

# MICA IS NOT RELEVANT FOR MY COMPANY. OR IS IT?

A BRIEF GUIDE TO THE CRYPTO INDUSTRY:  
HOW YOU CAN DECIDE WHETHER YOU FALL UNDER THE SCOPE OF MICA

## PART II.



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### PART II.

MiCA, the European Union's Markets in Crypto-Assets Regulation, is set to change the crypto-landscape as we know it. Now, that there is less than a year until the Regulation as a whole comes into force, and even less time before the articles on ARTs and EMTs will be applicable, it is time to address the crucial elements and get our heads around it all! It is time to address the crucial elements and get our heads around it all! As we pointed out in our first article, a thorough knowledge of the law is essential to every market participant in order for them to identify their role and what applies to them, whether they are issuers, offerors or crypto-asset service providers. If you are in the same boat as us, do not worry, we've got your back! [In our last article](#) we focused on the material scope of the Regulation (what it covers), so now it is time to dissect the intricate details of the territorial (where it is applicable) and personal (to whom it applies) scope.



## 1. WHERE IS MICA APPLICABLE? – THE TERRITORIAL SCOPE

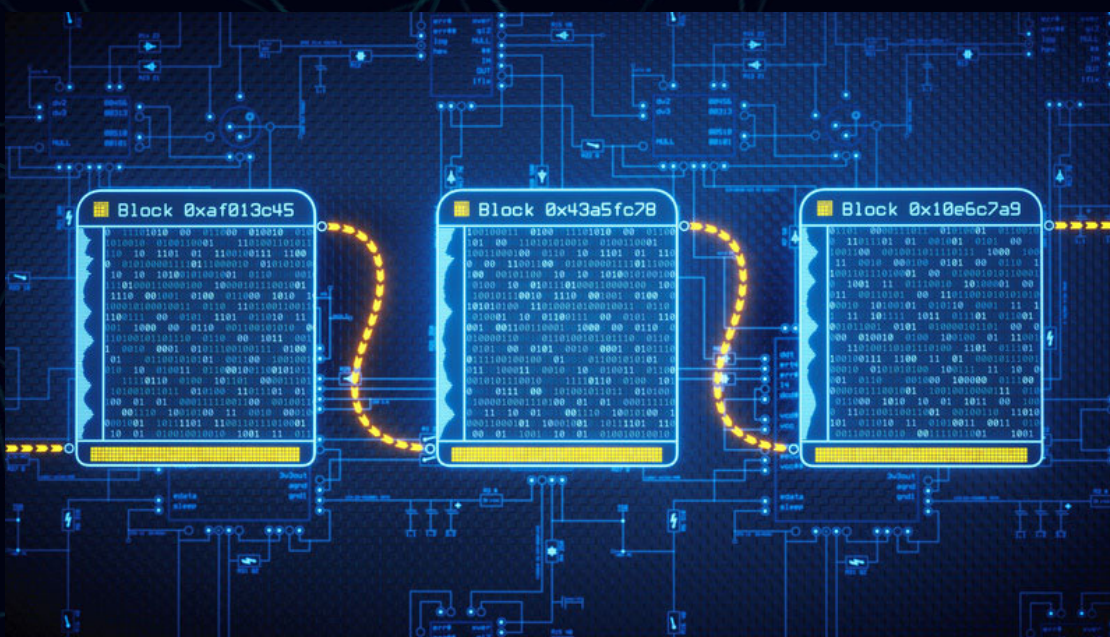
### 1.1. THE APPLICABILITY OF MICA ACROSS EU MEMBER STATES

If the issuance, offer, or provision of services (the latter is referred to as CASP) is related to crypto-assets in the EU, MiCA is naturally applicable, since the whole of the European Union, including all 27 Member States, falls within its scope. Following this line of thought, legal entities resident in the EU, and other undertakings and companies not residing in the EU but wishing to get authorization to do so fall under the Regulation's scope if they are considered crypto-asset service providers, issuers, or offerors. It is important to note that for the provision of services it is required to establish a legal person or undertaking within the EU. In case of a natural or legal person offeror who is established in a third-country, they need to notify the competent authority in the State they want to offer crypto-assets.

Although there are obligations that will remain centralized (such as the EBA's and ESMA's role in fulfilling a coordination role between competent authorities and across supervisory colleges), many implementational tasks among the requirements of the Regulation will be assigned to the competent national authorities. Examples would be the examination of white papers and marketing communications of those who wish to make use of crypto-assets in a financial sense.

## 1.2 CONSIDERATION OF CROSS-BORDER ASPECTS IN THE CONTEXT OF PASSPORTING

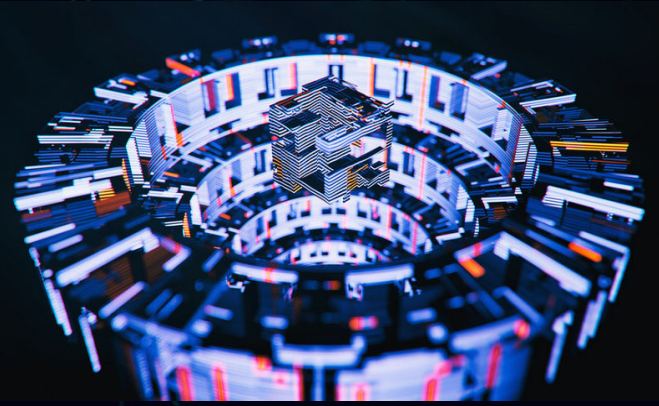
One of the most eagerly awaited aspects is the passporting of the licence provided to CASPs by MiCA. Once a licence has been acquired in the home Member State for the provision of services under MiCA – and after some requirements such as the notification requirements are also met – that licence will be usable in all EU Member States. That way the CASP is free to operate in all Member State, and not just in the Member State in which their license was obtained. As the European Commission put it: the CASPS need just one licence for the single market of 27 countries, 450 million consumers, and 23 million businesses. Less red tape and more opportunities can only be great news for anyone thinking about starting to provide crypto-asset services in the EU.



We will cover the questions that may arise regarding the passporting of provision of services in one of the following articles in our MiCA series.

### 1.3. IMPACT ON NON-EU ENTITIES OPERATING IN EU JURISDICTIONS

The question of third countries is a little more complicated. When it comes to the provision of services, the Regulation makes a distinction concerning the person who initiates the service. If that person – who is established in the European Union – is the one initiating the service but from a firm based in a third country, then the Regulation deems this interaction as not provided in the EU. The approach is called reverse solicitation, an exception that will most likely be revisited many times and must be understood as a narrow window of opportunity. Consequently, for example, MiCA would not apply to a situation where a Danish citizen who has of their own accord and volition sought out the services of a firm situated in Vietnam.



However, if the firm's goal from the third country is to pursue clients from the EU, and they then advertise their services to reach EU citizens through whatever means – be it online marketing, TV ads, or even airplane banner advertising – that would no longer be considered as being under the client's own initiative. In such cases, that foreign firm is then a crypto-asset service provider under MiCA, so in order to operate in the EU it will need to establish a legal entity within the EU and acquire the relevant authorization.

## 2. TO WHOM IS MICA APPLICABLE? – THE PERSONAL SCOPE



The personal scope always designates the natural and legal persons to whom the legislation directly or indirectly applies. Although MiCA does affect the users of crypto-asset services, the clients (for example via marketing communication), we will focus on in the following: the actors (on whom the Regulation imposes a slightly more active role), that is the issuers of crypto-assets, offerors, and crypto-asset service providers.

## 2.1. IDENTIFICATION OF INDIVIDUALS OR UNDERTAKINGS AFFECTED BY MiCA:

### 2.1.1. ISSUERS

According to the definitions in MiCA, issuers are natural or legal persons and other undertakings who issue crypto-assets. Based on the Regulation, issuance may predate the acquisition of the authorization, but you cannot engage in any activity.

In one of our next pieces we will also cover the timeline for authorization and the process of licensing that you can expect, and what exactly you can and cannot do until you have obtained such authorisation.



### 2.1.2. OFFERORS

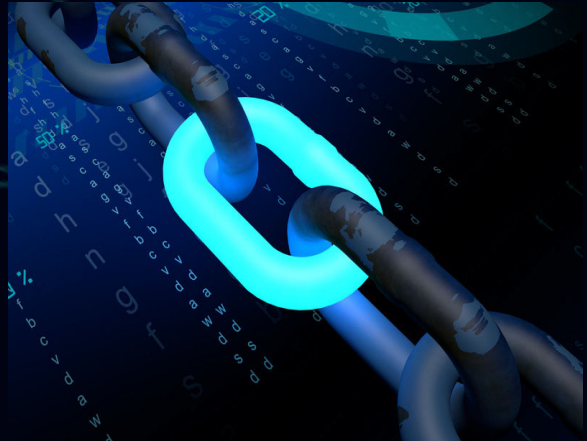
Under MiCA 'offerors' are natural or legal persons, other undertakings or issuers who offer crypto-assets to the public. This offer is described as a communication of adequate information regarding the proposition and the proffered crypto-assets regardless of their form. The aim is to make it possible for the person to whom the communication is sent to decide, on the basis of the information received, whether or not to take up the opportunity. For the purposes of the latter, MiCA made it a requirement for offerors to draw up white papers and to make their marketing communications verifiable. However, there are some exemptions depending on what type of token one wishes to offer to the public, based on the number of persons the communication is intended to reach, and the timeframe given for consideration, under which the offeror can be released from such an obligation.

We will return to the topic what is required for a white paper, breaking it down in detail by the classification of token in a future article.

### 2.1.3. CRYPTO-ASSET SERVICE PROVIDERS (CASPS)

CASPs, aka crypto-asset service providers, are legal persons or other undertakings – whose goal is the provision of one or more crypto-asset services. It is important to note that natural persons are not covered by the definition, which means that you need to establish a legal entity to be able to provide crypto-asset services, or in certain cases some other undertaking that provides an equivalent level of protection for the third parties' interests.

These services should be provided to clients on a professional basis because fully decentralized services – that is, services without any intermediary – do not fall within the scope of MiCA. For example, if you and your friend decide to sell your crypto-assets to one another, without the help of any mediator, you do not have to worry about the Regulation. Additional requirement beside these for a CASP is to comply with Article 59 of MiCA on Authorisation.



As for what qualifies as a crypto-asset service, MiCA basically follows the logic of the traditional financial ecosystems and therefore the following dealings fall under the scope of the Regulation:

#### **I. Providing custody and administration of crypto-assets on behalf of clients:**

In this case, the provision of the specific service happens on behalf of clients. The provision of custody and administration entails the safekeeping or control of crypto-assets, or of accessing such crypto-assets with a private cryptographic key where the latter is relevant.

#### **II. Operation of a trading platform for crypto-assets:**

By operation the Regulation means the management of one or several multilateral systems that, based on the system itself and its rules, makes it possible for multiple third parties to purchase and sell interests in crypto-assets with each other. This transaction can either be an exchange of crypto-assets for funds, or an exchange of crypto-assets for other crypto-assets.

#### **III. Exchanging crypto-assets for funds:**

In this type of exchange, the service provider concludes purchase or sale contracts for crypto-assets with clients by using proprietary capital. As the name indicates, it can only happen in exchange for money.

#### **IV. Exchange of crypto-assets for other crypto-assets:**

This is the same as the above case, but the object of the exchange is different: the exchange happens for other crypto-assets.

#### **V. Execution of orders for crypto-assets on behalf of clients:**

In this case, the service provider acts on behalf of clients, concluding agreements, and purchasing or selling a crypto-asset or multiple crypto-assets or subscriptions for one or more crypto-assets. This also entails the conclusion of contracts to sell crypto-assets at the moment of their offer to the public or admission to trading.

#### **VI. Placing of crypto-assets:**

By placing the Regulation means marketing activities on behalf of or for the account of the offeror, or it can happen on behalf of or for a party related to the offeror. The marketing is of crypto-assets and it is communicated to third-party purchasers, where the Regulation does not differentiate between natural or legal person purchasers.

#### **VII. Reception and transmission of orders for crypto-assets on behalf of clients:**

The focus of this service is on handling orders from third parties, and it means that the crypto-asset service provider receives orders from a person to purchase or sell one or more crypto-assets or to subscribe for one or more crypto-assets. The service provider is also entrusted with the transmission of that order to a third party for execution.



#### **VIII. Providing advice on crypto-assets:**

This might be the most surprising service in the CASP list. By the provision of advice the Regulation means 'offering, giving or agreeing to give personalised recommendations to a client, either at the client'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'. This means that giving specific advice regarding crypto-assets counts also as a crypto-asset service.

#### **IX. Providing portfolio management on crypto-assets:**

In this case, the service is described as the management of portfolios at the client's direction on a discretionary client-by-client basis where these portfolios include one or more crypto-assets.

#### **X. Providing transfer services for crypto-assets on behalf of clients:**

This is a rather simple service that entails the transfer of crypto-assets from one distributed ledger (DTL) address or account to another. The client can be either a natural or legal person.

#### 2.1.4. Important to note: advisory services

As we mentioned above, even if a legal person or an undertaking wants to participate in nothing but consultancy regarding crypto-assets, the necessary authorization must be acquired for compliance with MiCA. The Regulations consider this type of advisory service as equivalent to the investment advice regulated in MiFID II.

The Regulation specifies that the advice – to be considered advice on crypto-assets – needs to be regarding specific transactions or on the usage of crypto-services customized to the client's needs, which means that:

- The advisor shall establish whether the crypto-asset is suitable for the client, while bearing in mind the client's:
  - Knowledge and experience in investing in crypto-assets,
  - Investment objectives like risk tolerance, and
  - Financial situation.
- Furthermore they should also inform the clients, whether the advice is given on an
  - Independent basis or
  - Broad or restricted analysis



Further requirements for CASPs to acquire authorization, such as the place of effective management, residence of directors or registered office in a Member State will be the topic of our next article in the MiCA series.



### 3. BE A PART OF HISTORY: THE PUBLIC CONSULTATIONS

Although MiCA does cover a wide range of angles in the crypto industry, there are several points in need of polishing. It is true, that many sides of a phenomenon like the crypto-market, the rules of which exist partly at a practical level, are difficult to grasp. That is precisely why the legislator has asked for help from various bodies, most notably the European Securities and Markets Authority (ESMA) and the European Banking Authority (EBA) to fill in the still missing pieces. They are required to work on a few sets of regulatory technical standards (RTS) and on implementing technical standards (ITS) and to consult with market participants to produce the most realistic results as possible.

In the framework of that European collaboration during the implementation phase of MiCA, ESMA (in close cooperation with the EBA, EIOPA, and the ECB) is consulting with the public on a range of technical standards bundled into three main consultations. The first and second package is already out, the third is to be anticipated in the first quarter of 2024. Although the deadline for contribution of the first two has already passed, there is still time to participate and have a say in the upcoming third package of consultation.



And that is not all! ESMA and EBA are continuously preparing ever more consultations in order to tackle the more difficult part of the Regulation, such as on the requirements on conflict of interest under MiCA. We are on the lookout for all of them and we will brief you on the most important takeaway on a regular basis on our [LinkedIn channel](#). In general it can be stated that, based on the consultations that have already happened, the industry's activity is pretty moderate, so we would hereby like to encourage all of you to participate and share your insights directly with the organizations, because you know the rule, it is more rewarding and constructive to shape the world than to complain about its inadequacies afterwards.

It is apparent that although the Regulation covers a large layer of the crypto-asset market, there is still a lot of work to be done before the implementation of the Regulation is finalised, with all its supporting documentation.

Fortunately, the legislator has taken this into account when defining the timeline, as there is still a long time before the Regulation becomes fully applicable in December 2024. Until then it is strongly advisable that every stakeholder who feels called to contribute to the public consultations does so, as they focus on bringing practice and theory closer together.



THE NEXT ARTICLE WILL BE ON HOW TO START YOUR PREPARATIONS FOR THE REGIME CHANGE, INCLUDING THE SO CALLED 'TRANSITION PLAN' AND IT IS ALREADY IN THE MAKING, WATCH THIS SPACE!

If you have any questions regarding MiCA, or you would like us to dissect a specific part or relevance to your business, feel free to contact us at [office@kassailaw.com](mailto:office@kassailaw.com) and follow our [#micaserie](https://twitter.com/micaserie) for clarifications and industry insights so that you will be transitioned without even noticing.