Road to MiCAR: The European Crypto-assets Regulation


June 2023
This guide is intended to accompany the introduction of MiCAR in Europe: the Road to MiCAR. It was initially written in connection with the draft of MiCAR and has been continuously supplemented and updated. Now, the European Parliament has adopted MiCAR in first reading on 20 April 2023 with amendments; the Council approved the Parliament’s position on 16 May 2023. After its publication in the official journal of the European Union on 9 June 2023, MiCAR will enter into force on 29 June 2023 – however most of the regulations will apply only after 12 to 18 months.

This guide will now reflect further discussions on the introduction and application of MiCAR (and beyond) and includes contributions from Bird & Bird offices in various countries, including Denmark, Germany, Italy, the Netherlands and Spain. Currently, the following topics are covered:

1. Introduction to MiCAR
   a. The current patchwork of regulatory fragmentation
   b. The focus
   c. Overview
   d. Objective: What is being regulated?

2. Crypto-assets
   a. What is covered?
   b. Types of crypto-assets under MiCAR
   c. What crypto-asset are not covered by MiCAR

3. Offering/issuance of crypto-assets – in particular: the requirement of a White Paper
   a. Offering (other) crypto-assets, that are not asset-referenced tokens or e-money tokens
   b. Issuance of asset-referenced tokens to the public
   c. Issuance of e-money tokens

4. Crypto-Asset Service providers
   a. Authorisation and operating conditions of crypto-asset service providers
   b. Current status in some EU jurisdictions
      i. Germany
      ii. Denmark
      iii. Italy
      iv. Netherlands
      v. Spain
   c. Grandfathering/transitional provisions of MiCAR
   d. E-money institutions
   e. MiFID firms

5. Crypto services – what are crypto-asset service providers allowed to do under MiCAR?
   a. Regulatory background
   b. Specifically permitted activities or services within the crypto industry

6. Powers of NCAs, EBA and ESMA

7. Conclusion
1. Introduction to MiCAR

Regulation of crypto assets and related services is about to be unified across the European Union through the Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (abbreviated as MiCAR). Until the MiCAR becomes fully applicable (18 months after its entry into force – i.e., 30 December 2024), crypto regulation is more like a patchwork of regulatory fragmentation.

The planned regulation pursues the goal of maximum harmonization. The chosen form of action also plays a weighty role: as an EU regulation, it is binding in its entirety and applies directly in all EU member states. In terms of content, it pursues and achieves the goal of creating a comprehensive framework for public offerings, admission to trading on a trading platform, transactions and services related to the types of crypto assets specifically targeted by MiCAR. The requirements introduced by MiCAR do not affect in any way the DLT/blockchain technology underlying crypto asset markets.

Unlike the fifth EU Money Laundering Directive (AMLD5), which also covers certain crypto assets under the term “virtual currencies,” it creates a harmonized approach. While the chosen form of the directive in the case of AMLD5 led to national fragmentation of the regulation of transactions related to “virtual currencies” or crypto assets, MiCAR aims at a uniform regulation of those crypto assets that fall outside the scope of existing EU financial legislation. MiCAR enters into force on 29 June 2023 (20 days after its publication in the Official Journal of the European Union) and will be directly applicable in all EU Member States by 30 December 2024 (with certain exceptions, e.g., regulation of ARTs and EMTs will apply on 30 June 2024). This means that by the end of 2024, a harmonized regulatory framework for crypto-related products and services will be in place across the European Union.

a. The current patchwork of regulatory fragmentation

**Germany** had already gone ahead with the implementation of the fifth Anti-Money Laundering Directive (AMLD5) and had created the crypto custody business as a new regulated financial service. Providing services in crypto assets that are used as means of payment or for investment purposes, a MiFID-like licences is required. In addition, Germany enacted an Electronic Securities Act (eWpG), which also covers the crypto sector and offers further opportunities.

**Denmark** has implemented AMLD5 and included providers of exchange services between virtual currencies and fiat currencies, providers of virtual wallets, providers of exchanges services between virtual currencies, providers of virtual currency transfers and issuers of virtual currencies.

**Italy** – as part of the transposition of the EU Anti-Money Laundering Directives – has also issued a decree (Decree of the Ministry of Economy and Finance of 13 January 2022) setting out requirements, procedures and timelines that providers of services related to the use of virtual currencies and digital wallet services are required to comply with in order to perform their activities in the territory of the Italian Republic.

**The Netherlands** has transposed AMLD5 into the Dutch AML Act (Wet ter voorkoming van witwassen en financieren van terrorisme) and included the obligation for crypto service providers to request registration with the Dutch Central Bank (“DNB”). Crypto services providers are firms offering services for the exchange between virtual and regular currencies and providers of custodian wallets for virtual currencies, in a professional capacity or on a commercial basis in or from the Netherlands. In order to obtain registration with DNB a business plan, documents relating to a transparent control structure, sound operational management and ethical operational management, and fit and proper assessments will (amongst others) need to be submitted.

**Spain** has likewise transposed the AMLD5 regulation by means of Royal Decree-Law 7/2021, of 27 April, which introduced several amendments to Law 10/2010, of 28 April, on anti-money laundering and terrorist financing (“Spanish AML Act”), for the purposes of aligning its content to the provisions set forth under AMLD5.
The most relevant amendments resulting from the transposition are:

i. the incorporation of exchanges of virtual currency for fiat currency and custodians of electronic crypto-wallets as new “obliged entities” under the Spanish anti money-laundering act; and

ii. registration duties, imposed on such new “obliged entities”, which shall now register within the special register held by the Bank of Spain (the Spanish national competent authority for supervising the provision of financial services).

b. The focus

The central objectives of MiCAR are to regulate crypto assets at EU level and to create legal certainty across Europe. In addition, the regulation is intended to control the financial risk posed by crypto assets (e.g., financial risk, risk to market integrity and, in the future, likely financial stability).

The regulation of crypto assets is intended to enable a greater number of investors to engage in this area and to use distributed ledger technology (DLT). At the same time, innovation and development should be encouraged. Thus, the principle of "fair treatment" of crypto asset issuers and service providers applies to ensure flexibility in enforcement.

On April 20, 2023, the European Parliament adopted the MiCAR in its first reading with amendments. The official resolution including the adopted text can be found here. The Council approved the Parliament’s position on 16 May.

The formal adoption of the Act, through the signature of the President of the European Parliament and the President of the Council, took place on 31 May 2023. After its publication in the official journal of the European Union on 9 June 2023, MiCAR will enter into force on 29 June 2023. Most of the regulations will apply only after 12 to 18 months. While some parts will apply shortly, in particular, the provisions on stablecoins (meaning asset-referenced tokens and e-money tokens) will become applicable on 30 June 2024 and the remaining provisions (including those on crypto assets service providers) on 30 December 2024.

The adoption of MiCAR means that, for the first time, fungible and transferable crypto-assets (which are not financial securities or other products covered by financial regulation), issuers of such crypto-assets and providers of crypto-asset services will find rules that apply uniformly (with maximum harmonisation) across the European Union.

c. Overview

MiCAR’s primary objective is to create legal certainty for crypto-asset markets within the EU legal framework, pursuing the design of organisational and conduct requirements for participants, accompanied by prudential rules for issuers of certain types of crypto-assets (namely e-money tokens and asset-referenced tokens), introducing specific investor protection provisions and other measures (for example, governance arrangements) aimed at maintaining the integrity of the market itself.

Specifically, MiCAR sets out transparency rules for the offering/issuance and marketing of crypto assets by their offerors/issuers.

Moreover, the provision of services of crypto-assets may be carried out only by legal persons established in the EU that have received the relevant authorisation or by certain financial institutions, for example credit institutions, investment firms and alternative investment fund managers. MiCAR includes a list of MiFID II equivalent services.

The set of these rules will facilitate cross-border trading in crypto assets and simplify the provision of services related to them.

The content of the MiCAR can be divided into three parts:

- **White paper**: regulations on the obligation for issuers of crypto assets to prepare a whitepaper for the types of tokens covered by the regulation (asset-referenced tokens, e-money tokens and, as a catch-all, crypto assets).
Organizational Requirements: Organizational Requirements. The licensing requirements for issuers of certain cryptocurrencies and providers of cryptocurrency-related services, as well as related business organization requirements.

Conduct of Business Rules: The rules of conduct for crypto asset issuers and crypto asset service providers.

d. Objective: What is being regulated?

MiCAR is to apply to all legal persons who want to issue crypto-assets or provide services related to crypto-assets in the European Union.

After MiCAR is fully in force, there will be three regulatory categories: A crypto product can be classified as a financial instrument under MiFID II, a crypto asset under MiCAR, or an unregulated product. It will be important for crypto issuers, as well as crypto service providers, to qualify crypto assets accordingly.

MiCAR is intended to establish uniform rules for transparency and disclosure requirements for the issuance, public offering, and admission to trading of crypto securities. In addition, there are rules for the licensing and supervision of crypto asset service providers and the issuers of crypto assets. The main focus is on issuers of asset-referenced tokens and e-money tokens.

The regulation aims to regulate the operation, organization and corporate governance of issuers of asset-referenced tokens and e-money tokens, as well as crypto value service providers. The latter are also subject to the provisions of the EU Digital Operational Readiness Act (DORA), which aims to ensure high standards of IT (and cyber) security. There will also be investor protection rules for the issuance, trading, exchange and custody of crypto assets. In addition, measures to prevent market abuse and insider trading have been included in the regulation to ensure the integrity of crypto asset markets.

2. Crypto-assets

The scope of MiCAR is focused on certain crypto-assets not covered by MiFID II. It is important to recognise the form of the crypto-asset to determine the applicable provisions of the Regulation. Qualified law firms will be able to assist on this question.

a. What is covered?

MiCAR is designed to complement existing legislation. It is intended to cover companies that issue crypto-assets or provide services in relation to crypto-assets. Explicitly excluded from the scope of application are crypto-assets that are already covered by other legislation, such as financial instruments under MiFID II, deposits under the Deposit Guarantee Scheme Directive or securitisations under the Securitisation Regulation.

In addition, the regulation is not to apply to certain organisations. The exemptions also include, among other things, when a company only provides crypto-asset services to group companies.

b. Types of crypto-assets under MiCAR

MiCAR defines a crypto-asset as the digital representation of a value or of a right that is able to be transferred and stored electronically using DLT or similar technology. MiCAR divides crypto-assets into the following subcategories:

- ‘Asset-referenced tokens’ (ARTs): These are crypto-assets that is not an electronic money token (see below) and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies (fiat). Stablecoins in particular should be considered here.

- ‘Electronic money token’ or ‘e-money token’ (EMTs): These are crypto-assets that purport to maintain a stable value by referencing the value of one official currency.
• ‘Utility tokens’: These are crypto-assets which are only intended to provide access to a good or a service supplied by the issuer of that token.

Asset-referenced tokens and e-money tokens may each be classified as significant asset-referenced tokens or significant e-money tokens under the Regulation. The classification is determined by EBA. In this case, issuers are subject to more extensive requirements.

According to the European Commission (EC), ‘utility tokens’ have non-financial purposes related to the operation of a digital platform and digital services and should be considered as a specific type of crypto-assets.

Germany introduced a definition of crypto assets in the German Banking Act (Kreditwesengesetz - KWG) when implementing AMLD5. The definition of crypto-assets from the MiCAR is, however, not congruent with the term of the German Banking Act (Kreditwesengesetz - KWG), so the German market is expected to adapt to the new developments in crypto legislation when MiCAR starts to apply.

Spain, on its side, has included a definition of crypto-asset by means of article 3 (e) of the recently published Circular 1/2022, of 10 January, related to the marketing of crypto assets as investment assets (the “Circular”), published by the National Securities and Markets Commission (“CNMV”) on February 2022, which is fully aligned with the definition provided under MiCAR. References to the definition of “virtual currency” were also included in the Spanish AML Act as a result of AMLD5 transposition, which may be amended from time to time in order to align such definition to those provided under MiCAR and the Circular.

c. What crypto-asset are not covered by MiCAR

MiCAR does not cover everything that is based on a distributed ledger technology (DLT). The most important cases are as follows:

• Crypto assets that qualify as financial instruments under MiFID II are not covered by MiCAR. The financial regulation surrounding MiFID II still applies to them.

• Crypto-assets that are unique and not fungible with other crypto-assets shall fall outside the scope of MiCAR. This should cover non-fungible tokens (NFTs). However, issuers should be aware that the legal question of being “unique and not fungible” will not depend on the branding of the token but on the actual design. In a press release of the European Parliament following the provisional agreement, it is mentioned that all sorts of NFTs offered to the public at a fixed price, such as cinema tickets, digital collectibles from clothing brands or in-game items in computer games will be exempt from the scope of MiCAR. The exclusion of NFTs may be reconsidered by the competent authorities in the presence of certain features, applying on a case-by-case basis an approach that privileges substance over form (see Recital 11). Anyway, the European Commission shall review this exemption within 18 months.

3. Offering/issuance of crypto-assets – in particular: the requirement of a White Paper

MiCAR is intended to establish rules for the offering/issuance and marketing of crypto-assets by their offerors/issuers. Here, a distinction is made between asset-referenced tokens and e-money tokens, in contrast to other crypto-assets.

a. Offering (other) crypto-assets, that are not asset-referenced tokens or e-money tokens

For the (other) crypto assets that are not asset referenced tokens or e-money tokens, the issuer must prepare, publish and notify the competent authority of a whitepaper. The whitepaper must present and describe, among other things, the essential characteristics of the crypto asset, rights and obligations, the underlying technology, and the associated risks. There is a kind of prospectus requirement.

The issuer must also be a legal entity and meet certain conduct requirements. In addition, ESMA is allowed to issue regulatory technical standards (RTS), according to which the environmental and climatic impacts
caused by the issuance of the crypto assets are also taken into account. Furthermore, changes to the whitepaper must be notified to the competent authority of the home state prior to the publication of the new version (7-day deadline).

There are exemptions from these regulations for, among other things, free offers of crypto tokens, utility tokens that can be effectively exchanged for (existing) goods or services, or if the holder of the crypto token can only use it against goods or services in a limited network with contracted merchants (limited network exemption - LNE).

In addition, the whitepaper includes a specific exemption. This requirement no longer applies if an offer is addressed to fewer than 150 natural or legal persons per Member State; or if the turnover of the offer does not exceed EUR 1,000,000 in a 12-month period; or if an offer is addressed exclusively to qualified investors and can only be held by them. In these cases, however, the offeror must still be a legal entity and comply with certain conduct requirements.

No exceptions apply if the offeror seeks admission to trading. If admission to trading in such a crypto asset is sought, the above requirements (legal entity, preparation, communication and publication of a white paper, conduct requirements) apply. These obligations must be met by the operator of a trading platform if no crypto asset whitepaper has otherwise been published. Certain issues arise when the issuer of the crypto asset is unknown. For further details, see here.

For those who are required to prepare the whitepaper (i.e., providers, applicants for admission to trading, or operators of a trading platform), it is of particular importance to meet the content requirements for a whitepaper. If the content is not complete, bona fide or unambiguous, or if it is misleading, the provider, person seeking admission to trading or operator of a trading platform and the members of its administrative, management or supervisory body shall be liable to crypto holders for any damages caused by such breach.

b. Issuance of asset-referenced tokens to the public

Stricter requirements are placed on the issuance of asset-referenced tokens. Those requirements can be divided into (i) white paper requirement, (ii) organisational requirements and (iii) conduct requirements.

i) White paper requirement

There is also a kind of prospectus requirement (white paper) for asset-referenced tokens. The white paper must not only be published, but it must also be approved by the competent authority. The white paper needs to include information about the issuer of the asset-referenced token, the asset-referenced token, the offer to the public of the asset-referenced token or its admission to trading, the rights and obligations attached to the asset-referenced token, the underlying technology, the risks, the reserve of assets, the principal adverse impacts on the climate and other environment-related adverse impacts of the consensus mechanism used to issue the asset-referenced token.

Similar to the liability concept for other that are not asset-referenced tokens or e-money tokens, the issuer and the members of its administrative, management or supervisory body are liable to the token holder if the information in the white paper is not complete, fair or clear, or is misleading.

ii) Organisational requirements

The issuer must meet certain requirements and it must either be (i) a legal person or other undertaking that is established in the European Union and has been authorised by the competent authority of its home Member State; or (ii) a credit institution. Credit institutions do not need a special authorisation, but they must comply with certain rules. The limitations on who can issue asset-referenced tokens will not apply if the asset-referenced tokens are only distributed to and can only be held by qualified investors or the issued amount of asset-referenced tokens does not exceed EUR 5 000 000 over a 12-month period.

Before issuing asset-reference tokens, the issuer (including credit institutions) needs to provide certain information to the competent authority. Those information include (i) a programme of operations, setting out the business model that the credit institution intends to follow; (ii) a legal opinion that the asset-referenced token does not qualify as a crypto-asset excluded from the scope of MiCAR or an e-money token; (iii) detailed description of the governance arrangements; (iv) policies and procedures; (v) description of the contractual arrangements with third-party entities; (vi) description of the business continuity policy; (vii) description of the
internal control mechanisms and risk management procedures; and (viii) description of the systems and procedures in place to safeguard the availability, authenticity, integrity and confidentiality of data. If the issuer is not a credit institution, further information needs to be submitted during the licence process.

   iii) **Conduct and prudential requirements**

Certain conduct requirements apply to the issuer of asset-referenced tokens. Those include the obligation that the issuer of asset-referenced tokens shall act honestly, fairly and professionally and shall communicate with the holders of asset-referenced tokens in a fair, clear and not misleading manner. Further obligations include information of token holders, compliance handling procedures, conflict of interest handling,

The principle applies that the larger the provider, the stricter the requirements that must be observed. For example, anyone who issues asset-referenced tokens with a value of more than EUR 100 million is subject to an additional quarterly reporting requirements on, inter alia, the number of token holders, value of the asset-referenced token issued and the size of the reserve of assets. Issuers must also meet the capital requirement of at least EUR 350 000 own funds. An authorisation as an issuer of asset-referenced tokens shall be valid for the entire EU. Supervision, however, remains with the competent authority of the EU Member State in which the issuer is domiciled. If significant asset-referenced tokens are issued, it will be subject to higher requirements. Supervision will then be carried out at the European level by the European Banking Authority (EBA).

The holder of an asset-referenced token has a permanent right to its redemption in cash in an amount equal to the market value of the token or the delivery of the assets to which the token refers. For this reason, MiCAR also requires issuers of asset-referenced tokens to maintain and manage a reserve of assets that covers the corresponding market value of outstanding tokens. There is also a requirement for segregation of assets: they must not be mixed with the assets of the issuers or the reserve of assets for other asset-referenced tokens. Such segregation needs to be insolvency proof. Moreover, issuers of asset-referenced tokens are subject to own funds requirements calculated as a percentage of the reserve of assets that back the value of the asset-referenced tokens.

In addition, the issuers of asset-referenced tokens are subject to the obligation to prepare a recovery and orderly redemption plan. This must be based on the guidelines that the EBA or ESMA will draw up.

   c. **Issuance of e-money tokens**

MiCAR will have specific requirements on the issuance of e-money tokens. Those requirements can be divided into (i) white paper requirement, (ii) organisational requirements and (iii) conduct requirements. E-money tokens may only be issued by credit institutions and electronic money institutions. The rule that e-money tokens may only be issued by credit institutions and electronic money institutions does not apply if the issuer is exempt under the E-Money Directive or if an exemption on the notion of e-money under the E-Money Directive applies (e.g. payment instruments with limited use: Limited Range or Limited Network).

   i) **White paper requirement**

The issuer must publish and notify a white paper to the competent authority.

The white paper shall include, *inter alia*, information about the issuer of the e-money token, the e-money token, the offer to the public of e-money token or its admission to trading, the rights and obligations attached to the e-money token, and on the underlying technology in a fair, clear and not misleading manner.

Failing to draw up the white paper as required by MiCAR makes the issuer subject to liability. If the information in the white paper is not complete, fair or clear, or if it is misleading, the issuer and the members of its administrative, management or supervisory body are liable to a token holder for any loss incurred due to that infringement.

   ii) **Organisational requirements**

In order to ensure the regulation of e-money token issuers within the framework of current regulations for credit institutions and e-money institutions, MiCAR contains few additional organizational requirements:

   iii) **Conduct and prudential requirements**
Incidentally, a large number of regulations from the E-Money Directive also apply here, for example, the prohibition of the granting of interest. Holders of e-money tokens have the right to request the issuer to redeem them at any time against funds denominated in the official currency to which the e-money tokens refer, at par value. Also, the issuance shall be made at par value and on the receipt of funds.

In contrast to the regulation on e-money, the funds received for e-money token can be partly invested. At least 30% of the funds have to be deposited in separate accounts in EU CRR-licenced credit institutions. The remaining funds shall be invested in secure, low-risk assets that qualify as highly liquid financial instruments with minimal market risk, credit risk and concentration risk and are denominated in the same official currency as the one referenced by the e-money token.

4. Crypto-Asset Service providers

New legislation always brings a certain amount of uncertainty to the market. It is therefore important to prepare now already for the changes in MiCAR will bring. Questions arise as to what will happen to crypto undertakings already authorised under national law, once MiCAR comes into force. How will they be treated under the Regulation? And does it make sense to still acquire an authorisation under national law before MiCAR starts to apply?

a. Authorisation and operating conditions of crypto-asset service providers

Also, the provision of services of crypto-assets will be regulated. Only legal persons that are established in the EU and have received the relevant authorisation or certain financial institutions for example credit institutions, investment firms and alternative investment fund managers may provide these services.

Those crypto-asset service providers (CASP) with an authorisation under MiCAR shall have a registered office in an EU Member State where they carry out at least part of their crypto-asset services. In addition, the place of effective management must be in the European Union and at least one of the directors must residing in an EU Member State. The authorisation is to be valid for the entire EU (via so-called passporting). The CASP can make use of this of its authorisation in another EU Member State through the right of establishment, including through a branch, or through the freedom to provide services. This offers a decisive advantage compared to the currently applicable individual national rules, which the undertakings have to examine with a lot of effort on a separate basis.

The authorisations will be issued by the national competent authorities. In addition to the capital requirements, depending on the type of service, there are also requirements for the management body (good repute and possess sufficient knowledge, skills and experience, committing sufficient time). The shareholders of the service providers must also have good repute.

The service providers also have obligations towards conflicts of interest, information obligations (for example, they must provide information on the environmental impact of their own activities) and provisions on outsourcing. Depending on the activity offered by the service provider, further requirements apply.

Each national competent authority shall provide relevant information on the largest service providers to ESMA on a regular basis.

b. Current status in some EU jurisdictions

i. Germany

Under the current national legal situation, Germany follows a strict approach compared to the rest of the European Union in an international comparison: crypto-assets are recorded as financial instruments. A MiFID authorisation is required for the provision of crypto-asset services such as the brokerage of tokens; a separate crypto-asset custody license is required for the provision of wallet services. The corresponding authorisation requirements of MiFID II (Directive 2014/65/EU) were implemented in Germany in the German Banking Act (Kreditwesengesetz - KWG) and the Investment Firm Act (Wertpapierinstitutsgesetz - WpIG) and were also made applicable to crypto-asset services for Germany. The authorisation is granted by the Federal Financial Supervisory Authority (BaFin).
However, this strict approach may have its advantages. On the one hand, Germany already offers a clear legal framework for crypto-asset business. On the other hand, service providers with MiFID authorisations benefit from grandfathering/transitional provisions under the current MiCAR proposal. In this way, the advantages of the current German regulatory regime on crypto-assets can be optimally used to stay ‘ahead’ in the implementation of MiCAR.

ii. Denmark

Specific regulation of crypto-assets except for AML related regulation has not at this stage been introduced in Denmark. The Danish Financial Supervisory Authority (Danish FSA) has — also triggered by MiCA - established a crypto-asset focus group with the aim of supporting an efficient supervision on the crypto-asset area. The focus group will be contributing with input on guidance and risk assessments and generally supporting the Danish FSA in this supervision of crypto-assets.

iii. Italy

The exercise of services related to the use of virtual currencies and digital portfolio services in the territory of the Italian Republic is reserved to persons registered in the special part of the register established by the competent authority (Organismo degli Agenti e Mediatori - OAM). This authority is a public body for the management of the lists of financial agents and credit brokers and maintains a corresponding register. The registration in the special part of the register is done through an online procedure and is subject to the fulfillment of certain requirements, which are verified by the OAM.

iv. Netherlands

Specific regulation of crypto assets, with the exception of anti-money laundering rules, has not yet been introduced in the Netherlands. Apart from those cases where crypto assets are regulated under the existing legal framework and are, for example, considered a financial instrument or e-money under the Dutch Financial Supervision Act.

v. Spain

As a result of local transposition of AMLD 5 in Spain, crypto exchanges and wallet providers who (i) intend to carry out their business activity in Spain; (ii) are established in Spanish soil; or (iii) whose base, direction or management of the activity related to crypto-assets is in Spain, are obliged to register within a special register held by the Bank of Spain (Spanish NCA for supervising banking services).

Non-compliance with registration duties is considered a severe infraction and may be sanctioned with fines up to 10% of the total turnover or 10M Euro, whatever of both amounts is higher.

The registration process is straightforward and involves submitting corporate information from the provider, which shall evidence, at the discretion of the Bank of Spain, the honourability of its managers/directors and the anti-money laundering policies and processes that the provider has put in place in order to comply with its AML obligations, which have to pass through a strict filter to be deemed appropriate.

Additionally, it must be noted that CNMV’s Circular, among other issues, regulates advertising of crypto-assets targeted to Spanish investors when it is carried out by providers of services over crypto-assets. Key obligations that may apply to advertising campaigns carried out by such providers under the Circular include:

- adapting the campaign’s content to ensure that it is transparent to investors (i.e., by including certain disclaimers or warnings on the risks related to crypto-assets);
- prior notification to the CNMV where a campaign is targeted to a massive public (i.e., +100,000 investors); or
- keeping record of the details of the current and past campaigns.

c. Grandfathering/transitional provisions of MiCAR

Institutions with a MiFID authorisation will be able to continue to conduct business under MiCAR without having to obtain a separate authorisation under MiCAR where they only provide one or several crypto-asset services equivalent to the investment services and activities for which they are authorised under MiFID II.
MiCAR includes a list of those equivalent services. The transition to MiCAR will also be easier for e-money institutions than for new market participants.

d. E-money institutions

A grandfathering process will be available to e-money institutions, under which a simplified procedure for obtaining an authorisation will be offered rather than having to undergo the full authorisation process. The details of the simplified procedure are not yet specified in the current MiCAR proposal. However, it is intended to waive such documents in the authorisation procedure that are already known to the competent authority.

e. MiFID firms

Institutions that are authorised under MiFID II (such as investment firms) are not subject to the authorisation provisions under MiCAR when providing crypto-asset services. These institutions may continue to provide services they have previously provided in relation to financial instruments under MiFID II also with regard to crypto-assets without any further authorisation requirement.

5. Crypto services – what are crypto-asset service providers allowed to do under MiCAR?

Now that it has been clarified that certain authorisation and operating conditions apply to providers of crypto-asset services, the question arises as to which services these providers of crypto-asset services will be allowed to offer in the EU Member States in the future.

a. Regulatory background

Until MiCAR comes into force, there are only a few national regulations regarding transactions with cryptocurrencies and related services. These national regulations differ in terms of the binding character of the rules, the scope of crypto-assets that are covered and the related activities as well as the requirements for offerors/issuers or service providers.

These different approaches by the national competent authorities threaten to fragment the market. The lack of uniform rules therefore poses significant risks for consumers and investors. In addition, the lack of uniformity threatens to affect the stability of the market and shake consumer confidence in trading by calling on crypto-asset services in general.

The MiCAR is to be enacted in order to avert these threats. A central component for achieving the above-mentioned goals and avoiding the risks is the uniformity and clear definition of the notion of ‘the provision of crypto-asset services’.

b. Specifically permitted activities or services within the crypto industry

There are numerous services related to crypto-assets that are to be regulated for the first time by MiCAR in a way that is binding for all EU Member States. As already explained under 4. a. above, it is important to note that the provision of services is only permitted if an authorisation exists. Prior to the provision of the permissible services, an authorisation must be obtained from the competent authority. Thus, the MiCAR proposed rule provides for a preventive prohibition with a permit reservation.

First of all, it must be clarified who can be a provider of crypto-asset services at all. This includes any person whose professional or commercial activity consists of providing one or more crypto-asset services to third parties on a business basis.

The notion of ‘the provision of crypto-asset services’ covers a variety of activities that are explicitly listed in the MiCAR. These terms are often based on the securities and ancillary services of MiFID II. Accordingly, the following services and activities in connection with crypto-assets are permitted – provided that the corresponding authorisation exists – i.e. these services may be performed:

aa) Custody and administration of crypto-assets on behalf of clients
The first crypto-asset service is the provision of custody and administration of crypto-assets on behalf of clients. The wording here initially differs from the corresponding regulation under MiFID II (Annex I, Section B point (1)): MiCAR states "custody and administration of crypto-assets on behalf of clients", while MiFID II states "safekeeping and administration of financial instruments for the account of clients". However, the broader definition of MiCAR again refers to "safekeeping". It describes the crypto-asset service provision as the safekeeping or controlling of crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys. So, this is arguably aimed at the corresponding ancillary service of MiFID II.

**bb) Operation of a trading platform for crypto-assets**

Another crypto-asset service provision requiring an authorisation is the operation of one or more trading platforms for crypto-assets. This largely corresponds to the regulations of MiFID II on the operation of an MTF or OTF (Annex I, Section A points (8) and (9)), without, however, making this distinction between a MTF and an OTF. The activity is further defined as the management of a multilateral system that brings together the interests of a large number of third parties in the buying and selling of crypto-assets in such a way that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for fiat money.

**cc) Exchange of crypto-assets for funds**

The conclusion of contracts with third parties for the purchase or sale of crypto-assets which are exchanged for fiat money by using one's own capital is also recorded as a crypto-asset service. This should essentially correspond to proprietary trading (dealing on own account according to Annex I, Section A point (3) of MiFID II).

**dd) Exchange of crypto-assets for other crypto-assets**

Also included as a crypto-asset service is the conclusion of contracts with third parties for the purchase or sale of crypto-assets which are exchanged for other crypto-assets using one's own capital. This also essentially corresponds to proprietary trading (dealing on own account according to Annex I, Section A point (3) of MiFID II).

**ee) Execution of orders for crypto-assets on behalf of clients**

Also covered are the execution of agreements to buy or sell one or more crypto-assets or to subscribe to one or more crypto-assets on behalf of clients. This corresponds to the execution of orders on behalf of clients of Annex I, Section A point (2) of MiFID II.

**ff) Placing of crypto-assets**

The placing of crypto-assets is also included as a crypto-asset service. This is defined as the marketing of crypto-assets on behalf of the offeror to purchasers. It is thus similar to the underwriting business and the placing business of MiFID II (Annex I, Section A point (6) and (7)).

**gg) Reception and transmission of orders for crypto-assets on behalf of clients**

Also, a crypto-asset service is the reception of an order from a person to purchase or sell one or more crypto-assets or to subscribe to one or more crypto-assets and the transmission of that order to a third party. This largely corresponds to investment broking (Annex I, Section A point (1) of MiFID II).

**hh) Providing advice on crypto-assets**

The offering or giving of personalised or specific recommendations to third parties or agreeing to give such recommendations at the request of the third party or on the initiative of the crypto-asset service provider providing the advice, in relation to the purchase or sale of one or more crypto-assets or the use of crypto-asset services is also to be understood as a service. This corresponds to investment advice (Annex I, Section A point (5) of MiFID II).
ii) providing portfolio management on crypto-assets

Providing portfolio management of crypto-assets means managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more crypto-assets.

jj) providing transfer services for crypto-assets on behalf of clients

Providing transfer services for crypto-assets on behalf of clients means providing services of transfer, on behalf of a natural or legal person, of crypto-assets from one distributed ledger address or account to another.

6. Powers of NCAs, EBA and ESMA

The task of supervising issuers of significant asset-referenced tokens is assigned to the EBA once an asset-referenced token has been deemed significant by the EBA.

Issuers of significant e-money tokens are subject to dual supervision by both national competent authorities (NCAs) and the EBA due to the risks they may pose to financial stability.

The European Securities and Markets Authority (ESMA) is to establish a register of crypto service providers containing information on entities authorized to provide these services in the European Union. This register is also to include crypto white papers reported to competent authorities and published by crypto issuers.

In order to pool expertise, the EBA will also establish a Crypto Securities Committee.

All other rules for the application of MiCAR are the responsibility of national competent authorities.

7. Conclusion

Concluding, the MiCAR will not only have a major impact on the European crypto sector, but likely beyond. The rules provide a clear and uniform legal framework. The new rules can prevent national regulations from impeding further development of the crypto sector. The fact that a regulation rather than a directive was chosen as the legislative tool for this may be surprising at first glance, but it prevents “gold-plating” by individual EU member states. This means that the crypto sector is even more harmonized than other financial services as a result.

Given the benefits MiFID institutions enjoy under MiCAR, it is an attractive option for new entrants to apply for MiFID institution authorization now (e.g., in Germany, where a MiFID license is already required for related services in the crypto sector). When MiCAR comes into force, these institutions will not be subject to the uncertainties that a new implementation of the law will inevitably bring. A simplified authorization process also awaits already authorized e-money institutions, which is beneficial. This is because crypto-asset service providers (especially those from unregulated EU countries) will incur higher costs that may result from obtaining authorizations and setting up appropriate structures to meet MiCAR requirements. Early establishment of such infrastructure in an already established regulatory framework therefore offers advantages.
The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

This document is confidential. Bird & Bird is, unless otherwise stated, the owner of copyright of this document and its contents. No part of this document may be published, distributed, extracted, re-utilised, or reproduced in any material form.

Bird & Bird is an international legal practice comprising Bird & Bird LLP and its affiliated and associated businesses.

Bird & Bird LLP is a limited liability partnership, registered in England and Wales with registered number OC340318 and is authorised and regulated by the Solicitors Regulation Authority (SRA) with SRA ID497264. Its registered office and principal place of business is at 12 New Fetter Lane, London EC4A 1JP. A list of members of Bird & Bird LLP and of any non-members who are designated as partners, and of their respective professional qualifications, is open to inspection at that address.