
- issuers to be liable in damages for information that is not clear, fair or is misleading.

Electronic Money Tokens (EMT's)

A person must not offer EMT's to the public unless authorised as a credit institution or e-money institution and has published a whitepaper.

EMT Issuers

- must publish a whitepaper.

Contents of EMT Whitepapers

- EMTs must be redeemable at par;
- Whitepaper must describe the EMT issuer, the project, its designers, the rights, and obligations attaching to the EMTs and the risks as well as disclose any redemption fee chargeable;
- Disclosures must be fair, clear and not misleading;
- Must include a management statement confirming all information is correct and no significant omissions. The issuer and management shall be liable in damages for any omissions or inaccuracies;
- Must include a statement on the first page that "the whitepaper has not been approved by the Central Bank of Ireland or any other authority";
- Whitepaper must be notified to the Central Bank at least 20 days prior to publication; and
- Marketing communications must be consistent with whitepaper, refer to the whitepaper and clearly state that EMTs can be redeemed at any time at par.

Significant ARTs and EMTs

Significant ART's and EMT's will be subject to more stringent requirements based on:

- The size of the customer base;
- Value of the ARTs;
- Number and value of transactions;
- Size of the reserve assets;
- Significance of cross border activities; and
- Their inter-connectedness with financial systems.

Such significant ARTs must:

- Implement and maintain a remuneration policy conducive of effective risk management; and
- Implement and maintain appropriate liquidity policies.

Crypto Asset Service Providers (CASP's)

- CASP's must be authorised and established in EU;
- ESMA will maintain a register of CASPs authorised to carry on crypto-asset services and a register of whitepapers (other than EMT's or ART whitepapers);
- CASPs may "passport" their services across EU member states;
- CASPs must act honestly, fairly and professionally and act in the best interest of clients;
- Marketing materials must be fair, clear and not misleading and CASPs must warn clients of the risks involved in purchasing crypto-assets;
- Subject to minimum capital ranging from €50k – 150k (annex 4) or 1/4 of the previous years overheads;
- Subject to governance requirements in terms of its management and significant shareholders and appropriate ICT and security policies, procedures and business continuity precautions;
- Maintain records of all transactions and have systems and procedure to monitor and detect market abuse;
- Have procedures in place to safeguard client funds and ownerships rights and segregation of funds and not use client assets for their own account;
- Must have effective and transparent complaint handling procedures and systems and investigate complaints in a timely and fair manner;
- Have in place effective arrangements governing use of outsourcing; and
- Must disclose information regarding adverse environmental impacts of the crypto services they offer.

Insider Information and Market Abuse

The Regulations prohibit use or disclosure of inside information or engaging in market manipulation in respect of Crypto-Assets.

Inside Information

“any information of a precise nature that has not been made public, relating, directly or indirectly, to one or more issuers of crypto-assets, and which, if it was made public, would be likely to have a significant effect on the prices of those crypto-assets.”

Market Manipulation

- securing a dominant position over the supply of or demand for a crypto-asset which has or is likely to have the effect of fixing, directly or indirectly, purchase or sale prices or creates or is likely to create, other unfair trading conditions; and
- placing of orders to a trading platform which has the effect (i) disrupting or delaying the functioning of the trading platform; (ii) making it more difficult for other persons to identify genuine orders or engaging in activities which are likely to have that effect or by entering orders which result in the destabilisation of the trading platform's normal functioning; (iii) creating a false or misleading signal about the supply of or demand for, or price of, a crypto-asset, including entering orders to initiate or exacerbate a trend or activities likely to have that effect; or (iv) taking advantage of access to traditional or electronic media by voicing an opinion about a crypto-asset. CASP's must have procedures in place to prevent and detect market abuse.

Regulators Powers

Extensive supervisory and investigation powers similar to those which banks and investment firms are subject are conferred on the Central Bank of Ireland or other regulators. Power to publish infringements, require activities to be ceased and/or impose monetary sanctions €5,000,000.00 (five million euro) for corporates or up to €700,000.00 (seven hundred thousand euro) for individuals.

What does MiCA mean for existing Crypto-asset firms?

- they will no longer be permitted to pay interest;
- minimum standards and harmonised requirements will apply to whitepapers;
- minimum consumer protections and governance/complaint processes will apply; and
- MiCA will bring firms within the regulated sphere – applying authorisation requirements, minimum conduct standards, minimum capital requirements, supervisory reporting and regulatory sanctions.

Commencement Date for MiCA Requirements

- transition period for CASPs carrying on crypto-asset services for a period of 18 months following the entry into force of the regulation;
- ART's and EMT's 12 months after entry into force of the Regulation;
- transition period of 18 months for entities carrying of crypto-services prior to entry into force of the Regulation.



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