



EU policy-makers make a step forward on digital finance. Transparency, responsibilities and licensing of EU crypto-asset service providers

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On 30 June 2022, the Council and the Parliament of the EU achieved a provisional political agreement on the proposal for a regulation on markets in crypto-assets (“MiCA”). The agreement marks the conclusion of the trilogues commenced on 31 March 2022, and represents a turning point in the legislative process towards the MiCA. Along with the political agreement, the co-legislators have released a final text that will most likely be adopted.

Coordination issues might, though, arise between the new licensing regime applicable to crypto-asset service providers under the MiCA and those already in force in some Member States, such as Italy.

We describe below some key features of the MiCA from official EU press, while awaiting the polished final version, with preliminary comments on the interplay between new and existing licences for crypto-asset service providers.

In-scope crypto-assets and service providers

The MiCA will cover crypto-assets and certain non-fungible tokens (NFTs), whilst other NFTs may be regulated in the future through an *ad hoc* regime. Issuers of unbacked crypto-assets,



including “stablecoins”¹, and crypto-assets service providers (“CASPs”), including wallet providers², will fall within the scope of the MiCA.

CASPs obligations

CASPs will be obliged to disclose investment-related information to investors (e.g. on risks associated to their investments) and to protect the investments they manage. CASPs will be liable in case of investors’ crypto-assets portfolio default. In addition, the MiCA lays down provisions to prevent market abuse, notably market manipulation and insider dealing.

Tight supervisory obligations are imposed on so-called “stablecoins”, due to the higher potential risks they may cause to financial stability and investors’ protection. Among the prudential requirements designed for stablecoins issuers, there is an obligation to grant appropriate liquidity with a 1/1 ratio, partly in the form of deposits. This will enable stablecoins holders to reclaim their funds at any time free of charge.

An important novelty of the MiCA are the new provisions on sustainable fintech. More particularly, the MiCA imposes new transparency obligations on the environmental and climate footprint of crypto-asset activities. After the entry into force of the MiCA, the European Securities and Markets Authority (“ESMA”) will issue regulatory technical standards specifying the content, methodologies and presentation of the relevant information. Moreover, the European Commission will prepare,

within two years following the entry into force of the MiCA, a report detailing, among others, mandatory minimum sustainability standards with respect to energy-intensive blockchain consensus mechanisms, such as the proof-of-work³.

The ESMA and the European Banking Authority (“EBA”) will have the power to prohibit or limit crypto-asset activities (including the sale of tokens) whenever deemed to pose risks to financial stability, investors’ protection and market integrity.

The MiCA furthermore intervenes in the Anti-Money Laundering (“AML”) area. In this respect, the EBA will keep a public register of CASPs non-compliant with AML rules. CASPs whose parent company is located in third countries rated “high risk” for money laundering purposes, as well as in non-cooperative jurisdictions for tax purposes, will be scrutinised under the EU AML legal framework. Additionally, the MiCA may make compliance and supervision requirements for shareholders and management of CASPs stricter depending on their location. In principle, it seems confirmed that the MiCA will not duplicate the most recent version of the AML obligations⁴.

Licensing of crypto-assets service providers operating within the EU

Another key-novelty of the MiCA is that CASPs must be licensed to carry out business within the EU. This will not involve financial services providers already licensed under existing financial services legislation (such as banks).

¹ Stablecoins are fixed-price crypto-assets that have a market value attached to another stable asset.

² Wallet providers are not defined in EU legislation, but this term generally indicates an entity that provides a virtual currency wallet, i.e. an instrument for holding, storing and transferring virtual currencies.

³ Proof-of-work means a consensus mechanism that requires all miners that are participants to the distributed ledger technology (DLT) to solve complex mathematical puzzles to validate a new transaction, adding a block to the chain and permanently and irreversibly recording a new transaction.

⁴ As contained in Directive (EU) 2015/849, which may be soon repealed by the 6th EU AML Directive, and be complemented by a new AML regulation and by a new regulation on transfers of funds.

However, it is unclear whether the MiCA will apply to CASPs already licensed under national law previously in force. The licensing process under the MiCA will be administered by national authorities, which will verify requirements and respond to applicants within three months.

In Italy, the CONSOB (Securities Commission)⁵, possibly with an involvement of the central bank, will likely be the authority in charge for licensing.

CASPs will be required to set up a registered office in the EU, and to comply with a series of organizational requirements, to be licensed in a Member State, in substance following the licensing model already laid down for providers of other financial services under EU legislation. At this stage, it is not yet clear whether and to what extent these requirements, particularly that requiring the setting up of a registered office, will be retained in the final version of the MiCA, even though it is likely they will.

Moreover, the MiCA will provide for a “passporting” mechanism, whereby the license granted in a Member State will be valid throughout the entire EU. At first sight this mechanism recalls the one under MiFID.

The enrolment of CASPs in the new register

The ESMA will establish a register of CASPs operating in the Union without license, which will be updated in cooperation with the national authorities of the Member States and third countries.

This will be a different and additional register to that maintained by the EBA on non-compliant entities from an AML standpoint.

Coordination between licensing under the MiCA and Italian legislation in force

As an EU regulation, the MiCA will be binding in its entirety and directly applicable in all Member States. Therefore, Member States will not need to transpose its provisions into national law, but they will be required to ensure that national legislation does not create obstacles to its application. Member States are, however, allowed to introduce additional requirements or provisions for the licensing of CASPs, insofar as they respect the internal market freedoms of the EU.

On the other hand, once the MiCA is adopted, there may be conflicts between existing national legislation on CASPs and the Regulation.

This may be true for the new MiCA licences, as Italy already introduced a similar form of licensing by Decree of the Ministry of Economy and Finance of January 13, 2022 (“Decree”)⁶, that requires CASPs to be enrolled with a register kept by the OAM (*Organismo Agenti e Mediatori*)⁷. This registration obligation is fundamentally different from a regulatory license, both in its rationale and substance, as it does not impose material requirements on CASPs. However, it remains to be clarified if the Italian legislator laid down this obligation as a temporary arrangement serving as an alternative to the licensing of CASPs,

⁵ The Commissione Nazionale per le Società e la Borsa (CONSOB) is the independent authority responsible for the supervision of the financial markets in Italy.

⁶ Decree of the Ministry of Economy and Finance of January 13, 2022, Official Journal n. 40 of 17 February 2022. Further information on the provisions of the Decree and the establishment of the register may be found in our previous article available at the following [LINK](#).

⁷ The OAM is the body entrusted with the administration and supervision of agents in financial activities and brokers in Italy.

or solely for monitoring and AML/CFT purposes. In any event, if the registration obligation is retained, misalignments and inconsistencies cannot be ruled out. On the one hand, the MiCA introduces CASPs as a new category of service providers, which is in some respects comparable to that of investment services providers under the MiFID⁸. On the other hand, CASPs will need to be enrolled with a register for a completely different category of operators, i.e. agents and brokers. For practical purposes, the Italian legislator and the EU legislator would arguably continue to look at CASPs in two different perspectives. Therefore, even though EU law may not prevent the Italian legislator from retaining the registration obligation, it might be sensible to adjust the provisions of the Decree to those of the MiCA, in order to ensure consistency and avoid excessive administrative burdens on CASPs.

Conclusions

Overall, the text of the MiCA agreed by the co-legislators must be praised as it addresses a number of new challenges in the digital finance industry, in particular in the crypto-assets area. Its final adoption is welcome and eagerly awaited, as it ought to fill the gaps that may induce (and sometimes already induced) certain Member States to legislate in an uncoordinated manner in a field, that by definition knows no border.

In any event, the MiCA marks a fundamental step forward in the long-standing process of crypto-asset regulation in the EU, despite some uncertainties over licensing processes.

Operators would be well advised to timely assess issues arising from the new licensing model and the interplay between national law and MiCA rules.


⁸ Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, OJ L 173 of 12.6.2014.



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