MiCA: The Introduction of an EU-wide Regulatory Framework for Crypto-assets

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Abstract

The Markets in Crypto Assets Regulation (MiCA) will become directly applicable in the European Union (EU) as of 30 June and 30 December 2024, respectively, and will provide a harmonized legal framework for the regulation of crypto-assets in all Member States of the European Union. This will fundamentally change the regulatory landscape for the European crypto sector. In this article, the authors consider the purpose and scope of MiCA and highlight important requirements introduced by MiCA. The authors explore the different types of crypto-assets defined and regulated under MiCA and discuss the important topic of asset segregation. In doing so, the authors also elaborate on property law aspects connected to these topics, including custody of crypto-assets and client funds. The article aims to give readers a good overview of what to expect under MiCA and when market participants within the crypto sector start falling under MiCA's scope.

Keywords: MiCA, financial regulatory law, crypto-assets, asset-referenced tokens, e-money tokens, asset segregation, property law.

A. Introduction

There is currently no uniform regulatory framework in the European Union (EU) for crypto-assets. Harmonized rules are, as of the date of conclusion of this article, limited to the Fifth Anti-Money Laundering Directive (*AMLD5*),[1] which requires Member States to ensure that (i) providers of exchange services between virtual currencies and fiat currencies and (ii) providers of custodial wallets are licensed or registered by the national authorities.[2] The AMLD5 registration regime is, however, limited both in scope (it covers only two crypto-related services) and type of rules (it covers only anti-money laundering rules). Moreover, AMLD5 does not apply directly but needs to be implemented by each Member State in domestic law. As a

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1 Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering or Terrorist Financing, OJ 2018 L 156, pp. 43-74.

2 *Ibid*., Art. 47 AMLD5.

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result, differences exist between Member States when it comes to the regulation of activities concerning crypto-assets.

In 2024, this is about to change fundamentally with the entry into force of the EU Regulation on Markets in Crypto-assets (*MiCA*).[3] MiCA aims to create a harmonized framework for the regulation of crypto-assets in the EU. The first draft of MiCA was presented by the European Commission on 24 September 2020 and has since been heavily debated and amended several times in various parts. The final version was adopted in May 2023,[4] and MiCA was published in the Official Journal of the EU on 9 June 2023.

MiCA is modelled on existing EU financial services legislation, in particular the Prospectus Regulation,[5] the Markets in Financial Instruments Directive (*MiFID II*)[6] and the Market Abuse Regulation[7] and provides for:

1 the regulation of the issuance, offer to the public and admission of crypto-assets to trading on a crypto-asset trading platform;
2 the regulation of crypto-asset service providers;
3 rules regarding insider dealing, unlawful disclosure of inside information, and market manipulation related to crypto-assets; and
4 enforcement by and cooperation between supervisory agencies.

As set out in the foregoing, MiCA is a regulation and not a directive. This means that MiCA is directly applicable and binding and does not need to be transposed into domestic legislation in each Member State.[8] Rules with respect to the offering and admission to trading of crypto-assets, including asset-referenced tokens (*ARTs*) and e-money tokens (*EMTs*), will take effect on 30 June 2024. The other parts of MiCA, including the regulation of crypto-asset service providers, will apply directly in each Member State as of 30 December 2024.

In this article, we first consider the purpose and scope of MiCA (Section B) and highlight a selection of important requirements that MiCA will introduce (Section C). Subsequently, we explore the different types of crypto-assets defined and regulated under MiCA (Section D) and the asset segregation rules set out in MiCA, which crypto-asset service providers will need to observe (Section E). In several of these sections, we also describe how certain matters are currently legally

3 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on Markets in Crypto-Assets, OJ 2023 L 150, pp. 40-205.
4 https://www.consilium.europa.eu/en/press/press-releases/2023/05/16/digital-finance-council-adopts-new-rules-on-markets-in-crypto-assets-mica/.
5 Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the Prospectus to Be Published when Securities Are Offered to the Public or Admitted to Trading on a Regulated Market, as last amended by Regulation (EU) 2021/337.
6 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments, OJ 2014 L 173, pp. 349-496.
7 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse, OJ 2014 L 173, pp. 1-61.
8 An exception applies to enforcement that can be taken by local supervisors in case of non-compliance by market parties. These measures are typically implemented by member states in domestic law.

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structured in the Netherlands. We end this article with some of our concluding thoughts on MiCA (Section F).

B. Purpose and Scope of MiCA

I. Purpose

MiCA is a comprehensive regulatory framework. The Regulation itself – so-called 'Level 1' – consists of 149 articles. And there will be more: multiple Level 1 requirements will be detailed in 'Level 2'[9] and 'Level 3'[10] legislation. The European Securities and Markets Authority (*ESMA*) and the European Banking Authority (*EBA*) are currently working on this.[11]

MiCA has four main objectives:

1 to provide legal certainty by introducing a clear legal framework for crypto-assets not currently covered by existing EU financial services legislation (apart from AMLD5);
2 to support innovation and fair competition by putting in place a proportional framework that promotes the development of crypto-assets and the wider use of distributed ledger technology (*DLT*) (such as blockchain technology);
3 to instil appropriate levels of consumer/investor protection and market integrity, given that crypto-assets not covered by existing financial services legislation present many of the same risks as more familiar financial instruments; and
4 to address potential risks to financial stability and orderly monetary policy that could arise from stablecoins.[12]

II. Scope

1. In-Scope

a) Offering/Admission to Trading of Crypto-assets in the EU

In terms of scope of application, MiCA falls into three parts. The first part covers persons engaged in the offering to the public or seeking admission to trading, within the EU, of ARTs, EMTs and/or other crypto-assets, including utility tokens.[13] Each of this group of offerors is discussed separately in Section C, under I.

9 Level 2 includes regulatory technical standards (RTS) and implementing technical standards (ITS) that are prepared by (one or more of) the European Supervisory Authorities, such as the European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA), and adopted by the European Commission as 'Commission delegated regulations' or 'Commission implementing regulations'.
10 Level 3 includes guidelines issued by (one or more of) the European Supervisory Authorities.
11 *See* https://www.esma.europa.eu/esmas-activities/digital-finance-and-innovation/markets-crypto-assets-regulation-mica for an overview of the Level 2 and Level 3 measures to be developed under MiCA.
12 European Commission Explanatory Memorandum to MiCA Proposal, COM(2020)593 final, p. 3.
13 Art. 2(1) MiCA.

b) Provision of Crypto-asset Services in the EU

The second part covers persons whose occupation or business is the provision of one or more 'crypto-asset services' to clients[14] on a professional basis in the EU. This group will hereafter be referred to as *crypto-asset service providers* or *service providers*. MiCA introduces no less than 10 regulated crypto-asset services:

1 providing custody and administration of crypto-assets on behalf of clients;
2 operation of a trading platform for crypto-assets;
3 exchange of crypto-assets for funds;
4 exchange of crypto-assets for other crypto-assets;
5 execution of orders for crypto-assets on behalf of clients;
6 placing of crypto-assets;
7 reception and transmission of orders for crypto-assets on behalf of clients;
8 providing advice on crypto-assets;
9 providing portfolio management on crypto-assets;
10 providing transfer services for crypto-assets on behalf of clients.[15]

c) Market Abuse Rules

The third part covers any other persons carrying out any other acts concerning crypto-assets that are admitted to trading or in respect of which a request for admission to trading has been made.[16]

d) MiCA Definition of Crypto-assets

All aforementioned activities and services concern crypto-assets, and hence the scope of the term is crucial. 'Crypto-asset' is defined in MiCA as 'a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology'.[17] This is a very broad definition that aims to cover all kinds of crypto-assets but must always involve DLT or similar technology.[18] The best-known DLT is the blockchain. To qualify as a crypto-asset, a digital token must, by its nature, be amenable to transfer to a third party and be capable of being stored on a DLT.

MiCA introduces the following three specific types of crypto-assets:

1 asset-referenced tokens (ARTs);
2 electronic money tokens (EMTs); and
3 utility tokens.

A fourth – residual – category that is also within the scope of MiCA, includes '*other crypto-assets*'. These are crypto-assets that meet the definition of '*crypto-asset*' but

14 MiCA does not distinguish between professional and non-professional clients in this regard, *see* Art. 3(1) point 39 MiCA.
15 Each crypto-asset service is further defined in Art. 3(1) point 16 MiCA.
16 Art. 86 MiCA.
17 Art. 3(1) point 5 MiCA.
18 'DLT' is further defined in Art. 3(1) point 1 MiCA as 'a technology that enables the operation and use of distributed ledgers'. 'Distributed ledger' is defined in Art. 3(1) point 2 MiCA as 'an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism'.

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do not fall within any of the aforementioned specific categories of crypto-assets. In practice, this fourth category could be the most important one because a wide variety of digital units stored on a DLT could fall into this category. A crypto-asset will always have to be assessed on the basis of its features and characteristics to determine in which category it falls within MiCA. This qualification is relevant because the MiCA rules for ARTs and EMTs differ from the MiCA rules for utility tokens and other crypto-assets (*also see* Section C, I of this article). In Section D, we further explore the different definitions and associated characteristics of the specific crypto-assets mentioned previously.

2. Out-of-Scope

The MiCA regime for crypto-asset service providers is clearly modelled on MiFID II, which applies to investment firms. However, where MiFID II covers '*financial instruments*', MiCA applies to crypto-assets. To ensure that there is no overlap between the two regimes, crypto-assets that already qualify as financial instruments are explicitly excluded from the scope of MiCA.[19] This means, for example, that crypto-assets qualifying as shares (*e.g.* security tokens) will continue to be subject to the MiFID II regime.[20]

In addition, MiCA does not apply to crypto-assets that are unique and not fungible with other crypto-assets (NFTs), including digital art and collectibles. While NFTs might be traded on the marketplace and be accumulated speculatively, they are not readily interchangeable, and the relative value of one such crypto-asset in relation to another, each being unique, cannot be ascertained by means of comparison with an existing market or equivalent asset. This is the reason why NFTs are left out of the scope of application of MiCA. The European legislature takes the view that these features limit the extent to which those crypto-assets can have a financial use, thus limiting risks to investors and the financial system.[21] However, fractional parts of NFTs and NFTs that are de facto fungible or not unique and that meet all other criteria of the definition of 'crypto-asset' are within the scope of application of MiCA.[22]

Other exemptions from the scope of MiCA pertain to persons who provide crypto-asset services exclusively intra-group, and to digital assets, including central bank digital currencies (CBDCs), issued by the European Central Bank and central banks of the Member States when acting in their capacity as monetary authorities.[23]

Lastly, MiCA does not address the lending and borrowing of crypto-assets. The feasibility and necessity of regulating such activities should be further assessed, according to the European legislature.[24]

19 Art. 2(4)(a) MiCA.

20 This also includes crypto-assets that qualify as funds, other EMTs, (structured) deposits, securitizations, certain pension products, and certain social security schemes left out of the scope of application of MiCA; *see* Art. 2(4) under b-j MiCA.

21 Art. 2(3) and Recital 10 MiCA.

22 Recital 11 MiCA.

23 Art. 2(2) MiCA.

24 Recital 94 MiCA.

C. The Impact of MiCA in a Nutshell

I. Impact on Offerors of Crypto-assets

One of the activities MiCA will regulate is the offering of crypto-assets and admission to trading such crypto-assets via crypto-asset trading platforms (hereinafter referred to as *trading platforms*). To date, there is no harmonized regulatory framework for such activities in Europe, and market participants have to deal with a wide range of financial supervisory regimes applicable in the different Member States. Under MiCA, specific and uniform rules are introduced for the providers of other crypto-assets, ARTs and EMTs. In this context, we will also clarify why a distinction between these different asset types has been made under MiCA. For each of these types of providers, we now describe some salient points. Given the scope of this article and the extent of the rules under MiCA, we have to limit ourselves to the most important features.

1. Public Offerings and (Requests for) Admission to Trading of 'Other Crypto-assets' That Are Neither EMTs, Nor ARTs, in Particular Utility Tokens

The relevant rules for this section are contained in Title II of MiCA.[25] The basic principle is that no person is entitled to (i) offer other crypto-assets to the public or (ii) request admission to trading thereof on a trading platform (hereinafter referred to as *offerors of other crypto-assets*), unless various cumulative requirements are met. For both activities, MiCA contains a prohibition clause incorporating this principle.[26] To offer or request admission to trade other crypto-assets within the EU, the party at hand must be a legal person.[27] An offeror of other crypto-assets will have to prepare, prior to the offering to the public and the admission to trading of other crypto-assets, a crypto-asset *white paper* that at least meets the minimum information requirements prescribed by MiCA in great detail.[28] Also, when publishing other marketing communications (such as advertisements), an offeror of other crypto-assets will have to comply with specific rules with regard to publication. In a nutshell, the information contained in the *white paper* (and other advertisements) for other crypto-assets must be accurate, clear and not misleading in any way.

25 Arts. 4 up to and including 15 MiCA.

26 Arts. 4 and 5 MiCA.

27 This creates an interesting question because crypto-assets are also widely offered and issued by *decentralized autonomous organizations* (*DAOs*), which do not have legal personality and are often rather systemic forms of organizations governed by rules encoded as a computer programs, without a central governing body. The question is whether DAOs will, for the time being, fall outside the scope of MiCA as far as the offering of crypto-assets is concerned.

28 The *white paper* is an informational document containing mandatory information that can perhaps best be compared to a prospectus prepared under the European Prospectus Regulation ((EU) 2017/1129) for a regulated offer of securities or to authorize their trading. For the *white paper* obligations for other crypto-assets, *see* Art. 6(1) and Annex I MiCA.

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Title II of MiCA does, however, not apply to offerings to the public of other crypto-assets in the following cases:[29]

- the other crypto-asset is offered free of charge;
- the other crypto-asset is automatically created as a reward for maintaining the distributed ledger or validating transactions (this is done by so-called *validators*);
- the offer relates to a utility token that provides access to a good or service that exists or is in use;
- the holder of the other crypto-asset has the right to use it only in exchange for goods and services in a limited network of merchants with contractual arrangements.[30]

2. Public Offerings and (Requests for) Admission to Trading of ARTs

The second legal framework in this section relates to persons pursuing a public offering of ARTs or requests for their admission to trading on a trading platform within the EU (hereafter referred to as *ART issuers*). Title III of MiCA provides a range of rules for ART issuers, considerably more comprehensive and stricter than for offerors of other crypto-assets.[31]

Article 16(1) MiCA includes a licence requirement for parties that (i) offer ARTs to the public or (ii) request admission to trading of ARTs in the EU and that are issuers of those ARTs. These activities are only allowed after the legal entity or other undertaking in question has obtained a licence to that effect from the competent authority. The licence requirement does not apply in the following cases[32]:

- the average outstanding value of ARTs issued by the ART issuer has never exceeded EUR 5 million (or the equivalent amount in any other official currency) over the past 12 months, calculated at the end of each calendar day, *and* the ART issuer is not affiliated with a network of other exempt ART issuers[33]; or
- the offer of ARTs to the public is addressed exclusively to 'qualified investors', and the ARTs may be held only by 'qualified investors'.[34]

Once the competent authority has granted a licence within the meaning of Article 16 MiCA, an ART issuer may offer or request admission to trading of an

29 Art. 4(3) MiCA. *See* also Recital (26) MiCA.

30 This exception resembles the 'limited network' exception for payment service providers and electronic money institutions as currently laid down in the revised Payment Services Directive ((EU) 2015/2366) and the revised Electronic Money Directive (2009/110/EC) (EMD2).

31 Arts. 16-47 MiCA.

32 Art. 16(2) MiCA.

33 This exception bears a strong resemblance to one of the requirements under the exemption for electronic money institutions, as included in Section 1d(1) under the Dutch Exemption Regulation Wft (*Vrijstellingsregeling Wft*). Incidentally, MiCA does not clearly define the criterion of an issuer's affiliation with a network of other exempt issuers. In our opinion, it is not entirely clear at this time how this criterion should be interpreted.

34 Art. 3(1) point 30 MiCA defines '*qualified investors*' as persons or entities listed in Section I, points (1) to (4), of Annex II to Directive 2014/65/EU (MiFID II).

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ART anywhere in the EU.[35] This is a newly introduced licence requirement under MiCA. In addition, MiCA allows for a 'credit institution' to also offer ARTs or request their admission to trading under such a licence.[36] Credit institutions offering ARTs or requesting their admission to trading are not subject to a separate authorization requirement under MiCA.

ART issuers must also prepare a *white paper* for any initial offering of an ART or its admission to trading.[37] The *white paper* for an ART offering also plays an important role in the context of the licence application referred to previously. The crypto-asset *white paper* prepared by an ART issuer must be approved by the competent regulator.[38] In addition, MiCA also includes provisions for ART issuers with regard to, inter alia, reporting obligations, restrictions surrounding the issuance of ARTs, how to deal with changes to the *white paper*, and the liability of an ART issuer for information given in a *white paper*.[39]

Another important element introduced for ART issuers under MiCA concerns the obligation to maintain a 'reserve of assets'. This refers to a basket of reserve assets securing claims against the issuer.[40] The rules for the reserves are laid down in Articles 36 up to and including 38 MiCA and, in short, contain obligations for ART issuers to manage, hold and invest these reserves of assets. The purpose of requiring an ART issuer to create and maintain a reserve of assets is to reduce the risk of loss for ARTs and protect their value. The reserve of assets should be used for the benefit of ART holders in the event that the ART issuer is unable to meet their obligations to ART holders, for example, in the event of bankruptcy. The reserve of assets shall be composed and managed in such a way that (i) the risks associated with the assets referenced by the ARTs are covered and (ii) the liquidity risks associated with the permanent rights of redemption of the ART holders are addressed.[41]

MiCA also imposes an obligation on ART issuers to apply asset segregation for holding the reserve of assets. This means that the reserve of assets should at all times be both legally and operationally separated from the estate of the ART issuer (as well as from the reserves of assets for other crypto-assets, if any).[42] With respect to the reserve of assets and the obligation for ART issuers to ensure effective and prudent management of the reserve of assets, an ART issuer must have clear and detailed policies and procedures in place, among others, regarding the stabilization mechanism for the ART, but also with regard to the contractual arrangements relating to custody, and the investment of the reserve of assets.[43]

35 Art. 16(3) MiCA.
36 Art. 17 MiCA prescribes specific requirements to be observed by these credit institutions.
37 Minimum content requirements for this kind of white paper are prescribed by Art. 19 in conjunction with Annex II MiCA.
38 This approval is made under Art. 21(1) MiCA, or under Art. 17(1) MiCA in the case of a credit institution.
39 *See* Arts. 22, 23, 25, and 26 MiCA.
40 *See* Art. 3(1) point 32 MiCA for the definition of '*reserve of assets*'.
41 Recital (54) MiCA and Art. 36(1) MiCA.
42 Art. 36(2) MiCA.
43 Art. 36(6) and (8) MiCA, but *see also* Arts. 37 and 38 MiCA.

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Another relevant aspect for ARTs relates to the permanent redemption right ART holders have under MiCA. Under MiCA, the ART issuer is at all times fully and unconditionally obliged to refund an ART at nominal value on request by an ART holder.[44] The redemption can be made by paying an amount in funds (other than electronic money) or by delivering the assets referenced by the ART. Furthermore, it is important to note that ART issuers may not pay any interest in relation to an ART. With this rule, the European legislature aims at preventing ARTs from being used as a store of value.[45]

3. Public Offerings and (Requests for) Admission to Trading of EMTs

A third legal framework for the public offering and admission to trading is also included in Title IV MiCA and relates to EMTs.[46] This legal framework is similar to the one that applies to ARTs discussed in the previous section. However, there are also differences for EMTs compared with ARTs. For example, MiCA does not provide a specific new licence regime for a party seeking to offer EMTs to the public or requesting admission to trading of EMTs on a trading platform within the EU (hereafter referred to as *EMT issuers*). Instead, the legal framework for offering and requesting admission to trading of EMTs ties in with the supervisory framework for electronic money institutions (*EMIs*) as laid down in the revised European Electronic Money Directive (*EMD2*) and implemented at the national level within the EU by the individual Member States. This is reflected in this title of MiCA as several provisions refer to EMDs and regulate how MiCA relates to the rules for EMIs under EMD2.[47]

MiCA stipulates that an EMT issuer shall not make an offer to the public or seek admission to trading of an EMT within the EU, unless this EMT issuer is the actual issuer of the EMT and (i) is authorized as a 'credit institution' or as an EMI and (ii) has notified a crypto-asset *white paper* to the competent authority and has published such a document in accordance with the relevant MiCA provisions.[48] A separate licensing process for an EMT issuer is therefore not required if it is already licensed as a credit institution or EMI. However, issuers of EMTs must notify the competent regulator at least 40 business days before the date on which they intend to offer EMTs to the public or request their admission to trading.[49] This licence obligation does not apply if the EMT issuer can make use of the so-called exemption for small electronic money institutions (as referred to in Art. 9(1) EMD2).[50]

44 Art. 39 MiCA.
45 Art. 40 and Recital (59) MiCA.
46 Art. 48 up to and including 58 MiCA.
47 On 28 June 2023, the European Commission made proposals to modernize the current European payment services framework, consisting of the draft Third Payment Services Directive (*PSD3*) and the draft Payment Services Regulation (*PSR*). Part of these proposals is that EMD2 will be dropped and incorporated into PSD3/PSR. This would mean that the MiCA provisions referring to EMD2 would have to be amended in the future and, based on the current draft texts under PSD3/PSR, EMT issuers would no longer be referred to as electronic money institutions (EMIs) but as 'payment institutions', which under PSD3/PSR may start providing so-called 'electronic money services'.
48 Art. 48(1) MiCA.
49 Art. 48(6) MiCA.
50 Art. 48(4) MiCA.

An EMT issuer (but also an exempted EMT issuer, as referred to previously) is obliged to prepare a *white paper* for the EMT to be offered and/or admitted to trading on a trading platform.[51] The EMT issuer must notify the competent regulator of this crypto-asset *white paper*. Like *white papers* for other crypto-assets and ARTs, the *white paper* for EMTs also requires that the information contained therein be accurate, clear and not misleading. The document should contain all material information, and the information should be presented in a concise and understandable manner. Unlike the crypto-asset *white paper* for ARTs, MiCA does not require (prior) approval of the *white paper* for EMTs by the relevant regulator.[52] Finally, we note that MiCA, as for publishers of ARTs, also contains a liability provision for EMT issuers in case of incomplete, inaccurate, unclear or misleading information in a *white paper* for EMTs.[53]

As with ARTs, holders of EMTs can bring redemption claims against the EMT issuer.[54] Like regular electronic money, MTs must be issued at par value on receipt of cash. For EMT issuers, notwithstanding Article 11 EMD2, the requirements regarding the issuance and redeemability of EMTs are contained in Article 49 MiCA. This includes the obligation for EMT issuers to redeem, at the request of a holder of an EMT, at any time and at par value, the monetary value of the EMT held by such holders in cash other than electronic money. Redemption of EMTs may not be subject to a fee. As with ARTs, MiCA also stipulates that EMT issuers may not grant interest to their holders.[55]

Finally, MiCA introduces a specific regime for 'significant' ARTs and EMTs. Some of these crypto-assets may become so widely used that they will qualify as systemically important or 'significant'. The qualification has been deemed relevant by the European legislature because ARTs or EMTs of such size and widespread use may create specific challenges in terms of financial stability, monetary policy transmission or monetary sovereignty.[56] Against this background, significant ARTs and EMTs (and therefore their issuers) must be subject to more stringent supervision than non-significant ARTs and EMTs.[57] For example, significant EMTs shall be subject to additional requirements with regard to managing, holding and investing the 'reserve of assets', as discussed previously for ART issuers.[58]

51 The *white paper* for an EMT must be drawn up in accordance with Art. 51 and Annex III MiCA. Note that at the time of concluding this article, the relevant European regulators were still developing 'level 2' regulations with standard forms, formats and templates for the preparation of *white papers* for ARTs and EMTs, and information to be included in them.

52 Art. 51(11) MiCA. *See also* Art. 51(3) MiCA, which states that the crypto-asset *white paper* for an EMT must contain a statement that the document has not been approved by a competent regulator in a member state of the EU.

53 Art. 52 MiCA. The liability provision for publishers of ARTs regarding the information provided in a crypto-asset *white paper* is found in Art. 26 MiCA.

54 Arts. 49(2) and (4) MiCA.

55 Art. 50(1) MiCA. Just like ARTs, MiCA does not want EMTs being widely used as a 'store of value'.

56 Recital (59) MiCA.

57 The criteria for classifying ARTs as 'significant' can be found in Art. 43(1) MiCA, which provision also applies to EMTs via Art. 56 MiCA. Specific additional obligations for publishers of significant ARTs can be found in Art. 45 MiCA and for significant EMTs in Art. 58 MiCA.

58 *See* Art. 58(1) (a) MiCA that makes reference to Arts. 36, 37 and 38 MiCA.

II. Impact on Crypto-asset Service Providers

1. Licence Requirement versus Exemption for Regulated Financial Entities

Pursuant to MiCA,[59] crypto-asset services may only be offered within the EU by (i) MiCA-licensed service providers or (ii) regulated financial entities.[60] A MiCA licence as crypto-asset service provider must be applied for to the regulator of the Member State where the crypto-asset service provider has its registered office.[61] Only legal persons and other undertakings with a registered office in a Member State can apply for such a licence. From this registered office, the service provider must carry out at least part of its crypto-asset services. The service provider must have its place of effective management in the EU, and at least one of the directors must be resident in the EU.[62]

A MiCA licence obtained in a Member State provides access to the entire European market.[63] Crypto-asset service providers that are active internationally or wish to do so will consider this a significant improvement over the AMLD5 registration regime. AMLD5 has no such 'European passport' system. Consequently, service providers are currently required to apply for a separate registration in each Member State where they operate. This practice will cease to exist under MiCA.

The rules for crypto-asset service providers are directly applicable in each Member State as of 30 December 2024. This would mean that service providers should, in principle, have a MiCA licence by 30 December 2024. However, MiCA contains two transitional arrangements for existing service providers. First, MiCA stipulates that service providers who offered their services in accordance with applicable (national) law before 30 December 2024 may continue to do so until 1 July 2026 or until they are granted or refused a MiCA licence, whichever is sooner.[64] Second, MiCA provides that Member States may apply a simplified procedure for MiCA licence applications submitted between 30 December 2024 and 1 July 2026 by entities that were already authorized under national law to provide crypto-asset services on 30 December 2024.[65]

As noted, certain types of regulated financial entities do not require a MiCA licence to provide certain crypto-asset services in the EU, as these services may be provided by the relevant financial entities under their existing licence. For example, under MiCA, banks may, in principle, provide all crypto-asset services, central securities depositories may hold crypto-assets on behalf of clients, and investment firms are allowed to offer crypto-asset services which are deemed '*equivalent*' to the investment services for which they have a MiFID II licence.[66]

59 Arts. 59-60 MiCA.

60 These include credit institutions, central securities depositories, investment firms, market operators, electronic money institutions, UCITS management companies and AIFMs.

61 Art. 62(1) in conjunction with Art. 3(1) point 33 (f) MiCA.

62 Art. 59(2) MiCA.

63 Art. 59(7) MiCA.

64 However, individual member states may shorten this 18-month transition period or not apply this at all if they consider their national law to be less stringent than MiCA.

65 Art. 143(6) MiCA.

66 Art. 60 MiCA.

2. Ongoing Requirements

MiCA sets out various requirements crypto-asset service providers must comply with on an ongoing basis. These requirements relate to both the internal organization of the service provider and the manner in which clients are treated. Examples of organizational requirements include capital requirements,[67] suitability and reputation requirements for members of the management body,[68] and rules with respect to information communication technology (ICT) systems and business continuity.[69] Examples of client treatment requirements include mandatory warnings of risks associated with crypto-assets,[70] cost transparency,[71] proper complaint handling,[72] and the handling and disclosing of conflicts of interest.[73] In addition, MiCA introduces specific ongoing requirements for each of the ten regulated crypto-asset services, again modelled on MiFID II. For example, crypto-asset service providers that provide custody services to clients are subject to specific asset segregation rules. This will be discussed in Section E of this article.

D. Different Types of Crypto-assets under MiCA and Some Property Law Aspects

I. General

In recent years, the crypto market has continued to evolve rapidly, and many new crypto-assets have been and are being issued alongside Bitcoin, with a diverse palette of technical and financial characteristics. MiCA responds to this by legally defining different types of specific crypto-assets. By doing so, the European legislature aims to provide a clearer classification of crypto-assets, which will be relevant, among other things, for their issuers, as we have seen earlier in Section C.I. The entry into force of MiCA will bring these crypto-assets under the scope of regulatory law.

As already set out in Section B of this article, MiCA introduces the following specific 'crypto-assets': (i) utility tokens, (ii) asset-referenced tokens (ARTs) and (iii) e-money tokens (EMTs). These crypto-assets are each discussed separately in what follows. In this context, we also touch upon some property law characteristics, at least from a Dutch law perspective.

II. Utility Tokens

A 'utility token' is defined in MiCA as 'a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer'.[74]

67 Art. 67 MiCA.
68 Art. 68 MiCA.
69 *Ibid*.
70 Art. 66 MiCA.
71 *Ibid*.
72 Art. 71 MiCA.
73 Art. 72 MiCA.
74 Art. 3(1) point 9 MiCA.

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Utility tokens are crypto-assets that give the holder of such tokens the right to digital access to a good or service available via the blockchain and offered by the issuer of the token. This will often involve the right or access to use a specific application or service. An earlier non-final MiCA release also noted in this regard that such tokens have non-financial objectives associated with the operation of a digital platform and digital services.

For example, utility tokens can be used to acquire decentralized cloud services (an example is Filecoin). Tokens from network projects such as Ethereum (ETH), Cardano (ADA) or Binance Smart Chain (BSC) also seem to qualify as utility tokens, since they provide a right or access to services on that particular blockchain network. A utility token will also qualify under MiCA as an 'other crypto-asset' (not being an ART or EMT). This means that a party that offers a utility token or requests admission to trading thereof on a trading platform within the EU will have to comply with the relevant rules for offerors of 'other crypto-assets' as contained in Title II of MiCA and set out in Section C, under I, paragraph 1. of this article.

Unlike ARTs and EMTs, as we will describe further on, a utility token does not contain a claim against the issuer but rather grants the holder of the relevant utility token a right of use and potentially other functions, such as a means of payment. The extent of the right of use will depend on the design of the specific utility token. It may also depend on the value the utility token represents at any given time, which is reflected in the market- or trading price of the relevant crypto-asset.

The defining characteristics of a utility token are that it provides its holder with a right to or access to the use of a digital good or service. In our view, the utility token, therefore, confers a material benefit on the holder of the token, as the entitled party. This does not alter the fact that the holder may transfer the utility token, and thus the right of use, to a third party by selling it via, for example, a crypto-asset trading platform. These characteristics, in particular the provision of the material benefit, constitute, in our opinion, important legal arguments to qualify a utility token as a property right, at least from a Dutch property law perspective.

III. Asset-Referenced Tokens (ARTs)

The second specific type of crypto-asset under MiCA is the ART, defined as follows:

> a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies.[75]

ARTs aim at stabilizing their value by referring to another (underlying) value or right, or a combination thereof, including one or more official currencies. So-called *stable coins* will usually qualify as ARTs, – or as EMTs, as we will see later – under MiCA. The underlying assets may be one or more fiat currencies that are legal tender somewhere, for example the U.S. dollar, one or more commodities, like gold, but also other crypto-assets or a combination of various assets. Because of the

75 Art. 3(1) point 6 MiCA.

stabilizing mechanism, ARTs may be used by holders not only as a means of payment for the purchase of goods and services but also as a store of value.[76] As mentioned earlier in this article, this store of value function is what the European legislature has tried to limit via a prohibition in MiCA to grant interest to holders of ARTs and EMTs. MiCA explicitly states that all crypto-assets whose value is backed by other assets and which do not qualify as EMTs, are qualified as ARTs.[77] By doing so, the European legislature aims to prevent circumvention of MiCA by market participants and thus future-proof this regulation.

Another important feature is that MiCA grants a right of redemption to all holders of ARTs at all times and at market value vis-à-vis their issuers.[78] Briefly, this is a right of redemption of the market value of the underlying reserve assets at the time of filing the redemption request. This redemption right of the ART holder and the claim contained therein is also reflected in Article 37 MiCA on maintaining sufficient reserve assets. An ART issuer must have prompt access to their reserve assets at all times to meet redemption requests from ART holders.

This brings us to the question of how to interpret an ART from the perspective of property law. An ART grants its holder a claim against the ART issuer under MiCA. The ART represents a (re)payment guarantee of the market value of the underlying reserve of assets at the time of the repayment request. Taking these characteristics into account, ARTs will qualify as property rights, at least from a Dutch property law perspective. This also means that ARTs will become susceptible to transfer, pledge and/or seizure under Dutch law.

IV. E-Money Tokens (EMTs)

The third specific type of crypto-asset defined by MiCA is the EMT, also referred to as 'electronic money token' or 'e-money token'. MiCA defines an EMT as a 'type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency'.[79]

This definition of EMTs clarifies the difference between EMTs and ARTs. An EMT will try to maintain its stable value by referring to only one value of an official or fiat currency (*e.g.* the EUR or the USD), whereas an ART will instead refer to one or more (other) underlying assets (which also can include one or more official or fiat currencies). MiCA notes in this context that the definition of EMTs should be as broad as possible so that it will include all types of crypto-assets that refer to one official currency.

In one of the earlier MiCA proposals, the definition of EMTs still reflected that this type of crypto-asset should be primarily a means of payment. This wording has not been retained in the final legal text. However, by its nature, this does not detract from the payment nature that an EMT will have in practice. It also clearly follows from recital (18) MiCA that EMTs, like 'electronic money', will be an

76 This follows indirectly from recital (58) MiCA. *See also* recital (25) of the earlier MiCA proposal of 19 November 2021.
77 Consideration (18) MiCA.
78 Art. 39 MiCA.
79 Art. 3(1) point 7 MiCA.

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electronic substitute for coins and banknotes and are likely to be used to make payments. Some existing crypto-assets are likely to qualify as EMTs under MiCA, including existing *stablecoins* such as USDC (from *Circle*) and USDT (from *Tether*).

MiCA also stipulates that EMTs are deemed to be 'electronic money' as referred to in Article 2(2) EMD2.[80] This creates confluence between MiCA and other relevant legal frameworks applicable to (issuers of) electronic money in the case of EMTs. For example, and as already described previously, MiCA also stipulates that certain parts of EMD2 will apply to EMTs, unless MiCA provides otherwise.

One of the main features of EMTs – just like ARTs – is that its holders will have a claim against the issuer of the EMT in question.[81] This claim means that redemption at par value, at which the EMT was previously issued, can be requested in the official currency referred to by the EMT in question.[82] As it is the case with ARTs, EMTs will qualify as property rights, at least from a Dutch property law perspective. This also means that EMTs, like ARTs, will become susceptible to transfer, pledge and/or seizure under Dutch law.

E. Asset Segregation by Crypto-asset Service Providers

I. The Current or Pre-MiCA Landscape Regarding Custody of Crypto-assets and Funds

As mentioned earlier in this article, one of the core objectives of MiCA concerns the provision of an adequate level of consumer and investor protection.[83] In that context, MiCA provides for asset segregation rules that crypto-asset service providers must comply with. This makes sense from a client protection perspective. A service provider engages in commercial activities, takes risks in the process, and can incur significant debt or even go bankrupt. If the service provider is in trouble, what is the position of clients who have entrusted their crypto-assets to the provider? And how can a client be assured that a service provider will not use these crypto-assets for its own account? These questions are especially relevant in the crypto sector, since we have already seen several failures of exchanges in the last couple of years, as well as multiple examples of mishandling of client funds. The collapse of FTX in November 2022 is a good example. As has been widely reported, some 8.7 billion dollars in customer-deposited assets had been misappropriated by the owners and managers of the FTX.com exchange for their speculative investments in their Alameda Research fund.[84]

Before turning to the MiCA rules on asset segregation, we take a look at the nature of crypto-assets and how custody of crypto-assets is currently established. The decentralized nature of crypto-assets gives custody and asset separation a

80 Art. 48(2) MiCA. We also refer to Recital (9) MiCA, which explains why EMTs cannot be treated as 'deposits' within the meaning of European Directive 2014/49/EU.

81 Art. 49(2) MiCA.

82 Art. 49(1) and (3) MiCA.

83 MiCA Proposal European Commission 24 September 2020, p. 3 and Art. 1(2)(d) MiCA.

84 *See* the second interim report of John J. Ray III, filed with the US Bankruptcy Court for the District of Delaware on 26 June 2023, https://restructuring.ra.kroll.com/FTX/.

unique meaning. Crypto-assets are technically digital units that are administered on a blockchain or other DLT. Crypto-assets can be kept directly by individuals themselves. More precisely, they can independently store the keys[85] – for example, in a self-managed storage wallet (also called *non-custodial* or *self-hosted wallet*) on a cell phone or physical data carrier – which can be used to access the crypto-assets administered on the blockchain (or other DLT). If the person loses his or her private keys for any reason, in principle, the crypto-assets linked to these keys are also lost. Although the crypto-assets remain administered on the blockchain (or other DLT), no one can access them anymore. Another disadvantage of off-line, off-chain, or cold storage of crypto-assets is the need to upload the assets to an exchange before any transactions can be made. This costs time and transaction fees.

For these and other reasons, individuals may choose not to hold crypto-assets directly themselves but to give the crypto-assets for safe keeping to a service provider like an exchange. In such a case, the service provider stores the private keys giving access to the crypto-assets on behalf of the user. At least in theory, this means that the provider or exchange can also access the crypto-assets without the knowledge or consent of the client. In the Netherlands, for example, currently, about 40 service providers are registered with the Dutch Central Bank as providers of this crypto-asset service.[86]

Several crypto-asset trading platforms (exchanges) currently operate a system where they store their clients' (keys to) crypto-assets in one or more wallets managed by the platform operator. These wallets are often largely *cold wallets*, meaning that the private keys stored in them are kept offline using different security mechanisms.[87] The wallets used by these trading platform operators on behalf of their clients are also referred to as *custodial* or *hosted wallets* and actually represent the number and type of crypto-assets the platform operator holds for the client. Unfortunately, there have already been several cases in which platforms or exchanges were hacked and client funds were stolen.[88]

As for *funds* transferred by clients to a platform operator for conversion into and subsequently trade in crypto-assets, in practice – at least in the Netherlands – several crypto-asset service providers make use of the possibility of issuing electronic money, in exchange for the funds received.[89] With the electronic money, clients can then purchase crypto-assets on the platform. The proceeds of crypto-assets sold can then also be held by the clients with the platform operator in the form of electronic money. Like crypto, the e-money can be at risk. Several

85 When we refer to keys, we are referring to the cryptographic public and private keys that allow crypto-assets to be received and transferred through the blockchain (or other DLT).

86 https://www.dnb.nl/en/public-register/register-of-crypto-service-providers/?p=1&l=10&rc=V1dGVEFD.

87 For that matter, service providers like exchanges can also use third-party providers for the safekeeping of the keys to crypto-assets.

88 An example is the hack of the BSC Token Hub cross-chain bridge in October 2022, which led to a loss of US$570 million in client funds. Kaspersky lists 8 major hacks in recent years, see https://www.kaspersky.com/resource-center/threats/crypto-exchange-hacks.

89 They are relying on the so-called 'limited use exemption' under Directive 2015/2366 (PSD2) and Directive 2009/110/EC (EMD2).

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trading platforms currently use a separate foundation, or another corporate vehicle, in their legal set-up to hold user funds and crypto-assets in a legal sense. This, at least, protects the funds in case the service provider or exchange is pursued by creditors or even has to file for bankruptcy. In the Netherlands, however, this practice is so far not mandatory but takes place as a voluntary form of asset segregation to provide maximum protection for client assets.

II. The MiCA Regime for Custody of Client Crypto-assets

MiCA introduces asset segregation rules for cases where clients do not store the keys to their crypto-assets themselves but have them stored with a crypto-asset service provider authorized to provide the service of custody and administration of crypto-assets on behalf of third parties. This service is defined in MiCA as 'the safekeeping or controlling, on behalf of clients, of crypto-assets or of the means of access to such crypto-assets, where applicable in the form of private cryptographic keys'.[90]

Pursuant to MiCA, asset segregation involves two aspects: a crypto-asset service provider that holds crypto-assets belonging to clients or the means of access to such crypto-assets must make adequate arrangements to (1) safeguard the ownership rights of clients, particularly in the event of the insolvency of the service provider and (2) prevent the use of clients' crypto-assets for the service provider's own account.[91] In addition to these two general principles, MiCA contains a number of specific provisions. Each service provider must enter into an agreement with its clients that specifies the service provider's duties and responsibilities.[92] Service providers must maintain a separate register of positions opened in the name of each client, corresponding to each client's rights to the crypto-assets. Furthermore, service providers must establish a custody policy with internal rules and procedures. Those rules and procedures must minimize the risk of loss of crypto-assets or the keys to access the crypto-assets due to fraud, cyber threats or negligence. Furthermore, each service provider is required to have in place procedures to return the crypto-assets or the keys to access the crypto-assets to a client on demand as swiftly as possible.[93]

Most importantly, service providers shall be liable to their clients for any loss of crypto-assets or the keys to access the crypto-assets as a result of an incident that is attributable to the service provider. Incidents not attributable to the service provider include any event in respect of which the service provider demonstrates that it occurred (i) independently of the provision of the relevant service or (ii) independently of the operations of the service provider, such as a problem inherent in the operation of the distributed ledger (blockchain) that the provider does not control. The liability of the service provider is capped at the market value of the crypto-assets that were lost, at the time the loss occurred.[94]

90 Art. 3(1) under 17 MiCA.
91 Art. 70(1) MiCA.
92 For the specific requirements for this agreement, *see* Art. 75(1) MiCA.
93 Art. 75(2)(3)(6) MiCA.
94 Art. 75(8) MiCA.

For the purpose of asset segregation of crypto-assets, the most relevant requirement under MiCA is that the crypto-assets held in custody shall be legally segregated from the service provider's estate in accordance with applicable local law, so that creditors of the service provider have no recourse to the crypto-assets held in custody, in particular in the event of insolvency of the service provider or exchange. To make this technically possible, the service provider must also ensure that the crypto-assets held in custody are operationally segregated from the crypto-asset service provider's estate. This includes that the provider must ensure that, on the distributed ledger, crypto-assets of clients are held separately from its own crypto-assets.[95]

It is important to emphasize that MiCA's asset segregation regime consists of administrative law provisions prescribing a civil law outcome. Civil law is not harmonized in the EU; each Member State has its own civil laws. This means that each Member State will need to have in place some sort of civil law arrangements to enable crypto-asset service providers to achieve asset segregation and thus comply with MiCA.

III. The MiCA Regime on Custody of Client Funds

Regarding the custody of client funds other than crypto-assets or EMTs, MiCA stipulates that where the crypto-asset services require client funds to be held, a crypto-asset service provider shall have adequate arrangements in place to safeguard the ownership rights of clients and prevent the use of client funds for its own account. Service providers will be required to place those funds with a credit institution or a central bank by the end of the business day following the day on which the client funds were received. In doing so, a service provider must take all necessary steps to ensure that client funds held with a credit institution or a central bank are held in an account separately identifiable from any accounts used to hold funds belonging to the provider itself.[96]

IV. Application of MiCA Rules on Asset Segregation in Practice and Parallel with MiFID II – The Interplay between Administrative Law and Civil Law

1. Parallels with MiFID II as Applied in the Netherlands

As noted, the MiCA regime for crypto-asset service providers is largely based on MiFID II. To a certain extent, this also goes for the MiCA asset segregation requirements. A difference is, however, that a crypto-asset service provider is not allowed to use crypto-assets held in custody for its own account, irrespective of whether the client has expressly consented to such use. Under MiFID II, an investment firm may use financial instruments belonging to clients for its own account with the client's express consent.[97]

95 Art. 75(7) MiCA.

96 Art. 70(2-3) MiCA.

97 Art. 16(8) MiFID II. Art. 63(1) of the European Commission's original MiCA Proposal of 24 September 2020 still included this consent exception.

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In the Netherlands, investment firms may satisfy the asset segregation requirement laid down in MiFID II with respect to *financial instruments* belonging to clients by (1) administrating these instruments in accordance with the Dutch Securities Book-Entry Transfer Act or (2) by having these instruments held by a separate bankruptcy remote depository. If *financial instruments* are held in accordance with the Dutch Securities Book-Entry Transfer Act, clients have, from a civil law perspective, a right of joint ownership. In contrast, if an investment firm uses a separate depository (usually a foundation), clients have a contractual claim, namely a claim against the depository denominated in financial instruments. In both instances, the insolvency of the investment firm would not affect the rights of clients. With respect to client *funds*, an investment firm – not being a bank – can satisfy the asset segregation requirement set out in MiFID II by (1) ensuring that the funds are held in one or more accounts at a bank in the name of the client or (2) having the funds held in one or more accounts in the name of a separate bankruptcy remote depository[98] or (3) having the funds held in a segregated assets account in its own name with a Dutch bank.[99] As a result, from a civil law perspective, clients would have (1) a claim on their own bank, (2) a claim on the depository or (3) a claim on the investment firm. Therefore, generally speaking, the insolvency of the investment firm would not affect the rights of clients.

2. Possible Application under MiCA

We elaborate on the MiFID II regime for investment firms, as implemented in the Netherlands, because we believe this regime also appears to largely fit within the MiCA framework. With respect to *crypto-assets*, we consider it conceivable that crypto-asset service providers could (1) either store (keys to) crypto-assets in custodial wallets that fall outside the service provider's estate by operation of law, for example by virtue of a special law, or (2) use separate bankruptcy remote crypto-depositories that hold legal title to the crypto-assets. Both options would implement the MiCA requirement to take adequate measures to safeguard clients' ownership rights. In doing so, however, certain pitfalls may arise. For example, (keys to) many crypto-assets consist purely of a series of numbers and letters and thus cannot be in the name of a crypto-depository. Proper administration is, therefore, an essential prerequisite to achieving the result of legal asset segregation. In this context, MiCA stipulates that the keys to crypto-assets of clients must be clearly identifiable as such and, as noted, a provider must hold crypto-assets of its clients in the blockchain at different addresses than the addresses at which it holds its own crypto-assets.

With respect to *client funds*, we also believe that, in essence, the regime described previously for investment firms should be possible for service providers under MiCA as well. MiCA prescribes, as noted, that client funds other than

98 With the restriction that the funds must be used for the execution of a transaction in financial instruments.

99 The funds in the segregated assets account are separated from the other assets of the investment firm by operation of law and serve exclusively to satisfy certain creditors, in particular the clients who have entrusted their funds to the investment firm. We note this option of a segregated bank account in the name of the investment firm itself is new in the Netherlands and not used yet.

crypto-assets or EMTs must be forwarded to a bank or central bank and that the bank accounts in which client funds are held have to be distinguishable from the bank accounts in which the provider holds its own funds. In our view, these requirements are compatible with both the option in which funds are held in one or more accounts with a bank in the name of the client itself and the option in which funds of the client are held in one or more bank accounts in the name of a separate crypto-depository.[100] Also, the third option, namely that client funds are held in a separate bank account in the name of the service provider, seems to be allowed under MiCA, as long as such a bank account is clearly distinguishable from the bank account(s) held by the service provider for its own funds.

F. Concluding Remarks

MiCA constitutes a major shift in the regulation of crypto-asset markets in the EU. Unsurprisingly, some critics – including some national regulators[101] – have argued that MiCA does not go far enough.[102] We believe that MiCA is a good first step towards achieving a harmonized crypto rule book throughout the EU and adequate levels of consumer/investor protection. However, as developments are ongoing and new challenges have presented themselves already, we are quite sure this is only MiCA 1.0 and that revisions are to follow. Such developments and related regulatory challenges include DeFi, DAOs, crypto-lending, crypto-staking, NFTs and the role of influencers. Lastly, we note that although MiCA will certainly be the most extensive regulatory framework in the EU for crypto-assets, it is not the only set of rules that will need to be observed by the crypto sector. Other EU frameworks aimed at further regulating the crypto sector include anti-money laundering (AML) legislation and the Transfer of Funds Regulation.[103] In other words, exciting regulatory times ahead for the European crypto sector!

100 In this case as noted, there is currently a restriction in the Netherlands that funds must be used for the execution of transactions in crypto-assets.

101 In the Netherlands, for example, regulator AFM has pointed out that, among other things, unlike MiFID II, MiCA does not set any requirements for product development and distribution, that requirements related to crypto advice are limited, and that regarding market abuse MiCA also does not go as far as existing legislation and regulation in this area. The AFM has also stated that whereas MiCA places supervision mainly at the member state level, crypto markets are clearly cross-border in nature.

102 *See also* Zetzsche/Buckley/Arner/van Ek, *Remaining Regulatory Challenges in Digital Finance and Crypto-Assets After MiCA*, publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg (2023).

103 EU Regulation 2023/1113 of 31 May 2023 on Information Accompanying Transfers of Funds and Certain Crypto-Assets.

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