REPORT ON SIGNIFICANT ASPECTS OF THE PROPOSAL FOR THE EUROPEAN PARLIAMENT TO PASS A REGULATION ON MARKETS IN CRYPTO-ASSETS (MiCA) AND AMEND THE DIRECTIVE (EU) 2019/1937

MAY 2022

LEXPUNK

TABLE OF CONTENTS

INTRODUCTION

This is a report by a LeXpunK working group of European lawyers with great experience advising clients in the areas of cryptocurrency protocols, decentralised finance protocols, and related matters. It has been funded with a bounty from several decentralised finance DAOs.[1] The aim of this report is to provide information and guidance on the Proposal for a binding European Union Parliament bill entitled "Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937" ("***MiCA***").[2] The current draft of the legislation is available here. Although MiCA touches many aspects of crypto-asset regulation, the focus of this report is on helping developers of autonomous systems and their legal counsel gain awareness of issues and changes posed by MiCA.

The proposal to adopt MiCA is part of the EU "Digital Finance Package," a set of measures proposed in the European Parliament to support the innovative and competitive potential of digital finance in the European Union while mitigating risk. If adopted, MiCA would become a new crypto-asset regulation that must be followed by European Union member states. A transitional period of implementation will precede its taking full effect.[3]

This report is structured into three main parts:

First, a high-level conceptual overview of MiCA's intended regulatory scope and methods of regulation.

Second, a detailed breakdown of the four core areas of MiCA that will be of the most importance for the future of the crypto-industry worldwide:

> **A**, a presentation of the scope of application and relevant definitions contained in MiCA. The different definitions of tokens will be outlined and compared, as they each entail different legal requirements and information duties.
>
> **B**, an analysis of MiCA's provisions on so-called "stablecoins." These are classified by MiCA as "asset-referenced tokens" and "electronic money

[1] tracheopteryx et al., *Fund A Builder-First Legal Activism DAO*, Lido DAO Forum (Aug. 4, 2021), https://research.lido.fi/t/fund-a-builder-first-legal-activism-dao/867.
[2] Proposal for a Regulation of the European Parliament and of the Council on Markets in crypto-assets, and Amending Directive (MiCA), COM (2020) 593 final (Sept. 24th, 2020) [hereinafter MiCA].
[3] For more information on this transitional period, see Section D, *infra*.

tokens". As explained, MiCA's strict regulatory approach is based on an assumption that such tokens pose increased risk for holders of crypto-assets (in particular, retail holders) and market integrity when compared to other crypto-assets.

C, a review of MiCA's rules on crypto asset service providers. Such services entail, *inter alia*, the custody and administration of crypto-assets on behalf of third parties, the operation of a trading platform for crypto-assets, the exchange of crypto-assets for fiat currency that is legal tender, and the exchange of crypto-assets for other crypto-assets. It may be expected that these provisions greatly impact operations of the crypto-industry, particularly those of centralised exchanges. In this regard, this paper analyses whether the provisions would also apply to DeFi protocols.

D, relevant information about the entry into force and transitional period of MiCA, and a conclusion providing key takeaways.

Third, a conclusion on the main relevant aspects of the proposed regulation.

1. OVERVIEW OF MiCA'S IMPACT ON DEVELOPERS

MiCA seeks to regulate the issuance, offering and trading of crypto-assets, as well as the provision of crypto-asset services, within the European Union. As it takes the form of a regulation and not directive, it will be directly applicable in all Member States and will not require any transposition on the national level. MiCA would provide regulatory clarity for more conventional, centralised products and services of the crypto-asset industry (such as ICOs, IEOs, and token broker and investment services). But many regulatory questions about more decentralised, cryptonative applications or markets would be left unanswered and somewhat open to legal interpretation.

General Developer Impact

MiCA's greatest impact on project developers of decentralised crypto-asset protocols, decentralised finance protocols, and other types of decentralised applications (i.a. NFTs and gaming) would arise from its provisions concerning issuers and offerors of crypto-assets. The creation, distribution and sale of tokens is the primary method for developers to fund and be compensated for their work on such protocols, and MiCA would impose new regulations on certain token activities. These regulations require crypto-asset issuers/offerors to publish and file a "whitepaper" containing prescribed disclosures and, in certain cases relating to stable-value crypto-assets (i.e., "asset-related tokens" or "e-money tokens"), may require that whitepaper to be approved by relevant financial authorities.

Secondarily, MiCA may also impose certain requirements on “development studios” whose activities rise to the level of providing professional crypto-asset services directed at persons within the European Union. Activities that resemble traditional financial services in connection with crypto-assets such as custody, exchange, and/or transfer, if done for others in a professional capacity, require an authorisation as a fully regulated crypto-asset service provider.[4]

Impact Dependence - Token Typology Etc.

The exact impact of the regulations will vary based on the type of token involved, the way in which the token is offered or issued, or the way in which a market for the token is created. MiCA sets forth a detailed (but, unfortunately, non-comprehensive) taxonomy that roughly divides tokens as follows:

- **financial instrument tokens** (such as tokenized securities or security tokens), to be covered by current securities laws.
- **non-financial-instrument tokens**, which include:
    - **stable-value tokens** (asset-referenced tokens and e-money tokens), to be heavily regulated (including custodial and risk management requirements, etc.)
    - **pure utility tokens,** to be lightly regulated
    - arguably, **certain governance tokens**, which are not defined under MiCA but may be lightly regulated (assuming they are not financial instruments, which is not always clear)
    - certain **Non Fungible Tokens** (NFTs), which are not defined under MiCA but may be lightly regulated (assuming they are not financial instruments, which is not always clear)

In theory, MiCA will therefore cover only non-financial-instrument tokens; but some problems of classification between different categories of tokens may arise, and this will certainly impose a need to analyse “hybrid cases,” wherein a token may not seem initially qualifiable as a “financial instrument token” under MiCA’s definitions.

Impact on Utility and Governance Tokens,

The core of MiCA’s regulation affects public sales of tokens in the Union. Express exceptions are made for tokens transferred for free and tokens transferred to accredited investors.

We expect MiCA’s impact on the offer and issuance of tokens that are not deemed “financial instruments” or stable-value tokens (i.e., “utility tokens,” *possibly* at least some “governance tokens”) to be as follows:

[4]See section 2.C., *infra*.

MiCA IMPACT SUMMARY		
	CURRENT STATUS	MiCA
IEO/ICO	● No need previous approval at european level if token is considered a “utility” ● No legal entity required at EU level ● EU offshore subsidiaries (0 tax regimes) can issue tokens	● White paper needs to be registered ● Need to operate through a legal entity or a DAO ● EU companies cannot issue a token if maintaining an offshore subsidiary
Airdrops	● No need previous approval at european level if token is considered a “utility” ● No legal entity required at EU level ● EU offshore subsidiaries (0 tax regimes) can issue tokens	● **No** need of white-paper or authorization by competent authority for tokens that are offered for free. ● Need to operate through a legal entity or a DAO ● EU companies cannot issue a token if maintaining an offshore subsidiary
Team Selling Tokens (self funding)	No specific rules	Rules on market abuse may apply
VC founded team	● No legal entity required at EU level ● EU offshore subsidiaries (0 tax regimes) can issue tokens	● Need to operate through a legal entity or a DAO ● EU companies cannot issue a token if maintaining an offshore subsidiary ● No duty to publish white paper and to get an authorization by the competent

		authority.

Impact on Stable-Value Tokens

MiCA's impact on stable-value tokens, asset-referenced tokens, and e-money tokens may be extensive.[5] One ambiguity in its text is the treatment of algorithmic stable-value tokens which nominally meet the definition of "asset-referenced tokens" or "e-money tokens," but for which associated regulations (concerning, e.g., custody, risk management, redeemability) would not make sense. It is currently unclear whether it should be inferred that these regulations do not apply to such tokens, since they would be impossible to comply with, or whether the regulations amount to a *de facto* ban on offering, issuing, and/or providing services relating to algorithmic stablecoins.[6]

Impact on NFTs

It is arguable that crypto assets which are unique and not fungible with other crypto-assets cannot be considered financial instruments as they are taken into consideration within the cases of exemption from the duty to publish a white-paper and to get an authorization by the competent authority for the offering.

Impact on DAOs

MiCA defines a "decentralised autonomous organisation" as "a rule-based organisational system that is not controlled by any central authority and whose rules are entirely routed in its algorithm." The definition is not clear with respect to the element of being "entirely routed in its algorithm," as DAOs do not usually include such an element. Nevertheless, it is possible that the provision will not be interpreted according to its literal meaning. This could lead to an application of the rules to DAOs not "wrapped" by any off-chain legal entity, as referenced in recital (13):

> [A]ll issuers of crypto-assets should be legal entities. In order to promote, rather than to hinder, the decentralised issuance of crypto-assets, that requirement should not apply to decentralised issuers of crypto-assets unless and until the issuance of their crypto-assets is centralised.

Further, as described in recital 13(a) of MiCA, some types of crypto-assets are not issued by legal entities, but are instead managed by decentralised autonomous organisations. Provided that such crypto-assets are compatible with the requirements of MiCA and do not pose a risk to investor protection, market integrity or financial stability, competent authorities can admit such crypto-assets to trading on a Union trading platform for crypto-assets.

---

[5] See section 2.B, *infra*.
[6] MiCA Recital (26).

Nevertheless, MiCA makes clear that rules on token offerings within the EU apply also to DAOs.[7] Therefore, every DAO that offers tokens in the EU should present a white paper and receive an authorisation from the competent authority.[8] It should be noted that DAOs are *not* taken into consideration by MiCA when it comes to crypto-asset services.

Impact on DeFi Protocol Front-End Operators (AMMs, etc)

MiCA does not directly refer to front-end operators such as automated market makers. Nevertheless, as it focuses on services rather than entities, it is possible to conclude the potential impact on such operators. According to MiCA, the provision of crypto-asset services results in an entity becoming the crypto-asset service provider and thus falling under the regulatory scope of MiCA[9].

2. DETAILED BREAKDOWN OF MICA

A. Issuers, Offerors, and Token Categories

A.1. The Legal Nature of the Terms "Issuer" and "Offeror"

The terms "issuer" and "offeror" are of great importance to assess MiCA's scope of application. They identify the person(s) who must comply with the requirements set by the proposed Regulation.

According to art. 2(1):

> This Regulation applies to persons that are engaged in the issuance or offering of crypto-assets for the purpose of trading or providing services related to the trading of crypto-assets in the Union..[10]

[7] MiCA art. 4(1)(a).
[8] MiCA art. 4(3)(b).
[9] See section C, *infra*.
[10] MiCA art. 2(1).

The text clearly distinguishes between the "issuer" and the "offeror".[11] An "issuer" is not always synonymous with an "offeror." MiCA seems to employ the term "issuer" when setting the duties for a party which creates ("issues") a token, and "offeror" for a party which makes that token accessible to the public in any way or form. Relevant obligations should be determined based on MiCA's rules as applied to the features of the particular blockchain technology being analysed.[12]

The definitions of art. 3 provide the first points of reference:

- "issuer of crypto-assets" means an identifiable natural or legal person or other entity that is subject to rights and obligations, who offers to the public any type of crypto-assets or seeks the admission of such crypto-assets to a trading platform for crypto-assets (art. 3(6));
- "offer to the public" means a communication to persons in any form and by any means on a professional basis, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable a prospective holder or client to decide to purchase those crypto-assets, including the placing of crypto-assets through crypto-asset service providers; (art. 3(7));
- "offeror" means a legal person who offers to the public any type of crypto-asset or seeks the admission of a crypto-asset to a trading platform for crypto-assets;(art. 3(6a)).[13]

Art. 4(1) sets requirements for offerings of crypto-assets to the public of the European Union:

> (a) be a legal entity established in the Union, a natural person having its residence in the Union, or an entity established or having a seat in the Union and subject to the rights and obligations of the Union, or is a decentralised autonomous organisation**;**
> (b) draft a crypto-asset white paper in respect of those crypto-assets in accordance with Article 5;
> (ba) receive authorisation from a competent authority;
> (c) notify that crypto-asset white paper in accordance with Article 7;
>
> (d) publish the crypto-asset white paper in accordance with Article 8;
>
> (e) comply with the requirements laid down in Article 13.
>
> (ea) have measures in place to prevent the misuse of the offering of crypto-assets to the public or trading on a platform for crypto-assets for the purposes of money laundering or financing of terrorism in accordance with Directive (EU) 2015/849 of the European Parliament and of the Council;
>
> (eb) not have a parent undertaking, or a subsidiary, that is established in a

[11] In the initial version of MiCA, the Commission had abandoned the terms "offeror" and "offering as established under European financial law. Scholars noted that these terms as-defined would have been more inclusive: *see* Zetsche et al.,*The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy*, 20 (Eur. Bus. Inst. Law Working Paper Series, Paper No. 2020-018, 2021). For instance, "offeror" would have encompassed any person who offered crypto-assets like Bitcoin on a professional basis to the public of the EU unless the potential "offeror" could have been authorised as a "Crypto-Asset Service Provider" (*see infra* Section C). In the following legislative proceeding, the text has been amended and new definitions of "offeror" and "offering" have been adopted.

[12] MiCA does not apply to the persons/entities mentioned in art. 2(3), (e.g. central banks); therefore, these are not relevant to this report.

[13] MiCA art. (3).

third country that:

(i) is listed as a high-risk third country having strategic deficiencies in its regime on anti-money laundering and counter terrorist financing, in accordance with Article 9 of Directive (EU) 2015/849;

(ii) is listed in Annex I or Annex II to the EU list of non-cooperative jurisdictions for tax purposes;

(iii) has a 0% corporate tax rate or no taxes on companies' profits.

In this respect, it should be noted that art. 4(2) dictates that Paragraph 1, points (b) to (d) shall not apply where:

(a) the crypto-assets are offered for free;

(b) the crypto-assets are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions;

(c) the crypto-assets are unique and not fungible with other crypto-assets, or are not fractionable and not transferable directly to other holders without the issuer's permission, or are accepted only by the issuer, including merchant's loyalty schemes, or represent IP rights or guarantees, or certify authenticity of a unique physical asset, or any other right not linked to the ones that financial instruments bear, and are not admitted to trading on a crypto-asset exchange;

(d) the crypto-assets are offered to fewer than 150 natural or legal persons per Member State where such persons are acting on their own account;

(e) over a period of 12 months, the total consideration of an offer to the public of crypto-assets in the Union does not exceed EUR 1 000 000, or the equivalent amount in another currency or in crypto-assets;

(f) the offer to the public of the crypto-assets is solely addressed to qualified investors and the crypto-assets can only be held by such qualified investors.

(fa) the crypto-assets have a specified purpose of use and can only be used for purchases of a specific store or network of stores, cannot be transferred between holders and do not have a wider general purpose of use.

MiCA clarifies that, for the purpose of Art. 4(2)(a), crypto-assets shall not be considered to be offered for free when those receiving the crypto-asset are required to provide personal data to the issuer ***or offeror*** in exchange. Nor is it considered a free offering when the issuer ***or offeror*** of crypto-assets receives any third party fees, commissions, monetary benefits, or non-monetary benefits as a result of the offering.

These indications may have great relevance in the case of "free" distributions of tokens (e.g. airdrop to early users of a DeFi), or in the case of a lock-up of team tokens distributed to founders and contributors to a protocol. Both situations *could* fall under Art. 4(2)(a) as the crypto-assets are not necessarily exchanged in return

for consideration. But, if the early users of a DeFi platform paid fees or team members brought non-monetary benefits to the offeror, the outcome may be different and exemptions may not apply. At any rate, it would also be illogical to declare that founders can “offer” tokens to themselves.

It will need to be further assessed as to what happens once the lockup period in the above scenario is concluded and team members potentially sell their tokens on the market. In principle, it does not seem that these persons could then be considered as “offerors,” as they will theoretically operate on the market like every other token holder. Misbehaviours would be sanctioned by rules on market abuse, insider dealing, and market manipulation.[14] It is advisable to provide vesting periods, among other measures, to avoid impacting the market price of the token.

Art. 4(2)(c) is very relevant to the issuance of NFTs. But the scope of application is even wider and may, i.a., encompass certifications of physical assets, guarantees or IP rights.

An Offeror’s duties may be summarised as expressing the following principles:

- **Completeness of the information provided to the consumer**

MiCA articles 5 through 11 explain the minimum content required in a whitepaper that must be available at the time of a crypto-asset’s offering, or in promotional materials that may also be released. Such representations to consumers must be a complete and truthful reflection of the asset without omitting any detail of risk or capability.

- **Consumer protection**

For a period of 14 calendar days after investment in a crypto-asset, an Offeror must guarantee the consumer-investor a right to withdraw their investment. This right must be available to be exercised anytime during the 14-day period as long as the crypto-asset has not been accepted to a trading venue at the time of withdrawal. The offeror is obliged to inform the consumer about this right of withdrawal. Further, any contractual derogation that may prejudice consumer-investors will be considered null and void as will any attempt of the Offeror to limit civil liability.

- **Minimum standards**

MiCA aims to set the absolute minimum standards to be met by Offerors unionwide. Although the actual standards and their level of rigour are to be left to guidelines issued by ESMA and the EBA, MiCA’s strong concentration on fairness and minimum technical requirements are worth keeping in mind for analyses of these future guidelines.[15]

[14] MiCA title VI.
[15] MiCA art. 13.

A.2. The Territorial Scope of Application

MiCA will be applicable to persons engaged in the offering or issuance of crypto-assets or that provide a crypto-asset service in the Union. However, recital 51 observes that, due to the inherently digital nature of crypto-asset services, firms outside the European Union are often able to offer their own services to customers without any physical or legal presence within the Union's jurisdiction. That poses a significant risk of circumvention of MiCA and puts crypto-asset service providers authorised in the Union at a competitive disadvantage vis-à-vis non-Union competitors.

We believe that no legal or natural person should therefore be allowed to provide crypto-asset services to Union citizens on a non-occasional basis without having a legal representative in the Union and without being authorised under this Regulation, even if such services are provided solely at the personal initiative of Union clients. ESMA should monitor and report annually on the scale and severity of any circumvention of this Regulation by third-country actors, as well as propose possible countermeasures. The Commission should, in its final report, analyse the scale and severity of any circumvention of this Regulation by third-country actors and propose concrete and effective dissuasive penalties to be im posed on such entities in order to end or significantly reduce such circumvention. Practices such as the inclusion by a third-country firm of general clauses in its terms of business or the use of online pop-up "I agree" boxes, whereby clients agree that any transaction is executed on the exclusive initiative of the client, should not be deemed to be an attempt to circumvent this Regulation.

With respect to token offerings, the issue looks different as the offeror needs to be established, or have a seat, in the Union and being subject to the rights and obligations of the Union. What is not entirely clear is how this functions for DAOs.

A point of reference may be found in art. 6 of the Regulation 593/2008 on the law applicable to contractual obligations (Rome I), which determines that:

> a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
>
> (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence; or,
> (b) by any means, directs such activities to that country or to several countries including that country.[16]

In other contexts, the European Court of Justice (ECJ) has determined criteria for establishing whether an undertaking directs its activities in a country where the

[16] Commission Regulation 593/2008, 2008 O.J. (L 177) 6 (EC) [Rome I].

consumer has his habitual residence.[17] These criteria could also be used to determine MiCA's scope of application.

The following are relevant criteria indicated by the ECJ in online transactions:

- The number of transactions that the undertaking has conducted with consumers from other Member States in the past;
- The language can be an indication that activities are being directed to a particular Member State or several Member States in two respects. First, the fact that a website is written only in a language that is not very widespread and is the official language only in one particular Member State can be an indication that the undertaking is directing its activities to that Member State alone. Secondly, whether a website that is written in a particular language provides a facility whereby another language can be selected;
- the use of the top-level domain name of a state can be a relevant criterion;
- advertising links on websites that are shown in the hit list of a search engine in a Member State[18]

The provisions of art. 6 Rome I Regulation do not seem to fit well with blockchain technology.[19] The listed criteria should be used to evaluate the user-interface of the project and activities carried out by the proponents of the project.

Using this hypothetical approach to assessing the applicability of MiCA to a particular crypto-asset service received by a European citizen, if the aforementioned non-crypto-specific jurisdictional criteria are not met, then one could reasonably conclude that the crypto-asset services are being received at their own initiative by the European citizens and should not be considered "offered in the Union." Of course, this is just one possible approach to interpreting MiCA's jurisdictional requirements, and the law may evolve as it is interpreted by courts and regulators over time.

A.3. The Material Scope of Application

The intent of the European institutions is to offer a clear picture of the crypto-assets sector. To achieve this goal, the MiCA proposal contains a great number of definitions in its art. 3. The material scope of the proposed Regulation is defined in a residual way with reference to the crypto-assets' legal nature.[20]

According to art. 2(2), the Regulation does not apply – *inter alia* – to crypto-assets that qualify as:

(a) financial instruments as defined in Article 4(1), point (15),

[17] Anabela Susana De Sousa Goncalves,*The E-Commerce International Consumer Contract in the European Union*, 9 Masaryk U. J. L. & Tech.,5 (2015).
[18] *Id.*
[19] *See generally* Regulation (EC) No. 593/2008, *supra* note 7.
[20] R. Monasterolo & M.G. Caruso, *The New Frontier of the EU Digital Single Market: The MiCAR on the Path to the Capital Markets Union,* 16 Bocconi L. Papers, 175 (2021).

of Directive 2014/65/EU;
(c) deposits as defined in Article 2(1), point (3), of Directive 2014/49/EU of the European Parliament and of the Council 49;
(ca) funds, as defined in Article 4 (25) of Directive 2015/2366/EU, other than e-money tokens;
(e) securitization as defined in Article 2, point (1), of Regulation (EU) 2017/2402 of the European Parliament and of the Council[21].

This means that every crypto-asset which can be considered a security is not regulated by MiCA, instead regulated primarily by Directive 2014/65/EU ("MiFID II").[22]

MiCA further clarifies that crypto-assets shall qualify as financial instruments where they meet the criteria and conditions to be deemed equivalent in substance to any of the instruments referred to in Section C of Annex I to Directive 2014/65/EU, irrespective of their form.[23]

ESMA shall develop draft regulatory technical standards outlining the criteria and conditions for establishing when a crypto-asset is to be considered to be equivalent in substance to a financial instrument irrespective of its form, as referred to in the first subparagraph.

As to the categorization of tokens, MiCA first defines the general category of "Crypto-Assets," as "a digital representation of a value or a right that uses cryptography for security and is in the form of a coin or a token or any other digital medium which may be transferred and stored electronically, using distributed ledger technology or similar technology."[24]

Prevailing trends in interpreting crypto-assets against legacy EU member regulations distinguish between different types of tokens. Nevertheless, MiCA diverges from the somewhat settled distinction between investment, payment, and utility tokens established by continental legal systems–for example, Switzerland–and embraces a regulation which is mainly devoted to two types of crypto-assets considered **not** to be "financial instruments:"

- "Asset-Referenced Token" ("***ART***"), defined as a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referring to any other value or right or combination thereof, including one or several official currencies of a country (Art. 3(3));

- "Electronic Money Token" ("***EMT"***), defined as a type of crypto-asset the main purpose of which is to be used as a means of payment and that purports to maintain a stable value by maintaining a portfolio which ensures that the token maintains the value of a fiat currency that is legal tender; e-money tokens which maintain the value of a fiat currency of the

[21] MiCA art. 2(2),
[22]Directive 2014/65, O.J. (L 173) 349 [hereinafter MiFID II] .
[23] MiCA art 2(2a).
[24] MiCA art. 3(2).

Union shall be deemed to be electronic money as defined in Article 2 (2) of Directive 2009/110/EC (Art. 3(4)).[25]

MiCA does not provide a categorization scheme for tokens that (similarly to ARTs and EMTs) are not financial instruments but (unlike ARTs and EMTs) are not purported to maintain a stable value with reference to other assets. The only reference point for such tokens to be found within MiCA concerns so-called "Utility Token," which are defined as:

- a type of fungible crypto-asset which is accepted only by the issuer, is used for purposes other than for the payment or exchange of external goods or services, and is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token (Art. 3(5)).[26]

Of course, this still leaves a wide range of token types undefined within MiCA. For example, tokens that are not financial instruments, are not purported to maintain stable value and are not intended to provide digital access to a good or service are not defined within MiCA. As discussed below, this undefined category may include many DeFi governance tokens.

A.3.1. Tokens that are not Financial Instruments

ARTs and EMTs are regulated in Titles III and IV of MiCA as non-financial-instruments and differentiated from other non-financial-instruments by the fact that they are purported to maintain a stable value in terms of other assets. Although grouping referential stable assets apart from other kinds of non-financial-instruments makes sense, the division of such referential stable assets into "ARTs" and "EMTs" appears somewhat arbitrary–a token is an ART if it is purported to be stable in terms of several fiat currencies or one or several crypto-assets, regardless of its purposes, but a token is an EMT only if it is purported to be stable in in a single fiat currency ***and*** is used as a means of exchange.

While one might quibble with the fine-grained differences between ARTs and EMTs, at least they create a relatively clear category of non-financial-instruments intended to have a stable value. However, this leaves open the question of which ***non-stable*** tokens (potentially including governance tokens, utility tokens, NFTs and more) are non-financial instruments, and *de facto* places all such tokens into a single fuzzy regulatory category of non-ART/non-EMT-non-financial tokens despite the fact that they are likely much more different from each other than ARTs and EMTs are different from each other. The only indications given by MiCA concern utility tokens and crypto-assets automatically created as a reward for the maintenance of a Digital Ledger Technology ("DLT") or the validation of transactions in a consensus mechanism.[27] These types of crypto-assets are not considered financial instruments and do not fall under MiCA art. 2(2). Moreover, it is arguable that crypto assets which

[25] MiCA art. 3(1).
[26] *Id.*
[27] MiCA art. 4(2).

are unique and not fungible with other crypto-assets cannot be considered financial instruments as they are taken into consideration within the cases of exemption from the duty to publish a white-paper.[28]

In light of art. 4(2)(b), it may thus be argued that tokens such as Bitcoin and Ether – which are automatically created as a reward for the maintenance of a DLT – are not financial instruments. Such an interpretation is in line with previous case-law; in *Hedqvist*, the European Court of Justice ("ECJ") declared that Bitcoin, "is neither a security conferring a property right nor a security of a comparable nature."[29] The same may apply with respect to NFTs.

Problems also affect the exact nature of "Utility Tokens" as defined in MiCA, art. 3(5). Sometimes the legal nature seems to be clearly assessed. For example, this would be the case for the distributed storage network Filecoin and its token ($FIL), because the token gives access to a service accepted by the issuer of that token.

In general terms, the legal classification of a token is based on the objective characteristics of what an offeror or issuer offers in its token to the token holder. The issuer-assigned or offeror-assigned denomination of a token, such as designating a token as a "utility token," does not impact the regulation that should be applied to it. Hence, it is possible that the competent financial authority based on the actual function of the token requalifies it in accordance with its true nature.

A.3.1.1. Utility tokens

MiCA defines "Utility Tokens" more broadly than current guidance released by some countries in the EU. Under MiCA art. 3(5), a utility token is defined as a crypto-asset available on a distributed ledger, intended to provide digital access to a good or service, and accepted solely by the issuer of that token for the provision of that good or service.

The Swiss Financial Authority (FINMA) has drafted a comparatively narrow definition of utility tokens. Thereunder, utility token status and exemption from security rules is maintained only if a token's ***sole*** purpose–from its initial public offering–is to confer digital access to a good or service.[30] If the related good or service is not available at the time of initial offering, the token may not be considered a utility token.

Under MiCA, in contrast with FINMA guidelines, the "utility" of a "utility token" does not need to exist at the time of a token's initial public offering. Pursuant to MiCA art. 4(3), the public offering of a token for a good or service not yet in operation may extend up to 12 months from the release date of the token's whitepaper. This

[28] MiCA art. 4(2)(c).
[29] Case C-264/14, Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718, ¶ 55 (Oct. 22, 2015).
[30] Swiss Fin. Mkt. Supervisory Auth., Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), (2018).

provision seems to indicate that utility token status under MiCA does not require operation of a related good or service at the time of a token's issuance. Nevertheless, in order to protect the prospective buyers, the rules of Title II of MiCA will apply and the offeror will be obliged to publish a whitepaper.

Issuers of crypto-assets, other than asset-referenced tokens and e-money tokens, shall offer a right of withdrawal to any consumer who buys such crypto-assets directly from the issuer or from a crypto-asset service provider placing crypto-assets on behalf of that issuer, and to any consumer that has purchased crypto-assets that are subsequently the subject of a modified crypto-asset white paper. Consumers shall have a period of 14 calendar days to withdraw their agreement to purchase those crypto-assets without incurring any cost and without giving reasons. The period of withdrawal shall begin from the day of the consumers' agreement to purchase those crypto-assets.[31]

The problem of tokens with hybrid utility/financial nature is discussed *infra* in Section A.3.2.

A.3.1.2. Governance Tokens

"Governance tokens," i.e., tokens that grant holders the right or power to vote within a digital organisation, are not defined as a clear and distinct category of crypto-asset under MiCA. Thus, the status of governance tokens within the European Union will remain unclear and will be subject to principles-based facts-and-circumstances analysis based on each such governance token's specific features and circumstances of use and offering. Depending on the facts, governance tokens could be considered "financial instruments", "utility tokens" or some other type of (undefined) non-financial-instruments; in theory, if a governance token was also (as it were, coincidentally) purported to represent a stable value, it could potentially be an ART or EMT as well.

One problem of governance tokens concerns their attributes as compared to company shares or other forms of securitized debt. In some ways, governance tokens resemble shares of a company, which are considered a financial instrument in the European Union. If this reasoning were followed, then, like company shares, governance tokens would not be be regulated under MiCA[32]. Governance tokens would instead be regulated as "financial instruments" under MiFID II.[33] However, such a classification should not be taken for granted because tokens are evaluated by their concrete, not conceptual, traits. In other words, the nature of tokens should be assessed on a case-by-case basis to determine whether they may be designed in a way that triggers EU securities regulation.

---

[31] MiCA art. 12.
[32] MiCA art 2(2).
[33] MiFID II Annex I Section C.

Governance tokens typically fulfil the three initial criteria of a security under EU prospectus regulation, namely, "transferability," "negotiability," and "standardisation." MiFID II art. 4(1)(18) presents these three criteria with a non-exhaustive list of example assets.[34] The list is of utmost importance in determining whether a governance token is a security.

The examples presented in the MiFID II art. 4(1)(18) list include three broad categories of securities:

- "shares" and equivalent issued units (lit. a);
- "bonds and other forms of securitized debt" (lit. b); and
- "any other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies [...] or other indices or measures" (lit. c).

More in detail, "shares" are issued in exchange to an equity stake in a corporation; "bonds", in turn, are fixed-income securities which do not confer an ownership stake in the issuing entity.[35]

It should also be noted that, differently than what is applied in the U.S. according to the *Howey* test, the expectation of profits does not form part of the wording of MiFID II art. 4(1)(18). However, the expectation of future cash flows can be the basis of the functional comparability of investment tokens with shares or bonds.

Some authors adopt a broad understanding of MiFID II art. 4(1)(18) with reference to tokens traded on the secondary market.[36] The investor does not get dividends and pro quota/pro rata liquidation value, but instead receives the increase (decrease) in the value of the token that is related to the increase (decrease) in the value of the platform. These authors also believe that in any event the key concepts are those of negotiability on capital markets and financial risk involved in the investment component of the asset.

From a different perspective, governance tokens (when abstracting them from any investment component they may have) do not always grant rights or powers which are equal to those associated with shares in companies, partnerships, or other entities. Governance tokens do not confer ownership in an underlying company, but – to a certain extent – they grant membership and voting rights or powers in a blockchain-based platform. The aim of the membership is not always to generate

---

[34] Philipp Hacker & Chris Thomale, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, 15 Eur. Co. and Fin. L. Rev. 645, 669 (2018); Niels Vandezande, *Regulating Initial Coin Offerings and DAO Tokens under the EU's Financial Instruments Framework*, 14 L. & Fin. Mkts. Rev., 33, 33–38 (2020).

[35] *Id.*

[36] Boreiko et al., *Blockchain Startups and Prospectus Regulation*, Oxford Bus. L. Blog (Feb. 3, 2020), https://www.law.ox.ac.uk/business-law-blog/blog/2020/02/blockchain-startups-and-prospectus-regulation

future cash flow. Thus, governance tokens may vastly differ from the model of shares in a corporation).[37]

The difference between a governance token and a typical security is accentuated by the presence of a utility attached to the token. For instance, a shareholder of a U.S. listed company does not have any conferred right or power to consume the product created by the company, whereas this is exactly the function of a utility token, notwithstanding that the utility token may also (as it were, coincidentally) confer governance right or powers as well.

Though we have described governance tokens as conferring "rights or powers" to vote, it is often the case that governance tokens do not expressly confer any rights–i.e., any specific contractual rights against any specific person or persons–but instead merely confer the ***power*** to set parameters of, or perform other actions within, a particular blockchain system. In such cases, legal authorities may argue that there is an ***implied*** right associated with the token, but this is not always (or typically) clear. Therefore, governance tokens also differ from traditional securities in another way–they do not confer clear contractual rights; instead, their only clear feature is typically to confer the ***power*** to affect a particular blockchain system, while on the other hand certain looser advisory voting norms on off-chain or social issues may nevertheless be respected as a matter of social custom, if not a matter of legal rights.

The enactment of MiCA seems to demonstrate that in order to not frustrate the legislative purpose of the European Union, MiFID I art. 4(1)(18) should be interpreted in a narrow sense: the decrease or increase in value of the token may not be considered anymore a key element in assessing if a governance token should be qualified as a security. The capacity to appreciate in value seems not the conclusive element to recognize a governance token as a security, given that also pure utility tokens – that are expressly exempted from MiFID II by MiCA – may grow in value due to the availability on the secondary market.[38]

Therefore, the more important element seems to be the presence of a right to receive dividends, i.e., future cash flows for the tokenholder. If the tokenholder has a right to receive part of the profits generated by the digital organisation or the protocol controlled through the governance tokens, the governance token is comparable to a share and could be considered a security pursuant to MiFID art. 4(1)(18). Such outcome also results from a report of ESMA's Securities and Market Stakeholder Group, where a tradable token that gives a right to a financial entitlement, has been considered a security in the sense of MiFID II.[39] However, the situation where a governance token conveys only a power to receive on-chain proceeds from a given

[37] Hacker and Thomale, *supra* note 22 at 673.
[38] *See supra* Sec. 3.1.1.
[39] Vandezande, *supra* note 17, at 35.

system, but not a contractual right to receive payments from any person, entity, or undertaking remains unclear.

In this regard, the establishment of a staking pool where liquidity providers that stake the governance token of the project get a certain percentage of the same tokens which were already in the treasury at time of issuance remains at risk of being considered the governance token as a security. The additional governance tokens granted to the tokenholder who uses the staking could be viewed as a kind of reward for the devotion demonstrated to the organisation, and thus a dividend.[40] On the other hand, these staking systems could also be viewed as mere anti-dilution controls rather than dividends, especially when the staking participation rate is quite high and thus staking merely preserves the "status quo" of pro rata token ownership among current token owners. In summary, the classification of governance tokens, and whether they will be regulated as non-financial instruments under MiCA or under applicable securities laws, is not clear.

A.3.2. Tokens with "Hybrid" Nature

It is now necessary to assess which regime should be applied in cases in which a token shows a hybrid nature (for instance, utility and investment at the same time). MiCA does not engage the problem of the dual nature of the utility token. This issue has been discussed in literature but is not directly addressed in the proposal. It is argued that if utility tokens encompass significant investment components, they could be subject to securities regulations.[41]

In Switzerland, FINMA's guidelines adopt a more precise approach under which, if a utility token functions solely or partially as an investment in economic terms, the token should be treated as a security. In other words, for FINMA, if a token is both a "utility token" and a "security token", it will be regulated as a security token, not a utility token.

One novel critique of the utility token category acknowledges that utility tokens can be both used for their good/service-bound functions and traded on crypto exchanges for other currencies.[42] In this sense, utility tokens are affected by market dynamics which predominantly depend on the value/quality of the use-cases connected to the utility tokens. Utility tokens may therefore be conceptualised both as "mini-currency" and investment in a platform.

All utility tokens that can be traded on a secondary market can also be sold for profit. Investors could (and many do) have an expectation of profits even if a token is

[40] Salvatore L. Furnari & Roberto A. Lener, *Contributo alla qualificazione giuridica dell'offerta al pubblico di Utility Tokens*, 16 Bocconi L. Papers, 63, 91 (2021).
[41] MiCA art. 2(2)..
[42] Boreiko et al., *supra* note 19.

primarily designed to confer utility.[43] This profit is not the sole result of blind market forces; impact is also generated by the maintenance and development efforts of core developers working for the issuing organisation. The question arises: is the possibility to appreciate in value enough to qualify certain utility tokens as securities, or should the concept be reserved to those tokens that also promise a potential future cash flow to token holders?

It has already been seen that appreciation in value cannot be considered a key element to qualify a governance token as a security (*supra* Sec. 3.1.2.). The potentially hybrid nature of tokens should be assessed given that MiCA expressly recognizes the category of utility tokens and that, obviously, European institutions are aware that such tokens are traded on the secondary market and subject to price volatility. It should be confirmed that the mere appreciation (or decrease) in value of the token is not a relevant element to assess the legal nature of the token.

However, there are cases in which a token that provides digital access to a good or service should be considered a security. Two cases of tokens with "hybrid nature" seem to fall under MiFID II according to MiCA art. 2(2):

- Tokens that, although intended to provide digital access to a good or service, also give to token holders a right to a cash flow related to the services or goods provided by the organisation to which the token is connected;

- If expectations of profit connected to a token, that merely provides digital access to a good or service, are actively and objectively promoted by the issuer or conditioned by the "business case" of the token (for instance, where the issuer promises a cash flow to the token holders which is not granted at the time of issuance or where the issuer promises an increase in value due to functionalities/membership perks that will be attached to the token, inter alia through a staking pool).[44]

In these cases, the fact that a token also offers (or will offer) access to functional products would not detract from its qualification as a security and exclude the application of MiCA's rules. In conclusion, it should be argued that tokens with a hybrid nature, i.e., utility and investment, should in principle respect both the MiCA and MiFID II regimes.[45]

A.3.3. Transformation of the token's Functionalities after the Issuance.

An interesting matter is what happens if, after issuance, the token changes nature due to a decision of the token holders. A common example would be the transformation of a mere governance token with some use-cases to a token that grants a revenue stream coming from the profits of a digital organisation.

[43] Hacker & Thomale, *supra* note 17, at 681.
[44] MiCA art. 2(2).
[45] Furnari & Lerner, *supra* note 22, at 84.

Governance tokens such as UNI (Uniswap) have been issued in a context allowing a "fee switch" to eventually be activated by vote of the governance token holders, as a result of which the smart contract system would charge fees and those fees may flow to holders of the governance tokens. A number of provisions of MiCA could be relevant to this scenario.

Pursuant to Article 11 MiCA, issuers of crypto-assets other than ARTs and EMTs shall modify their published crypto-asset whitepaper, and, where applicable, marketing communications to describe any changes or new facts that are likely to have a significant influence on potential purchasers or current holders who may sell/exchange the asset. Communication of these changes must also be made to a competent authority.

Pursuant to MiCA art. 8(1), the crypto-asset whitepaper, and, where applicable, the marketing communications, shall remain available on the issuer's website for "as long as the crypto-assets are held by the public." MiCA art. 11 will apply for the duration of the offer or for as long as the crypto-asset is admitted to trading.

These provisions clearly do not take into consideration the possibility that an issuer may lose control over its project. Even the capacity to modify the official website of the project could be lost, rendering the issuer unable to fulfil its duties as required under MiCA art. 11. A somewhat extreme case could entail the transformation of a crypto-asset from a utility token to a security. In this case, if the offering is not concluded, it seems necessary to fulfil the rigorous information requirements set for in MiFID II. In all instances the issuer must still notify competent authorities.

With the introduction of the concept of DAOs the duties seem to also affect merely digital organisations. So if the original offerors have chosen the path of decentralisation and a DAO has been established, the latter should be held liable for communicating any changes concerning the token nature to the public.

Another matter of concern is the access of a token on secondary markets. As seen above in Sec. 3.2., even utility tokens will typically have an investment component, making them a hybrid of finance and function. The fact that the token is traded on the secondary market does not in principle entail a change in its nature. In this regard, it has been seen that offers of utility tokens that refer to an extant good/service are not subject to the duty of publishing a whitepaper (*supra* Sec. 3.1.1.). The exemption shall not apply if the Offeror or another person on their behalf communicates to the public an intention of seeking admission to trading; if the communication is subsequent to the beginning of the offering, the Offeror shall publish a whitepaper.

B. Asset-referenced tokens and Electronic money tokens

A large part of MiCA's Titles III and IV is devoted to stablecoins. Such overarching focus originates from the European Commission's reaction against Facebook's proposal for the Libra (now renamed "Diem") stablecoin.[46] MiCA thus constitutes a European response to the issuance of tokens that can potentially influence monetary systems.

Rules provided in Titles III and IV are similar to extant provisions of EU financial law.

As previously stated,[47] the features of a stablecoin will determine whether it is designated as an asset-referenced token ("ART")[48] or as an electronic money token ("EMT")[49]. It should be noted that the exact design of a token–including the mechanism to maintain its stable value–is *irrelevant* with respect to the applicable designation and associated rules. MiCA makes clear that these designations could include algorithmic stablecoins.[50]

B.1 Asset-referenced tokens

B.1.1. Definition and scope of the relevant rules.

MiCA defines asset-referenced tokens as

> a type of crypto-asset that is **not an electronic money token** and that purports to maintain a stable value by referencing to any other value or right or a combination thereof, including one or several official currencies of a country;.[51]

Definitionally, ARTs may not be EMTs. Therefore, the correct approach for determining whether a stablecoin is an ART is to first verify that it **does not** fulfil the definition of an EMT. Only then should one assess the qualities of the stablecoin against the definition of an ART. Further to this, it shall be noted that the criteria sustained in the preceding MiCA chapter when addressing that duality between offeror and issuer changes dramatically, embracing the (more restrictive) definition of issuer when setting the minimum requirements to release either an EMT or an ART.

---

[46] Zetsche et al., *supra* note 3, 203.
[47] *See* A.3., *supra*.
[48] Such as stablecoins referencing a basket of currencies or commodities.
[49] Such as stablecoins referencing the value of a country's official currency on a 1:1 basis.
[50] MiCA recital 26.
[51] MiCA art. 3(3).

In general terms, MiCA's approach to ARTs is based on the assumption that such tokens pose increased risk in terms of protection of holders of crypto-assets (especially retail holders) and market integrity when compared to other crypto-assets. In consequence, issuers of ARTs are subject to more stringent requirements than issuers of other crypto-assets.[52]

In this regard, MiCA sets restrictions to issue ARTs that are used widely as a means of exchange.[53] When, for a given ART, the estimated quarterly average number and value of transactions per day associated to uses as means of exchange is higher than 1 000 000 transactions and EUR 200 million respectively, within a single currency area, the issuer shall: (i) stop issuing the asset-referenced token; and (ii) present a plan to the competent authority, within 40 working days, to ensure that the number and value of transactions per day associated to uses as means of exchange within a single currency area is kept below 1 000 000 and EUR 200 million respectively

B.1.2. Supervision, Authorisation, White Paper Approval

MiCA foresees that offers to the public of ARTs should be supervised and monitored. In order to achieve this, issuers of ARTs addressing the EU market should have a registered office in the Union.[54]

The issuer of ARTs should be:

> (a) a legal entity that is established in the Union and have been authorised to do so in accordance with Article 19 MiCA by the competent authority of their home Member State; or,
> (b) a credit institution authorised in accordance with Article 8 of Directive 2013/36/EU ("CRD")[55] .

This includes not only offers to the public, but also seeking an admission of ARTs to trading on a trading platform for crypto-assets in the Union.

The authorisation requirement should not apply where the ARTs are only offered to qualified investors–and can only be held by such qualified investors–or when the offer to the public of asset-referenced tokens is below a certain threshold. The verification of compliance with such threshold should be made with a 12 months average, using the aggregated value of outstanding tokens at the end of each day contributing to the average.[56]

---

[52] MiCA recital 25.
[53] MiCA art. 19b.
[54] MiCA art. 15.
[55] Council Directive 2013/36, 2013 O.J. (L 176), 338.
[56] MiCA art. 15(3)(a).

MiCA foresees certain exceptions for credit institutions already authorised under CRD. . In particular, credit institutions will not be obliged to seek another authorisation under MiCA in order to issue ARTs. However, they will still be covered by remaining MiCA rules and should be still required to produce a white paper and have this white paper approved by the competent authority before its publication.

Refusal of authorisation is possible on the basis that the ARTs issuer's business model may pose a serious threat to financial stability, monetary policy transmission and monetary sovereignty. .[57]. The authorisation by the competent authority should be valid throughout the EU, and should allow the issuer to offer ARTs in the Single Market and to seek an admission to trading on a trading platform for crypto-assets. In the same way, the relevant ART white paper should also be valid for the entire EU and no additional requirements can be imposed by Member States.[58] Regulatory technical standards relating to the application for authorisation shall be developed by ESMA.

B.1.3. White Paper Requirements and Additional Information Duties

MiCA foresees certain information duties on both issuers and offerors of ARTs. To ensure protection of retail holders, issuers of ARTs should always provide holders with clear, fair and not misleading information. The crypto-asset white paper on ARTs should include, among others, information on the stabilisation mechanism, on the investment policy of the reserve assets, on the custody arrangements for the reserve assets, and on the rights provided to holders.[59]

In addition to information included in the crypto-asset white paper, issuers of ARTs should also publish a summary of the audit report and audit reports itself in relation to reserve assets. Issuers are also obligated to disclose on their website information about circumstances that have or are likely to have significant effect on the value of the ARTs or on the reserve assets. .[60] In particular, they should disclose the amount of ARTs in circulation and the value and the composition of the reserve assets, on at least a weekly basis, on their website. Offerors of ARTs should also disclose any event that is likely to have a significant impact on the value of the asset-referenced tokens or on the reserve assets, irrespective of whether such crypto-assets are admitted to trading on a trading platform for crypto-assets.

Issuers of ARTs shall also regularly report to ESMA on developments in the markets in relation to their ARTs. This shall include information on customer base, value and market capitalisation of ARTs, size of the reserve and the average number of transactions.[61]

---

[57] MiCA recital 29.
[58] MiCA recital 29.
[59] MiCA art. 17.
[60] MiCA art. 26.
[61] MiCA art. 26a

B.1.4. Requirements: Contractual Arrangements, Governance, Capital and Reserve Assets

MiCA considers that issuers of ARTs are usually at the centre of a network of entities that ensure the issuance of such crypto-assets, their transfer and their distribution to holders.[62] Issuers of asset-referenced tokens should therefore be required to establish and maintain appropriate contractual arrangements with those third-party entities ensuring the stabilisation mechanism and the investment of the reserve assets backing the value of the tokens, the custody of such reserve assets, and, where applicable, the distribution of the ARTs to the public.

MiCA also prescribes that Issuers of ARTs should have robust governance arrangements, including a clear organisational 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.[63] The management body of such issuers and their shareholders should have good reputation and sufficient expertise and be fit and proper for the purpose of anti-money laundering and combatting the financing of terrorism. Issuers of ARTs should also employ resources proportionate to the scale of their activities and should always ensure continuity and regularity in the performance of their activities. For that purpose, issuers of ARTs should establish a business continuity policy aimed at ensuring, in the case of an interruption to their systems and procedures, the performance of their core activities related to the ART. Issuers of such tokens should also set up a strong internal control and risk assessment mechanism, as well as a system that guarantees the integrity and confidentiality of information received.

Moreover, issuers of ARTs are subject to capital requirements. Those capital requirements should be proportional to the issuance size of the ARTs and therefore calculated as a percentage of the reserve of assets that back the value of the asset-referenced tokens. Issuers of asset-referenced tokens shall, at all times, have own funds equal to an amount of at least the higher of the following: (a) EUR 350 000; (b) 2% of the average amount of the reserve assets referred to in Article 32 and (c) a quarter of the fixed overheads of the preceding year, to be reviewed annually and calculated in accordance with Article 60(6).[64]

Competent authorities should however be able to increase the amount of own fund requirements required on the basis of, *inter alia*, the evaluation of the risk-assessment mechanism of the issuer, the quality and volatility of the assets in the reserve backing the asset-referenced tokens or the aggregate value and number of ARTs.

---

[62] MiCA recital 35.
[63] MiCA art. 30.
[64] MiCA art. 31(1).

Finally, ARTs issuers constitute and maintain a reserve of assets in order to collateralize the issuer liabilities against holders of ARTs.[65] The reserve of assets should be used in benefit of the ARTs holders when the issuer is not able to comply with its obligations towards the holders, such as in insolvency. The reserve of assets shall be composed and managed in such a way that the issuer of such tokens does not face market and currencies risks.

B.1.5. Custody policy and Investments of the Assets

To prevent the risk of loss for ARTs and to preserve the value of those assets, issuers should set-up an adequate custody policy for reserve assets.[66] That policy should ensure that the reserve assets are entirely segregated from the issuer's own assets at all times, that the reserve assets are not encumbered or pledged as collateral, and that the issuer of asset-referenced tokens has prompt access to those reserve assets.

The reserve assets should, depending on their nature, be kept in custody either by a credit institution authorised under CRD an investment firm authorised under MIFID II or by an authorised crypto-asset service provider. Credit institutions, investment firms or crypto-asset service providers that keep in custody the reserve assets that back the asset-referenced tokens should be responsible for the loss of such reserve assets vis-à-vis the issuer or the holders of asset-referenced tokens, unless they prove that such loss has arisen from an external event beyond reasonable control.

To protect ART holders against a decrease in value of the assets backing the value of the tokens, issuers should invest the reserve assets in secure, low risk assets with minimal market and credit risk.[67] The investments shall be capable of being liquidated rapidly with minimal adverse price effect. As the ARTs could be used as a means of exchange, all profits or losses resulting from the investment of the reserve assets should be borne by the issuer.

B.1.6. Redemption right of the Holders and Prohibition of Interests

The issuer of ARTs shall provide a permanent redemption right to the holders. To this end, they shall establish, maintain and implement clear and detailed policies and procedures that ensure the redemption of ARTs at market value and at the latest within two working days.[68] Issuers of asset-referenced tokens that voluntarily stop

[65] MiCA art. 32.
[66] MiCA art. 33.
[67] MiCA art. 34.
[68] MiCA art. 35.

their operations should prepare a plan for the orderly redemption of the asset-referenced tokens.

Suspension of redemption is possible only temporarily, in exceptional cases and in accordance with the conditions set out in the crypto-asset key information sheet. Suspension must be in the interests of the holders of ARTs. In the event of a temporary suspension, the issuers of ARTs shall, without delay, communicate their decision to ESMA. ESMA may require the suspension of the redemption of tokens in the interest of the holders of the asset-referenced tokens or of the public.[69]

To reduce the risk that ARTs are used as a store of value, issuers of ARTs, and any crypto-asset service providers that provide crypto-asset services in relation to ARTs, are precluded from granting interest to holders of such ARTs.

B.2. Electronic money tokens

B.2.2 Authorisation and operating conditions / relationship to Directive 2009/110/EC

B.2.2.1 EMT Definition

MiCA defines “Electronic Money Token” (“e-money token,” or, “EMT”) as:

> a type of crypto-asset the main purpose of which is to be used as a means of payment and that purports to maintain a stable value by maintaining a portfolio which ensures that the token maintains the value of a fiat currency that is legal tender; e-money tokens which maintain the value of a fiat currency of the Union shall be deemed to be electronic money as defined in Article 2 (2) of Directive 2009/110/EC;.[70]

This definition is wide and seems to include tokens referring to a single, legal-tender currency. The definition of EMT is distinguishable from “electronic money” as defined by Directive 2009/110/EC (“E-Money Directive”).[71] “Electronic money” as defined by the E-Money Directive means:

> electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of

[69] Id.
[70] MiCA art. 3(4).
[71] Council Directive 2009/110/EC, 2009, O.J. (L 267) [hereinafter E-Money Directive].

> making payment transactions and which is accepted by a natural or legal person other than the electronic money issuer.[72]

MiCA makes clear that EMTs shall be deemed "electronic money" as defined in the E-Money Directive.[73] EMTs should consequently comply with relevant operational requirements of the E-Money Directive, including: the requirements for the taking up, pursuit, and prudential supervision of a business; as well as the E-Money Directive's requirements on issuance and redeemability.

B.2.2.2. Issuing EMTs and holders' rights

EMTs are considered to be "offered to the public" in the EU when they refer to EU currencies.[74] As a consequence of considering EMTs as "electronic money," MiCA foresees that the offering of EMTs or admitting of EMTs to trading on a crypto-assets trading platform requires authorisation - either as a credit institution under the CRD, a certain local form of credit union established in Member State or as an "electronic money institution" under the E-Money Directive.[75] EMT issuers are not subject to any unique authorisation requirements under MiCA.[76] However, MiCA leaves room for the ECB to decide whether to authorise EMTs.[77]

As EMTs are considered to be "electronic money," they shall be issued and redeemed in accordance with the rules laid down in the E-Money Directive, thus providing a level playing-field for both EMTs and electronic money in this regard. EMTs which do not provide their holders with a free redeemability claim are prohibited.[78]

In addition to receiving authorisation under either E-Money Directive or CRD, EMT issuers are required to publish a crypto-asset white paper reported to a competent authority.[79]

B.2.2.3 Exemptions to E-Money Directive authorisation requirement for EMT issuers

MiCA's requirement of authorisation under the E-Money Directive does not apply to (a) EMTs that are marketed, distributed and held by qualified investors and can only be held by qualified investors and (b) if the average outstanding amount of e-money

---

[72] E-Money Directive art. 2(2)
[73] MiCA art. 43.
[74] Id.
[75] MiCA art. 43(1).
[76] Issuers of other types of crypto-assets, e.g. asset referenced tokens, are subject to such unique authorisation requirements under MiCA.
[77] MiCA, art. 43(1a).
[78] MiCA art. 44.
[79] MiCA art. 43(1)(c).

tokens does not exceed EUR 5 000 000, or the corresponding equivalent in another fiat currency, over a period of 12 months, calculated at the end of each calendar day.[80] Such issuers shall nevertheless produce a crypto-asset white paper and notify such white paper to the competent authority.

B.2.2.4 Algorithmic 'stablecoins'

In case of algorithmic stablecoins that aim at maintaining a stable value via protocols and which provide for the increase or decrease of the supply of such crypto-assets in response to changes in demand, MiCA states that they should not be considered as asset-referenced tokens, provided that they do not aim at stabilising their value by referencing one or several other assets.[81]

B.2.2.5 "Significant" EMTs

Apart from the voluntary classification of EMTs as significant EMTs, the classification is done by the EBA, after consulting the ECB and the relevant central banks of Member States whose currency is not the euro. Classification is based on criteria foreseen for significant ARTs and on the basis of information provided by competent authorities of the issuer's home Member State(s).[82] To achieve this classification, at least two of the same items under the following criteria must be fulfilled:

1. the size of the customer base,, is higher than 10 million;
2. the value of EMTs, or where applicable, their market capitalisation is higher than EUR 5 billion;
3. the number and value of transactions is higher than 2,5 million transactions and EUR 500 million respectively, per day;
4. the size of the reserve of assets of the issuer is higher than EUR 5 billion;
5. The fact that the issuer is a provider of core platforms services designated as gatekeeper in accordance with the Digital Markets Act[83]
6. the significance of the cross-border activities of the issuer;
7. the interconnectedness with the financial system;
8. the same person or related group of persons issue several e-money tokens, asset referenced tokens and provide crypto-asset provider services.[84]

Further specification of the criteria is foreseen through delegated acts which shall be adopted by the Commission. Classification as a significant EMT results in specific obligations related to, e.g., fund ownership, custody of reserve assets, and safeguarding requirements.

[80] MiCA, art. 43(2).
[81] MiCA recital 26 (Draft Sep. 24, 2020).
[82] MiCA art. 39.
[83] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act).
[84] MiCA art. 39.

B.2.2.6. Owned funds, reserve of assets, safeguarding

As written, it seems that issuers of EMTs not classified as "significant" under MiCA must nevertheless comply with provisions regarding funds owned by credit or electronic money institutions. This results from the fact that EMTs are considered electronic money, and thus may only be issued by entities authorised through the E-Money Directive.

MiCA requirements for issuers of significant EMTs include the following topics:

1) Obligation to have a reserve of assets, and composition and management of such reserve of assets;
2) Rules on the custody of reserve assets;
3) Rules on the investment of the reserve of assets;
4) Obligation to adopt, implement and maintain a remuneration policy;
5) Requirement that custody provider does not belong to the same group;
6) Obligation to assess and monitor the liquidity needs to meet redemption requests or the exercise of rights;
7) Obligation to conduct liquidity stress testing.[85]

MiCA recitals provide that, when an issuer of EMTs invests funds received in exchange for EMTs, such funds should be invested in assets denominated in the same currency as the one that the EMT is referencing to avoid cross-currency risks.[86]

C. Crypto-asset service providers

C.1. Non-custodial DeFi protocols and crypto-asset service providers

Title V of MiCA sets out provisions on authorisation and operating conditions of crypto-asset service providers.[87]

Under MiCA art. 3(1)(8), a "**crypto-asset service provider**" is defined as

> any natural person, legal person or undertaking whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis.[88]

[85] *Id.*
[86] MiCA recital 48.
[87] MiCA art. 53 et seq.
[88] MiCA art. 3(1)(8).

The following business activities are defined as "**crypto-asset services**" by MiCA art. 3(1)(9):

(a) the custody and administration of crypto-assets on behalf of third parties;
(b) the operation of a trading platform for crypto-assets;
(c) the exchange of crypto-assets for fiat currency that is legal tender;
(d) the exchange of crypto-assets for other crypto-assets;
(e) the execution of orders for crypto-assets on behalf of third parties;
(f) placing of crypto-assets;
(fa) the transfer of crypto-assets;
(g) the reception and transmission of orders for crypto-assets on behalf of third parties;
(h) providing advice on crypto-assets;
(ha) the exchange of crypto-assets for financial instruments;
(hb) providing portfolio management on crypto-assets
(hc) the provision of a portfolio management service[89]

Note that the provider of these services can be a **natural or legal person, or an undertaking**. A lack of corporate structures does not protect against regulation.

Crypto-asset services must represent an **occupational or business activity** of a person or undertaking and shall be provided on a professional basis in order for such person or undertaking to be considered a crypto-asset service provider. To predict how this terminology may be implemented across the EU, one may examine a defined term from a directive currently in-force. MiFID II dubs an "investment firm" to be "any legal person whose regular occupation or business is the provision of one or more investment services to third parties and/or the performance of one or more investment activities on a professional basis."[90] MiFID II does not expand further, instead leaving Member States to fully develop compliant, localised terminology.

One fully-formed and directive-compliant localised term may be seen with "commercial financial services providers" as defined by Germany's Federal Financial Supervisory Authority ("BaFin") in accordance with the German Banking Act ("KWG").[91] A financial service provider operates "commercially" if its services are intended to continue for a certain length of time and conducted with the intention of making profit.[92]

BaFin's MiFID II-compliant "commercial financial services provider" also serves as a point of comparison to MiCA's "crypto-asset service." For example, crypto-asset services under MiCA lack the element of intent written into BaFin's commercial financial service definition. Instead, an alleged crypto-asset provider is gauged

[89] MiCA art. 3(1)(9).
[90] MiFID II art. 4(1).
[91] Fed. Fin. Supervisory Auth., Notice on the granting of authorisation to provide financial services pursuant to section 32 (1) of the German Banking Act, 2016, BaFin: Notice on the granting of authorisation to provide financial services pursuant to section 32 (1) of the German Banking Act § 1.1 (Nov. 18, 2016) https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/WA/dl_fidierlaubnis_buba_en.html.
[92] *Id.*

through whether the scale of their service reaches a "professional" level.[93] Only effort actually made seems to be important for defining such a service in this new world of MiCA.

Under MiCA, a person or undertaking is only a crypto-asset service provider insofar as their activities are carried out "for third parties." The regulation does not explain this phrasing, however Member States have usually already established approaches in relation to defining third parties. BaFin's use of a similar term–"for others"--may foreshadow how "for third parties" could be interpreted under MiCA"[94] In its guidelines for KWG-compliant crypto-asset custody, BaFin states that such "others" are any person, or group of persons, "other than the undertaking providing such services."[95] The scope of an "undertaking" (equivalent to MiCA's "service provider") is defined broadly; a number of significant exemptions are granted under the KWG. Thus, crypto-asset custody, management, or storage services are **not** provided "for others" when such services are:

- used for an undertaking's own crypto-assets;
- provided through an undertaking's employees;
- complemented within the scope of a division of labour; or
- extended to a genuine partnership-based network[96]

Crypto asset services, exempting item 3(1)(9)(a) ("custody and administration" on behalf of third-parties), are exempt from most MiCA regulations if provided by "investment firms" authorised under MiFID II.[97] Such provision is instead governed as "investment services" or "ancillary services" as described in Annex I Section A of the MiFID II.[98]

C.2. Examining crypto-asset services

C.2.1. Custody and administration of crypto-assets on behalf of third parties

The term "custody and administration of crypto-assets on behalf of third parties," (MiCA art. 3(1)(9)(a), listed in Section 1, *supra*) is not eligible for the abovementioned MiFID II exemptions. MiCA art. 3(1)(10) explains this term as:

---

[93] MiCA art. 3(1)(8).
[94] Fed. Fin. Supervisory Auth., *Guidelines Concerning the Statutory Definition of Crypto Custody Business* (Mar. 02, 2020) https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Merkblatt/mb_200302_kryptoverwahrgeschaeft_en.html.
[95] *Id.*
[96] *Id.*
[97] MiCA art. 2(6).
[98] MiFID II Annex I Section A.

> the safekeeping or controlling, on behalf of third parties, crypto-assets or the means of access to such crypto-assets, where applicable in the form of private cryptographic keys.[99]

The phrase "safekeeping or controlling" alone is not particularly illuminating; it only becomes somewhat usable through reference to “cryptographic keys.”[100]

For DeFi applications that hold, manage, and reuse the crypto-assets of users through smart contracts, the provision of “custody and administration” services appears to become relevant in cases where, for example, a person or group of people controls a private key (an "**admin key**") with which crypto-assets locked in a smart contract may be transferred without users’ permission.

At first glance, these admin key-secured applications do not seem to be developed in the “decentralised” ethos of Web 3.0. But users consider the possibility of an admin key intervention necessary–particularly in early stages–as a safeguard against, e.g., malfunctions, hacks, or exploits. Many project roadmaps include a plan to gradually dismantle this admin access, or restructure the power in a decentralised manner in later stages of maturity.

If a project includes admin key(s) as a part of its early-stage security system, there is a risk that the administrators of the keys–e.g. the holders of a multi-signature wallet–could be classified to be jointly acting as a “crypto asset service provider.” This risk increases if the admin-key holder(s) represent through a user interface or other way that they wish to act on behalf of third parties. The risk may be further compounded insofar as the key holders act on behalf of a joint enterprise or are employees of a single company.

This definition could also apply to a wallet software where the **source code is not public**. In such a case, it is not always possible to check whether the wallet provider has access to the private keys generated by the software or whether they are locally generated.

C.2.2. Operation of a trading platform for crypto-assets

Pursuant to MiCA art. 3(1)(11), the "operation of a trading platform for crypto-assets" means:

> the management of one or more multilateral systems, which brings together or facilitates the bringing together of multiple third-party buying and selling interests for crypto-assets – in the system and in accordance with its rules - in a way that results in a contract, either by exchanging one crypto-asset for another or a crypto-asset for funds.[101]

The definition can be stripped down to three aspects:

---

[99] MiCA art. 3(1)(10).
[100] This definition seems to coincide with the German KWG definition of a “crypto custody business” under the KWG, *see supra* note 89.
[101] MiCA art. 3(1)(11).

- management of,
- a trading platform which brings together or facilitates the bringing together of multiple third-party buying and selling interests in such a way,
- that a contract is concluded.

This definition is very similar to that of a “trading venue,” under MiFID II[102] , which states that such a venue may be a “regulated market, MTF, or OTF.”[103] Among these, a “regulated market” is also defined in MiFID II as:

> a multilateral system operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments – in the system and in accordance with its non-discretionary rules – in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or systems, and which is authorised and functions regularly and in accordance with Title III of this Directive.[104]

Both “trading platform for crypto assets” in MiCA and “regulated market” in MIFID II include yet another term defined under MiFID II, “multilateral system.” “Multilateral system” is defined in MiFID II art. 4(19) as:

> any system or facility in which multiple third-party buying and selling trading interests in financial instruments are able to interact in the system.[105]

MiCA, however, lacks its own definition of the term “multilateral system.”

Consequently, MiCA also lacks a provision similar to MiFID II art. 1(7) which stipulates that, “all multilateral systems in financial instruments shall operate either in accordance with the provisions of Title II concerning MTFs or OTFs or the provisions of Title III concerning regulated markets.”[106] It appears that, in MiCA, “multilateral systems” which do *not* facilitate the conclusion of a contract between the parties interacting on a multilateral system are *not* prohibited and may also *not* be covered by the term “trading platform for crypto assets.”[107] They may, however, be covered by another designation as a crypto asset service.

Regarding decentralised financial applications, there are various forms of “**Decentralised Exchanges**” ("DEX") which may come under MiCA art. 3(1)(11). “Automated Market Makers” ("AMM") are a subcategory of DEX where users ("Liquidity Providers", or, "LP") provide crypto-assets in liquidity pools. These liquidity pools are managed by smart contracts. Users can exchange crypto-assets with

[102] MIFID II art. 4(24).
[103] MiFID II art. 4(19).
[104] MiFID II art. 4(21).
[105] MiFID II art. 4(19)
[106] MiFID II art. 1(7)
[107] Argument based on the lack of a similar provision in MiCA to MiFID II art. 1(7).

these liquidity pools and associated market prices are automatically generated by the contract. An order book is not necessary for a basic AMM configuration. [108]

Another form of DEX is the **decentrally coordinated order book**. An order book is generally understood as the list of orders that a trading venue uses to record the interest of buyers and sellers in a particular financial instrument. A matching engine uses the book to determine which orders can be fully or partially executed. In DEXs, those order books may be coordinated "on chain" or "off chain."[109]

All DEX forms could be considered trading platforms in the sense of MiCA art. 3(1)(11), as the definition's clause, "bringing together multiple third-party buying and selling interests," directly references the purpose of these systems.

Deeper analysis is required to determine whether "bringing together" also refers to the **conclusion of a contract**. This determination would be most significant regarding AMM due to the lack of clear allocation of liquidity to certain trades when compared with models that maintain an order book. Attempting to broadly predict the conclusion of such analysis appears futile, since there is no uniform term to mean "contract" under civil law in the EU. The concept of the conclusion of a contract will have to be interpreted broadly, at least from a regulatory point of view.

In practice, it is likely to be much more decisive whether a person or group of people actually "manages" a DEX. Only a **managing entity** may provide the crypto-asset service of "operation of a trading platform."[110] For this purpose, some kind of power of intervention in what is happening on the DEX protocol, even only through activation and deactivation, should be required. This may not be the case if the trading platform's system is completely processed using smart contracts, the parameters of which cannot be changed and cannot be stopped (such is particularly conceivable with AMM).

In the case of decentralised order books, however, depending on the design, roles are conceivable that could come close to an administrative activity, in particular if the order books are partially managed and executed "off-chain" and controlled by a determinable person or group of people.

The idea that the **deployment of the system** on a smart contract-capable blockchain network already represents the activity of "managing" a trading platform seems absurd. However, a regulator might come to this result if the term "trading platform" (which itself is not defined any further in MiCA), is not interpreted in a purely technical way, but rather in a functional way relating it to the **online interface** through which a user engages a platform**.**

Such an interface, e.g. a "web app," which enables interaction with a DEX protocol, could then be understood as the "management" of the trading platform. For example,

---

[108] For more reading on how AMM work, *see* Hasu, *Understanding Automated Market-Makers, Part 1: Price Impact*, Paradigm Research (Apr. 19, 2021) https://research.paradigm.xyz/amm-price-impact.
[109] Lindsay X. Lin, *Deconstructing Decentralized Exchanges*, Stan. J. Blockchain L. & Pol'y (Jan. 5, 2019) https://assets.pubpub.org/ob89i66u/61573938834913.pdf.
[110] Argument based on MiCA art. 3(1)(11) ("the management of …").

the administrator of the interface could change out the referenced smart contracts for another. However, in addition to the pure wording, the result of this interpretation speaks against this broad, functional understanding of the term "trading platform". It would lead to other roles in the ecosystem of the blockchain network, such as providers of block explorers and published node-interfaces to fall under the concept of the “management of a trading platform” just because they enable interaction with the relevant smart contracts. This leaves room for the argument that the “online interface” is not *per se* an integral part of a trading platform.

C.2.3. Exchange of crypto-assets for funds

According to MiCA, the “exchange of crypto-assets for funds” means:

> concluding purchase or sale contracts concerning crypto-assets with third parties against funds by using proprietary capital.[111]

The term “funds” in the above definition is explained by art. 4(2) of Directive 2015/2366 (“PSD2”), as referenced by MiCA art. 3(1)(7b), and means, “banknotes and coins, scriptural money or electronic money.”[112] This crypto-asset service, therefore, generally concerns the handling of “legal tender” currency and thus classic centralised crypto exchanges.

An **exchange for stablecoins** (such as an EMT[s]) is also covered by this definition, as it implicitly follows from MiCA art. 2(ca) that EMTs are to be considered as “funds.”[113]

Implications for **DeFi Apps** shall be discussed in the following section, as they are identical for crypto-to-crypto trades.

C.2.4. Exchange of crypto-assets for other crypto-assets

Pursuant to MiCA, the “exchange of crypto-assets for other crypto-assets” means:

> concluding purchase or sale contracts concerning crypto-assets with third parties against other crypto-assets by using proprietary capital[114]

It is not the operation of the trading platform and its administration that is decisive here, but the pure exchange activity itself. Above all, it is unclear whether the **provision of liquidity on AMM** falls under this condition. The liquidity is provided by transferring the crypto-assets to the DEX's smart contract. In return, the user receives other crypto-assets back, which represent the user's share of the total liquidity of the trading pair in the smart contract. The provision of liquidity in a trading pair of two different (or more) crypto values on an AMM could well be understood as an exchange offer using one's own capital.

---

[111] MiCA art. 3(1)(12).
[112] Directive 2015/2366, 2007 O.J. (L. 337) at art. 4(2).
[113] MiCA art. 2(ca).
[114] MiCA art. 3 (1)(13).

Determination of whether the provision of liquidity to an AMM amounts to **"concluding sale contracts"** in the sense set by MiCA will be necessary under the various civil codes of the EU.

Under German civil law, for example, it is not obvious if a user who transfers crypto-assets to an AMM's liquidity pool thereby submits a binding declaration of intent that includes the future interactions of third parties with the smart contract (thereby leading to the "conclusion" of the contract). It would also be impossible to clarify with which liquidity pool a given exchange concludes its contract.

It may further be argued that assuming such implied contractual consent would include malicious interactions that exploit errors in code. That the transfer of crypto assets to a liquidity pool constitutes an implied declaration of intent which only refers to certain foreseeable and "fair" interactions of third parties with the smart contract does not appear to be practical. Rather, it may be argued that when liquidity is transferred to a smart contract, the user's intent is to generate and receive a token from the smart contract system (a so-called "LP token" representing a share of that liquidity pool) in order to use or redeem it at a later point in time and to participate to the allocation of part of the fees or other incentives in form of tokens, directly generated by the smart contract system. For this, the user gives up their power to immediately use the crypto added to the LP in a purely factual manner – **without** entering into a contract with a counterparty.

However, since the concept of contract is not harmonised throughout the EU, a less particular definition may be upheld over this conception. At this time there is, at least, a lack of regulatory clarity for liquidity providers.

Status as a "crypto-asset service provider" may be avoided if an activity is not carried out on a commercial basis. This can be difficult to assess in individual cases. It is unclear how the phrase "using proprietary capital"[115] interacts with "for third parties".[116] Liquidity providers in AMM may only be covered as "crypto-asset service providers" if they perform their service as **market makers** on behalf of a third party (for example, to stabilise prices), and not if they do so out of self-interest.

C.2.5. Execution of orders for crypto-assets on behalf of third parties

According to MiCA art. 3(1)(14), the "execution of orders for crypto-assets on behalf of third parties" means:

> concluding agreements to buy or to sell one or more crypto-assets or to subscribe for one or more crypto-assets on behalf of third parties and includes the conclusion of agreements to sell crypto-assets at the moment of their issuance.[117]

[115] MiCA art. 3(1)(12)
[116] MiCA art. 3(1)(8).
[117] MiCA art. 3(1)(14).

These are intermediaries who coordinate execution and representation in a commercial transaction on relevant factors such as price, costs, speed, likelihood of execution and processing, scope and type of order execution, or receive specific specifications from their customers. A decentralised financial application that maps this process is currently not apparent, though certain DeFi "front-ends"/web applications combine centralised routing techniques with smart contracts in a way that may qualify as providing the execution of orders for crypto-assets on behalf of third parties.[118]

C.2.6. Placing of crypto-assets

Pursuant to MiCA, the "placing of crypto-assets" means:

> the marketing, on behalf of or for the account of the offeror or of a party related to the offeror, of crypto-assets to purchasers.[119]

The placing activity includes the marketing activity that is not carried out by the issuer itself. The term "marketing" is not defined in more detail.

C.2.7. Transfer of crypto-assets

MiCA defines the "transfer of crypto-assets" as

> a transfer of crypto assets as defined in [the Funds Transfer Regulation].[120]

The current draft of the Funds Transfer Regulation (TFR) is available here. It defines a "transfer of crypto-assets" as

> any transaction moving, by electronic means, crypto-assets from one wallet address or crypto-asset account to another wallet address or crypto-asset account, carried out or received on behalf of a natural or legal person by at least a provider of crypto-asset transfers or other obliged entity as listed in Article 2(1) of Directive (EU) 2015/849, acting on behalf of either the originator or the beneficiary, irrespective of whether the originator and the beneficiary are the same person and irrespective of whether the provider of crypto-asset transfers of the originator and that of the beneficiary are one and the same.[121]

Further, according to the TFR a "provider of crypto-asset transfers" means

> any natural or legal person whose occupation or business includes the provision of services relating to the transfer of crypto-assets on behalf of another natural or legal person.

---

[118] Outside of the scenarios that have already been dealt *supra* section C.2.2.
[119] MiCA art. 3(1)(15).
[120] MiCA art. 3(2a).
[121] TFR art. 3(10).

The TFR definitions mentioned above are circular to some extent: A *transfer of crypto-assets* is one that is carried out or received by at least a *provider of crypto-asset transfers*, while such a *provider of crypto-asset transfers* is one that provides services related to a *transfer of crypto-assets* in the first place. This means in short, any person providing services related to a transfer of crypto-assets is a provider of crypto-asset transfers and, thus, a crypto-asset service provider under MiCA.

TFR does not further elaborate on what type of services fall under this definition. It does, however, hint at certain activities that do not fall within the scope of transfer related services. **Non-custodial wallet software** itself or its development, for example, clearly doesn't fall under these regulated services as the TFR states that it shall not apply to providers of ancillary infrastructure that enables *another entity* to provide services related to the transfer of crypto-assets.[122] TFR recitals further clarify that persons that only provide **internet services** and **cloud services**, or **software developers**, should not fall within the scope of TFR unless they provide services for the transfer of crypto-assets on behalf of another person.[123]

C.2.8. Reception and transmission of orders for crypto-assets on behalf of third parties

According to MiCA, the "reception and transmission of orders for crypto-assets on behalf of third parties" means:

> the reception from a person of an order to buy or to sell one or more crypto-assets or to subscribe for one or more crypto-assets and the transmission of that order to a third party for execution.[124]

This service includes the transmission of customer orders for processing, for example via a trading platform for crypto-assets or to another provider of crypto-asset services. The mere transmission activity is covered. A decentralised financial application that maps this process is currently not apparent.[125]

C.2.9. Providing advice on crypto-assets

According to MiCA 'providing advice on crypto-assets' means:

> offering, giving or agreeing to give personalised recommendations to a third party, either at the third party's request or on the initiative of the crypto-asset service provider providing the advice, in respect of one or more transactions relating to crypto-assets, or the use of crypto-asset services.[126]

---

[122] TFR art. 2(4)
[123] TFR recital 18a
[124] MiCA art. 3(1)(16).
[125] Outside of the scenarios that have already been dealt with section in C.2.2., *supra*.
[126] MiCA art. 3(1)(17).

Similar to traditional MIFID II investment advice, recommendations regarding the purchase or sale of crypto-assets or the use of crypto-asset services are also regulated. Due to the requirement of "personalisation", the mere presentation of a user interface for interaction with decentralised financial applications should typically not be included in this service definition. The more user specific the interface is, the more relevant this crypto-asset service might become.

C.2.10. Exchange of crypto-assets for financial instruments

This type of service does not have its own definition in MiCA. Based on the definitions of "*exchange of crypto-assets for fiat currency*"[127] and "*exchange of crypto-assets for other crypto-assets*"[128], however, the definition may be derived as

> concluding purchase or sale contracts concerning crypto-assets with third parties against financial instruments by using proprietary capital.

MiCA also doesn't define the term "financial instruments". It does however refer to "financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU" multiple times.[129] This MiFIDII definition refers to those instruments specified in Section C of Annex I of MiFIDII which lists transferable securities, money-market instruments, units in collective investment undertakings, options, futures, swaps, forward rate agreements amongst other instruments.[130]

MiCA itself assumes that some tokens, especially certain types of asset-referenced tokens may qualify as financial instruments.[131] In principle, an exchange of crypto-assets against financial instruments may, therefore, also be conducted through **DeFi Apps**. In this regard, the discussions under C.2.4. may apply here as well. Any further elaboration heavily depends on the structure of the financial instrument represented by the token and is, therefore, out-of-scope of this report.

C.2.11. Providing portfolio management on crypto-assets

MiCA states that 'portfolio management ' means portfolio management as defined in Article 4(1), point (8), of Directive 2014/65/EU[132], which defines it as

> managing portfolios in accordance with mandates given by clients on a discretionary client-by-client basis where such portfolios include one or more financial instruments.[133]

MiCA transfers this definition of portfolio management over to crypto-assets instead of financial instruments.[134] Automated portfolio management solutions in

[127] MiCA art. 3(12)
[128] MiCA art. 3(13)
[129] E.g. MiCA recital (6), art. 2(2)(a), art. (2)(2a)
[130] MiFID II Annex I, Section C (1) - (11)
[131] MiCA art. 16(2)(d)
[132] MiCA art. 3(17a18).
[133] MiFID II art. 4(1)(8)
[134] MiCA art. 3(9)(hb)

decentralised finance applications such as "**yield optimizers**" generally offer "strategies" that are not discretionary on a client-by-client basis. These strategies are mostly followed by groups of individuals and seem to be conceptually more similar to "automated copy trading" rather than pure discretionary portfolio management.

This type of crypto asset service may be more relevant in arrangements where an individual or a group of multi-sig-administrators effectively controls the crypto assets of other users and is empowered through the smart contract or protocol to execute investment decisions with those crypto assets. It may or may not be relevant in these cases to what extent these investment decisions are, for example, signalled by a "community vote" and whether or not the administrator is able to deviate from such a vote or not.

C.2.12. Providing a portfolio management service

MiCA does not define this crypto asset service besides the definition of "portfolio management" described in C.2.11. above. The distinction between "providing portfolio management on crypto assets" as in MiCA art. 3(9)(hb) and this separately mentioned activity of "portfolio management service" as in MiCA art. 3(9)(hc) is, therefore, not clear. Neither the recitals, nor the material regulation of this activity in MiCA art. 73 reflect or explain this distinction into two different types of activities.

D. Transitional measures

D.1. Entry into force and application

Similar to other EU regulations, MiCA shall enter into force on the twentieth day following its publication in the Official Journal of the European Union.[135] Once adopted, MiCA shall **become applicable 18 months** following its entrance into force.[136] The provisions laid down in Title III ("Asset-referenced tokens") and Title IV ("Electronic money tokens") shall become applicable **immediately** following the entry into force. As all EU regulations, MiCA shall be binding in its entirety and will be directly applicable in all Member States.

D.2. Transitional measures

As a part of transitional measures, Title II ("Crypto-Assets, other than asset-referenced tokens or e-money tokens") shall not apply until the entry of MiCA into application.[137] This gives an 18-month window following the entry of MiCA into force to conclude all offers of such crypto-assets to the public. Because MiCA does

[135] MiCA art. 126(1).
[136] MiCA art. 126(2).
[137] MiCA art 123(1a)

not explicitly provide that offers must be commenced before the adoption of the regulation in order for transitional measures to apply, Title II would not affect offers commenced after the entry of MiCA into force and ended before the Regulation becomes applicable. In consequence, for 18 months following the entry of MiCA into force, the following provisions shall **not** apply:

- Article 4 on offers of crypto-assets, other than asset-referenced tokens or e-money tokens, to the public;
- Article 4a on admission of crypto-assets, other than asset-referenced tokens or e-money tokens, to trading on a trading platform for crypto-assets;
- Article 5 on content and form of the crypto-asset white paper;
- Article 6 on marketing communications;
- Article 7 on notification of the crypto-asset white paper;
- Article 8 on publication of the crypto-asset white paper, and, where applicable, of the marketing communications
- Article 9 on information on the result of the offer and safeguarding of funds and crypto-assets, other than asset-referenced tokens or e-money tokens, received during offers;
- Article 10 on rights of offerors and persons seeking admission to trading of crypto-assets, other than asset-referenced tokens or e-money tokens;
- Article 11 on modification of published crypto-asset white papers and, where applicable, published marketing communications after their publication;
- Article 12 on right of withdrawal;
- Article 13 on obligations of offerors and persons seeking admission to trading of crypto-assets, other than asset-referenced tokens or e-money tokens;
- Article 14 on liability of offerors or persons seeking admission to trading of crypto-assets, other than asset-referenced tokens or e-money tokens for the information given in a crypto-asset white paper

D.2.1. Crypto-assets other than asset-referenced tokens and e-money tokens admitted to trading

In the case of crypto-assets other than ARTs and EMTs which were admitted to trading on a trading platform for crypto-assets before the entry of MiCA into application, certain MiCA provisions shall still apply. In particular, this relates to provisions on marketing and communications[138] and to rules on publication of the crypto-asset white paper/marketing communications.[139]

Additionally, operators of trading platforms where crypto-assets have been admitted to trading shall have 6 months following MiCA's date of application to prepare white

[138] MiCA art. 6.
[139] MiCA art. 8.

papers for those crypto-assets in accordance with relevant MiCA provisions.[140] White papers shall also be announced and published in accordance with MiCA, as shall all modifications relating to significant factors, material mistakes, or material inaccuracies capable of affecting the assessment of the crypto-assets.[141] In consequence, not only will operators be required to prepare white papers, but following their notification and publication they will also be responsible for the monitoring of their content.

D.2.2. Crypto-asset service providers providing services on the basis of previously existing law

Crypto-asset service providers which provided their services in accordance with applicable law before the date entry of MiCA into application, may continue to do so until 6 months after the date of MiCA application or until they are granted an authorisation pursuant to Article 55 of MiCA, whichever is sooner.[142]

D.2.3. Issuers of asset-reference tokens that were issued in accordance with already existing law

MiCA rules on asset-referenced tokens–together with those on electronic money tokens–shall become applicable at the time of MiCA entry into force.[143] This is a derogation from the general rule of MiCA's activating 18 months following its entry into force. Issuers of ARTs which issued such tokens in accordance with applicable law before MiCA's entry into force may continue to do so until they are granted an authorisation pursuant to the relevant provisions of MiCA. The condition here is that, following MiCA's entry into force, issuers of such tokens shall apply for authorisation before the end of the 6-month period following MiCA's entry into force.[144]

D.2.4. Simplified procedure for authorisation for entities authorised under already existing law

As part of transitional measures, and as another derogation from MiCA rules on applying for authorisation and its assessment by competent authorities.[145] Member States may apply a simplified procedure to applications for authorisation which are submitted between the date of application of MiCA (6 months following its entry into force) and 6 months after the date of the submitted application. This simplified

[140] MiCA art. 123(2a).
[141] MiCA art. 11(1).
[142] MiCA art. 123(2).
[143] MiCA art. 126(3).
[144] MiCA art. 123(2a).
[145] MiCA arts. 54-55.

procedure may apply to entities that, at the time of entry into force of MiCA, were authorised under national law to provide crypto-asset services.[146] The procedure consists of a general requirement to ensure that requirements laid down in Chapters 2 and 3 of Title V of MiCA are complied with before granting authorisation pursuant to such simplified procedures.[147] In consequence, entities subject to the simplified procedure shall not be required to fulfil MiCA's authorisation conditions but shall nevertheless meet the following criteria foreseen by the Regulation for the authorised entities:

Chapter 2: Obligation for all crypto-asset service providers:

- Article 59 on obligation to act honestly, fairly and professionally in the best interest of clients and information to clients;
- Article 60 on prudential requirements;
- Article 61 on organisational requirements;
- Article 62 on information to competent authorities;
- Article 63 on safekeeping of clients' crypto-assets and funds;
- Article 64 on complaint handling procedure;
- Article 65 on identification, prevention, management and disclosure of conflicts of interest;
- Article 66 on outsourcing;

Chapter 3: Obligations for the provision of specific crypto-asset services

- Article 67 on custody and administration of crypto-assets on behalf of third parties;
- Article 68 on operation of a trading platform for crypto-assets;
- Article 69 on exchange of crypto-assets against funds or exchange of crypto-assets against other crypto-assets;
- Article 70 on execution of orders for crypto-assets on behalf of third parties;
- Article 71 on placing of crypto-assets;
- Article 72 on reception and transmission of orders on behalf of third parties;
- Article 73 on advice on crypto-assets and portfolio management of crypto-assets.

D.2.5. Supervisory responsibilities of the European Bank Authority

On the basis of MiCA, the EBA has significant supervisory responsibilities over issuers of ARTs and EMTs. These powers shall be exercised from the date of entry into application of the delegated acts adopted by the European Commission.

[146] MiCA art. 123(3).
[147] *Id.*

Delegated acts shall further specify the criteria for ARTs to be deemed significant as well as determine, among others, the circumstances under which ARTs and their issuers shall be considered as "interconnected with the financial system". The acts shall also specify the circumstances under which the issuance of EMTs and ARTs, as well as the provision of crypto-asset services, should be considered "significant."

3. CONCLUSION AND KEY TAKEAWAYS

A recital of MiCA states that Union legislation on financial services should be based on the principle 'same business, same risks same rules' and follow a technologically neutral approach.[148] Crypto-assets that have the same or very similar features to financial instruments should therefore be treated as equivalent to financial instruments. Within a large extent, this regulation throws any ideas of tech-neutrality overboard but at the same time goes ahead and applies a plain vanilla financial regulatory approach to the crypto sector. MiCA was initially drafted with the unimaginative 2017 phenomenon of "initial token offerings" in mind, and it shows: Issuers, offerors and crypto asset service providers are identified as the main regulatory subjects. Their obligations are similar to those of their corresponding roles in the traditional financial sector known from regulations such as MiFIDII, MiFIR, and MAR. While this seems fair, baking a one-size-fits-all super regulation for crypto markets doesn't succeed in bringing regulatory clarity to those aspects of the crypto sector that less resemble the roles and activities known from the traditional financial sector. While the latest changes to the draft try to some extent to reflect the more recent developments in crypto communities (e.g. the term "decentralised autonomous organisation" was added) it becomes obvious that anticipatory regulation is not possible. It rather leads to more curious results such as DAOs being required to publish their telephone number. Ultimately, the strongest and most clear aspects of this regulation appear to be those that focus on what the regulators know a lot about: roles and activities in the crypto sector that resemble those in the traditional financial sector. It, therefore, remains unclear why a dedicated crypto regulation was deemed necessary in the first place.

An advantage is that some types of fungible tokens, "utility" and to some extent governance tokens, and NFTs should undergo a somewhat lighter regulation than that of financial instruments. In addition, some clear exemptions are stated with respect to the duty to publish a white paper and obtain an authorisation by the competent authority before token launch. Given that in many cases the legal qualification of tokens will not be an easy task, one has to wait for the ESMA guidance before raising conclusions with regard to particular problems such as the legal qualification of tokens with more than one function (so-called "hybrid tokens"). The regulatory approach seems similar to the one usually adopted by the EU

[148] Mica, recital 6.

legislator: the focus is on information duties that aim at protecting prospective investors/consumers.

The part on AMTs and EMTs shows the willingness of providing a very strict regulation. Issuers of these kinds of tokens will undergo significant controls by the competent authority and have to respect heavy requirements concerning the organisational structure, the management of funds and the ability to grant redemption to the token holders. The rigour of the Regulation reveals the original intent of the EU to combat forms of payment systems alternative to fiat currency that could impact on the monetary policies of the Union (i.e. the Libra/Diem projects). This explains why particular safeguards are established for ARTs and EMTs qualified as “significant” ARTs or EMTs according to certain criteria (size, value, number of customers, etc.). The overall impression seems that this part of regulation is particularly (although not expressly) referred to issuers located in other regions of the world that have already issued stablecoins that have in the last years gained large market caps. For such operators, it is predictable that significant compliance measures will be required in order to adequate their activities to the new European rules. A drawback for European located ARTs and EMTs willing to access the market is that the entry costs will be high. Given that purely European stablecoins projects did not gain significant traction so far, it seems difficult that with such regulatory pressure this will happen in the future.

The last bulk of MiCA rules, devoted to crypto-assets services, will greatly impact on the activity of centralised exchanges in terms of organisational settings and prudential controls. While in general terms it can be expected that big players will comply with this new regulatory architecture, the strict requirements will probably generate obstacles for smaller businesses. The rules on transfers of crypto assets, if not redefined within the next months, will be a problem for every interested party and could significantly harm the privacy of users. As regards to DeFi applications, the most important challenge seems to be understanding whether and how the new rules will apply to non-custodial protocols, in which operations are run by smart contracts. A high level answer to this question seems to be “no”, but every situation will need to be carefully assessed. Situations in which it is arguable that a group of people manages the platform (e.g. with admin activities provided with a multisig) seem at risk.