PolicyPartner

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Recent MiCA materials – PolicyPartner

Recordings of recent calls on MiCA:

Call with ESMA's Head of DLT Pilot on decentralization: **Link**

- Discussion of decentralization starts ~11:00

Call with experts on MiCA implementation in Portugal: Link

Call with AFME on MiCA adoption by institutions: Link

Excerpts from recent notes:

Talks of MiCA 2.0

With MiCA coming into force this year, there already seems to be interest in a new legislative effort to mend gaps in the coming regulation. While MiCA establishes floor for a regulatory framework in Europe, there are legitimate questions surrounding the obligations for MiFID businesses, and the interplay between the two regimes, the role of market makers, and the rules around DeFi. As the National Competent Authorities assess their readiness to implement MiCA, we might see some initial steps for supplemental legislation to take place.

Takeaways from Talos/PolicyPartner call with Portugal/ MiCAR experts:

When to expect compliance/enforcement actions:

MiCA is a soft regulation with a grandfathering regime as well as the grace period for CASPs. 2026 – 2027 is likely to be period of strong enforcement, given extended periods of implementation.

Stablecoins:

Only 2 E-money institutions registered with the Bank of Portugal. Having other issuers with pending registrations operate in the EU would likely create a disadvantageous situation for the registered entities. Based on PSD2 – requirements for EM institutions are quite stringent. The time to get an approval for e-money institutions is ~1.5 years and given that the regulators are most concerned with systemic risks of stablecoins grace period likely to not be possible. Finally, while exchanges could assume liability for listing tokens that are issued not according to MiCA rules, they would be unable to do so

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for stablecoins – leading to EU-based exchanges likely listing only MiCA-licensed stablecoins.

Differences between jurisdictions:

- Non-regulatory factors: tax policy, labor laws, investment rules.
- Knowledge and sophistication of regulators – guidelines, openness

Some changes to expect are how local regulations will apply and changes in the behavior of regulators as MiCA comes into force.

- In Portugal: Bank of Portugal will regulate stablecoins/EMTs, CMVM will oversee CASPs
- Austria wants to start accepting applications as early as October 2024
- Lithuania is already preparing the regime and is favorable for EM companies.
- Malta is a common regime given the openness of the regulator.
- France is actively attracting firms to grow the fintech sector.
- Germany has a wider local market that is attractive for companies.

Passporting:
Companies can now use passporting rights largely without considering strictness of approaches – general EU laws will apply to the operations. Given that MiCA is an EU-wide regulation, there are two ways companies can operate: freedom to provide services (core activities in the domicile country and request to other NCAs to operate) and freedom of establishment (a company would establish local offices in different countries). NCAs would remain in contact on joint business supervision. While passporting makes it easier for licensed companies to operate in the EU, some companies with significant operations across multiple countries may require several offices.

UK and Switzerland in relation to MiCA:
UK is similar to the US in the approach towards crypto regulation but less intense and is likely to diverge from MiCA in its approach, specifically on the stablecoin question. Both UK and Switzerland are considered “third countries” in the context of MiCA and companies from there have other requirements than EU-native firms.

MiCA: early movers and banks will see significant advantages in stablecoins
PolicyPartner believes that early registration will afford stablecoin issuers a competitive advantage. Further, we believe that stablecoins that were not previously authorized, but continue to be offered after June 2024 could face enforcement from local authorities.

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Who can issue an ART and which tokens will persist?
As stipulated in MiCA, issuers of Asset Referenced Tokens (stablecoins) must obtain "authorization as a credit institution or as an 'electronic money institution'" (EMI.) Our conversations with EU lawyers indicate e-money licenses can take up to a year and half to obtain. Finalized regulatory and implementation guidance in ARTs is due to be submitted to the European commission for review by June 30. The same date ART provisions of MiCA set to go into force. Without finalized RTS, national regulators will be slow to issue CASP licenses.

Credit institutions on the other hand, do not need prior "authorization to offer or seek the admission to trading of ART" (MICAR (44)). Issuers of ARTs that have prior approval will be able to continue to issue ARTs provided they apply for authorization before 30 July 2024. Our read is that this applies to e-money institutions that have existing approval to issue stablecoins. While the transition period presents uncertainty, issuers will eventually need to have both a CASP license and an e-money license (or be a bank).

We believe this dynamic gives banks and EMIs with approval to issue a stablecoin a head start in the EU stablecoin market.

- Uncertainty around ART regulations coming into force has been in focus for issuers and exchanges since the final text was agreed last year.
- Stablecoin and e-money issuer Monerium, has been calling for stricter enforcement of stablecoins out of compliance with e-money rules for some time.

Given the lengthy application process, M&A in the EMI space may be an attractive alternative for firms hoping to issue an EU ART. A quick review of EMI licenses in Europe indicates that some countries are more popular than others. Lithuania 81, Ireland 21, France 20, and Cyprus 17. The UK has over 290 EMIs, however Brexit has complicated EU operations for UK based firms as CASP license will also be required to issue stablecoins.

Ireland in focus
Many crypto firms have selected Ireland as a home base, registering as e-money institutions to provide exchange and other services. Further, Ireland boasts a favorable tax regime and corporate legal structures. Banks.eu lists a total of 24 EMIs based in Ireland. From our view point, regulators in Ireland are well prepared to bring MiCA into force – Ireland has indicated they will reduce the transitional period to 12 months instead of the allotted max of 18. Further, the bank of Ireland has plentiful resources on MiCA and appears to be more than ready to issue authorizations to CASP applicants. **We believe existing E-money institutions in Ireland will likely find themselves in a competitive position to issue asset referenced tokens**.

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Country level differences continue to emerge:
Many jurisdictions will likely split roles between local central banks (regulation of stablecoins and E-money) and local securities regulators (regulation of other tokens and services).

Policymakers' familiarity with the industry and the available resources for supervision such as staffing, and funding is critical. Available resources are a cornerstone in the question of passporting, as NCAs are required to actively communicate and collaborate with other regulators and non-local issuers.

While MiCA affords firms freedom of operation and rights of establishment, local regulations and requirements may emerge.

- Some NCAs (ex. Austria, Lithuania, Malta) are further ahead both in terms of infrastructure to support registrations and in terms of being proactive about CASP registrations. While ESMA's timeline is uniform, in practice the timelines are likely to diverge as implementation continues.
- Stablecoin companies are likely to have a more pressing schedule, given that in many cases the requirements to operate include obtaining both an e-money license and a CASP authorization.

Status update on transition/grandfathering country by country
In October 2023, ESMA urged NCAs and participants to prepare for the coming regulation in an open letter. The letter stressed the need for early designation by NCAs and the disadvantages to extensive use of grandfathering clauses.

- **Austria**: 12-month transitional period - 30 December 2025
- Belgium: has not confirmed if adopting transition period. Has in the past allotted grandfathering periods for compliance in AML/CFT for VASPs.
- Bulgaria: has not confirmed if adoption transition period.
- Croatia: has not confirmed if adoption transition period.
- Republic of Cyprus: has not confirmed if adopting transition period. May enact one given pre-existing extensive regulatory requirements.
- Czech Republic: has not confirmed if adopting transition period.
- Denmark: has not confirmed if adopting transition period.
- **Estonia**: 18-month transition period. Estonia is allowing CASPs to operate under the MLTFPA license only until July 1, 2025
- Finland: has not confirmed if adopting transition period.
- **France**: Offering 18-month transition period
- **Germany**: does not appear to be granting transition period.
- Greece: has not confirmed if adopting transition period.
- Hungary: has not confirmed if adopting transition period.

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- **Ireland**: Ireland also reduced the transitional period to 12 months instead of the allotted max of 18.
- Italy: has not confirmed if adopting transition period.
- Latvia: has not confirmed if adopting transition period.
- **Lithuania**: No transition period in Lithuania.
- **Luxembourg**: Sticking with ESMA 18-month transition period. Rumors this may change to 12 months.
- Malta: has not confirmed if adopting transition period.
- Netherlands: has not confirmed if adopting transition period.
- Poland: Has not confirmed if providers in Polish Register of Virtual Currency Activities have transitional period.
- Portugal: has not confirmed if adopting transition period.
- Romania: has not confirmed if adopting transition period.
- Slovakia: has not confirmed if adopting transition period.
- Slovenia: has not confirmed if adopting transition period.
- **Spain**: transitional period set for 6 months.
- Sweden: has not confirmed if adopting transition period.