Hogan Lovells

The EU's Markets in Crypto Assets (MiCA) regulation

18 July 2024

On 26 June 2024, Hogan Lovells, in collaboration with Buen Crypto, hosted an event to discuss imminent implications for firms who will be subject to the Markets in Crypto Asset Regulation (MiCA) due to come into force from 30 December 2024.

Hogan Lovells hosted an in-house legal panel which looked at some practical and regulatory challenges that firms may face with MiCA, with a particular focus on France and Ireland, which have sophisticated crypto asset industries. With regards to how a regulator will treat crypto asset firms, a useful starting point is the existing Virtual Asset Service Provider (VASP) regime, which in Europe is implemented through a transposition of the fifth anti-money laundering directive (5AMLD). The panel noted that Poland has in excess of 1,000 VASP registrations, with Lithuania the next highest with around 500. Meanwhile France has 107 and Ireland has 14. However, VASP requirements and registration processes can vary among member states. The panel noted that it is difficult to rely on these numbers alone as an indicator of choice of jurisdiction for MiCA authorisation as VASPs need to register in every jurisdiction in which they operate and will therefore have a number of registrations.

From VASP to CASP

Under existing AML rules in the EU for VASPs, 5AMLD, requires registration in each Member State that a VASP operates in. The Transfer of Funds Regulation in the EU attempts to deal with this through removing the requirements set out in 5AMLD for VASPs and removing the requirement for registration. However, the difficulty is that because 5AMLD is a directive, it will already have been transposed into national legislation, meaning domestic legislation will be needed to remove the VASP registration requirement. On the other hand, MiCA promotes passporting and removing any internal barriers to the EU internal market.

In Ireland and France, the regulatory guidance is that the VASP registration requirements will fall away. As such, it is important that when pursuing a MiCA authorisation, firms should undertake jurisdictional reviews to confirm whether they will still need to retain / apply for a VASP registration in their target EU member states.

The panel discussed how regulators will consider this transition from VASP to CASP and whether there are any arrangements in place to facilitate this. MiCA allows a transitional period of 18 months should firms already be operating in a Member State. However, in a bid to speed this along, Member States have been encouraged to reduce the transitional period to 12 months. Ireland has a 12 month transitional period whereas France will keep the full 18 months.

In Ireland, in terms of the transition, the feedback statement to the Department of Finance consultation has determined that the AML registration regime and MiCA are different and therefore there will be no ‘topping up’ or simplified processes.

The Central Bank of Ireland (CBI) recently released a statement stating that only those firms that have been registered as a VASP, and have provided their services in accordance with applicable law before 30 December 2024 can avail of the MiCA transitional arrangements.

The CBI’s experience of assessing applications for VASPs, since commencement of the regime highlights that a period of at least ten months is required to conclude the assessment of a VASP application. Therefore, the CBI stated that firms that are considering providing CASP services should focus their efforts on preparing for a CASP application rather than seeking a VASP registration at this time.

The panel did note that of potential comfort to registered VASPs is the CBI’s assertion that it will take existing supervisory history and engagement with a firm into consideration as part of the authorisation assessment.

France’s transition is slightly more streamlined. Firms that are already registered will be able to operate in France under their existing permissions for 18 months. However, France has also implemented an enhanced regime, effective from 1 January 2024, for those seeking to operate in France before MiCA comes into effect. The enhanced regime seeks to ‘top up’ the existing requirements to be broadly in line with MiCA and therefore help firms to transition faster. The panel noted that in 2023, there were 49 registrations under the simplified registration process to avoid having to go through the enhanced process, almost doubling the number of registrants.

The panel noted, that this will leave an interesting situation in the domestic market in France as next year, feasibly, there could be firms operating in France under the simplified process, enhanced process and those who have passported into France under a MiCA authorisation.

Passporting

On the theme of passporting, the panel discussed the topic of jurisdictions of choice. With firms only needing one authorisation to be able to passport across the EU, it will be interesting to see what jurisdictions will be the choice for crypto asset firms.

France has historically been a sought after location for businesses to locate themselves. Aside from Paris being a desirable location to do business, it is also a financial centre with great access to professional services. France has long been making a play to attract the crypto asset community to Paris with the introduction of a number of regulations / licenses. It has since become a hub for Web3 technologies and is seen as a progressive and credible location that has garnered strong expertise. That being said, France does have stringent labour laws making the cost of hiring expensive. The cost of compliance is also high.

Meanwhile Ireland has a favourable corporate taxation regime making it a draw for firms. The panel also noted that with Dublin being English speaking with close ties to the UK and the US, it presents itself as a great location to not only be a hub for the EU but also a conduit for the rest of the world. Dublin also has deep financial services expertise which leaves the CBI well placed to administer this regime. However, the CBI can be seen as a tough (but very thorough and credible) regulator (as evidenced by the VASP regime) and therefore the timing for application approvals may be a factor taken into consideration by firms.

On the question of passporting, the panel noted that the grounds for restricting passporting under MiCA are very limited. One area where firms may be blocked is under AML requirements. If a Member State has continued its requirement for a firm to be registered in its jurisdiction for AML purposes and a firm has not done this, its passporting may be blocked.

Technical requirements

As implementation dates draw closer, the panel discussed some of the key things that need to be considered. It was noted that the Regulatory Technical Standards (RTS), though in draft form, are the best indicators that firms should look to in preparation for implementation. Domestic authorisation regimes will be based on the RTS, which include requirements around developing a programme of operations for 3 years, prudential requirements, governance and controls, business continuity, ensuring the fitness and probity of the board and information on the shareholding structure.

The panel also noted that firms will have to consider the other regulatory requirements that may be in place in particular the Digital Operational Resilience Act (DORA).

With regards to Ireland specifically, Gerry Cross (CBI Director of Financial Regulation: Policy & Risk) in a speech at Blockchain Ireland week on 28 May 2024 noted that the CBI plans to outline its authorisation process in detail at an industry event on 18 July 2024 and they will be published thereafter. The CBI intends to open its MiCA authorisation gateway in early Q3 2024. The Director encouraged firms to engage with the CBI as soon as possible. He also set out some high-level expectations for firms to prepare now for the MiCA authorisation process. Applicants can expect the authorisation process in Ireland to be thorough, robust and involved.

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