

MARKETS IN CRYPTO-ASSETS REGULATION (MiCA): ECB OPINION ON THE SUPERVISORY STRUCTURE

1. Introduction

In September 2020, the European Commission published four legislative proposals aimed at implementing the so-called digital finance strategy. The package, known as the digital finance package, comprises:

- (i) a Regulation on markets in crypto-assets (so-called “**MiCA**” or “**MiCAR**”)⁽¹⁾;
- (ii) a Regulation on digital operational resilience for the financial sector⁽²⁾;
- (iii) a Directive amending or clarifying certain provisions in existing EU financial services directives⁽³⁾;
- (iv) a Regulation establishing a pilot regime for market infrastructures based on distributed ledger technology (“**DLT**”)⁽⁴⁾.

2. MiCA: the architecture of regulation and supervision

MiCAR establishes a twofold regulatory regime: the first relates to crypto-assets **other than asset-referenced tokens and e-money tokens** (essentially, to **utility tokens**)⁽⁵⁾; the second relates to **asset-referenced tokens** (“**ARTs**”) and **e-money tokens** (“**EMTs**”).

With respect to utility tokens, MiCAR provides that the issuers are subject to certain organisational, conduct and disclosure rules, including:

- (i) incorporation in the form of a legal entity;
- (ii) the drafting of a white paper;
- (iii) the publication and submission of the white paper to the national competent authority;
- (iv) compliance with rules of conduct set forth by Article 13 of MiCAR⁽⁶⁾;
- (v) the carrying out of marketing communications in accordance with the requirements of Article 6 of MiCAR⁽⁷⁾.

⁽¹⁾ COM(2020) 593.

⁽²⁾ COM(2020) 595.

⁽³⁾ COM(2020) 596.

⁽⁴⁾ COM(2020) 594.

⁽⁵⁾ Utility tokens are defined by Article 3 of MiCAR as “a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token”.

⁽⁶⁾ Article 13 of MiCAR establishes, inter alia, the duty to: (i) act honestly, fairly and professionally, (ii) communicate with the holders of crypto-assets in a fair, clear and not misleading manner; (iii) prevent, identify, manage and disclose any conflicts of interest that may arise, and (iv) maintain systems and security access protocols to appropriate standards.

⁽⁷⁾ Which include: (i) the clear identification of marketing communications, (ii) the fairness and clarity of marketing communications, (iii) consistency with information included in the white paper, and (iv) the inclusion of a reference to the publication of the white paper.

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ARTs and EMTs are defined by MiCAR as "a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets" and as "a type of crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender", respectively⁽⁸⁾.

Issuers of these classes of tokens are subject to more stringent requirements than issuers of utility tokens. In particular, with reference to **ARTs**, MiCAR requires – *inter alia* – that **issuers**:

- (i) be authorised by the competent authority of the home Member State;
- (ii) hold a reserve of assets segregated from the issuer's own assets at all times, with a view to stabilising the value of ARTs;
- (iii) publish a white paper containing information on, *inter alia*, the governance arrangements of the issuer, the custody arrangements of the reserve assets and the complaint handling procedure;
- (iv) be subject to governance arrangements set forth by Article 30 of MiCAR⁽⁹⁾;
- (v) have in place at all times own funds amounting at least to the higher of (x) €350,000 and (y) 2% of the average amount of the reserve assets⁽¹⁰⁾.

With respect to **EMT issuers**, MiCAR provides – *inter alia* – that they shall:

- (i) be authorised as credit institutions or electronic money institutions;
- (ii) issue EMTs at par and on receipt of funds;
- (iii) not provide for interest or any other benefit related to the duration of the holding period of EMTs;
- (iv) publish a white paper including, *inter alia*, a description of the right to redemption at par value of the EMTs and the procedures for exercising such right;
- (v) invest the funds received for the issuance of EMTs in safe, low-risk assets denominated in the EMT's denominated in the same currency as the one referenced by the EMT;

Supervision of ART and EMT issuers is entrusted to **national competent authorities**, which must have adequate supervisory and investigative powers in accordance with national law.

On top of such categories of issuers, MiCAR identifies **additional requirements** for issuers of **significant ARTs** ("**SARTs**") and **significant EMTs** ("**SEMTs**").

⁽⁸⁾ See Article 3 of MiCAR.

⁽⁹⁾ Which include, *inter alia*: (i) the adoption of a clear organisational structure with well-defined, transparent and consistent lines of responsibility; (ii) the fulfilment, by members of the management body, of the good repute and competence requirements; and (iii) the fulfilment, by natural persons holding, directly or indirectly, more than 20% of the share capital or voting rights of ART issuers or exercising a power of control over them, of good repute and competence requirements.

⁽¹⁰⁾ Own funds consist of Common Equity Tier 1 (CET1) items and instruments, as defined by Regulation (EU) No 575/2013 (see Article 31(2) of MiCAR). Competent authorities may: (x) require to hold an amount of own funds which is up to 20% higher, or (y) permit issuers to hold an amount of own funds which is up to 20% lower (see Article 31(3) of MiCAR).

The designation of SARTs and SEMTs is based on mainly dimensional criteria, such as – *inter alia* – the size of the customer base, the tokens' value, the number and value of token transactions, the cross-border activities of the issuers and the interconnection with the financial system.

Designation as a SART and SEMT may take place either at the initiative of the European Banking Authority ("**EBA**") or at the request of the issuer. In relation to issuers, such qualification implies the application of further requirements in addition to those applicable to ART and EMT issuers⁽¹¹⁾.

MiCAR entrusts the supervision of SART and SEMT issuers to EBA. More specifically:

- SART issuers operate under the **supervision of EBA**, which is responsible for establishing a consultative supervisory college for each SART issuer comprising, among others, the EBA, the national competent authority, the European Securities and Markets Authority (ESMA) and the ECB;
- SEMT issuers are subject to **dual supervision** by the national competent authorities and EBA, whose supervision focuses on compliance with the supplementary requirements applicable to such issuers. Also in relation to SEMT issuers, EBA is responsible for establishing a consultative supervisory college.

3. The ECB opinion on the supervisory structure

In the context of the European Commission's consultation on the MiCAR proposal, the ECB issued an opinion – published in the Official Journal of the European Union on 29 April 2021 – on the draft proposed by the European Commission (the "**ECB Opinion**").

The ECB Opinion commented on the supervisory structure proposed in MiCAR. With regards to SEMT issuers, the opinion highlighted the serious drawbacks of dual supervision. Moreover, as highlighted by the ECB Opinion, it would not be economically justified to differentiate between the treatment of SART issuers, whose activities are supervised by EBA at the European level, and the treatment of SEMT issuers.

In addition, the ECB Opinion stressed that the implementation of a system based on dual supervision would be further burdensome where the SEMT issuer is a significant credit institution, as it would be implemented on top of the supervisory framework already in place (which relates, in particular, to the Single Supervisory Mechanism). In such a case, the issuer would be subject to the supervision of three different authorities: the national competent authority identified in accordance with MiCAR, the EBA and the ECB. In light of this, the ECB Opinion emphasises the need to better clarify the respective supervisory tasks of the EBA and the ECB.

In particular, as a broad consideration, the ECB Opinion highlights the need to establish a clearer coordination mechanism between the powers of the EBA and the ECB, also with a

⁽¹¹⁾ Such requirements include, with respect to SART issuers, (i) the adoption of a remuneration policy that promotes sound and effective risk management, (ii) the adoption of a liquidity management policy, and (iii) higher capital requirements. With respect to SEMT issuers, MiCAR requires compliance with, among other things, certain rules relating to (i) the custody of reserve assets, (ii) the remuneration policy, and (iii) own funds requirements.

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view to preventing measures adopted by the EBA under its supervisory powers from interfering with the prudential supervision exercised by the ECB over significant credit institutions.

In this respect, the ECB Opinion considers that it is may not be sufficient to lay down a general duty for the EBA and national authorities to coordinate with the authorities responsible for the supervision or oversight of activities other than those carried out by crypto-asset issuers, and calls for the establishment of a coordination mechanism with precisely defined procedures and deadlines.

Lastly, with regards to activities conducted by significant credit institutions, the ECB Opinion stresses the need to establish a requirement for national competent authorities to inform the ECB in the event that a significant credit institution issues a white paper, intends to provide crypto-asset services⁽¹²⁾ or is in breach of MiCAR itself.

⁽¹²⁾ Services for cryptocurrencies are defined in Article 3 of MiCAR and include: (i) the custody and administration of crypto-assets on behalf of third parties, (ii) the operation of a trading platform for crypto-assets, (iii) the exchange of crypto-assets for fiat currency that is legal tender; (iv) the exchange of crypto-assets for other crypto-assets; (v) the execution of orders for crypto-assets on behalf of third parties; (vi) placing of crypto-assets; (vii) the reception and transmission of orders for crypto-assets on behalf of third parties; and (viii) providing advice on crypto-assets.

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