THE ITALIAN LAW IMPLEMENTING THE EU MICAR REGULATION: A "MIFIDISATION" OF CRYPTO-ASSETS?

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EU Finance Alert

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On 13 September 2024 Legislative Decree no. 129/2024 (Decree no. 129), implementing the MiCAR Regulation (Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets – MiCAR) was published in the Italian Official Gazette.

While Decree no. 129 itself has come into force on the following day, it explicitly cross refers to the relevant paragraphs of the MiCAR with regard to the entry into force of the specific provisions on the matter.

Decree no. 129 does not generally contain a repetition of the MiCAR provisions; rather, it appoints specific state bodies (Banca d'Italia and Consob) as supervising authorities for the entities operating in the crypto-asset sector identified by the MiCAR and outlines the authorities' powers. In addition, Decree no. 129 amends a number of provisions of the Banking Act and the Finance Act applicable to the operators of the crypto market.

In more details, the most important aspects introduced by Decree no. 129 are:

1. The conferring of supervisory powers to Bank of Italy (the Italian central bank) and Consob (the Italian security and exchange commission) depending on the category of crypto-asset operator;
2. The segregation of funds of crypto-asset service providers, implementing Article 70 of MiCAR;
3. A set of rules to govern crisis and insolvency of crypto assets service providers and issuers;
4. A specific rule (Article 39 of Decree no. 129) to exempt crypto assets falling within the MiCAR from Italian rules regulating financial products;
5. Terms and requirements for registration of crypto asset service providers.

The approach adopted by the Italian legislator - which, however, does not seem to us to deviate from the approach of the European Union - follows in the wake of principles used for other categories of supervised entities. With some approximation, it can perhaps be said to resemble the MiFID approach.

SUPERVISORY POWERS OF BANK OF ITALY AND CONSOB

Decree no. 129 identifies Bank of Italy and Consob as the competent supervisory authorities in Italy. Both authorities are also entrusted, pursuant to article 3 of Decree no. 129, with the powers to issue technical acts and secondary regulations implementing the MiCar.

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Decree no. 129 also sets out the allocation of the competence among Consob and Bank of Italy based on the specific matters, substantially reflecting the roles conferred thereto under the Legislative Decree no. 385 dated 10 September 1993 (Consolidated Law on Banking) and the Legislative Decree no. 58 dated 24 February 1998 (Consolidated Law on Finance).

In particular, Bank of Italy is in charge of the authorization procedure of the ARTs *(Asset-Referenced Token)*, in consultation with Consob. Article 14 of Decree no. 129 then confirms that Bank of Italy is empowered as the competent authority, for the market access of EMTs *(Electronic Money Tokens)* and the relevant ongoing supervision as it is currently the case for electronic money.

Consob is in charge, *inter alia,* of the authorization procedure, of all CASPs (*Crypto-Asset Service Providers*) in consultation with the Bank of Italy, except when the applicant entity is an electronic money institution (Istituto di Moneta Elettronica or *IMEL*) or a payment istitution (Istituto di Pagamento or *IP*), in which cases Bank of Italy remains the competent body for the authorisation procedure.

Moreover, the main inspection powers (including those provided by Article 94 of MiCAR) and supervision tasks are attributed to Consob, who is also vested with the powers of preventing the offering of crypto-activities which do not qualify as ART or EMT in the absence of white paper notification and providing services for crypto-activities without authorisation.

SEGREGATION OF FUNDS OF CRYPTO-ASSET SERVICE PROVIDERS

Article 26 of Decree no. 129 introduces an asset segregation regime in relation to crypto-assets and funds held by CASPs for the provision of their services.

These crypto-assets and funds constitute assets that are separate in all respects from the CASP own assets and other customers' assets; no actions by creditors of the CASP or creditors of any custodian or sub-custodian or in their interest are allowed on those assets. Actions by creditors of individual customers are permitted within the limits of the assets owned by the debtor with the CASP.

Moreover a CASP is forbidden to use for their own account crypto-assets or funds held on behalf of customers.

Similar principles of asset segregation also apply to ARTs issuers and issuers of significant EMTs, pursuant to article 19 of Decree no. 129 and to article 38 of the MiCAR: ARTs issuers may in no case use, in their own interest or in the interest of third parties, the assets being part of the asset reserve (riserva di attività), except for investing in highly liquid financial instruments with minimal market, credit and concentration risks. Furthermore, no actions by or in the interest of the ART issuer's creditors, nor those of the depositary's creditors, are allowed on the segregated assets; legal and judicial set-off does not operate and no contractual set-off can be agreed with respect to the depositary's claims against the ART issuer.

CRISIS AND INSOLVENCY OF CRYPTO ASSETS SERVICE PROVIDERS AND ISSUERS

Under Decree no. 129, ARTs issuers - upon the occurrence of the crisis or insolvency events provided therein and on the basis of their level of gravity – may be subject to an extraordinary administration (*amministrazione*

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straordinaria) in accordance with article 24 and to a compulsory administrative liquidation (*liquidazione coatta amministrativa*) pursuant to article 25.

CASPs, in case of crisis or insolvency are made subject to the relevant procedures and rules provided for by the Consolidated Law on Finance applicable to professional securities dealer (the companies defined as "Società d'Intermediazione Mobiliare or "SIM", with the exception of Class 1 SIMs[1])

EXEMPTION OF CRYPTO ASSETS FALLING WITHIN MICAR FROM ITALIAN RULES REGULATING FINANCIAL PRODUCTS (ARTICLE 39 OF DECREE NO. 129)

With the entry into force of the MiCAR, from a regulatory point of view, three different macro-categories of crypto assets have been defined:

Crypto assets classified as financial instruments, within the meaning of MiFID 2;

Crypto assets regulated by MiCAR (ARTs, EMTs, and the so-called "other than" category (i.e. those assets that are different from the ARTs and the EMTs);

Crypto-assets that, not falling typologically within the scope of the traditional financial regulation (nor of MiCAR), will possibly fall within the regulatory scope of electronic money directives (such as the EMD 2[2]) and payment services directive (such as the PSD 2[3]) or within the scope of existing consumer protection.

In this respect, Article 39 of Decree no. 129 explicitly provides that the regulation of financial products set forth in the Consolidated Law on Finance does not apply to crypto-assets falling within the scope of the MiCAR (substantially distinguishing the category sub (i) above from the one in (ii) above). As the applicable regulatory regime of each type of crypto assets depends on its specific characteristics, the correct legal qualification of the asset is clearly fundamental, as it leads to the identification of the relevant applicable discipline and the category of market participants authorised to manage such assets. Nonetheless, defining the dividing line between financial instruments (under MiFID 2) and crypto-assets included in the scope of MiCAR still is not easy in practical terms, considering the myriad facets that crypto-assets can have.

To help the operators in such a challenging exercise, appropriate guidelines will be issued by ESMA (the European Securities and Markets Authority) within 30 December 2024. In addition. on 29 January 2024 ESMA already issued general principles for the classification of crypto-assets in a consultation paper entitled "*Consultation paper on the draft guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments*". Such principles include the following: (i) the assessment has to be made on a case-by-case basis; (ii) "technology neutrality" i.e. the technological structure of an asset is irrelevant for the purpose of the assessment – for instance, if an asset is issued by means of a Distributed Ledger Technology such as blockchain, this does not make it a crypto-asset by default; (iii) a "substance over form approach" needs to be adopted to determine if a crypto-asset qualifies or not as a financial instrument.

The above is particularly important, considering the position of case law so far. Italian courts who have ruled in recent years in Italy on cases involving crypto assets – in the absence of a specific regulation on crypto-assets - have often applied the general principles applicable to securities and regulated assets. In particular, in one of the leading cases before the enactment of Decree no. 129 (i.e. decision no. 5116/2023 issued by Tribunale di Milano), the Criminal Court in Milan regarded the issue of a cryptocurrency by a company as an unauthorised

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issue of electronic money and sanctioned the director for illegal financial activity, as such a company was not licensed to banking or professional fund raising in Italy.

SUMMARY OF TERMS AND REQUIREMENTS FOR REGISTRATION OF CRYPTO ASSET SERVICE PROVIDERS

Before the implementation of MiCAR, operators in the crypto-asset sector (generally classified in the category of virtual asset service providers or VASPs) in Italy were subject to a simplified regulatory regime, based on a mere registration procedure with the Organismo Agenti e Mediatori (OAM – the same supervisory authority of loan brokers).

Compliance with MiCAR will pose a significant challenge for Italian VASPs, as compliance standards under MiCAR are significantly higher than those currently in place.

Decree no. 129 states that VASPs who are duly registered in the "Virtual Currency Operators Register" held by the OAM as of the date of 27 December 2024 and who apply for authorisation by 30 June 2025 in Italy or in another EU Member State may transiently continue to operate in Italy until 30 December 2025 (or until the date on which the authorisation is granted or rejected) on the basis of pre-existing rules.

In order to benefit from such a transitional regime, Italian VASPs will have to deliver an appropriate notice to OAM. If the application for authorisation is submitted to the competent authority of another EU Member State, the relevant notice must also be delivered to the Bank of Italy and Consob. In the event that the application is denied, VASPs must promptly close their existing relationships with Italian customers and in any case no later than 60 days from the date of the denial.

Moreover, all VASPs registered in Italy must publish by 31 May 2025 on their website and provide to their customers, adequate information on their plans and a summary of the measures taken to comply with MiCAR (or for the orderly termination of relationships where they do not intend to apply for authorisation).

FOOTNOTES

[1] SIMs (securities investment firms) are investment firms authorized to carry out investment services or activities pursuant to the Consolidated Law on Finance. Class 1 SIM are those SIMs that carry out trading on their behalf, underwriting and/or placement with underwriting, or underwriting and whose balance sheet assets are not lower than EUR 30 billion - which, due to their size and operational complexity, fall under the new definition of credit institution for the purposes of the Capital Requirement Regulation.

[2] Directive (EU) 2009/110/EC of the European Parliament and of the Council of 16 September 2009 – known as Payment Service Directive 2 (PSD 2).

[3] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 – known as Electonic Money Directive 2 (EMD2).

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