MiCA: An early global standard or an early mover disadvantage?

Back in May, I wrote about how engagement was intensifying as the EU sought to finalise its landmark legislative proposal on cryptoassets/stablecoins known as the Markets in Crypto Assets (MiCA) Regulation. To much fanfare, France concluded a political deal with the European Parliament and the European Commission at the 11th hour (well, 22.30 to be precise!) on the last day of its Presidency of the Council (30 June). This short commentary provides a snapshot of the agreement, initial reactions and analysis as to how MiCA might influence other jurisdictions' approaches to regulating digital assets.

So what was agreed in MiCA?: The first few minutes of a recent podcast with Commission DG FISMA's digital advisor Peter Kerstens and EP Vice President Eva Kaili provides a nice overview. In short, the Commission boils down MiCA's achievements into 5 buckets: i) legal certainty; ii) provisions for 'unbacked' crypto assets (white paper required but no registration/authorization needed); iii) provisions for issuers of stablecoins (authorisation, prudential supervision and reserve requirements) iv) provisions for Crypto Asset Service Providers (CASPs) including a license/approval regime, market integrity rules, oversight and prudential requirements and v) access for approved issuers and providers to an EU-wide passport.

So far, so good, I hear you say. But despite talk of legal certainty and a political agreement, many industry stakeholders are at a loss to understand the fine print of the deal when it comes to such basic aspects as definitions and scope. In fact, the fine print is still being discussed and amended! Here's just one example of lingering uncertainty:

What's an 'undertaking'?: Whilst the Commission's proposal initially sought to focus solely on stablecoins, explicitly carving out Decentralised Autonomous Organisations (DAOs), Decentralised Finance (DeFI) and Non-Fungible Tokens (NFTs), the French Presidency muddied the water. The political agreement on the scope (article 2 para 1) saw the Council position win out, stating 'This Regulation applies to natural and legal persons and undertakings that are engaged in the issuance, offer to the public and the admission to trading of crypto-assets or provide services related to crypto-assets in the Union and to any transaction, order or behaviour associated to crypto-assets, concerning market abuse rules'. The outgoing French Presidency asserted that the addition of 'undertaking' does not alter the scope (comment: in which case, what's the value in adding it?) and was supposed to provide an explanation to the EP and Commission regarding how undertakings differ from legal/natural persons – no explanation was ever given. As such, it remains unclear if and how DAOs, DeFI and NFTs are (or are not) treated by MiCA, with the Commission internally divided on the merits of such inclusion/exclusion.

Next steps on MiCA: The political agreement of 30 June marked an important milestone but not the end of the road. Technical trilogues will continue into September, which should (hopefully) provide some necessary clarity on, amongst other things, definitions and scope. Arguably, these quintessential issues should not be for technical trilogues but should rather have been clarified in the political agreement. However, it seems all sides were content to rush the deal through, in order that the French could claim the political credit for closing the deal in June. The current Czech Presidency is understood to be targeting an end September date for agreement by Ambassadors (Coreper) on a final text, which will then need to be formally endorsed in Council by Ministers and by a vote in the EP plenary. It seems likely that the legislation will be in on the statute books in the EU's Official Journal by the end of this year.

What next in the EU?: Once the final text of MiCA is available, it should be easier to understand the implications beyond stablecoins (Asset Reference Tokens in MiCA parlance) and unbacked cryptoassets (electronic money tokens). The European Commission is eager to work closely with national competent authorities and the European Supervisory Authorities (EBA and ESMA) to ensure appropriate and consistent implementation and enforcement of MiCA. On the one hand, this may suggest a pause before further legislation targeting DeFI, DAO and NFTs. On the other hand, given the institutional changes in 2024, some stakeholders believe this Commission would be wise move forward with the next round of draft legislation prior to its successor taking up its position in November 2024. This latter scenario seems more likely were the EP to push for such an approach. Either way, new rules beyond MiCA are unlikely to be applicable until 2025 at the earliest.

Will MiCA become the global standard?: Clearly many EU policymakers and politicians hope so. They cite the EU's General Data Protection Regulation as a precedent which MiCA might emulate. Arguably, MiCA does provide a legal framework for stablecoins which could be replicated elsewhere - the nature of the issues relating to stablecoins, which policymakers across the globe are seeking to address, are the same and not unique to the EU. That said, it seems unlikely other major financial jurisdictions such as the US and the UK will want to recreate an extremely rigid, prescriptive, rules-based playbook for regulating a fast-evolving industry and asset class. It's perhaps too early to say whether the MiCA framework will provide inspiration for others or whether a more pragmatic, principles-based approach, devolving powers to regulators who can amend the provisions more quickly to adapt to evolving circumstances, will be taken elsewhere. If this latter scenario materialises, MiCA might ultimately become a first-mover disadvantage for the EU.

So, what are other major jurisdictions doing? Indeed, the UK has already set in motion a process (UK FS and Markets Bill) to defer powers to the regulator to come up with rules for cryptoassets (recent HMT consultation) whilst an attempt at a bi-partisan Bill (Senator Kirsten Gillibrand (D-NY) and Senator Cynthia Lummis (R-WY)) has been launched in the US, designed to provide the CFTC rulemaking powers to regulate crypto. Given the mid-term elections in November it is unlikely the Bill will pass but it may frame future attempts to regulate digital assets in the US.

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