

Relevant Aspects of the MiCA Regulation

Camilo Gantiva Hidalgo
Juan Felipe Fontecha Mejía
Simón Escobar

This document highlights the most relevant aspects of the Markets in Crypto-Assets (MiCA) Regulation recently adopted in the European Union (EU). MiCA is aimed at regulating crypto-assets in a comprehensive and integral manner. The most important aspects of this regulation are summarized below.

Issuance and Public Offering of Crypto-Assets

Regarding the issuance of crypto-assets, MiCA establishes specific requirements and obligations that must be met by any legal entity that intends to conduct a public offering of this type of assets or to request the admission of a crypto-asset to a trading platform. Such requirements and obligations vary according to the classification of the crypto-asset, depending on the different risks they may represent. Under MiCA, one of the main requirements for crypto-asset issuers is the preparation, publication and notification, to the competent authority in which the entity has its registered office, of a white paper that includes relevant information regarding the issuance and important characteristics of the crypto-asset that will be issued. This requirement represents an essential condition to be able to offer crypto-assets to the public or request the admission of a crypto-asset to a trading platform. At a minimum, the white paper must include the following:

- » information about the offeror or the person requesting the admission of the crypto-asset to a trading platform
- » information about the issuer when the issuer is different from the offeror or the person requesting admission to trading
- » information on the operator of the crypto-asset trading platform, in the event that the operator prepares the white paper
- » information on the crypto-asset project
- » information on the public offering of the crypto-asset or its admission to trading
- » information about the crypto-asset and the risks associated with it
- » information on the underlying technology used in the project
- » information on the rights and obligations associated with the crypto-asset
- » information on the main adverse effects on the climate, as well as other adverse environmental effects associated with the consensus mechanism used to issue the crypto-asset

It is important to mention that, in case the crypto-asset that is to be issued is an asset-referenced token (ART), the issuer must obtain prior authorization from the competent authority on the white paper that has been proposed. On the other hand, white papers for the issuance of e-money tokens (EMTs) or crypto-assets that do not fall into the category of ARTs or EMTs do not require prior

authorization from a competent authority, as it will only be necessary to submit the white paper to the authority and publish it in accordance with the provisions contained in MiCA.

Additionally, any marketing communications related to the public offering of crypto-assets or the admission of a crypto-asset to a trading platform must present fair, clear and not misleading information, as well as be consistent with the information included in the corresponding white paper, among other requirements established in the standard for such purpose.

Issuance and Public Offering of Crypto-Assets Different Than EMTs and ARTs

In the case of public offerings of crypto-assets other than EMTs and ARTs, the regulation establishes that these may only be carried out by legal entities. Additionally, the offeror, the person requesting the admission to trading of the crypto-asset or the trading platform, as the case may be, must notify the competent authority at least 20 business days prior to the date of publication of the white paper. The content of the white paper shall include all the information mentioned above.

Nevertheless, and on the understanding that crypto-asset offerings could represent an innovative and inclusive form of financing for small and medium-sized enterprises (SMEs), the rule establishes that the white paper and marketing communications requirements will not be applicable when any of the following types of public offerings are presented:

- » an offer to fewer than 150 individuals or legal entities for each EU Member State
- » an offer in which the total consideration of the public offer does not exceed €1,000,000 over a 12-month period from the commencement of the offer
- » an offer directed exclusively to qualified investors and in which only such qualified investors may hold the crypto-assets

Issuance and Public Offering of EMTs

The issuers of EMTs must be authorized credit institutions or electronic money institutions. Likewise, public offerings of EMTs and ARTs, or their application for admission to trading, may be carried out only by the issuer of such crypto-asset or by a third party that has been authorized to do so by the issuer itself.

In this case, the offeror shall notify the competent authority at least 20 business days prior to the date of publication of the white paper. In addition, it shall explicitly include an acknowledgement of the right of EMT holders to receive a redemption of EMTs in funds denominated in the official currency to which the EMT refers, at their nominal value and at any time.

Because EMTs are considered to be electronic money, certain provisions contained in Titles II and III of Directive 2009/110/EC will apply. Specifically, issuers of EMTs will have to comply with the regulations for electronic money institutions in relation to capital requirements, custody of funds received and the issuance and redemption of EMTs. Certain prudential supervisory standards for these types of entities will also apply to issuers of EMTs.

Issuance and Public Offering of ARTs

MiCA establishes stricter rules regarding the issuance of ARTs due to concerns about financial stability and monetary sovereignty.

The rule establishes that issuers of ARTs must be legal entities or companies established in the EU and duly authorized under the MiCA, or must correspond to a credit institution.

In the case of the former, any legal entity or company that intends to publicly offer or seek admission to trading must submit an application for authorization to the competent authority. In order for the issuer to advance the offering, the authority must grant its authorization to both the application and the corresponding white paper. For public offerings of ARTs, the white paper must include, in addition to the information mentioned above, information regarding the reserve of assets underlying the issuance of the ARTs.

However, it will not be necessary for a legal entity or company to request authorization from the competent authority when the average outstanding value of an ART in circulation never exceeds €5,000,000 during a period of 12 months or when the public offering is directed exclusively to qualified investors and only these may be holders of the crypto-asset.

The MiCA Regulation also includes detailed regulatory requirements for ART issuers, including the following:

- » act honestly, fairly and professionally
- » communicate with holders and prospective holders of the crypto-assets in a fair, clear and not misleading manner
- » act in the best interest of token holders and treat them equitably
- » publish the crypto-asset white paper on its website
- » disclose in a clear, accurate and transparent manner, the number of ARTs in circulation, as well as the value and composition of the reserve assets
- » publish the audit report in relation to the asset reserves, as well as a brief, clear, accurate and transparent summary of such report
- » disclose any event that significantly affects or may significantly affect the value of the ARTs or the reserve assets
- » establish and maintain effective and transparent procedures for the prompt, fair and consistent handling of complaints received from ART holders and other stakeholders
- » establish and maintain effective policies and procedures for the detection, prevention, management and communication of conflicts of interest
- » notify the competent authorities of any changes in their management bodies
- » have robust governance arrangements, including a clear organizational structure with well-defined, transparent and consistent lines of responsibility and effective processes to identify, manage, monitor and report the risks to which they are or might be exposed
- » ensure that the members of the issuer's management bodies are of good repute, with appropriate experience, skills and knowledge
- » recognize the rights of ARTs holders, as well as establish policies and procedures with respect to the permanent right of reimbursement to which holders are entitled
- » establish business continuity strategies and plans
- » have adequate systems and procedures in place to protect the availability, authenticity, integrity and confidentiality of data
- » have, at all times, funds equal to the greater value between €350,000, two percent of the average amount of reserve assets or a quarter of the general fixed overheads of the preceding year

- » establish and maintain a reserve of assets that is legally segregated from the issuer's equity and that can be managed to cover the risks associated with the assets referenced by ARTs and to address the liquidity risks associated with the permanent redemption rights to which holders are entitled
- » establish and implement policies, procedures and contractual arrangements to comply with regulations regarding the custody of issued crypto-assets
- » establish and implement policies regarding the stabilization mechanism for issued ARTs

In the event that the value of issued ARTs exceeds €100,000,000, the issuer shall be obliged to report the information corresponding to the number of holders, the value of the issued ART, the volume of the asset reserve, the number and average aggregate value of daily operations, and an estimate of the number and average aggregate value of daily operations involving its use as a means of exchange in the same currency zone to the competent authority on a quarterly basis. In the event that this estimate exceeds one million transactions, or their aggregate value exceeds €200,000,000, the issuer must cease issuing the ART and submit a plan to ensure that the estimated quarterly average number and aggregate value of such transactions per day will remain below such limit.

Crypto-Asset Service Providers

MiCA contemplates a wide variety of rules and obligations that must be met by Crypto-Asset Service Providers (CASPs) in the EU. Firstly, the regulation establishes that this type of services may only be provided by the following entities:

- » legal entities or other companies that have been authorized as CASPs and have their registered office in an EU Member State
- » a credit institution, central securities depository, investment firm, market operator, electronic money institution, Undertakings for Collective Investment in Transferable Securities (UCITS) management company or an alternative investment fund manager — provided that they report and submit certain required information to the competent authority at least 40 business days prior to the commencement of services

Once the authorization is obtained, the CASP will be entitled to provide services related to crypto-assets throughout the EU. The authority that issues the authorization will specify the type of services that have been authorized.

In the case of legal entities and other authorized companies, it is required that they carry out the effective management of the business at a location within the EU and that at least one of the directors resides in an EU member state. Additionally, companies from countries outside the EU may provide crypto-asset services, without prior authorization, only when it is on the exclusive initiative of a client domiciled or located in the EU. Thus, foreign companies are prohibited from offering or promoting crypto-asset services within the EU.

CASPs in the EU will be subject to supervision by the competent authorities and must act in the best interest of clients. They must also comply with extensive prudential requirements regarding minimum capital and corporate governance, as well as prudential reserves for the safe custody of their clients' assets. In addition, they must also implement policies and procedures against money laundering and terrorist financing, as well as policies on business continuity and the prevention of conflicts of interest.

MiCA establishes several consumer protection measures related to disclosure and transparency of information, data protection and planning for an orderly wind-down of activities, if necessary.

The types of services regulated under MiCA are as follows:

- » custody and administration of crypto-assets on behalf of clients
- » operation of a trading platform for crypto-assets
- » exchange of crypto-assets for funds
- » exchange of crypto-assets for other crypto-assets
- » execution of orders for crypto-assets on behalf of clients
- » placing of crypto-assets
- » reception and transmission of orders for crypto-assets on behalf of clients
- » providing advice on crypto-assets
- » providing portfolio management on crypto-assets
- » providing transfer services for crypto-assets on behalf of clients

Providers of each of these crypto-asset services must comply with certain additional regulatory requirements.

Finally, MiCA stipulates a series of measures against market abuse. In this regard, it includes the obligation for issuers, offerors and persons applying for admission to trading of crypto-assets to disclose inside information. In turn, it prohibits insider trading, unlawful disclosure of inside information and market manipulation, providing rules for the prevention and detection of market abuse.

The standard was formally adopted by the Council of the European Union on May 16, 2023, thus concluding the legislative process. The standard will now be published in the official gazette and will take effect 20 days after its publication. The provisions contained in the regulation will start to apply after a transition period of ranging between 12 to 18 months, depending on the specific provision.

Additional Rules

In addition to the above, MiCA establishes several additional rules applicable to diverse types of crypto-assets, including the following:

- » With respect to the liability of issuers, in the event that an issuer of crypto-assets has provided information in its crypto-asset white paper that is not complete, fair or clear or is misleading, the issuer and the members of its administrative, management or supervisory body shall be liable to the holder of the crypto-asset in question for the loss suffered as a result of such non-compliance.
- » Issuers of EMTs and ARTs and crypto-asset service providers are not authorized, under this new rule, to grant interest in relation to these types of crypto-assets.
- » Both EMTs and ARTs are susceptible of being classified as "significant," which implies additional and stricter obligations for issuers of such crypto-assets, including the transfer of supervisory responsibility from the national competent authority to the European Banking Authority. The classification of these crypto-assets as "significant" will be based on different criteria set forth in the rule, such as the number of holders of the crypto-asset, the value of the crypto-asset issued, its market capitalization, the volume of the issuer's asset reserves, the number and average

aggregate value of daily transactions performed, the importance of the issuer at an international level, and the use of the crypto-asset for payments and remittances, among others.

Holland & Knight actively monitors regulatory developments regarding crypto-assets and advises clients on potential impacts on the development of their business related to blockchain technology.

Information contained in this alert is for the general education and knowledge of our readers. It is not designed to be, and should not be used as, the sole source of information when analyzing and resolving a legal problem, and it should not be substituted for legal advice, which relies on a specific factual analysis. Moreover, the laws of each jurisdiction are different and are constantly changing. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. If you have specific questions regarding a particular fact situation, we urge you to consult the authors of this publication, your Holland & Knight representative or other competent legal counsel.

Copyright © 1996-2023 Holland & Knight LLP All Rights Reserved.