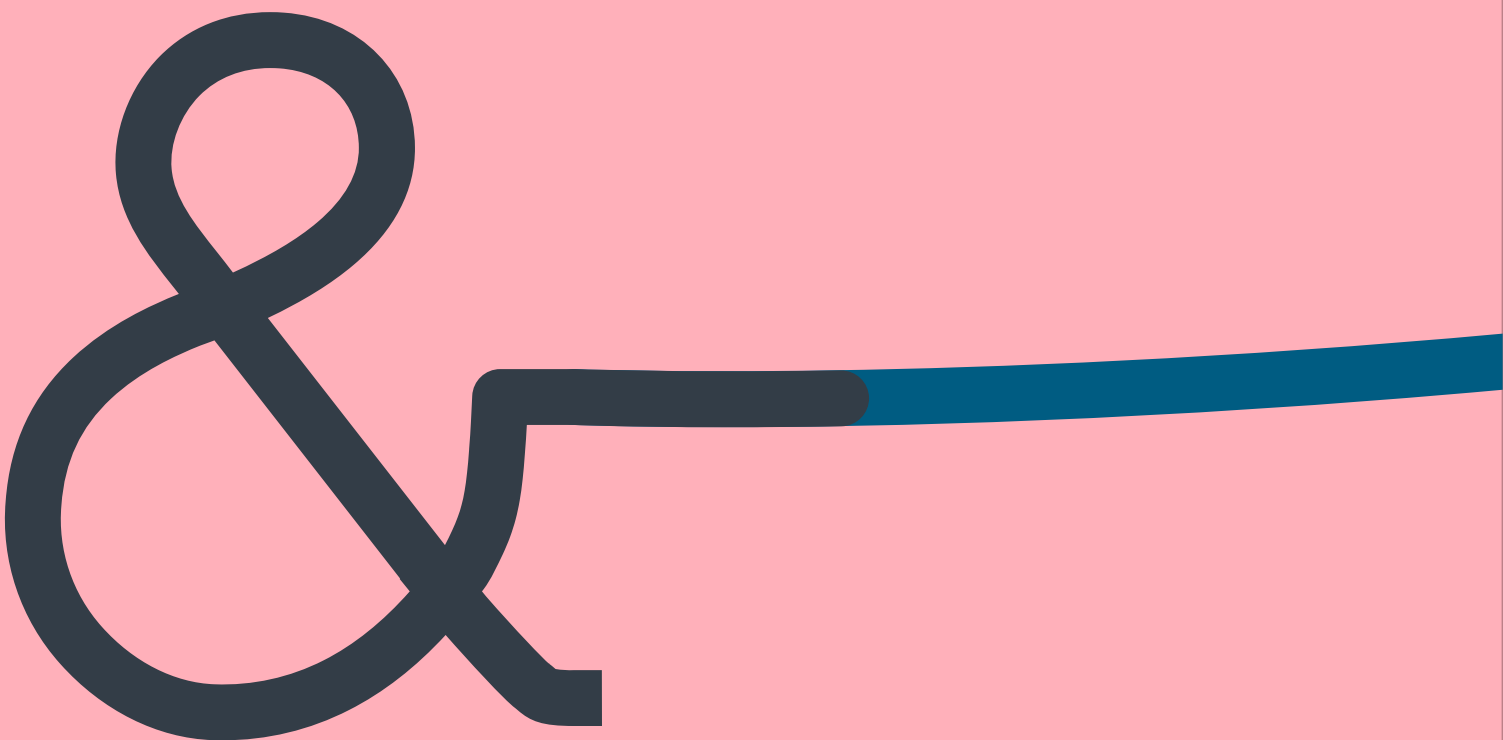


Bird & Bird

# Road to MiCAR: The European Crypto-assets Regulation

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

*April 2024*



# Contents

This guide is 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.

This guide reflects further discussions on the introduction and application of MiCAR (and beyond) and 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	2
1.	Background and objective of MiCAR	3
2.	The current implementation status	3
3.	The current patchwork of regulatory fragmentation	5
4.	Overview of MiCAR	7
II.	Crypto-assets	7
1.	What is covered?	7
2.	Types of crypto-assets under MiCAR	7
3.	What crypto-asset are not covered by MiCAR	9
III.	Offering/issuance of crypto-assets	10
1.	Offering (other) crypto-assets that are not ARTs or EMTs	10
2.	Issuance of ARTs to the public	10
3.	Issuance of EMTs to the public	11
IV.	Crypto-Asset Service providers	12
1.	Authorisation and operating conditions of CASPs	13
2.	Notification procedure for certain financial institutions and banks.	14
3.	Current status in some EU jurisdictions	14
i.	Denmark	14
ii.	France	14
iii.	Germany	15
iv.	Italy	15
v.	Netherlands	15
vi.	Poland	15
vii.	Spain	16
viii.	Sweden	16
4.	Grandfathering/transitional provisions of MiCAR	17
5.	Third-country CASPs	17
i.	Regulatory background	17
ii.	Specifically permitted activities or services within the crypto industry	17
V.	Powers of NCAs, EBA and ESMA	19
VI.	Conclusion	19

---

## I. Introduction

## 1. Background and objective of MiCAR

We are getting closer to a major shift in regulation of crypto assets and related services as it is about to be unified across the European Union through the Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (abbreviated as **MiCAR**).

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 and will become fully applicable by December 30, 2024, except regulation of asset-referenced tokens (ARTs) and electronic money tokens (EMTs) that starts to apply already on 30 June 2024.

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 must be developed before MiCAR enters into force. The European Market and Securities Authority (**ESMA**) and the European Banking Authority (**EBA**) have the assignment to draw up these documents.

ESMA has published two consultation packages and a part of the 3<sup>rd</sup> consultation package:

- 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 on standard forms and templates for the crypto-asset white paper
- ITS on technical means for appropriate public disclosure of inside 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 (published, 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, the EBA is responsible to develop several technical standards and guidelines to further specify the requirements for ARTs and EMTs that have now been published:

- 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 internal governance arrangements for issuers of asset-referenced tokens (ARTs)
- 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 on the reporting on ARTs and on EMTs denominated in a currency that is not an official currency of a Member State
  - Guidelines on establishing the common reference parameters of the stress test scenarios for the liquidity stress tests by issuers of significant ARTs.

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

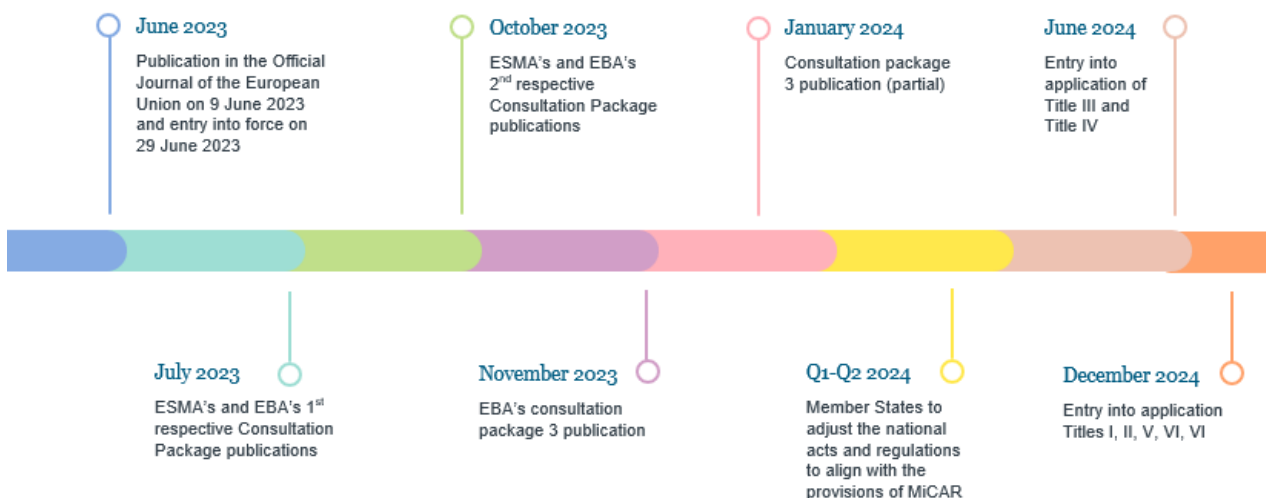
- Draft Joint EBA and ESMA Guidelines on the suitability assessment of shareholders and members, whether direct or indirect, with qualifying holdings in issuers of ARTs.

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

In correspondence to the above the European Commission published on 8 November 2023 four [drafts](#) of delegated regulations:

- Specifying the fees charged by the European Banking Authority to issuers of significant asset-referenced tokens and issuers of significant e-money tokens;
- Specifying certain criteria for classifying asset-referenced tokens and e-money tokens as significant;
- Specifying the criteria and factors to be taken into account by ESMA, EBA and competent authorities in relation to their intervention powers; and
- 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.

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.



### 3. The current patchwork of regulatory fragmentation

Without MiCAR, the EU regulatory framework for crypto-assets would remain fragmented on a national basis. Once fully implemented, MiCAR will allow EU Member States to regulate only what falls outside its scope. Below we provide a short description on what currently applies in some jurisdictions in the EU.

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

**France** has 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).

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

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

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

**Poland** has so far not had 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, as well as The Polish AML Act obliges VASPs to exercise other AML obligations (e.g., apply KYC procedures). In addition, the KNF has released a communication on issuing and trading in crypto-assets. The communication emphasises that even though there is no law dedicated to crypto-assets in Poland, this does not mean that certain activity does not fall under other regulations (e.g., MIFID).

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

- i. the incorporation of exchanges of virtual currency for fiat currency and custodians of electronic crypto-wallets as new “obliged entities” under the Spanish anti money-laundering act; and
- ii. registration duties, imposed on such new “obliged entities”, which shall now register within the special register held by the Bank of Spain (the Spanish national competent authority for supervising the provision of financial services).

**Sweden** has 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 will apply 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 of crypto assets to prepare a whitepaper for the types of tokens covered by the regulation (ARTs, EMTs and, as a catch-all, 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:

- those classified as a financial instrument under MiFID II,
- crypto-assets regulated by MiCAR, or
- 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.

### 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<sup>1</sup> 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, 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 Regulation. 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.

**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.

**Germany** introduced a definition of crypto assets in the German Banking Act (*Kreditwesengesetz - KWG*) when implementing AMLD5. The definition of crypto-assets from the MiCAR is, however, not congruent with the term of the German Banking Act (*Kreditwesengesetz - KWG*), so the German market is expected to adapt to the new developments in crypto legislation when MiCAR starts to apply. The German government has already issued a draft bill to adapt German law to the application of MiCAR: the Financial Market Digitisation Act (*Finanzmarktdigitalisierungsgesetz – FinmadiG*) shall amend the German Banking Act and introduce a Crypto Markets Supervision Act (*Kryptomärkteaufsichtsgesetz – KMAG*).

**Poland** has so far 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

---

<sup>1</sup> '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.



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 Polish Financial Supervision Authority has 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.

**Spain**, on its side, has included a definition of crypto-asset by means of article 3 (e) of the recently published Circular 1/2022, of 10 January, related to the marketing of crypto assets as investment assets (the "Circular"), published by the National Securities and Markets Commission ("CNMV") 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 may be amended from time to time in order to align such definition to those provided under MiCAR and the Circular.

### 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 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 and will continue to apply to them. For further information on ESMA's Consultation Paper on the Draft Guidelines on the delimitation of crypto assets from financial instruments 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 becomes 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 issuer must prepare, publish and notify the competent authority of a whitepaper. The whitepaper must present and describe, among other things, the essential characteristics of the crypto asset, rights and obligations, the underlying technology, and the associated risks. This is a kind of prospectus requirement.

The issuer 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 tokens, utility tokens that can be effectively exchanged for (existing) goods or services, or if the holder of the crypto token can only use it against goods or services in a limited network with contracted merchants (limited network exemption - LNE).

In addition, 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 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) white paper requirement, (ii) organisational requirements and (iii) conduct requirements.

##### *i) White paper requirement*

For ARTs a kind of prospectus requirement (white paper) apply. In this case the white paper requires both the approval by the competent authority and publishing. The white paper 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 token holder if the information in the white paper 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 credit institution 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 licence 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 token holders, compliance 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 token 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 token or the delivery of the assets to which the token 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 tokens. 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 EMT that can be divided into (i) white paper 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 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 white paper and notify the white paper to the competent authority.

#### *i) White paper requirement*

The issuer must publish and notify a white paper to the competent authority. The white paper shall include, *inter alia*, information about the issuer of the 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 white paper as required by MiCAR makes the issuer subject to liability. If the information in the white paper is not complete, fair or clear, or if it is misleading, the issuer and the members of its administrative, management or supervisory body are liable to a token holder for any loss incurred due to that infringement.

#### *ii) Organisational requirements*

In order to 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 Electronic 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 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**

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

It's worth noting that MiCAR regulates and reserves the activities exercised, on a professional basis, by crypto-asset service providers (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<sup>2</sup>, 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 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 currently applicable individual national rules, which the undertakings have to examine with a lot of effort on a separate basis.

The authorisations will be issued by the national competent authorities 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 reputation and possess sufficient knowledge, skills and experience, committing sufficient time). The shareholders of the service providers must also have good reputation. As mentioned above, ESMA and EBA develop draft joint regulatory technical standards to further specify the information required for the authorisation that shall be admitted to the European Commission for approval by 30 June 2024. The European Commission has adopted those as delegated regulation (Level-2-Act). ESMA launched a consultation on the RTS on the content of the application for authorisation for CASPs in July 2023 as part of a [first consultation package](#).

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

---

<sup>2</sup> 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.



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

With the exception of banks, other (and specified) 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. Current status in some EU jurisdictions

### 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 the current MiCAR proposal. In this way, the current French regime on crypto-assets can be optimally used to anticipate and transition to MiCAR.

### iii. Germany

Under the current national legal situation, Germany follows a strict approach compared to the rest of the European Union in an international comparison: crypto-assets are recorded as financial instruments. A MiFID authorisation is required for the provision of crypto-asset services such as the brokerage of tokens; a separate crypto-asset custody license is required for the provision of wallet services. The corresponding authorisation requirements of MiFID II (Directive 2014/65/EU) were implemented in Germany in the German Banking Act (*Kreditwesengesetz - KWG*) and the Investment Firm Act (*Wertpapierinstitutsgesetz - WpIG*) and were also made applicable to crypto-asset services for Germany. The authorisation is granted by the Federal Financial Supervisory Authority (*BaFin*).

However, this strict approach may have its advantages. On the one hand, Germany already offers a clear legal framework for crypto-asset business. On the other hand, service providers with MiFID authorisations benefit from grandfathering/transitional provisions under the current MiCAR proposal. In this way, the advantages of the current German regulatory regime on crypto-assets can be optimally used to stay *'ahead* in the implementation of MiCAR.

### iv. Italy

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

### v. Netherlands

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

### 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

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

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

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

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

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

## 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 about 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 a [consultation paper](#) on the draft 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**

Until MiCAR comes into force, there are only a few national regulations regarding transactions with cryptocurrencies and related services. These national regulations differ in terms of the binding character of the rules, the scope of crypto-assets that are covered and the related activities as well as the requirements for offerors/issuers or service providers. These different approaches by the national competent authorities contribute to fragmented market. The lack of uniform rules therefore poses significant risks for both consumers and investors. In addition, the lack of uniformity threatens to affect the stability of the market and shake consumer confidence in trading by calling on crypto-asset services in general. MiCAR is to be enacted in order to avert these threats. A central component for achieving the above-mentioned goals and avoiding the risks is the uniformity and clear definition of the notion of 'the provision of crypto-asset services'.

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, Bitcoin, other decentralized crypto-assets and their derivatives, 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. Powers of NCAs, EBA and ESMA**

The task of supervising issuers of *significant* 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 temporarily 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 will 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.

---

## **VI. Conclusion**

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

Given the benefits MiFID institutions enjoy under MiCAR, it is an attractive option for new entrants to apply for MiFID institution authorization now (e.g., in Germany, where a MiFID license is already required for related services in the crypto sector). When MiCAR comes into force, these institutions will not be subject to the uncertainties that a new implementation of the law will inevitably bring. A simplified authorization process also awaits already authorized e-money institutions, which is beneficial. This is because crypto-asset service

providers (especially those from unregulated EU countries) will incur higher costs that may result from obtaining authorizations and setting up appropriate structures to meet MiCAR requirements. Early establishment of such infrastructure in an already established regulatory framework therefore offers advantages.

---



# Your MiCAR team



*Johannes Wirtz, LL.M. (London)*

Partner, Germany

+49 (0)69 74222 6267  
johannes.wirtz@twobirds.com



*Giuseppe D'Agostino*

Of Counsel, Italy

+39 (0) 23035 6000  
giuseppe.dagostino@twobirds.com



*Annette Printz Nielsen*

Partner, Denmark

+45 3914 1660  
annette.nielson@twobirds.com



*Dr. Michael Jünemann*

Partner, Germany

+49 (0)69 74222 6230  
michael.juenemann@twobirds.com



*José Luis Lorente Howell*

Partner, Spain

+34 91790 6000  
jose.luis.lorente.howell@twobirds.com



*Slawomir Szepietowski*

Partner, Poland

+48 22 583 79 00  
slawomir.szepietowski@twobirds.com



*Cathie-Rosalie Joly*

Partner, France

+33 (0)1 42 68 6000  
cathie-rosalie.joly@twobirds.com



*Eleonora Pavliouk*

Senior Associate, Sweden

+46 8 506 320 00  
eleonora.pavliouk@twobirds.com



*Filip Windak, LL.M.rr*

Associate, Poland

+48 22 583 79 00  
filip.windak@twobirds.com



*Timo Förster*

Associate, Germany

+49 (0)69 74222 6000  
timo.foerster@twobirds.com



*Delphine Frye*

Senior Associate, France

+33 (0)1 42 68 6000  
delphine.frye@twobirds.com

twobirds.com

• Abu Dhabi • Amsterdam • Beijing • Bratislava • Brussels • Budapest • Casablanca • Copenhagen • Dubai • Dublin • Dusseldorf • Frankfurt  
• The Hague • Hamburg • Helsinki • Hong Kong • London • Luxembourg • Lyon • Madrid • Milan • Munich • Paris • Prague • Rome • San Francisco  
• Shanghai • Shenzhen • Singapore • Stockholm • Sydney • Warsaw

The information given in this document concerning technical legal or professional subject matter is for guidance only and does not constitute legal or professional advice. Always consult a suitably qualified lawyer on any specific legal problem or matter. Bird & Bird assumes no responsibility for such information contained in this document and disclaims all liability in respect of such information.

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

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

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