MPR PARTNERS

MiCA Isuers and Tokens

1. Introduction

The Markets in Crypto Asset Regulation (EU) 2023/1114, commonly referred to as MiCA, is a legislative framework applicable in the European Union to crypto-assets and crypto-assets service providers. It will mainly apply from 30 December 2024 (with the exception of Titles III and IV coming into force from 30 June 2024). The Regulation seeks to promote transparency and responsible corporate governance amongst token issuers, thus seeking to protect holders against any liquidity crises and mismanagement similar to the FTX one.

The article describes the disclosure and issuance rules for crypto-assets, including special provisions for significant tokens.

Crypto-assets are defined in the Regulation under 3 distinct categories, namely: asset-referenced, e-money and other purposes tokens. All of these have a different regime, as well as exceptions for categorisation.

The Regulation does not apply to financial instruments under MiFID II, deposits, funds (unless they are e-money tokens), securitisation positions, non-life or life insurance products and pension products. It does not apply to those NFTs which are unique and not fungible.

2. Asset-referenced token

Asset-referenced tokens (discussed under Title III) are a type of tokens stabilizing their value by linking to various assets including fiat currencies representing legal tender, commodities and other crypto-assets. Such tokens can be excluded from the provisions below if they fail to exceed 5 million EUR in 12 months or if they are exclusively addressed to qualified investors.

To proceed with the issuance of the tokens, legal persons must submit an application for authorisation to the competent authority of their home Member State. The form requires the applicant details, information about the business model and organisation as well as appropriate proof skill and reputation of the management members. An important element of the application is the crypto-asset white paper outlined in Article 19. The white paper presents to the public who the issuer is and gives an overview of the offer to the public/admission to trading, while mentioning the underlying tech and possible risks.

The white paper has important disclosures, which alert potential holders of the general risks associated with crypto-asset tokens, including loss of value. While there is a reserve of assets attached to the token, the tokens themselves are not covered under European Union deposit guarantee and investor compensation schemes. Therefore, the onus remains on the potential holder to inform himself and decide about the fitness of the token.

Civil liability arises for the issuers once the white paper is published for any information that can misled the holder or which is false, unclear and incomplete. There are no contractual exclusions or limitation of liability available per Article 26.

A particular requirement for asset-referenced tokens is that of reporting, which arises once the value exceeds 100 million EUR. Such report needs to contain the number of holders, the value of the token issued, the size of the reserve asset, the average number of transactions per day and an estimate value of transactions associated to use as exchange within a single currency area. However. the quarter report is not mandatory solely for the 100 million EUR threshold, as Paragraph 2 of Article 22 leaves the discretion to competent authorities to request reports for smaller values. This comes in addition to the general requirement of disclosing publicly and accessibility the number of tokens in circulation, their value and the composition of reserve assets on the website monthly.

A special category of asset-referenced tokens is that of tokens used widely as a means of exchange under Article 23. A token falls under this definition if the transactions in a single currency area exceed 1 million transactions and the value is over 200 million EUR per day. In such cases, the issuer is obliged to stop issuing the said token and submit timely a plan to ensure that the quarterly average number and average aggregate value is reduced under the threshold.

Moreover, asset-referenced tokens can also be considered under the significant category. European Banking Authority is the authority which has the classification power, and it will generally refer to the criteria set in Article 43 to decide. If a token is deemed significant, then the competent authority of the Member State will transfer its supervisory powers to European Banking Authority. There are additional obligations to be met such as increasing the value of reserve of assets and conducting liquidity stress testing on a rather regular basis.

To promote fair marketing policies, the Regulation requires all such communication to be carried out in a clear and non-misleading manner while relating to the information in the white paper (which is referenced in the advertisement). There is no prior approval needed for the publication of marketing communication, but it must commence after the white paper is made available.

A rather distinct element of the provisions is the scope of Regulation in corporate governance (Article 34). The framework imposes a clear duty to have functional organisational structures, to constantly monitor the on-going risks and to address them through appropriate means. There is a strong emphasis on the need to have a business continuity plan which ensures continuous operations in case of an interruption in the core systems. The legislation also relates to the members of the management body and their integrity, as it imposes the need to have reputable individuals with sound levels of knowledge, skills and experience. In terms of anti-money laundering policies, all such members must be free from any money laundering, terrorist financing or other impactful offences. An interesting aspect is that of time, as all members according to the Regulation are required to be able to commit sufficient time for their role.

There is an own fund requirement discussed in Article 35. The threshold is set by choosing the highest of any of the following: 350.000 EUR, 2% of the average amount of the reserve of assets or a quarter of fixed overheads of the preceding year. There can be an additional threshold imposed on the issuer, by raising the value up to 20% higher than the average amount of reserve of assets if the competent authority of the home Member State chooses so. Such an increase is decided by following the risk-management process, the quality of the reserve of assets, the number of the transactions as well as the impact that the token has on its proposed markets. Depending on the stress testing results, between 20-40% can be added on the average amount of reserve assets, particularly in situations of grave operational risk or when the economic situation imposes.

The presence of a reserve of assets is an obligation for the issuer considering Article 36. This is mainly requested to cover the risks associated to the assets referenced and to have constant liquidity for enabling rights of redemption. The reserve itself is subject to segregation and its value should meet the aggregate value of all the claims against issuer by the holders of the tokens. The custody of the reserve of assets remains in the control of either a crypto-service provider, a credit institution or an investment firm providing safekeeping (depending on the type of assets).

Drawing further on the reserve of assets, issuers of asset-referenced tokens are required to have a policy describing the stabilisation mechanism. This shall include the list of assets referenced by the tokens and any risks arising from the reserve of assets. Any part of the reserve which is invested has to be disclosed alongside the investment policy.

The asset-referenced tokens provide holders the right of redemption established under Article 39. Such a right is exercised by receiving funds equivalent to the value of assets referenced or by obtaining the assets themselves. The right of redemption can also be exercised against the reserve of assets when the issuer cannot meet its legal obligations. The specific policy for redemption remains at the issuer's discretion, as thresholds and timeframes need to be agreed beforehand. Such a policy must prevent any undue economic harm to holders or to affect the market's stability.

To prevent storing the value within asset-referenced tokens rather than exchanging them, issuers are not permitted to grant interests to holders of the tokens.

3. E-money tokens

E-money tokens have a different regime than the above tokens in terms of offers to the public and admission to trading. Such actions can only be performed by an issuer, which is a credit or electronic money institution (except for other persons obtaining written consent from the issuer) according to Article 48.

As electronic money, e-money tokens can be redeemed by the holders at par value in funds means. The conditions of redemption are decided by the issuer and included in the white paper.

Unlike asset-referenced tokens, the white paper for e-money tokens requires no prior authorization. The competent authority of the home Member State only needs to be notified of the document and prospective communication.

There is a strong requirement of storing minimum 30% of the funds received from the e-money tokens in separate accounts within credit institutions per Article 54. All the remaining funds should be invested in secure, low-risk assets qualifying as highly liquid financial instruments with minimal market, credit and concentration risk.

E-money tokens can be classified as significant by the European Banking Authority in accordance with the criteria listed in Article 43(1), comparable to the factors of significant asset-referenced tokens. E-money tokens can also be classified as significant through voluntary action, if the issuer indicates so.

Granting of interest by the issuers or crypto-asset services providers for e-money tokens is prohibited, including remuneration or other related benefits under Article 50.

4. Other tokens

Other tokens (discussed in Title II) refer to different instruments such as utility tokens. These tokens can be excluded from the provisions below if they are offered to fewer than

150 natural/legal persons per Member State, when the total consideration of the offer does not exceed 1 million EUR or if they are addressed solely to qualified investors. If the crypto assets are offered for free, they are automatically created as reward for maintenance of distributed ledger, they offer access as utility tokens to goods/services in operation or they can only be used on a limited network of merchants (contractors with offeror), they are also excluded.

Offerors of the tokens, persons seeking admission to trading or operators of trading platforms for such tokens have the obligation to notify the competent authority of the home Member State in regard to the white paper and the marketing communications. No prior approval is required.

Issuers of such tokens must publish on their website the result of the offer to the public if the offer was time limited. If the offer is not time-limited, there should be at least a monthly published report of the number of units of the crypto-assets in circulation.

The funds raised during the offer to the public must be kept in custody by a credit institution or a crypto-asset service provider under effective safeguarding arrangements.

There is a particular right of withdrawal for retail holders of these crypto-assets which is granted for 14 days. Such a right cannot be exercised after the end of the subscription period and the issuer is under an obligation to reimburse the retail holder any charges and payments within 14 days of the notification of withdrawal.

5. Legislative Focus: Romania

In Romania, the legislation follows the general European Union provisions in the zone of crypto-assets tokens, namely MiCA. There is specific legislation on issuance of crypto-asset tokens that represent e-money category and fall under Law 210/2019. There are particularities that impose additional obligations which relate to individual taxation and anti-money laundering policies (following the implementation of AML 5 Directive).

Crypto-assets which are considered financial instruments are regulated by the provisions of Law 126/2018 and Law 24/2017. This category of crypto-assets is explicitly excluded from MiCA's operation under Article 2 and within MiFID II.

The issuance of crypto-asset tokens as virtual currency is regulated under Law 210/2019 which also outlines the conditions for offering payment services. Only credit institutions, authorised legal entities, postal service providers, the National Bank and the state acting as public authority can issue e-money.

In order to issue crypto-asset tokens, the issuer requires an authorisation which is obtained from the competent authority (the National Bank of Romania) only by legal entities (defined in Companies Law 31/1990). The National Bank provides authorisations to entities with prudential safeguards that include efficient control mechanisms and risk identification policies. The issuer is required to have a management team which has good reputation and knowledge for the duties. Under the present law, issuers which

offer other commercial activities (apart from payment services) can be required to form subsidiaries to prevent affecting the stability of the company. The authorisation given by the competent authority is valid in all Member States of the European Union.

An issuer can fail to obtain an authorisation if the business plan is inadequate or the links with legal persons can impede the supervisory power of the National Bank of Romania. An authorisation can be revoked if the activity of the entity did not commence after 12 months or if the information provided was false.

The law establishes a capital requirement of minimum 350.000 EUR for all issuers of e-money tokens. The level of own funds can be increased up to 20% at the discretion of the National Bank based on the risk reports. Additionally, an insurance policy is required which can cover the services of the entity including unauthorised payments.

Issuers of the crypto-assets are obliged to provide ownership as soon as the funds are received from the potential holder. All the funds obtained from holders should be segregated from the entity's estate and placed in a separate account with a credit institution (or invested safely). Adequate financial records should be maintained yearly and audited by authorised companies. All information regarding crypto-asset tokens issuance and payments has to be reported to the National Bank as competent authority and archived for 5 years.

The law prohibits the entities to outsource totally or partially the issuance of crypto-assets tokens. In the case of outsourcing affiliated operations, issuers must notify the National Bank while ensuring that the quality of control mechanisms remain intact.

Issuers of crypto-asset tokens are required to offer the token at the value equal to the funds received. It is strictly prohibited to provide any interest for the holder. The holder can request to redeem the token at its nominal value and the issuer must return the funds. The contract between the issuer and the holder must provide clearly the conditions of redemption, including any possible fees.

The legislation allows all issuers of crypto-assets to provide affiliated services such as order execution, exchange and custody. If the issuer is a registered legal entity in Romania and decides to issue crypto-asset tokens in another Member State, it has to send a request to the National Bank.

Any issuer authorised in a Member State which plans to issue a crypto-asset token within Romania has to notify the National Bank. Additionally, the entity needs to provide a business and organisation plan if it operates through a subsidiary.

All transactions with crypto-assets tokens are regulated under Law 30/2019 which refers to the taxation of income from any virtual currency source. This means that any individual obtaining material benefits from crypto-asset dealings and related transactions has to declare the income and pay the consequence taxes (according to the Romanian Tax Code).

The specific moment in which the taxes are due depends on the results of the trading activity. It is important to mention that taxes may become payable well before the crypto-asset is exchanged into funds during validation processes. There is a particular exception from paying taxes if individuals have revenues less than 200 RON/transaction without exceeding 600 RON during a year. For corporations operating within Romania, profits are taxed at 1% per corporate income if the said company falls under the small businesses category.

The crypto-assets transactions are also regulated under Emergency Ordinance 111/2020 which implements the EU anti-money laundering policies in Romania (through Law 129/2019). The crypto-asset service providers alongside financial institutions are reporting entities which are required to report suspicious transactions to the National Office for the Prevention and Combat of Money Laundering. Such transactions are considered suspicious if they are linked with goods arising from terrorist financing or money laundering activities.

Additionally, any transactions with the value over 10.000 EUR alongside the details should be reported to the same supervisory body. The National Office for the Prevention and Combat of Money Laundering can suspend any transactions for up to 48 hours and extend the suspension with the decision of the Public Prosecutor's Office attached to the High Court of Cassation and Justice.

Therefore, the crypto-assets tokens falling under MiCA are regulated along the lines of the European Union legislation, with Romania establishing its authorisation process through national laws.

6. Conclusion

The Market in Crypto Asset Regulation provides a comprehensive framework of how crypto-assets can be issued and traded in the European Union. The admission procedures enable competent authorities from the Member States to guard against any potential false information that can reach the holders and potential buyers of the assets. By deciding different levels of significance based on value, the legislation also accentuates the need to protect the market's stability through the supervision of European Banking Authority.

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