



# EU AGREES NEW RULES TO REIN IN 'WILD WEST' CRYPTO INDUSTRY

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Legal Briefings

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EU legislators have outlined a landmark regulation package to protect consumers and increase transparency in the nascent crypto market

The European Parliament and Council reached a preliminary [political agreement](#) on the Regulation on Markets in Crypto-assets (**MiCA**) on 6 June 2022. This latest develop follows a series of other steps in the EU's drive to become a first mover on crypto regulation. These include:

- Political agreement in other pieces of legislation such as the Funds Transfer Regulation on 29 June 2022, the Digital Operational Resilience Act earlier in March and crypto-related amendments to the Markets in Financial Instruments Directive (**MiFID**) and other product legislation in May.
- The planned expansion of scope of anti-money laundering requirements to align the Fifth Money Laundering Directive with MiCA and capture additional cryptoassets.
- The [DLT Pilot Regulation](#), which came into force in June.

This note summarises our understanding of where MiCA has landed following political agreement. As the agreed text of MiCA is not yet publicly available, some of the detail of the agreement may not be reflected below.

*“We are the first continent to have a crypto-asset regulation. In the Wild West of the crypto-world, MiCA will be a global standard setter.”*

**Stefan Berger MEP**

## **WHEN WILL MICA APPLY?**

Following political agreement on MiCA, the final text will now be worked on by technical experts before it is put before the European Parliament and Council for approval. MiCA will enter into force following approval and publication in the Official Journal, expected to be towards the end of 2022. The majority of provisions will become applicable 18 months later, in mid-2024, except for the requirements related to stablecoins (referred to in MiCA as “asset referenced tokens”, or **ARTs**) which are expected to apply within 12 months of MiCA entering into force, likely to be end 2023/early 2024. Technical standards and delegated acts specifying certain elements of MiCA will need to be adopted before new regulation becomes applicable.

Grandfathering and transitional arrangements will be available. Crypto-asset service providers (**CASPs**) providing services before MiCA enters into force should be able to continue to do so for a further 18 months after the new regulations apply (potentially end 2025/early 2026) or until they become authorised.

## **MICA OVERVIEW**

By way of recap, MiCA introduces a sweeping set of rules that will regulate issuers and intermediaries of certain cryptoassets. These assets include:

- **Tokens which are not stablecoins or e-money.** This will capture utility tokens, cryptocurrency, exchange tokens, etc. Importantly this also now captures certain types of non-fungible tokens (**NFTs**).
- **Stablecoins**, referred to in MiCA as ARTs. These are effectively cryptoassets whose value is pegged to one or more fiat currency or other value/rights. This includes algorithmic stablecoins that aim to maintain a stable value in relation to an official currency or to one or several assets, via protocols, that provide for the increase or decrease of the supply of such cryptoassets in response to changes in demand.
- **E-money tokens.** These are cryptoassets that purport to maintain a stable value by referencing to the value of one official currency

MiCA excludes any cryptoassets which look like traditional financial products and are caught by other regimes such as MiFID, the Second Electronic Money Directive, Capital Requirements Directive (deposits), securitisation regulation, Pan-European Personal Pension Product Regulation, etc.

Digital assets that cannot be transferred to other holders (such those only accepted by the issuer or the offeror and are technically impossible therefore to transfer to other holders) and cryptoasset services provided in a fully decentralised manner without any intermediary, are not caught. Other exemptions apply to tokens which are not stablecoins or e-money. Conversely, more onerous obligations apply to stablecoins or e-money tokens which are deemed “significant” by the EBA.

## **ISSUERS AND CASPS**

MiCA applies to cryptoasset issuers and intermediaries, referred to in MiCA as cryptoasset service providers (**CASPs**). CASPs provide to third parties, on a professional basis, services in relation to cryptoassets (such as custody and administration, operating cryptoasset trading platforms, exchange of cryptoassets for fiat currency, execution of orders, reception and transmission of orders, providing advice on cryptoassets, etc).

The requirements in MiCA apply in a tiered fashion to issuers and CASPs depending on the product and the activity. The broad requirements are outlined below:

- **Authorisation:** Issuers of ARTs must have a registered office in the EU and will require authorisation under MiCA. CASPs are required to be authorised under MiCA unless they are already authorised under existing financial services legislation (eg banks, investment firms and payment institutions). Cryptoasset services can only be provided in the EU by an authorised CASP that has its registered office in the EU. Similar to MiFID, a CASP authorised in one EU member state may operate across the EU under a passport.
- **Other requirements:** These include requirements relating to transparency and disclosure for the issuance and admission to trading of cryptoassets, organisational, conduct and prudential rules for CASPs and certain issuers, change in control, and supervision arrangements. MiCA also establishes a market abuse regime for cryptoassets that are admitted to trading on a trading platform for cryptoassets, introducing requirements prohibiting certain behaviours likely to undermine users’ confidence in cryptoasset markets and the integrity of cryptoasset markets, including insider dealing, unlawful disclosure of inside information and market manipulation related to cryptoassets.

## **AREAS OF CONTROVERSY**

There were a number of points discussed during dialogues which were politically charged and caused much debate in the industry and the legislators including:

- **NFTs.** This was a hotly-debated topic with the co-legislators taking different stances on whether or not to include NFTs within the scope of MiCA. The latest position appears to be NFTs which are non-fungible and unique will be excluded from the scope of MiCA. If they are fungible in any way or are not fully unique, they will be captured by MiCA or other applicable product regime (depending on the nature of the token). The definition of NFTs will be clarified in the finalised text. Within 18 months, the European Commission will assess the position and, if necessary, publish a legislative proposal to create a separate regime for NFTs. In the meantime, individual member states would be free to regulate them at a national level.
- **ESG.** How the high carbon footprint of cryptocurrencies should be reduced proved to be contentious among the EU co-legislators. Following a call for a ban earlier this year on proof-of-work crypto mining (which would have effectively meant a ban on cryptocurrencies such as Bitcoin which rely on proof-of-work consensus mechanism), this ultimately did not receive sufficient support in the co-legislators. A framework compromise has been agreed but the precise details remain to be confirmed. It is likely the white paper will be required to include: An independent assessment of the likely energy consumption of the crypto-asset where the proof-of-work model is used; and information on sustainability indicators including in accordance with the EU Sustainable Finance Taxonomy. CASPs are likely to have to publish this information on their website for every cryptoasset in relation to which they provide services. The European Securities and Markets Authority (**ESMA**) has been tasked with developing draft technical standards on the content, methodology and presentation of information related to principal adverse environmental and climate-related impact. The European Commission will, within two years, report on the environmental impact of cryptoassets and consider the introduction of mandatory minimum sustainability standards for consensus mechanisms, including the proof-of-work. The EU Sustainable Finance Taxonomy will likely be changed in due course (by Jan 2025) to include cryptoasset mining in the economic activities that contribute substantially to climate change mitigation.
- **Supervision of significant CASPs and stablecoins.** There has been some debate between the co-legislators as to the supervision of significant CASPs (the threshold for a CASP to be significant has now been set at 15 million users) and in particular whether that would be by national competent authorities (**NCAs**) in the relevant Member State or if it would be by ESMA. Supervision is set to remain with NCAs although ESMA will have powers to intervene in order to prohibit or restrict the provision of cryptoasset services by CASPs if there are threats to market integrity, investor protection or financial stability. Stablecoins will be supervised by the European Banking Authority (**EBA**) and stablecoin issuers must be located in the EU.

## WHAT MICA MEANS FOR FIRMS NOW

Once the final text becomes available, cryptoasset issuers and CASPs should waste no time in assessing what MiCA will mean for their businesses. At a high-level:

- **Existing financial institutions** will be permitted to provide cryptoasset services without authorisation as CASPs if they notify NCAs before providing those services for the first time. These firms will need to understand the perimeter of MiCA and the MiCA obligations they will be subject to and adapt their existing systems and processes accordingly.
- **Businesses which are not currently authorised** will see a significant impact, although the more onerousness of the obligations under MiCA will depend on the types of cryptoasset being issued and activities being carried on. These businesses will need to consider whether their existing activities fall within the scope of MiCA and, if necessary, seek authorisation as a CASP or an issuer of ARTs. Grandfathering arrangements should apply. A simplified authorisation process may apply to crypto businesses which are already authorised under national law to provide crypto-asset services. These firms must not underestimate the time it will take to apply MiCA to their businesses, from assessing the extent to which MiCA applies to them, to applying for authorisation and implementing MiCA requirements into their systems and processes, from scratch.
- **Non-EU businesses** should consider how the territorial scope of MiCA will impact on its current and future business models. For example, will they be able to continue operating without being based in the EU by relying on reverse solicitation?

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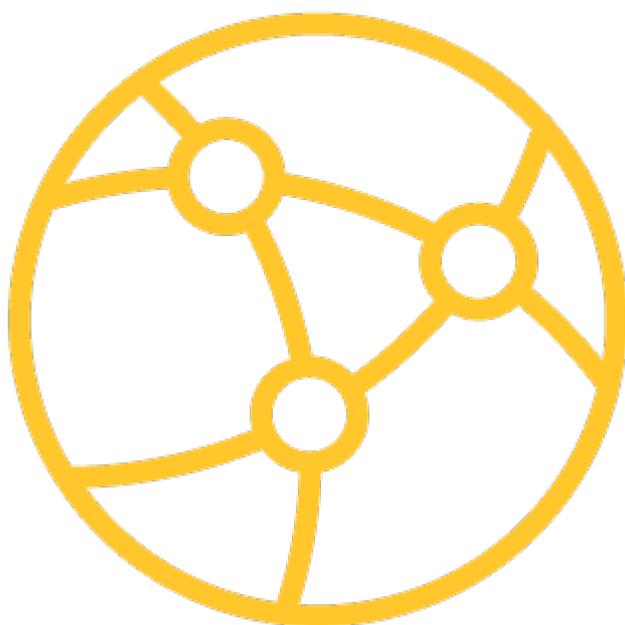
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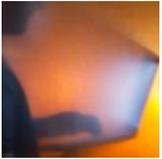
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