

339. An introduction to the MiCA proposal, the European Regulation on Markets in Crypto-Assets

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The coronavirus pandemic has brought many changes, including the rapid digital transformation of our lives. Digital technologies have proven to be a key component in supporting our new reality. On 24 September 2020, the European Commission ('Commission') has adopted the *Digital Finance Package*, setting out its approach towards digitalisation in the financial sector.

The package includes a proposal for a legal framework on crypto-asset markets, the Markets in Crypto-Assets Regulation ('MiCA'). Given the proposed timeline, application can be expected in 2024.

New risks, new regulations

The Commission aims to strike a balance between stimulating innovation offered by crypto-assets and mitigating the emerging risks to investors and financial and monetary stability.

Crypto-assets are one of the major applications of blockchain technology in finance.¹

With this initiative, the Commission proposes regulating those crypto-assets that were previously relatively unregulated. Some crypto-assets were already regulated, e.g. those that serve for investment purposes and qualify as financial instruments as defined in MiFID II² and payment cryptos could qualify as e-money as defined in EMD2³. However, in May 2020 with the implementation of the Anti-money laundering regime⁴ also integrity supervision came into force for these instruments. Mr. Hakvoort dis-

cusses this topic in her contribution for this edition of FRP. Nevertheless, this leaves most crypto-assets and related services outside of the regulatory scope, exposing consumers and the financial stability to substantial risks.⁵

Similar to the introduction of MiFID II, in-scope firms will face significant costs and challenges to make their businesses and operations MiCA-compliant. For new in-scope firms⁶, the proposal is expected to have a disruptive effect. They will need to abide by new prudential requirements, rules of conduct and perhaps require authorisation and oversight by a national competent authority ('NCA') or the European Banking Authority ('EBA').

In this contribution, we shall set out the broad outlines and consequences of the MiCA for in-scope firms. This contribution will start with a short introduction on the background of the new rules, after which the structure of the new regime will be discussed following the two main categories of in-scope firms. This article will discuss, per category, the scope of the structure as well as the key requirements and implications. Besides prudential rules, the MiCA also addresses broader market abuse rules and supervisory elements, which will be discussed separately. We will end with a few concluding remarks.

Background

Currently, the regulatory climate for crypto-assets is fragmented. Most crypto-assets fall outside MiFID II and EMD2. Some Member States ('MS') have implemented national rules on crypto-assets, specifically in regard to service providers that provide fiat currency to crypto-asset conversion – the buying and selling of crypto-assets for fiat currency and custodian wallet services.⁷ For example, in

¹ MiCA Explanatory memorandum.

² Directive 2014/65/EU (MiFID II).

³ Directive 2009/110/EC (EMD2).

⁴ Directive 2018/843/EU (AMLD5). In this regard it will be interesting how the definitions of 'crypto-asset' (MiCA) and 'virtual currency' (AMLD5) will apply to the different instruments that can be issued.

A crypto asset is defined as 'a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology' and a virtual currency is defined as 'a cryptographically secured digital representation of value or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically'.

⁵ MiCA Explanatory memorandum.

⁶ Crypto-asset issuers and crypto-asset service providers as further elaborated on below.

⁷ EBA report with advice for the European Commission on crypto-assets, 2019.