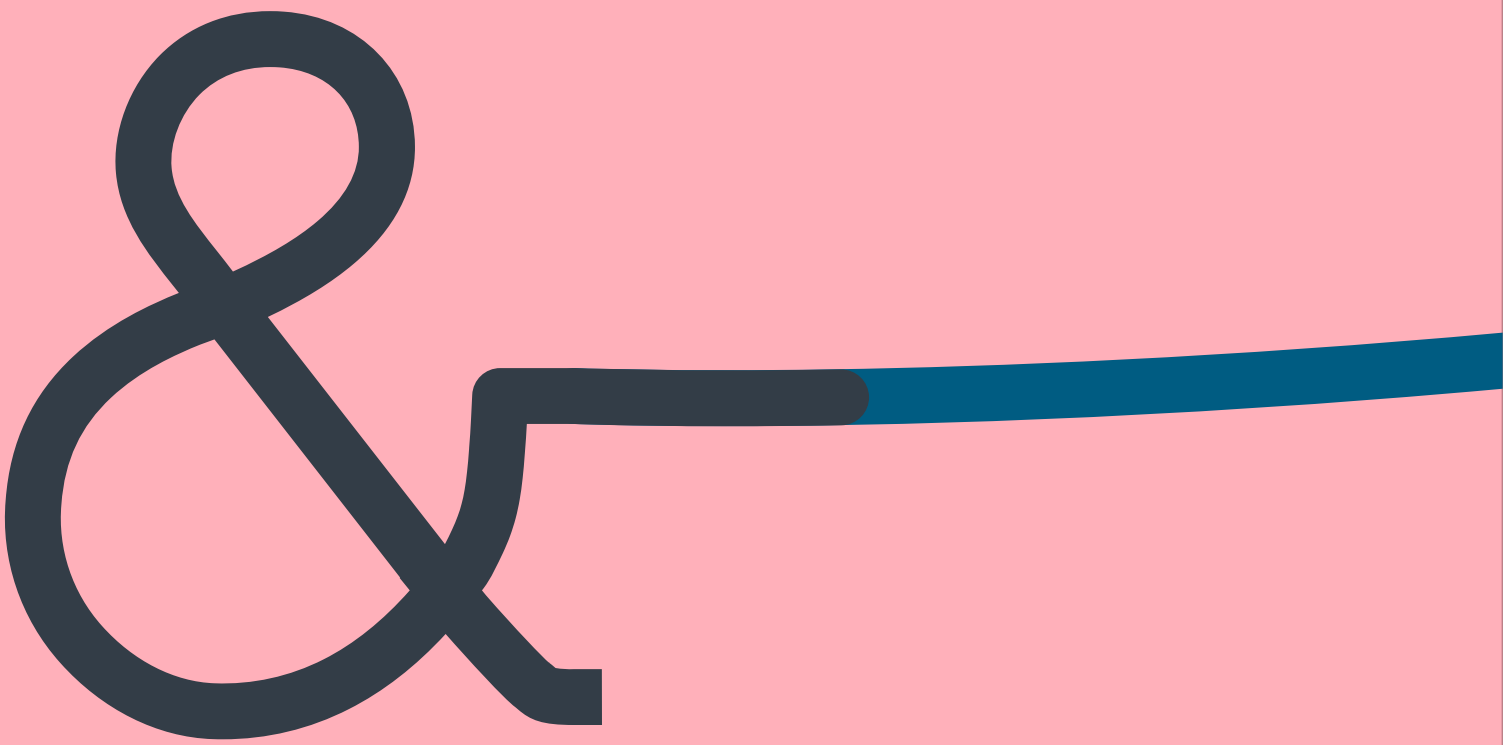
Bird & Bird

Road to MiCAR: The European Crypto-assets Regulation

The Bird & Bird Guide to the European Union's Regulation on Markets in Crypto-assets (MiCAR).

Januar 2025



Contents

This guide was intended to accompany the introduction of MiCAR in Europe: The Road to MiCAR. It was initially written in connection with the publishing of the MiCAR draft and has been continuously supplemented and updated to reflect the current MiCAR-landscape and provide the reader with an updated status picture. Now, since 30 December 2024 MiCAR is finally fully applicable – but open questions remain.

This guide shall provide an overview and initial guidance on MiCAR. It includes contributions from Bird & Bird offices in various countries, including Denmark, France, Germany, Italy, the Netherlands, Poland, Spain and Sweden. Currently, the following topics are covered:

I. Introduction

1. Background and objective of MiCAR

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**) constitutes a major shift in the regulation of crypto assets and related services in the European Union (EU): it unified regulation across the EU.

MiCAR pursues the goal of maximum harmonization within the EU. 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. Unlike the fifth EU Money Laundering Directive (AMLD5), which also covers certain crypto-assets under the term "*virtual currencies*", MiCAR 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. 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.

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

2. The current implementation status

After being adopted by the European Parliament on 20 April 2023, MiCAR was approved by the European Council on 16 May 2023. After its publication in the official journal of the European Union as Regulation (EU) 2023/1114 on 9 June 2023, MiCAR entered into force on 29 June 2023. The entry into force, however, did not mark the date of its application. MiCAR became applicable in (more or less) two stages: (i) on 30 June 2024, the parts regulating asset-referenced tokens (ARTs) and electronic money tokens (EMTs) started to apply; (ii) on 30 December 2024 the remaining part of MiCAR (in particular requirements on crypto-assets other than ARTs or EMTs as well as on service providers) became applicable.

The European Commission is empowered to adopt delegated acts in certain areas to supplement MiCAR in order to further specify, inter alia, the following elements:

- technical elements of the definitions and their adaptation to market and technological developments;
- the criteria for an asset-referenced token to be considered significant;
- criteria and factors to be taken into account by ESMA/EBA when deciding on the exercise of temporary intervention powers;
- criteria and factors to be taken into account by (national) competent authorities when deciding on the adoption of product intervention measures.

MiCAR includes a substantial number of Level 2 (RTS/ITS) and Level 3 (Guidelines) measures that had to be developed. The European Market and Securities Authority (**ESMA**) and the European Banking Authority (**EBA**) have the assignment to draw up these documents.

ESMA conducted the preparation of its Level 3 measures via three consultation packages:

- ESMA's consultation package 1 (July 2023):
  - RTS on content of notification from selected entities to NCAs
  - ITS on forms and templates for notification from entities to NCAs
  - RTS on the content of the application for authorisation for CASPs
  - ITS on forms and templates for CASP authorisation application

- RTS on complaint handling procedure
- RTS on management and prevention, disclosure of conflict of interest
- RTS on intended acquisition information requirements

- ESMA's consultation package 2 (October 2023):
  - RTS on content, methodologies and presentation of sustainability
  - RTS on measures that crypto-asset service providers must take to ensure continuity and regularity in the performance of services
  - RTS on trade transparency
  - RTS on content and format of order book records
  - RTS on record-keeping by crypto-asset service providers
  - RTS on the data necessary for the classification of white papers
  - ITS which have been enacted as Commission Implementing Regulation (EU) 2024/2984 of 29 November 2024 laying down implementing technical standards for the application of Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to forms, formats and templates for the crypto-asset white papers
  - ITS which have been enacted as Commission Implementing Regulation (EU) 2024/2861 of 12 November 2024 laying down implementing technical standards for the application of Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to the technical means for the appropriate public disclosure of inside information and for delaying the public disclosure of that information
- ESMA's consultation package 3 (partially published in January 2024, while the rest of the consultation package is expected to be published during Q1 2024):
  - Qualification of crypto-assets as financial instruments (further information see *here*)
  - Monitoring, detection, and notification of market abuse
  - Investor protection:
    - Reverse solicitation (published, further information see *here*)
    - Suitability of advice and portfolio management services to the client
    - Policies and procedures for crypto-asset transfer services, including clients' rights
  - System resilience and security access protocols

Also, EBA is responsible to develop several technical standards and guidelines to further specify the requirements for ARTs and EMTs and conducted the following consultations:

- EBA's consultation package 1 (July 2023):
  - RTS on complaints handling procedures for issuers of ARTs
  - RTS on information for application for authorisation to offer to the public or to seek admission to trading of ARTs
  - ITS on information to be included in an application for authorisation to offer to the public or to seek admission to trading of ARTs
  - RTS on EU market access of issuers of ARTs
  - RTS on the detailed content of information necessary to carry out the assessment of a proposed acquisition of qualifying holdings in issuers of ARTs
- EBA's consultation package 2 (October 2023):
  - RTS on approval process for white papers for ARTs issued by credit institutions
  - RTS on the minimum content of the governance arrangements on the remuneration policy
  - Guidelines on the minimum content of the governance arrangements for issuers of asset-referenced tokens.
- EBA's consultation package 3 (November 2023)
  - RTS specifying the requirements for policies and procedures on conflicts of interest for issuers of ARTs
  - RTS on supervisory colleges
  - RTS on the liquidity requirements of the reserve of assets
  - RTS on the minimum content of the liquidity management policy and procedures
  - RTS on the highly liquid financial instruments with minimal market risk, credit risk and concentration risk
  - RTS on procedure and timeframe to adjust its own funds requirements for issuers of significant ARTs or of EMTs
  - RTS on the adjustment of own funds requirements and stress testing of issuers of ARTs and of EMTs

- RTS on recovery plans
- RTS on the methodology to estimate the number and value of transactions associated to uses of ARTs as a means of exchange and of EMTs denominated in a currency that is not an official currency of a Member State
- ITS which have been enacted as Commission Implementing Regulation (EU) 2024/2902 of 20 November 2024 laying down implementing technical standards for the application of Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to reporting related to asset-referenced tokens and to e-money tokens denominated in a currency that is not an official currency of a Member State;
- Guidelines establishing the common reference parameters of the stress test scenarios for the liquidity stress tests referred in Article 45(4) Regulation (EU) 2023/1114.

Furthermore, EBA and ESMA have published two joint guidelines in October 2023:

- Draft joint EBA and ESMA Guidelines on the suitability assessment of members of management body of the applicant CASPs and of their shareholders or members, whether direct or indirect, with qualifying holdings, and
- Draft Joint EBA and ESMA Guidelines on the suitability assessment of shareholders and members, whether direct or indirect, with qualifying holdings in issuers of ARTs.

Further, ESMA has drafted the following ITS without open public consultations:

- Commission Implementing Regulation (EU) 2024/2545 of 24 September 2024 laying down implementing technical standards for the application of Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to standard forms, templates and procedures for the cooperation and exchange of information between competent authorities;
- Commission Implementing Regulation (EU) 2024/2494 of 24 September 2024 laying down implementing technical standards for the application of Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to standard forms, templates and procedures for the cooperation and exchange of information between competent authorities and EBA and ESMA.

All level 2 and 3 documents listed above have or will be published in their final form once they have been adopted by the Council.

In correspondence to the above the following delegated regulations have been enacted:

- Commission Delegated Regulation (EU) 2024/1503 of 22 February 2024 supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying the fees charged by the European Banking Authority to issuers of significant asset-referenced tokens and issuers of significant e-money tokens;

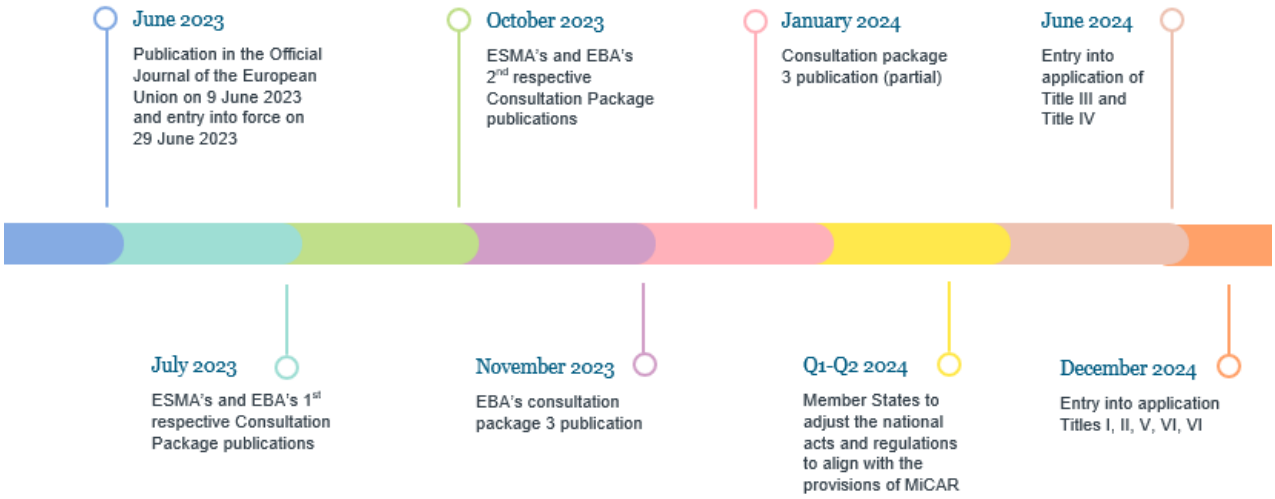
- Commission Delegated Regulation (EU) 2024/1506 of 22 February 2024 supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying certain criteria for classifying asset-referenced tokens and e-money tokens as significant;

- Commission Delegated Regulation (EU) 2024/1507 of 22 February 2024 supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying the criteria and factors to be taken into account by the European Securities Markets Authority, the European Banking Authority and competent authorities in relation to their intervention powers; and

- Commission Delegated Regulation (EU) 2024/1504 of 22 February 2024 supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council by specifying the procedural rules for the exercise of the power to impose fines or periodic penalty payments by the European Banking Authority on issuers of significant asset-referenced tokens and issuers of significant e-money tokens.

The ESAs (EBA, ESMA, EIOPA) have also published Guidelines on templates for explanations and opinions, and the standardised test for the classification of crypto-assets, under Article 97(1) of Regulation (EU) 2023/1114.

Respective EU Member States' legislators shall make certain adjustments in the national legislative acts and regulations to facilitate implementation of MiCAR. As an example of such necessary changes is designation of national competent authorities to be responsible for handling of applications following MiCAR, establishing the sanctions regime for violations of MiCAR, carrying out the functions and duties as provided in MiCAR as well as determining the grandfathering regime that allows entities providing crypto-asset services in accordance with national applicable laws before 30 December 2024 to continue to do so until 1 July 2026 or until they are granted or refused a MiCAR authorisation.



To see which EU Member State has adjusted their national law to MiCAR, take a look at our MiCAR Implementation Tracker here.

3. The previous patchwork of regulatory fragmentation

Before MiCAR became applicable, the EU regulatory framework for crypto-assets was fragmented on a national basis. Now, MiCAR allows EU Member States to regulate only what falls outside its scope. Below we provide a short description on what applied in some jurisdictions in the EU before MiCAR.

i. Denmark

Denmark 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.

ii. France

France had a regime applicable to digital asset service providers since 2019. Accordingly, a service provider may qualify as a Digital Asset Service Provider ("**DASP**") if it provides at least one of the ten services regulated under French law, which are similar to the ones regulated under MiCAR and further described in section IV part 3 below. Depending on the services provided, DASP may be required to register or elect to apply for a license with the relevant French authority (l'Autorité des Marchés Financiers).

France introduced a definition of digital asset (i.e., crypto-asset) in the French monetary and financial code. Pursuant to Article L. 54-10-1 of the Monetary and Financial Code, a crypto-asset is:

- a token which is any intangible asset representing, in digital form, one or more rights which may be issued, recorded, stored or transferred by means of a shared electronic recording device enabling the owner of the asset to be identified, directly or indirectly and excluding the tokens meeting the characteristics of financial instruments, medium-term notes and bills of exchange; **or**

- any digital representation of value that is not issued or guaranteed by a central bank or public authority, that is not necessarily attached to legal tender and that does not have the legal status of money, but that is accepted by natural or legal persons as a medium of exchange and that can be transferred, stored or traded electronically.

Under French law, the qualifications of crypto-asset and electronic money are mutually exclusive. Furthermore, please note that crypto-assets that are unique and not fungible with other crypto-assets (i.e., "**NFT**"), including digital art and collectibles or that represent services or physical assets, should not qualify as digital assets under French law.

iii. Germany

Germany had regulated crypto-assets like Bitcoin as financial instruments due to the administrative practice of the Feder Financial Supervisory Authority (BaFin) for more than a decade (even though this was not uncontested). The legislator used the implementation of the fifth Anti-Money Laundering Directive (AMLD5) to confirm the administrative practice and created crypto custody business as a regulated financial service. Providing services in crypto-assets that are used as means of payment or for investment purposes, a MiFID-like licences was required.

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 required to be adjusted to MiCAR. The German parliament passed bill to adapt German law to the application of MiCAR on 18 December 2024: the Financial Market Digitisation Act (*Finanzmarktdigitalisierungsgesetz – FinmadiG*) amends the German Banking Act and introduce a Crypto Markets Supervision Act (*Kryptomärkteaufsichtsgesetz – KMAG*). The amended law still regulates crypto-assets which are not covered by MiCAR on national basis.

The strict approach taken by Germany may have its advantages. On the one hand, Germany already offered a clear legal framework for crypto-asset business. On the other hand, service providers with MiFID authorisations benefit from grandfathering/transitional provisions under MiCAR. The German regulator already announced that institutions (other than CRR credit institutions) holding an authorisation for crypto custody or other financial services relating to crypto-assets may use the simplified procedure.[1] 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.

In addition, Germany enacted in 2021 the Electronic Securities Act (eWpG), *inter alia*, allowing the issuance of crypto securities (which are, of course, outside the scope of MiCAR and regulated by MiFID II).

iv. Italy

Italy – as part of the transposition of the EU Anti-Money Laundering Directives – 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.

v. The Netherlands

The Netherlands 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.

vi. Poland

[1] https://www.bafin.de/DE/Aufsicht/MiCAR/MiCAR_node.html

Poland did not have extensive regulations applicable to crypto-asset services providers. Activity in this area was not subject to oversight by the Polish Financial Supervision Authority (Pol. *Komisja Nadzoru Finansowego* – the "**KNF**") and thus, it involves some risk for investors and market participants, but also legal uncertainty for market actors providing various services utilising crypto-assets. The only applicable laws in this respect stemmed from the Act of 1 March 2018 on the Prevention of Money Laundering and Terrorist Financing (i.e., Journal of Laws 2023, item 1124, as amended; the "**Polish AML Act**").

The Polish AML Act provides for mandatory registration of VASPs in the register of virtual assets service providers. VASP activity may only be conducted by persons with no criminal record and with adequate knowledge and experience. The Polish AML Act obliges VASPs to exercise AML obligations (e.g., apply KYC procedures). In addition, the KNF released a communication on issuing and trading in crypto-assets. The communication emphasises that even though there was no law dedicated to crypto-assets in Poland, this did not mean that certain activities do not fall under other regulations (e.g., MIFID II).

Poland had no legislation addressing the legal qualification of crypto-assets. However, the Polish AML Act contains a definition of "virtual currency" more or less reflecting the definition of "virtual currency" included in AMLD5. It has been argued in the literature that crypto-assets should be qualified as carriers of private rights, not being a tangible object (which affected, inter alia, the ways of transferring the 'ownership' of crypto-assets). Nonetheless, noting the possible proximity of certain crypto-assets and financial instruments, the KNF indicated that if crypto-assets were constructed in such a way as to be considered financial instruments (*e.g.* tokenised bonds), their issuance and functioning on the market would be subject to the regime applicable to financial instruments.

vii. Spain

Spain likewise transposed the AMLD5 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).

Spain, on its side, had 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**") in 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 needed amendments in order to align such definition to those provided under MiCAR and the Circular.

In 2023, a Securities Market Act (*Law 6/2023, of March 17, of the Securities Markets and Investment Services*) was published, which adapted the regulations applicable to securities markets and investment services in Spain to enable the application of MiCAR.

On 17 December 2024, the Council of Ministers approved a regulatory package in the field of digital finance that includes, among others, (i) a Draft Law on the Digitalization and Modernization of the Financial Sector and (ii) a Draft Royal Decree on the Use of Distributed Ledger Technology-based Systems. These texts have been published in the public hearing and information process, so that any interested party can make allegations (until 17 January 2025).

i. The **Draft Law on the Digitalization and Modernization of the Financial Sector** includes three relevant aspects to ensure the proper implementation of MiCAR: (i) updates the provisions on the sanctioning regime of *Law 6/2023, of 17 March, on the Securities Markets and Investment Services* to adapt them to the provisions of MiCAR, (ii) updates the AML regulations to include crypto-asset

service providers as obliged subjects, (iii) promotes DLT solutions for capital markets and (iv) updates the functioning of the Sandbox.

ii. The **Draft Royal Decree implementing Chapter II of Title I *Law 6/2023, of 17 March, on the Securities Markets and Investment Services*, with respect to the use of systems based on registry the use of systems based on Distributed Ledger Technology** establishes the development of the legal regime for the representation of financial instruments by means of DLT (issue document, registration, transfer, fungibility, certificates of legitimacy) and specifies the legal regime of the ERIRs (registry management, functions, obligations, registration of other transfers, redemption of financial instruments represented by DLT, codification of financial instruments, and an annex with the documentation that the ERIR must make public on its website for each issue of financial instruments represented by DLT).

viii. Sweden

Sweden implemented AMLD5 in the Swedish Anti-Money Laundering and Counter Terrorism Financing Act (2017:630) ("**Swedish AML Act**") following which entities operating with virtual currency became subject to the provisions of the Swedish Certain Financial Operations Act (1996:1006) ("**SCFOA**") and thus subject to the provisions of the Swedish AML Act. There are two types of virtual asset service providers in SCFOA - providers offering exchange services between virtual currencies and fiat currencies and also providers of virtual currency wallets – both being subject to the registration requirement with the Swedish Financial Supervisory Authority.

4. Overview of MiCAR

MiCAR applies to all (legal) persons who want to issue / offer crypto-assets or provide crypto-asset services to the public in the EU. MiCAR's regulatory framework is designed having as a reference centralized models in which it is easy to identify the entities responsible for disciplinary obligations, deferring to a later stage the evaluation of the possibility of extending such regulation to fully de-centralized permissionless and public systems. The provision of crypto-asset services may be carried out only by legal persons having a registered office 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.

MiCAR sets out the design of organisational and conduct requirements for participants, accompanied by prudential rules for issuers of certain types of crypto-assets (namely EMTs and ARTs), 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. MiCAR is intended to establish uniform rules for transparency and disclosure requirements for the issuance, public offering, and admission to trading of crypto-assets. In addition, there are rules for the licensing and supervision of crypto-asset service providers (CASP) and the issuers of crypto-assets, in particular those issuers of ARTs and EMTs.

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

- *White paper*: regulations on the obligation for issuers/offerors of crypto-assets to prepare a white paper for the types of tokens covered by the regulation (ARTs, EMTs and other crypto-assets).
- *Organizational Requirements*: licensing and operating requirements for issuers of certain crypto-assets and CASPs.
- *Conduct of Business Rules*: the rules of conduct for crypto-asset issuers and CASPs.

MiCAR aims to regulate the operation, organization and corporate governance of issuers of ARTs and EMTs, as well as CASPs. The latter are also subject to the provisions of the EU Digital Operational Resilience Act (DORA), which establishes uniform rules for valid ICT risk management (and cyber-security) for the entire EU financial sector. 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.

II. Crypto-assets

1. What is covered?

After MiCAR is fully in force, there will be three regulatory categories of crypto-assets:

(i) those classified as a financial instrument under MiFID II (or other regulated financial products),
(ii) crypto-assets regulated by MiCAR, or
(iii) unregulated crypto-assets.

The definition of crypto-assets covers all three categories listed above but the scope of MiCAR excludes two of them, namely (i) and (iii). It will be important for crypto-asset issuers, as well as service providers, to qualify crypto-assets accordingly. Qualified law firms will be able to assist on this question. To get a first indication how to qualify a token, please see our Token Self-assessment tool here.

2. 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 are not electronic money tokens (see below) and that purport 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.

- **Crypto-assets other than ARTs or EMTs** – this category has no further general definition. It covers all "other" crypto-assets, if fungible, transferable and with identified issuer, which are not expressly excluded from the scope of MiCAR. These include utility tokens[2] with the aforementioned characteristics. Crypto-assets for which the reasons of use outweigh those of investment (or exchange) do not seem to be considered by MiCAR.

The scope of ARTs and EMTs is to maintain a stable value. However, while EMTs refer to the value of an official currency and are therefore considered to be e-money within the meaning of Directive 2009/110/EC (E-Money Directive – EMD2), i.e, having the function of a means of payment, redeemable on demand at the face value of the official currency to which they refer, ARTs may refer to several (instead of only one) official currencies, other values, assets or rights, or to combinations thereof, and are characterised by the presence of value-stabilising mechanisms based on actual reserves of liquid financial assets, which give the holders the right to demand redemption at any time at the market value of the assets to which they refer. That makes the ART more flexible in its structure.

Further, ARTs and EMTs may each be classified as *significant* ARTs or *significant* EMTs under the MiCAR. The classification is determined by EBA when they meet the specific criteria outlined in MiCAR. In this case, issuers are subject to more extensive requirements.

3. What crypto-asset are not covered by MiCAR

MiCAR is designed to complement existing legislation. Due to that, explicitly excluded from the scope of MiCAR are crypto-assets that are already covered by other legislation, such as financial instruments under

[2] 'Utility tokens' are defined as crypto-assets which are only intended to provide access to a good or a service supplied by the issuer of that token.

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 entities. The exemptions also include, among other things, cases where a company only provides crypto-asset services to its group companies.

MiCAR does not cover all DLT-based tokens. 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. ESMA published Guidelines on the delimitation of crypto assets from financial instruments; for further information on ESMA's Consultation Paper see *here*.
- Crypto-assets that are products subject to financial regulation (e.g. non-life or life insurance products; bank deposits; securitisations, etc.).
- 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 of MiCAR). In any case, the European Commission shall review this exemption within 18 months. For further information relevant to retailers with NFT projects, see *here*.
- Moreover, crypto-assets that do not have an identifiable issuer (such as Bitcoins) do not fall within the scope of Title II of MiCAR, which governs public offerings or admission to negotiation of crypto-assets other than ART or EMT, Titles III (ART discipline) and IV (EMT discipline) of the same regulation. However, service providers in relation to such crypto-assets are subject to the provisions of MiCAR. For further details, see here.

The question of the legal classification of crypto-assets therefore is crucial in order to identify the relevant regulation and also the category of market participants that can "deal" with them, knowing that it is the specific "contractual characteristics" of each crypto-asset that determine the applicable regulatory regime.

Defining the demarcation line between blockchain-based financial instruments and other crypto-assets is not an easy task: it is the responsibility of the crypto-asset offeror to include, among the information elements of the white paper, a description of the type of crypto-asset offered to the public and the rationale for its inclusion within the scope of MiCAR (in the case of ART, this is done through a legal opinion submitted to the competent authority with the request for authorisation).

As stated by ESMA, the legal qualification of crypto-assets as financial instruments is a case-by-case matter: a "substance over form" approach (from a technology-neutral perspective). The existence of an unenforceable expectation of profit (the "investment component") would not be sufficient to qualify a crypto-asset as a financial instrument.

III. Offering/issuance of crypto-assets

MiCAR sets out rules for the offering/issuance and marketing of crypto-assets by their offerors/issuers. Here, a distinction is made between ARTs and EMTs, in contrast to other crypto-assets.

1. Offering (other) crypto-assets that are not ARTs or EMTs

For the (other) crypto assets that are not ARTs or EMTs, the offeror 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. This is a kind of prospectus requirement.

The offeror must be a legal entity and meet certain conduct requirements. In addition, ESMA has issued a draft RTS according to which the environmental and climatic impacts caused by the issuance of the crypto assets shall be taken into account. Changes to the whitepaper must be notified to the competent authority of the home state prior to the publication of the amended version (7-day deadline).

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

In addition, there is an exemption from the requirement to draft, notify and publish a whitepaper 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-asset holders for any damages caused by such breach.

2. Issuance of ARTs to the public

Stricter requirements apply to the issuance of ARTs. These can be divided into (i) whitepaper requirement, (ii) organisational requirements and (iii) conduct requirements.

i) Whitepaper requirement

For ARTs a kind of prospectus requirement (whitepaper) apply. In this case the whitepaper requires both the approval by the competent authority and publishing. The whitepaper needs to include information about the issuer of the ART, the ART itself, the offer to the public of the ART or its admission to trading, the rights and obligations attached to the ART, 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 ART.

Similar to the liability concept that applies to crypto-assets other than ART or EMTs, the issuer and the members of its administrative, management or supervisory body are liable to the crypto-asset holder if the information in the whitepaper is not complete, fair or clear, or is misleading.

ii) Organisational requirements

The issuer of ARTs 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 ARTs will not apply if the ARTs are only distributed to and can only be held by qualified investors or the issued amount of ARTs does not exceed EUR 5 000 000 over a 12-month period.

Before issuing ARTs, the issuer (including credit institutions) needs to provide certain information to the competent authority, including (i) a programme of operations, setting out the business model that the issuer intends to follow; (ii) a legal opinion that the ART does not qualify as a crypto-asset excluded from the scope

of MiCAR or an EMT; (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 authorisation process.

iii) Conduct and prudential requirements

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

The principle applies that the larger the provider, the stricter the requirements that must be complied with. For example, anyone who issues ARTs with a value of more than EUR 100 million is subject to an additional quarterly reporting requirements on, inter alia, the number of crypto-asset holders, value of the ART issued and the size of the reserve of assets. Issuers must also meet the capital requirement of at least EUR 350 000 in own funds. An authorisation as an ART issuer 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 ARTs are issued, it will be subject to higher requirements. Supervision will then be carried out at the European level by the EBA.

The holder of an ART has a permanent right to its redemption in cash in an amount equal to the market value of the ART or the delivery of the assets to which the ART refers. For this reason, MiCAR also requires issuers of ARTs to maintain and manage a reserve of assets that covers the corresponding market value of outstanding ARTs. There is also a requirement for separation of assets: they must not be mixed with the assets of the issuers or the reserve of assets for other ARTs. Such separation needs to be insolvency proof. Moreover, issuers of ARTs are subject to own funds requirements calculated as a percentage of the reserve of assets that back the value of the ARTs. In addition, the issuers of ARTs are subject to the obligation to prepare a recovery and orderly redemption plan based on the EBA's RTS on recovery plans.

3. Issuance of EMTs to the public

MiCAR sets out specific requirements on the issuance of EMTs that can be divided into (i) whitepaper requirement, (ii) organisational requirements and (iii) conduct requirements. EMTs may only be issued by credit institutions and electronic money institutions. The rule that EMTs 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 (2009/110/EC) applies (e.g. payment instruments with limited use: Limited Range or Limited Network). However, in case of an exemption being applicable, the issuers of EMT are still required to draw up a whitepaper and notify the whitepaper to the competent authority.

i) Whitepaper requirement

The issuer must publish and notify a whitepaper to the competent authority. The whitepaper shall include, *inter alia*, information about the issuer of the EMT, the EMT itself, the offer to the public of EMT or its admission to trading, the rights and obligations attached to the EMT, and on the underlying technology, in a fair, clear and not misleading manner.

Failing to draw up the whitepaper as required by MiCAR makes the issuer subject to liability. If the information in the whitepaper 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 crypto-asset holder for any loss incurred due to that infringement.

ii) Organisational requirements

In order to issue EMTs the legal person shall be either an authorized credit institution or an e-money institution.

Before issuing EMTs, the issuers of EMTs need to, at least 40 working days before the date on which they intend to offer the EMT to the public, notify the competent authority on that intention. The issuers of EMTs shall notify the competent authority with regards to its recovery plan within six months of the date of the offer to the public or admission to trading of the EMT. Issuers of significant EMTs that are e-money institutions shall apply specific additional obligations as set out in article 58 of MiCAR, inter alia additional requirements to the reserve of assets and their custody and investment instead of what applies to e-money institutions following the national implementations of the E-Money Directive (2009/110/EC).

Issuers of (non significant) EMTs needs to comply with similar organisational requirements as ART issuer. Those requirements are not directly set out in MiCAR but result from their status as e-money institution or credit institution. The requirements (e.g., originating in PSD2 and Electronic Money Directive) include that the issuer must provide certain information to the competent authority, including (i) a programme of operations, setting out the envisaged business model; (ii) detailed description of the governance arrangements; (iii) policies and procedures; (iv) description of the business continuity policy; (v) description of the internal control mechanisms and risk management procedures; and (vi) description of the systems and procedures in place to safeguard the availability, authenticity, integrity and confidentiality of data.

iii) Conduct and prudential requirements

Incidentally, a large number of regulations from the E-Money Directive (2009/110/EC) also apply here, for example, the prohibition of the granting of interest. Holders of EMTs have the right to request the issuer to redeem them at any time against funds denominated in the official currency to which the EMTs refer, at par value. Also, the issuance shall be made at par value and on the receipt of funds.

MiCAR also provides for safeguardings comparable to those applicable on e-money and payment services. Those regulations appear to be a bit more specific when it is required that at least 30% of the funds are deposited in separate accounts in EU CRR-licenced credit institutions and the remaining funds are 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 EMT.

IV. Crypto-Asset Service Providers

MiCAR introduced harmonised regulation of Crypto-Asset Service Provider (**CASP**) to the EU legislation. It's worth noting that MiCAR regulates and reserves the activities exercised, on a professional basis, by CASP in the EU.

Different modalities for obtaining legal access to the provision of crypto-asset services, depending on the nature of the specific legal entity and the accompanying conditions:

1. an authorisation procedure, reserved for legal persons or other entities[3], as well as certain financial entities, for which the principle of equivalence to already authorised investment services does not apply;
2. a notification procedure for certain financial entities if they already provide equivalent services in relation to financial instruments under Article 60 and for credit institutions without being authorised under MiFID II;
3. a simplified procedure (from 30 December 2024) for entities - authorised under national law to provide crypto-asset services – submitting applications during the transitional period until 1 July 2026. In this case, the provision of CASP services under national regimes may continue until authorisation is granted or refused.

MiCAR introduces a prohibition on the provision of crypto-asset services in the EU by a third-country entity without prior authorisation, unless the provision of crypto-asset services by that entity to a client established or resident in the EU is at the sole initiative of that client (reverse solicitation). In this case, provided that

[3] Non-legal persons may apply only if their legal form ensures a level of protection of third parties' interests equivalent to that afforded by legal persons and if they are subject to equivalent prudential supervision appropriate to their legal form.

certain strict conditions are met, the firm will not be subject to the authorisation requirement for the provision of crypto-asset services or activities in the EU.

1. Authorisation and operating conditions of CASPs

The provision of services related to 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 (AIFM)) may provide these services.

CASPs authorized 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 EU and at least one of the directors must be 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 previous applicable individual national rules, which the undertakings had to examine with a lot of effort on a separate basis.

The authorisations are issued by the national competent authorities that are to be appointed by each Member State in accordance with national applicable procedures. In addition to the capital requirements, depending on the type of service, there are also requirements for the management body (good repute and sufficient knowledge, skills and experience, commitment of sufficient time). The shareholders of the service providers must also have good repute. As mentioned above, ESMA and EBA develop draft joint regulatory technical standards to further specify the information required for the authorisation. The European Commission has adopted those as Commission Delegated Regulation (EU) …/... supplementing Regulation (EU) 2023/1114 of the European Parliament and of the Council with regard to regulatory technical standards specifying the information to be included in an application for authorisation as a crypto-asset service provider (Level-2-Act) which are currently wating for publication in the Official Journal of the EU.

CASPs also have obligations to handle conflicts of interest, information obligations (for example, they must provide information on the environmental impact of their own activities) and provisions on outsourcing. Furthermore, CASPs shall establish and maintain effective and transparent procedures for the prompt, fair and consistent handling of complaints received from clients. Included in ESMA's first consultation package, there draft RTS on complaint handling procedure as well as on management and prevention, disclosure of conflict of interest.

Depending on the activity offered by the service provider, further requirements apply.

As known from the financial markets regulations, any person intending to acquire a qualifying holding in a financial institution, including CASPs, will be assessed by the national competent authority. For the purpose of facilitating this, ESMA's first consultation package also includes RTS on intended acquisition information requirements.

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

2. Notification procedure for certain financial institutions and banks.

The following financial entities can benefit from the notification procedure:

- **Credit institutions** which may provide all crypto-asset services;
- **Central securities depositories** which may provide custody and administration of crypto-assets on behalf of clients;
- **Investment firms** which may provide such crypto-asset services which are equivalent to the investment services and activities for which they are specifically authorised under MiFID II. MiCAR includes a list of which investment services equals which crypto-asset service;
- **E-money institutions** which may provide custody and administration of crypto-assets on behalf of clients and transfer services for crypto-assets on behalf of clients with regard to the e-money tokens it issues;
- **UCITS management company** or an AIFM which may provide crypto-asset services equivalent to the management of portfolios of investment and non-core services for which it is authorised; and

- **Market operator** which may operate a trading platform for crypto-assets

Sh, financial institutions may - by notification to the competent authority of their home member state, i.e. without "going through" an authorisation procedure under MiCAR - provide crypto-asset services equivalent to those already provided under a specific authorisation obtained under other financial regulations (principle of equivalence), as set out in MiCAR.

It means that, in the case of an investment firm, access to the provision of crypto-asset services for which the principle of equivalence does not apply the authorisation rules of MiCAR should apply.

In the case of credit institutions, a tout court authorisation to conduct banking business is sufficient to the provision of MiCAR crypto-asset services, on the assumption that they already possess adequate technical and organisational capabilities.

In any case the notification shall contain the information required which is not already in the possession of the national competent authorities. The notification needs to be done at least 40 working days before providing the crypto-asset services for the first time.

3. Adoption status in some EU jurisdictions

The EU Member States need to adjust their national laws to MiCAR. For our implementation tracker see here.

i. 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 MiCAR - 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.

ii. France

Under French law, the 10 following services on crypto-assets are regulated:

1) custody of crypto-assets on behalf of a client;
2) the service of buying or selling crypto-assets for legal tender;
3) trading of crypto-assets against other crypto-assets;
4) the operation of a trading platform for crypto-assets;
5) the reception and transmission of orders for crypto-assets, meaning the act of receiving and transmitting buy or sell orders for crypto-assets on behalf of a client;
6) the management of crypto-assets portfolios, meaning the act of managing, on a discretionary, client-by-client basis, portfolios that include one or more crypto-assets under a mandate given by a client;
7) advice to investors in crypto-assets, which means giving personalized recommendations to a third party, either at their request or on the initiative of the service provider providing the advice, concerning one or more crypto-assets;
8) crypto-assets underwriting, defined as the act of purchasing crypto-assets directly from a crypto-asset issuer, with a view to subsequently selling them;
9) the guaranteed placement of crypto-assets, which consists in searching for buyers on behalf of a crypto-assets issuer and guaranteeing them a minimum amount of purchases by undertaking to buy the crypto-assets not placed;
10) the non-guaranteed placement of crypto-assets, meaning the act of searching for buyers on behalf of a crypto-assets issuer without guaranteeing them an amount of purchases.

Depending on the regulated services provided, there are two different status applicable:

(i) a mandatory registration is required for the provision of services 1 to 4: it does not require an establishment in France, however, the provider applying for registration must be established in a Member State of the European Union (EU) or in the European Economic Area (EEA).

(ii) an optional license is available for all services listed (it extends rights in terms of communication - e.g., canvassing, sponsorship): the provider has to be established in France, either by setting up a legal entity (subsidiary) or a branch on French territory.

France therefore already offers a clear legal framework for crypto-asset business. DASP authorized under French law benefit from grandfathering/transitional provisions under MiCAR. Further, the French regulator announced that an "enhanced" DASP registration or a "DASP" licence will be able to benefit from the simplified procedure.[4] In this way, the current French regime on crypto-assets can be optimally used to anticipate and transition to MiCAR.

iii. Germany

The legislation in Germany needed to be adapted to MiCAR. The previously enacted legislation regulates parts which are now covered by MiCAR. The new law (FinmadiG) has been passed on 18 December 2024.

The German regulator BaFin is appointed as national competent authority for MiCAR. It has already published some guidance and a consultation of an ordinance.

The transitional period ends on 31 December 2025. The simplified procedure shall be available for entities currently holding a licence under the German Banking Act (*Kreditwesengesetz* – KWG) and the German Investment Firms Act (*Wertpapierinstitutsgesetz* – WpIG) if their services are related to crypto-assets.

iv. Italy

Italy has integrated the EU regulatory framework - specifically the Markets in Crypto-Assets Regulation (MiCAR), the recast Transfer of Funds Regulation (TFR) and the Fourth Anti-Money Laundering Directive (AMLD4) - into national law with the implementation of MiCAR, TFR and AMLD4 for crypto-assets. Below is an overview of the legislative measures introduced in Italy, the relevant supervisory responsibilities and the transitional regime applicable to Crypto-Asset Service Providers (CASPs).

Legislative Decree No. 204/2024 was enacted to align national legislation with Regulation (EU) 2023/1113 on fund transfers and crypto-assets. This decree incorporates CASPs into Italy's anti-money laundering (AML) framework and designates the Bank of Italy (BoI) as the primary AML authority. Date of entry into force: 30 December 2024.

Legislative Decree No. 129/2024 was introduced to implement Regulation (EU) 2023/1114 (MiCAR). It defines the roles and responsibilities of the Bank of Italy and CONSOB in the supervision of crypto-assets, establishes the criminal and administrative sanctions regime and establishes the transitional regime for CASPs. It entered into force on 14 September 2024.

Supervisory Framework. The BoI exercises prudential supervision over ART and EMT issuers as well as CASPs, focusing on capital requirements, crisis management, and risk controls. It also oversees the transparency of EMTs/ARTs (the latter jointly with Consob) and acts as the national AML authority, assessing and monitoring the compliance of CASPs, banks and financial intermediaries with AML/CFT regulations.

CONSOB, Italy's financial market regulator, is responsible for overseeing market conduct, investor protection, market transparency as well as the transparency of ART issuers and the conduct of CASPs. It enforces market abuse rules and reviews white papers and public offerings of crypto-assets other than ARTs/EMTs.

Transitional Regime for CASPs. Italy has introduced a shortened transitional framework for Crypto-Asset Service Providers (CASPs) under the Markets in Crypto-Assets Regulation (MiCAR). CASPs already registered by 27 December 2024 with the OAM can continue operating if they apply for full authorisation within the prescribed timeframe. Those who choose not to apply must cease operations in an orderly manner. The transitional period concludes on 30 December 2025. CASPs with pending authorisation applications may continue operating until this date or until their application is approved or denied, whichever occurs earlier. The main objective of this regime is to maintain market integrity and protect investors while allowing CASPs sufficient time to adapt to the new regulatory requirements.

v. Netherlands

As of 30 December 2024, the provisions of MiCAR will be directly applicable to CASPs offering services in the Netherlands, as in all other EU Member States. The Netherlands has chosen to limit the transitional period under Article 143 (3) MiCAR to 6 months, i.e. until 30 June 2025. The Dutch regulator AFM has taken the position that only entities with a registration on the basis of the Dutch Anti-Money Laundering and Terrorist Financing (which implements the European AMLD5 Directive in the Netherlands) can benefit from the

[4] https://www.amf-france.org/en/news-publications/depth/mica

transitional regime. During the transitional period they will continue to be governed by the national regime. The transitional regime is not open to other CASPs.

vi. Poland

Poland, as indicated above, has so far had hardly any legislation regulating crypto-asset service providers. The only regulatory framework in this area was the Polish AML Act, which, by implementing AMLD5, recognised the importance of virtual asset service providers (VASPs). The Polish AML Act understood the activities of VASPs to be the business of exchanging virtual currencies for cash or other virtual currencies (as well as brokering these exchanges) and operating crypto-asset accounts/wallets. VASPs were able to start their activities in Poland once they were registered in the register of virtual currency related services. This entry was of a purely formal nature - it was only refused if the application was incomplete and not completed within the set deadline, or if it contained false data.

vii. Spain

The Spanish National Securities Market Commission (**"CNMV"**) published on 23 July 2024 new information and documents related to the upcoming entry into force of European Regulation on crypto-asset markets (MiCAR), in particular, the following documents:

i. Template for notification of information to be submitted by certain financial entities for the provision of crypto-asset services: this template should be used by entities that already have a financial license (i.e. credit institutions, investment services companies, managements companies of IICs, electronic money institutions and central securities depositories or market infrastructures). This process is not as exhaustive as the authorization process, since it presumes that entities that have some type of financial license already comply with many of the obligations of the MiCAR.

ii. Manual to apply for authorisation of crypto-asset service providers ("**CASP**"): this authorization model and the descriptive manual must be used by the rest of the entities that do not have any of the licenses mentioned in the previous paragraph. This standardized model asks for very exhaustive information about the CASP, in accordance with the final draft of delegated regulations developing MiCAR.

Both documents aim to facilitate the authorization processes of crypto-asset service providers and the notification by financial entities that wish to provide crypto-asset services. The manual and the template serve as a guide regarding the documentation and information required from interested parties.

The CNMV is advancing the publication of both documents prior to the approval of the implementing rules of MiCAR (regulatory technical standards (RTS) and implementation of technical standards (ITS)) related to the authorisation and notification processes (approval still pending at European level). In any case, the manual and the template have been developed according to the latest available drafts of the aforementioned implementing regulation and will be adjusted (if necessary) to their final content.

Since MiCAR was not applicable until 30 December 2024, the CNMV shall not authorise any entity to provide crypto-asset services until said date. However, any interested party was able to submit an application from September 2024, in order to facilitate and streamline the process in an orderly manner.

viii. Sweden

As previously mentioned, following the implementation of AMLD5 Sweden has implemented some rules on virtual asset service providers through the Swedish Certain Financial Operations Act (1996:1006) ("SCFOA"). Two types of providers have been introduced in SCFOA; providers offering exchange services between virtual currencies and fiat currencies and providers of virtual currency wallets. To be able to provide services as either type of the virtual service provider, a registration with the Swedish Financial Supervisory Authority ("SFSA) is required. In addition to that, there is a requirement to conduct a fit and proper assessment for the management and owners, some requirements for internal governance document structure and also a catalogue of sanctions that are included in the SCFOA.

On February 15, 2024 a proposal for several national legislative acts has been presented. Inter alia, the proposal contains a new legislative act aiming to supplement MiCAR, Act on supplementary provisions to the Market in Crypto-Assets Regulation ("Supplementary Act"), and also several proposals that include necessary changes in SCFOA, Banking and Financing Business Act (2004:297), Payment Services Act (2010:751), Electronic Money Act (2011:755) and Anti-Money Laundering and Counter Terrorism Financing Act (2017:630) ("AML Act") etc.

The new Supplementary Act stipulates inter alia that the Swedish Financial Supervisory Authority ("SFSA") is the competent authority for handling matters related to MiCAR. It also stipulates the SFSA's supervisory and investigative powers as well as provides the catalogue of measures that may be undertaken by the SFSA in cases of breach of MiCAR.

The SCFOA is amended to no longer include virtual asset service provider activities. The rest of the aforementioned acts implement relevant changes, mostly references to MiCAR, where necessary, and also to the European Regulation (EU) 2023/1113 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849.

The AML Act is among other things updated to include crypto-asset service providers.

The new and amended acts are to enter into force on 30 December, 2024.

Also, in November 2023, a new legislative act -, Act on Assessment of cases pursuant to MiCAR, has been published. The proposal stipulates that the SFSA shall be appointed as the authority responsible for handling of MiCAR application processes. Also, the proposal gives the SFSA the power to charge application and registration fees. The proposal shall come into force on June 30, 2024, but will be repealed as soon as the Supplementary Act comes into force on 30 December 2024.

4. Grandfathering/transitional provisions of MiCAR

MiCAR provides a transitional period of up to 18 months, until 1 July 2026, for entities that will provide crypto-asset services, in conformity with the applicable national law, before 30 December 2024. In the event that the application for authorization to provide CASP services is submitted at an earlier date, provision under national regimes may continue until the authorization is granted or denied. This does not pre-judge the right of member states not to apply the transitional regime or to reduce its duration if they consider that their national regulatory framework applicable before 30 December 2024 is less stringent than the regulation in question.

5. Third-country CASPs

Finally, MiCAR also refers to CASPs established outside the EU. These third-country firms are only allowed to provide crypto-asset services to clients in the EU if the provision of services is at the exclusive initiative of the clients. This principle, referred to as reverse solicitation, is already known from MiFID II. For some key take-aways from MiFID II Reverse Solicitation for MiCAR Reverse Solicitation see *here*.

As mentioned above, ESMA has published guidelines on reverse solicitation under MiCAR. For further information on this consultation see *here*.

6. What are CASPs allowed to do under MiCAR?

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

i. Regulatory background

The provision of services relating to crypto-assets falls within the scope of MiCAR only if they are crypto-assets regulated by MiCAR or, if not, if they are the subject of services provided by authorized entities under MiCAR. Therefore, crypto-assets not regulated by MiCAR and not subject to the regulation of the financial sector (such as, for example, NFT, non-transferable tokens, etc.) can be the subject of services rendered by entities other than those licensed/authorized under MiCAR, which respond to compliance only with EU consumer protection and anti-money laundering rules and national civil law rules of the countries in which they operate.

ii. 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 IV.1 and IV.2 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, MiCAR provides for a preventive prohibition with a permit reservation.

First of all, it must be clarified who can be a CASP in general; 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 MiCAR. These terms are often based on the investment 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/RTO (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 CASP 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.

V. Market Abuse under MiCAR

The **Markets in Crypto-Assets Regulation (MiCAR)** establishes a comprehensive framework to address market abuse in the crypto-asset sector within its scope, targeting activities involving assets admitted to trading on platforms operated by **Crypto-Asset Service Providers (CASPs)** or for which a request for admission to trading has been made.

MiCAR's approach is modelled on the **Market Abuse Regulation (MAR)** for traditional financial instruments, with necessary adaptations to reflect the unique characteristics of crypto-assets. **Key definitions** such as inside information, insider dealing, and market manipulation are aligned with MAR to ensure consistency of interpretation.

Its provisions apply broadly to any person involved in relevant transactions, orders, or behaviours, regardless of whether the activities take place on a trading platform. Specific obligations are imposed on issuers and those seeking admission to trading, including the **prompt and transparent disclosure** of inside information, with limited allowances for delayed disclosure under strict conditions.

MiCAR's prohibitions extend to insider trading, unlawful disclosure of inside information, and market manipulation, covering direct and indirect transactions as well as recommendations and inducements.

Accountability measures are comprehensive and cover both natural and legal persons, including decision-makers acting on behalf of legal persons. Entities professionally arranging or executing transactions in crypto-assets (**PPAETs**) are required to implement robust systems to detect and prevent market abuse. They must report suspected market abuse to the competent authority of their Member State, which must coordinate with other jurisdictions to enforce compliance. CASPs operating trading platforms must include market abuse detection procedures in their licence applications and maintain effective post-licence monitoring systems.

Penalties for market abuse under MiCAR are addressed through a combination of administrative and criminal measures, depending on the Member State's legal framework. The **European Securities and Markets Authority (ESMA)** has published draft **Regulatory Technical Standards (RTS)**, yet to be adopted by the European Commission, to support MiCAR compliance. These standards adapt MAR requirements for crypto-assets, focusing on automated monitoring systems capable of detecting patterns of abuse in both on- and off-chain transactions. The draft RTS outline requirements for **governance systems**, real-time

monitoring tools, and standard reporting templates, including crypto-specific details such as wallet addresses and transaction characteristics. **Cross-border coordination mechanisms** ensure efficient sharing of reports and investigation results between competent authorities in international market abuse cases.

Through these provisions, MiCAR strengthens integrity and fosters trust in the crypto-asset market by aligning it with broader financial regulatory standards.

MiCAR represents a significant step toward aligning the crypto-asset market with established financial market practices, enhancing transparency and accountability. To fully realize these goals, it is critical to design and implement market abuse prevention and detection systems that are fully in line with clear governance frameworks and comply with MiCAR's provisions and the relevant Regulatory Technical Standards (RTS).

VI. Powers of NCAs, EBA and ESMA

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

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

ESMA is to establish a register of CASPs containing information on entities authorized to provide these services throughout the EU. This register is also to include crypto white papers reported to competent authorities and published by issuers under MiCAR.

In order to pool expertise, the EBA will also establish a Crypto Securities Committee. Under certain circumstances ESMA and EBA will have the power to temporary intervene by prohibiting and/or restricting certain actions undertaken by entities subject to MiCAR requirements.

In relation to the powers granted to the NCAs, MiCAR provides a substantial list of powers, both supervisory and investigative that the NCAs possess. The NCAs shall cooperate with each other for the purposes of MiCAR and render assistance to another Member State's NC as well as ESMA and EBA.

VII. Conclusion

Concluding, MiCAR has not only 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. These institutions will not only be able to provide investment services in relation to tokenised securities but also crypto-assets services after a notification.

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