

Market in Crypto Assets Regulation (EU 2023/1114)

Public Consultation

9 August 2023



Contents

1. Introduction	3
2. Consultation Process	5
3. Background	6
4. Key Measures included within MiCAR	8
5. Consultation Questions on the National Discretions	11
6. Extracts from MiCAR Regulation	14
Article 88 – Public disclosure of inside information	14
Article 111 – Administrative penalties and other administrative measures	15
Article 143 – Transitional Measures	15

1. Introduction

The purpose of this consultation is to obtain submissions on the transposition of national discretions included within the Markets in Crypto-Assets Regulation (MiCAR) EU 2023/1114¹. MiCAR is the first European-level legislation introducing a harmonised and comprehensive framework for crypto-assets, covering issues from the offering to the public of crypto-assets to preventing market abuse in crypto-asset markets. The legislation provides a set of prescriptive rules that will shape the functioning of the European markets in crypto-assets, including transparency rules, authorisation requirements, customer protection rules and an anti-market abuse framework.

As a Regulation MiCAR has direct effect, however, there are a number of provisions in the Regulation to which full harmonisation does not apply and Member States are given discretion as to whether and how to apply these provisions.

The four national discretions this consultation seeks feedback on include:

- Article 88 (1): Public disclosure of inside information
- Article 111 (2): Administrative penalties and other administrative measures
- Article 143 (2): MiCAR transition period; and
- Article 143 (6): Simplified authorisation procedure.

Section 5 of this consultation document sets out detail of the national discretions contained within MiCAR and the Department invites comments on whether these discretions should be availed of, how they should be availed of and clear reasoning for such a position.

In responding to this consultation you are invited to:

- Give your views on the specific questions set out below. You do not have to answer every question – you may choose to answer all of the questions or only those which are relevant to you.

¹ https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32023R1114&pk_campaign=todays_OJ&pk_source=EURLEX&pk_medium=TW&pk_keyword=Crypto%20assets&pk_content=Regulation&pk_cid=EURLEX_todaysOJ

- Provide details of any issues or concerns you feel should be considered in dealing with the particular topic being addressed in your response.
- Where appropriate, provide some analysis or views on the regulatory and/or financial impact of the proposed approach.

The comments received will be taken into consideration when deciding how best to transpose the MiCAR into Irish law.

2. Consultation Process

How to respond

The consultation period will run from 9 August 2023 to 15 September 2023. Any submissions received after this date may not be considered.

If you wish to respond to this consultation paper you may do so either electronically or in writing by **15 September 2023**, as set out below:

Electronically at:	By post to:
https://consult.finance.gov.ie/	MiCAR Public Consultation, Financial Advisory, Department of Finance, 1 Miesian Plaza, D02 R583, Ireland.

The Department requests that you provide reasons and explanations for the responses you provide to this consultation paper as this will aid in the consideration of the issues. Where possible, please also provide material, or references to material, that support or evidence the points you make in your responses.

Please include contact details in your response.

FREEDOM OF INFORMATION

Responses to this consultation are subject to the provisions of the Freedom of Information Acts. Parties should also note that responses to the consultation may be shared with the Central Bank of Ireland and may be published on the website of the Department of Finance. Parties should clearly indicate where their responses contain personal information, commercially sensitive information or confidential information that they would not wish to be released under FOI or published.

MEETINGS WITH STAKEHOLDERS

The Department of Finance may also invite key stakeholders to meet with them, including representative bodies and other interested groups or individuals.

AFTER THE CONSULTATION

The submissions received in response to this consultation will be considered when reviewing the national discretions contained within the text and when transposing MiCAR into Irish law. The outcome will be published in due course but before the end of October.

3. Background

The European Commission presented the MiCAR proposal on 24 September 2020. It is part of the larger digital finance package, which aims to develop a European approach to foster technological development and ensures financial stability and consumer protection. In addition to MiCAR, the package contains a Digital Finance Strategy, the Digital Operational Resilience Act (DORA), that covers crypto-asset service providers as well, and the distributed ledger technology (DLT) pilot regime for wholesale uses.

The package bridges a gap in existing EU legislation by ensuring that the current legal framework does not pose obstacles to the use of new digital financial instruments and, at the same time, ensures that such new technologies and products fall within the scope of financial regulation and operational risk management arrangements of firms active in the EU. Thus, the package will support innovation and the uptake of new financial technologies while providing for an appropriate level of consumer and investor protection.

The Council adopted its negotiating mandate on MiCAR on 24 November 2021. Trilogues between the co-legislators started on 31 March 2022 and ended in a provisional agreement reached on 30 June 2022. MiCAR was published in the Official Journal of the European Union on 9 June 2023 following its approval by the European Parliament and entered into force 20 days later, on 29 June 2023.

The timelines below detail the implementation and transitional phase for MiCAR and (i.e. the period of 18-months after full application in December 2024)².

² https://www.esma.europa.eu/sites/default/files/2023-08/Newsletter_July_2023.pdf

Markets in Crypto-Assets Regulation (MiCA)

Implementation timeline

Last updated: 9 June 2023



4. Key Measures included within MiCAR

MiCAR will protect investors by increasing transparency and putting in place a comprehensive framework for crypto-asset issuers and service providers including compliance with the anti-money laundering rules³. The new rules cover issuers of certain utility tokens. It also covers service providers such as trading venues and crypto-asset custody providers.

It also introduces a harmonized regulatory framework in the European Union. MiCAR aims to protect investors and ensure financial stability while allowing innovation and fostering the attractiveness of the crypto-asset sector⁴.

Issuers of Asset Reference Tokens (ARTs) and E-Money Tokens (EMTs)

MiCAR will bring issuers of certain types of crypto-assets into the regulatory framework. Specifically, MiCAR will establish new rules for those types of crypto-assets known as "stablecoins" including Asset-Referenced Tokens (ARTs), E-Money Tokens (EMTs) and certain utility tokens. MiCAR distinguishes stablecoins by defining ARTs as being linked to multiple currencies, commodities or crypto-assets and EMTs as being linked to a single fiat currency. Utility tokens covered by MiCAR will be those intended to provide access to a good or service that will be supplied by the issuer of that token.

Issuers of ARTs and EMTs will be required to be authorised by the Central Bank of Ireland (the Central Bank) and to publish a white paper that will contain information for investors; they will also be required to build up a sufficiently liquid reserve with a 1/1 ratio and meet other regulatory requirements. MiCAR recognises that some ARTs or EMTs may be significant due to their size and other factors and as a result may present a number of risks with respect to financial stability, the smooth transmission of monetary policy and sovereignty, or the smooth operations of payments systems. The European Banking Authority (EBA) will have supervisory responsibilities for issuers of significant ARTs and EMTs.

³ <https://www.consilium.europa.eu/en/press/press-releases/2023/05/16/digital-finance-council-adopts-new-rules-on-markets-in-crypto-assets-mica/#:~:text=MiCA%20will%20protect%20investors%20by,so%2Dcalled%20'stablecoins'>.

⁴ <https://www.centralbank.ie/regulation/markets-in-crypto-assets-regulation>

Crypto-Asset Service Providers (CASPs)

CASPs shall require authorisation in order to operate within the EU. Crypto-asset services include the operation of a trading platform, custody and administration of crypto-assets on behalf of third parties, the exchange of crypto-assets for funds/other crypto-assets, the execution of orders for crypto-assets, the placing of crypto-assets, providing transfer services for crypto-assets to third parties, providing advice on crypto-assets and portfolio management of crypto-assets. At a high level, CASPs that provide crypto-asset services to third parties (e.g. consumers) on a professional basis will be subject to new rules including governance and liquidity requirements.

Market Abuse

MiCAR also introduces new rules that prohibit market abuse related to any type of crypto-asset that is traded, including unlawful disclosure of inside information, insider trading and actions that are likely to lead to disruption or manipulation of crypto-assets, e.g. prices, volumes and transactions.

Level 2 and Level 3 Text

The European Supervisory Authorities⁵ (ESAs) are continuing to develop level 2 and 3 texts which, when finalised, will provide greater granularity on certain provisions in MiCAR^{6,7}. These texts are important to industry and National Competent Authorities (NCAs)⁸ alike, as they will provide detailed specifications of key obligations for firms, including applicant firms seeking authorisation such as CASPs or issuers of asset-referenced tokens, and details regarding the supervisory responsibilities of NCAs for example.

On 12 July 2023, both the ESMA and the EBA launched their first packages of draft Regulatory Technical Standards and draft Implementing Technical Standards, providing an opportunity for industry to consult and engage with

⁵ The ESAs are the: European Banking Authority, European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority. The ESAs work primarily on harmonising financial supervision in the EU by developing the single rulebook, a set of prudential standards for individual financial institutions. The ESAs help to ensure the consistent application of the rulebook to create a level playing field. They are also mandated to assess risks and vulnerabilities in the financial sector.

⁶ Level 2 text refers to the technical implementing measures through which framework legislation is implemented. This phase of the EU legislative process is led by the ESAs working in conjunction with the Commission.

⁷ Level 3 text refers to guidelines on the implementation of the rules. This stage is led by committees of national supervisors responsible for advising the Commission in the adoption of level 1 and level 2 acts

⁸ The Central Bank of Ireland will be the designated National Competent Authority (NCA) for the authorisation and supervision of entities that will be subject to MiCAR.

ESAs. The ESMA Consultation Paper⁹ is open for input until 20 September 2023 and the EBA Consultation Papers¹⁰ remain open until 12 October 2023.

⁹ https://www.esma.europa.eu/sites/default/files/2023-07/ESMA74-449133380-425_MiCA_Consultation_Paper_1st_package.pdf

¹⁰ <https://www.eba.europa.eu/markets-crypto-assets>

5. Consultation Questions on the National Discretions

- **Discretion 1 – Public disclosure of inside information Article 88 (3)**

Article 88(2) of MiCAR permits issuers, offerors or persons seeking admission to trading of a crypto-asset to delay public disclosure of inside information providing certain conditions are met, such as where disclosure of the information would prejudice the legitimate interest of the issuer, offeror or persons seeking admission to trading, and where the delay in disclosure is not likely to mislead the public.

Article 88 (3) states that when an issuer, offeror or someone seeking admission to trading has delayed the disclosure to the public of inside information, they are obliged to inform the NCA about the delay of disclosure and provide an explanation. The Regulation also contains a discretion to Article 88(3) that allows for Member States to provide that a record of such an explanation is to be provided only upon the request of the NCA.

Question 1:

- a) Should Ireland exercise this discretion?
- b) How should this discretion be transposed in Ireland?

- **Discretion 2 – Administrative penalties and other administrative measures Article 111 (1)**

Article 111(1) of MiCAR provides a Member State discretion in relation to administrative penalties and other administrative measures. This article allows Member States to provide for NCAs to have the power to take appropriate administrative penalties and other administrative measures in relation to a number of infringements. This discretion relates to Member States not laying down the administrative penalties where the associated infringement is subject to criminal penalties in national law.

Article 111(6) permits Member States to supplement the powers given in 111(2) to (5) and allow Member States to impose higher levels of penalties than those provided for in the Article.

In respect of the criminalising of certain breaches, it is important that an option exists for such matters to be pursued by the Central Bank as administrative breaches ('prescribed contraventions') and for the Central Bank to be able to bring Administrative Sanctions Procedure (ASP) proceedings in respect of such breaches.

Question 2:

- a) Should Ireland exercise this discretion?
- b) How should this discretion be transposed in Ireland?

- **Discretion 3 – MiCAR transition period for existing CASPs Article 143**

Article 143 provides a transition period for CASPs that are providing their services in accordance with national law prior to MiCAR applicability (29 December 2024). In Ireland, those CASPs will be those firms that have registered as Virtual Asset Service Providers with the Central Bank of Ireland under the European Union's Fifth Anti-Money Laundering Directive ('5AMLD') by 29 December 2024.

The transition period permits these CASPs to continue to provide services for up to 18 months after the date of application of MiCAR (i.e. to June 2026), or until they are granted or refused an authorisation.

While the default position in MiCAR is that these CASPs can avail of a transition period, the text provides discretion for Member States to either not apply this transition period or to reduce its duration in circumstances where they consider that their national regulatory framework is less strict than that set out in MiCAR. A reduction in the length of the transition period is also envisaged in Recital 114 where Member States that do not currently have strong prudential requirements for CASPs should be permitted to either not apply or reduce the 18 month transition period.

- **Question 3:**

- a) Should Ireland exercise this discretion?
- b) How should this discretion be transposed in Ireland?
- c) How long should the transition period last?

- **Discretion 4 – Simplified procedure Article 143 (6)**

Article 143(6) contains a provision that Member States may apply a simplified procedure for applications submitted between the date of the application of MiCAR (30th December 2024) and 18 months after the date of application of MiCAR (June 2026). This provides an opportunity for NCAs that have an existing crypto-asset regulatory regime to leverage information already gathered, thus simplifying the procedure and potentially shortening the application time.

Under this procedure, the NCA will still need to confirm that all relevant aspects of MiCAR are being complied with.

- **Question 4:**
 - a)** Should Ireland exercise this discretion to implement a simplified regime?
 - b)** How should current regimes be evaluated and by whom?
 - c)** How should divergent opinions on the compliance of current regimes be challenged?

6. Extracts from MiCAR Regulation

Article 88 – Public disclosure of inside information

1. Issuers, offerors and persons seeking admission to trading shall inform the public as soon as possible of inside information referred to in Article 87 that directly concerns them, in a manner that enables fast access as well as complete, correct and timely assessment of the information by the public. Issuers, offerors and persons seeking admission to trading shall not combine the disclosure of inside information to the public with the marketing of their activities. Issuers, offerors and persons seeking admission to trading shall post and maintain on their website, for a period of at least five years, all inside information that they are required to disclose publicly.

2. Issuers, offerors and persons seeking admission to trading may, on their own responsibility, delay disclosure to the public of inside information referred to in Article 87 provided that all of the following conditions are met:

(a) immediate disclosure is likely to prejudice the legitimate interests of the issuers, offerors or persons seeking admission to trading;

(b) delay of disclosure is not likely to mislead the public;

(c) issuers, offerors or persons seeking admission to trading are able to ensure the confidentiality of that information.

3. Where an issuer, offeror or a person seeking admission to trading has delayed the disclosure of inside information in accordance with paragraph 2, it shall inform the competent authority that disclosure of the information was delayed and shall provide a written explanation of how the conditions set out in paragraph 2 were met, immediately after the information is disclosed to the public. Alternatively, Member States may provide that a record of such an explanation is to be provided only upon the request of the competent authority.

4. In order to ensure uniform conditions of application of this Article, ESMA shall develop draft implementing technical standards to determine the technical means for:

(a) appropriate public disclosure of inside information as referred to in paragraph 1; and

(b) delaying the public disclosure of inside information as referred to in paragraphs 2 and 3.

ESMA shall submit the draft implementing technical standards referred to in the first subparagraph to the Commission by 30 June 2024.

Power is conferred on the Commission to adopt the implementing technical standards referred to in the first subparagraph of this paragraph in accordance with Article 15 of Regulation (EU) No 1095/2010.

Article 111 – Administrative penalties and other administrative measures

1. Without prejudice to any criminal penalties and without prejudice to the supervisory and investigative powers of competent authorities listed in Article 94, Member States shall, in accordance with national law, provide for competent authorities to have the power to take appropriate administrative penalties and other administrative measures in relation to at least the following infringements:

- (a) infringements of Articles 4 to 14;
- (b) infringements of Articles 16, 17, 19, 22, 23, 25, Articles 27 to 41, Articles 46 and 47;
- (c) infringements of Articles 48 to 51, Articles 53, 54 and 55;
- (d) infringements of Articles 59, 60, 64 and Articles 65 to 83;
- (e) infringements of Articles 88 to 92;
- (f) failure to cooperate or to comply with an investigation, with an inspection or with a request as referred to in Article 94(3).

Member States may decide not to lay down rules for administrative penalties where the infringements referred to in the first subparagraph, point (a), (b), (c), (d) or (e), are already subject to criminal penalties in their national law by 30 June 2024. Where they so decide, Member States shall notify to the Commission, ESMA and to EBA, in detail, the relevant parts of their criminal law.

Article 143 – Transitional Measures

1. Articles 4 to 15 shall not apply to offers to the public of crypto-assets that ended before 30 December 2024.

2. By way of derogation from Title II, only the following requirements shall apply in relation to crypto-assets other than asset-referenced tokens and e-money

tokens that were admitted to trading before 30 December 2024:

(a) Articles 7 and 9 shall apply to marketing communications published after 30 December 2024;

(b) operators of trading platforms shall ensure by 31 December 2027 that a crypto-asset white paper, in the cases required by this Regulation, is drawn up, notified and published in accordance with Articles 6, 8 and 9 and updated in accordance with Article 12.

3. Crypto-asset service providers that provided their services in accordance with applicable law before 30 December 2024 may continue to do so until 1 July 2026 or until they are granted or refused an authorisation pursuant to Article 63, whichever is sooner.

(a) Member States may decide not to apply the transitional regime for crypto-asset service providers provided for in the first subparagraph or to reduce its duration where they consider that their national regulatory framework applicable before 30 December 2024 is less strict than this Regulation.

(b) By 30 June 2024, Member States shall notify to the Commission and ESMA whether they have exercised the option provided for in the second subparagraph and the duration of the transitional regime.

4. Issuers of asset-referenced tokens other than credit institutions that issued asset-referenced tokens in accordance with applicable law before 30 June 2024 may continue to do so until they are granted or refused an authorisation pursuant to Article 21, provided that they apply for authorisation before 30 July 2024.

5. Credit institutions that issued asset-referenced tokens in accordance with applicable law before 30 June 2024 may continue to do so until the crypto-

6. By way of derogation from Articles 62 and 63, Member States may apply a simplified procedure for applications for an authorisation that are submitted between 30 December 2024 and 1 July 2026 by entities that on 30 December 2024, were authorised under national law to provide crypto-asset services. The competent authorities shall ensure that Chapters 2 and 3 of Title V are complied with before granting authorisation pursuant to such simplified procedures

asset white paper has been approved or has failed to be approved pursuant to Article 17 provided that they notify their competent authority pursuant to paragraph 1 of that Article before 30 July 2024.

7. EBA shall exercise its supervisory responsibilities pursuant to Article 117 from the date of application of the delegated acts referred to in Article 43(11).



An Roinn Airgeadais
Department of Finance

Tithe an Rialtas. Sráid Mhuirfean Uacht,
Baile Átha Cliath 2, D02 R583, Éire
Government Buildings, Upper Merrion Street,
Dublin 2, D02 R583, Ireland

T:+353 1 676 7571
@IRLDeptFinance
www.gov.ie/finance