

KEY POINTS

- Asset-referenced tokens can be distinguished from other cryptoassets by the explicit or implicit “promise of stability”.
- The obligation to publish a white paper (or to obtain consent for the use of a published white paper) also applies to cryptoassets service providers (CASPs) offering cryptoassets for sale on the secondary market – which is often overlooked.
- A core obligation of CASPs that offer custody services is the safeguarding of customers’ ownership interests. How this is implemented depends on how national law views cryptoassets.
- CASPs that are subject to prudential requirements under the Capital Requirements Regulation (such as banks) may be able to structure their business model to avoid the up to 1,250 % risk weight by abstaining from recording cryptoasset exposure on their books.

Feature

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MiCA: unresolved questions

The EU Markets in Crypto-Assets Regulation has been in force for the better part of a year. Still, many legal questions surrounding its scope of application remain unanswered and new questions are emerging at a rapid pace. Among those open issues are whether European Markets in Crypto-Assets Regulation’s (MiCA’s or MiCAR’s) asset-referenced tokens can be characterised as derivative financial instruments under MiFID II, as well as their differentiation from “other” cryptoassets. The understanding of white paper obligations is evolving. The question of how cryptoassets service providers (CASPs) may use cryptoassets initially received for custody purposes is being debated, and the link between EU and national law raises further questions about how to insolvency-proof a CASP’s custody business. This article aims to shed light on these topics and provide ideas for an understanding of MiCA’s provisions going forward.

INTRODUCTION

The first bits of the European Markets in Crypto-Assets Regulation (MiCA or MiCAR) have been in force for about a year. Rules for the issuance of e-money tokens (EMTs) and asset referenced tokens (ARTs) were the first to apply in July 2024. By the end of that year, the remaining parts of MiCA came into force. But not all obligations apply in full effect yet. Transition periods allow trading platforms to adapt to white paper publication requirements until the end of 2026 (Art 143 MiCA).

Broadly speaking, MiCA covers three distinct areas. First, it sets out rules for the public offerings of cryptoassets, ie for ARTs, EMTs, utility tokens (UTs) and – as a catch all – the category of “other” cryptoassets (OCAs). These rules are heavily inspired by the current EU Prospectus Regulation that applies to the public offering of transferable securities. Instead of publishing a prospectus, issuers of cryptoassets are required to publish a white paper. If there is no white paper available, this obligation may shift to certain CASPs.

Which leads to the second major part of MiCA: the rules that govern CASPs.

These rules are also largely inspired by the current framework around securities firms under MiFID II. MiCA even compartmentalises the crypto industry into the same service classes under MiFID II (execution, placement, advice, portfolio management etc). In addition, it introduces one new service category as a regulated activity: the transfer of cryptoassets.

Lastly, MiCA deals with market manipulation and insider trading. Unsurprisingly, these rules are also strongly influenced by existing EU legislation, in particular the EU Market Abuse Regulation (MAR).

Given the strong resemblance to existing legal frameworks, one would expect seasoned financial markets lawyers to have a competitive edge in providing crypto-related advice, but in many cases the opposite is the case. While MiCA borrows heavily from existing financial markets regulations, it sometimes does so with little regard to “traditional” terminology. The same terms used under MiFID II and MiCA may have a completely different meaning. This is particularly pronounced in the definitions of services: advice on cryptoassets under MiCA,

for example, goes far beyond the scope of investment advice under MiFID II. Relying on prior financial markets law knowledge can therefore sometimes be a disadvantage.

How well have the new EU rules on cryptoassets been received in the market? Some insight may be drawn from ESMA’s interim MiCA register (<https://gomica.eu/mica-register>). As of April 2025, the register contains 17 licensed CASPs and lists 27 white papers for OCAs, 18 white papers for EMTs, and a staggering zero white papers for ARTs. One may infer that, in particular, ARTs are not a well-received invention of the EU legislator. This may well have something to do with difficulties in distinguishing them from other instruments, in particular from derivative transferable securities, but also from the category of OCAs.

To give a tangible example, imagine a token whose holder may, in exchange for returning the token to the token’s issuer, receive either a gram of gold from the issuer, or the current market price for one gram of gold in Euros. Would this token classify as a derivative security, ART or OCA?

DISTINGUISHING ASSET-REFERENCED TOKENS FROM DERIVATIVE TRANSFERABLE SECURITIES

ARTs are defined as a “crypto-asset [...] that purports to maintain a stable value by referencing another value or right or a combination thereof [...]” (Art 3(6) MiCA). Making our gold-token redeemable for gold or cash would likely have the effect of aligning the token’s price with the gold price; in other words, the token would likely have a stable value in relation to gold.

Compare this to the definition of derivative transferable securities (which

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derive their value from an underlying asset): “securities [...] giving rise to a cash settlement determined by reference to [...] commodities [...]” (Art 4(44) MiFID II). Since the gold-token could be redeemed for cash (and MiCA even requires cash settlement for ARTs; Art 39(2) MiCA), a categorisation of our gold-token as a derivative transferable security seems at least plausible.

There must be a clear distinguishing line between the two phenomena, however. Derivative transferable securities fall under the umbrella term of financial instruments, and financial instruments are explicitly excluded from MiCA’s scope of application (Art 2(4) MiCA). A tokenised derivative is therefore subject only to MiFID II and, as a derivative transferable security, to the Prospectus Regulation. It falls outside the scope of MiCA. On the basis of the cited definitions alone, it is not obvious where exactly the line can be drawn between ARTs and derivatives.

This task is complicated by another factor. While MiCA, as an EU regulation, creates a fully harmonised framework for cryptoassets across member states, EU financial markets legislation does not. As an EU directive, MiFID II allowed member states to implement its concepts differently. What constitutes a derivative may therefore be answered differently across EU member states.

For Austria and Germany, every derivative is understood to be a forward transaction. The distinction of ARTs and derivative transferable securities therefore lies in the understanding of what constitutes a forward. Reduced to the very core principle and put in simple terms, those jurisdictions count as a derivative only such contracts that require both parties (as opposed to one party) to fulfill at least part of their respective obligations (delivery/payment) at a later point in time, where a change in price of the underlying is expected. This can be distinguished from ARTs where one party, the purchaser, fulfills all obligations right away. Whether this legal understanding is valid in other EU member states is a completely different matter, however. As a result, one could imagine a situation

where the same token is regarded as an ART by one NCA and as a transferable security by another. The issue is being discussed on an EU-level (ESMA, Guidelines on the conditions and criteria for the qualification of cryptoassets as financial instruments; ESMA75453128700-1323), but a European-wide clear answer is yet to be found.

DISTINGUISHING ASSET-REFERENCED TOKENS FROM OTHER CRYPTOASSETS

Even staying within MiCA’s framework, a clear distinction between ART and OCA is yet to be made. NCAs seemingly started out by classifying every tokenised real-world asset (RWA) as an ART. Given the onerous obligations under MiCA, this had the effect of driving EU-based issuers to third countries, removing their offering from the EU market, and/or trying to utilise MiCA’s exemption for cryptoassets without an identifiable issuer and for services which are provided in a fully decentralised manner (see Recital 22 MiCA).

The sentiment of NCAs towards tokenised RWAs has appeared to shift a bit. To illustrate that not every tokenised RWA must ultimately qualify as an ART, we can discuss our example of the gold-token further.

The fact that a token holder may either receive a gram of gold or the current market value of gold in exchange for returning the token to the issuer says little about the underlying legal relationship between token holder and token issuer, or token holder and RWA, respectively. This becomes apparent when looking at how tokenisation is done in practice in Austria, Germany or Switzerland, and likely other civil law-based continental-European jurisdictions as well. While the details differ, it always involves one of two methods that could be called “claim-based” on the one hand, and “ownership-based” on the other.

In the claim-based model, a link to the RWA is established by agreeing contractual terms that only have effect between the token holder and the issuer (eg they impose an obligation to deliver a gram of gold, paying the current gold price, etc). As in the case of a purchase agreement that is yet to be

fulfilled, the token holder does not (yet) receive an ownership interest in the RWA itself. A transfer of the token is interpreted by the parties as an assignment of the token holder’s contractual position. Regardless of the details of the actual contract, it is always (only) a debt-based claim of the token holder against the issuer.

In the ownership-based model, a link to the RWA is established directly. Such as in the case of a purchase agreement that has been fulfilled, the token holder becomes owner of the RWA. The token issuer, or a third party, holds the RWA only in custody for the token holder. The rights of the token holder are now those of an owner of the RWA, because the token holder *is* the owner. To facilitate an ownership transfer (both in primary and secondary market transactions), the parties first form a purchase agreement regarding the RWA (title). To effectuate the ownership transfer in the jurisdictions discussed, another act, a mode of transfer, is required. In its basic form this would be handing over the purchased RWA. Since this is explicitly not intended by the parties, the mode used instead is either a *constitutum possessorium* (the issuer continues to possess the RWA, but holds it on behalf of the purchaser (where the purchaser has purchased the token on the primary market)) or an instruction of the issuer/custodian to possess the RWA for another purchaser down the line (on the secondary market). Based on the contractual agreement, the transfer of the token is interpreted by the parties as the required notification.

One could argue that these tokens maintain a stable value to gold. Categorising them as ARTs would preclude them from qualifying as ownership-based tokens, however. This is because MiCA stipulates how issuers of ARTs are required to create and manage a “reserve of assets” (Art 36 MiCA) to ensure the timely payment to token holders on redemption; it lays out rules on the investment of this reserve of assets (Art 38) and provides details on the right of redemption of tokens (Art 39 MiCA). Those rules were not designed with the ownership-based model of tokenisation in mind (because the ART is not tied to a specific RWA – the

token holder only has a right to the redelivery of equivalent assets) and indeed cannot be complied with if the business model only consists of ensuring that the property (RWA) of the token holder is safely kept in custody.

Substitute the token for a piece of paper and no EU capital market regulation applies. Taking MiCA's stated goal of technology neutrality seriously (Recital 9), this alone should convince NCAs that the rules on ARTs are not designed for issuers of tokenised RWAs utilising the ownership-based model of tokenisation. Nonetheless, based on MiCA's definition, every cryptoasset that purports to maintain a stable value by referencing another value or right is an ART. Discussions with NCAs show that making a "promise of stability" will likely form the core of what constitutes an ART. Where tokens are used to effectuate an ownership transfer such as in the ownership-based model of tokenisation, one will therefore have to use precise language in the contractual terms, but also in marketing materials. It should be made clear to the market that the issuer is *not* selling a token, but rather the RWA itself, meaning that, while the token undoubtedly may have value as a tool to effectuate ownership transfers, it is certainly not the value of the RWA itself.

WHITE PAPER OBLIGATION IN CASE OF PUBLIC OFFERINGS

Being able to clearly categorise cryptoassets is important because different rules apply. An offeror may need to be authorised in the case of ARTs and EMTs, or only have to notify a white paper if UTs and OCAs are concerned. These obligations apply not *per se* but are linked to the cryptoasset either being offered to the public, or being admitted to trading on a trading platform (Art 4, 16, 48 MiCA).

In particular, the concept of "offer to the public" and its consequences are frequently overlooked by CASPs. While it is often associated with initial coin offerings (ICOs) or other forms of primary issuance, the scope under MiCA is significantly broader. Offer to the public is defined as communication "in any form, and by any means, presenting sufficient information on the terms of the

offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets" (Art 3(1)(12) MiCA).

This definition is intentionally broad and captures a wide range of communications. It can be argued that, for instance, publishing exchange rates, methods of payment, or transaction fees – especially if accompanied by the opportunity to acquire the cryptoasset – can be deemed a public offer. The fact that such information is only visible to registered or logged-in users does not necessarily exempt the activity from this legal classification. ESMA has made clear that CASPs may themselves be considered to be conducting offers to the public depending on the nature of the services they provide (ESMA QA 2404). In particular, CASPs engaged in exchange services, crypto brokerage, placement services or similar activities – where cryptoassets can be acquired directly or indirectly from the CASP – may themselves be conducting public offers of the cryptoassets they make available to customers. How exactly a CASP would have to design its website to avoid being considered as making an offer to the public is not easily answered.

An offer to the public requires a MiCA-compliant white paper being drawn up, published and notified to the competent NCA (and an approval, in the case of ARTs). If a MiCA-compliant white paper exists, the CASP may rely on this white paper, but only if prior written consent for its use has been obtained. At least, some cryptoassets are exempt from the obligation to publish a white paper, most importantly this is the case when it comes to layer-1 cryptoassets (Bitcoin, Ether, etc) and Airdrops (see Art 4(2) and (3) MiCA for further exemptions).

SAFEGUARDING OF CLIENT'S CRYPTOASSETS VS OWN-FUNDS REQUIREMENTS

One of the core obligations in relation to clients' cryptoassets is laid out in Art 70(1) MiCA: CASPs "that hold crypto-assets belonging to clients [...] shall make adequate arrangements to safeguard the ownership rights of clients, especially in the event of

the [CASP's] insolvency, and to prevent the use of clients' crypto-assets for their own account".

The core of the clause seems straightforward: Ensure that cryptoassets remain your clients' "property", and do not use them yourself. How exactly a CASP should achieve the first of these two goals (safeguard ownership rights), in particular in cases of insolvency, is not laid out in MiCA itself. Rather it depends on how the applicable national law assesses cryptoassets. The difficult-to-answer question of how to decide which national law applies in particular cases is outside the scope of this article. From a practitioner's view, it is very likely that courts would apply the respective national law, or the law applicable to the entity holding the private keys to facilitate transactions.

Unlike in Germany, for example, in Austria it is broadly accepted that property law principles are applied to cryptoassets either directly or by analogy. By applying these principles, cryptoassets which are either handed over to, or purchased from, the CASP for custody-purposes, become or remain the property of the customer and are therefore insolvency-proof. Of course this is complicated by a number of factors. Most importantly, property law principles are only applied in Austria to cryptoassets that are based on immutable and trustless (participants can interact without needing to trust each other) technology. Bitcoin's blockchain falls under this category, but not every blockchain/DLT necessarily does. The same is true for tokens whose transfer logic is handled by smart contracts.

If third parties can either shut down the system altogether (think of a private/permissioned blockchain such as Hyperledger Fabric, R3 Corda or Quorum by JPMorgan) or influence whether and how transfers can be made (think of freezing tokens/wallets, or moving assets as in the case of USDT), then the holder has no real power to dispose of an asset *and exclude others from it*. He or she fundamentally has *no real control* over the cryptoasset. This power to control, however, forms the very basis for the application of property law to cryptoassets under Austrian law.

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Biog box

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Where property-law principles cannot be applied because the system is ultimately controlled by another entity, assets and transactions are instead treated as in any other SaaS-setup, by applying the law of obligations including liability of the respective blockchain operator or entity providing services via a specific smart contract (for details see Völkel, 'Crypto Assets in Insolvency – Rights of Crypto Asset Holders under Austrian Law', in: *Koller/Lehmann, Digital Assets in Enforcement and Insolvency* (Bloomsbury, 2025)).

While MiCA defines the terms of DLT, distributed ledger, consensus mechanism and even DLT network node (Art 3(1) to (5) MiCA), these definitions do not include immutability or trustlessness. This leads to the situation where tokens on a Bitcoin-fork operated with two nodes by one person are considered cryptoassets under MiCA. CASPs offering the custody of such cryptoassets would also have to make adequate arrangements to safeguard the ownership rights of clients (Art 70(1) MiCA). It is questionable how this could even be achieved when a third party can shut down the entire system or move assets at will. One could argue that there are no adequate arrangements to safeguard "ownership rights" in relation to cryptoassets on such a Bitcoin-fork, which would ultimately make offering custody services for those cryptoassets inadmissible altogether.

Also, as one approaches edge cases, the exact meaning of Art 70(1) MiCA becomes obscure. How, for example, is the clause to be applied in cases where a CASP wishes to borrow cryptoassets from its clients to fund its own activity? It could be argued that once the cryptoassets are borrowed and become the property of the CASP, they no longer qualify as cryptoassets "belonging to clients". This would result in the clause not applying in such cases. However, NCAs seem to interpret Art 70(1) MiCA to include a prohibition to borrow cryptoassets from clients (at least in cases where those cryptoassets were previously held in custody for the client).

To illustrate a perfectly legitimate reason why a CASP would want to use borrowed cryptoassets for its own activity, assume

the CASP offers to purchase Bitcoin from clients. Such a CASP will usually seek to hedge itself or dispose of the market risk by executing back-to-back transactions with a third party on an execution venue (trading platform, liquidity provider). Those third parties usually require that the cryptoasset in question (and not funds) is provided as liquidity or collateral before allowing a trade. The CASP could now decide to use its own Bitcoin as collateral (buy-scenario), or it could decide to borrow Bitcoin from its customers to pre-fund this activity (borrow-scenario).

If the CASP in question is a bank – as now explicitly permitted under the equivalence regime of Art 60 MiCA – there is a strong preference for the borrow-scenario. In 2022, the Basel Committee on Banking Supervision published its framework for the prudential treatment of cryptoassets exposure which introduced a grouping of cryptoassets. Unbacked cryptoassets such as Bitcoin are considered to fall under Group 2b and attract a risk weight of 1,250 % under the Basel framework. The same risk weight has been introduced in Art 501d of the Capital Requirements Regulation (CRR) which applies to banks and other financial market participants in the EU.

In the buy-scenario, the bank-CASP owns the Bitcoin directly and records it on the asset side of its balance sheet. This Group 2b exposure attracts a 1,250 % risk weight under CRR (or is fully deducted from CET1 under certain interpretations). There are no offsetting positions, which means that this business is very capital-intensive, requiring a 100 % backing with own funds. In effect, this is a prohibition of this business model disguised as prudential requirements.

In the borrow-scenario, the CASP borrows Bitcoin (ie it enters into a crypto borrowing agreement). On the assets side of the balance sheet, the CASP records Bitcoin (held for use as collateral at the execution venue); on the liability side there now exists a corresponding obligation to return Bitcoin to the lender. If properly structured and economically neutral, this means that assets and liabilities may net out which could avoid the 1,250 % risk weight on the cryptoasset itself. Even considering the additional

counterparty credit risk, this option could be much more preferable to outright owning Bitcoin.

It is hard to argue that on the one hand MiCA would like to open up the possibility for traditional financial markets participants to engage in crypto activity via Art 60 MiCA, but then discourages this activity by introducing mechanisms (Art 70(1) MiCA) that require a capital backing that is simply not attainable in practice.

CONCLUSION

How all of the questions addressed above will ultimately be decided is yet to be seen. What can be said with certainty, however, is that after about a year of exposure to MiCA, the market resonance is restrained at best. Market entry barriers have become excruciating. Not because of MiCA alone, but also because of the EU Digital Operational Resilience Act (DORA) which applies to all CASPs regardless of their business model. To understand the requirements in detail, one has to review thousands of pages of Consultation Papers, Final Reports, Guidelines, Delegated Regulations, Q&As, Opinions and Briefings issued by ESMA and EBA (see <https://gomica.eu/resources>).

As pointed out above, MiCA can be mostly avoided when it comes to cryptoassets without an identifiable issuer and with services which are provided in a fully decentralised manner. Providing this exit, the flood of regulation does indeed have the positive effect of reminding the crypto industry of its core principle: Decentralisation. ■

Further Reading:

- A MiCAR for the UK? Or something else altogether? (2023) 4 JIBFL 255.
- *SEC v Ripple* and MiCAR: the classification of cryptoassets as securities (2024) 10 JIBFL 667.
- Lexis+® UK: LexisPSL News Analysis: Legal Analysis: The Central Bank's MiCAR authorisation and supervision expectations.