

GERMANY'S NEW FINANCIAL MARKET DIGITALISATION ACT

On 23 October 2023, the German Ministry of Finance (BMF) published a draft Act on the Digitalisation of the Financial Markets (*Finanzmarktdigitalisierungsgesetz* – FinmadiG). FinmadiG is intended to align the German financial regulation regime with key parts of the EU's new Digital Finance Package, which includes comprehensive new regulations on markets in crypto-assets (MiCA) and digital operational resilience (DORA). Amongst others, FinmadiG introduces a new Act on the Supervision of Crypto Markets (*Kryptomärkteaufsichtsgesetz* – KMAG) and amends numerous German financial market laws such as the German Banking Act (KWG), the German Securities Trading Act (WpHG), the German Investment Institutions Act (WpIG) and the German Capital Investment Code (KAGB).

FinmadiG is intended to align German law with the directly applicable EU regimes under Regulation (EU) 2023/1114 ([MiCA](#)), Regulation (EU) 2022/2554 ([DORA](#)), Regulation (EU) 2023/1113 (Funds Transfer), as well as Directive (EU) 2022/2556 (DORA-Directive). FinmadiG determines the relevant authorities for supervising compliance with, and enforcing, MiCA and DORA (mainly the German financial services supervisory authority BaFin). It also stipulates additional powers for these authorities and sets out sanctions and transitional regimes. Its amendments to existing financial regulation laws include aligning the definitions of crypto-assets and introducing new obligations under the German Anti Money Laundering Act (GWG).

FINANCIAL INSTRUMENTS AND CRYPTO-ASSETS

The new MiCA regime provides for full harmonisation of the law in relation to issuance of, and services provided in relation to, crypto-assets across the EU. Unlike the current German regulatory regime for cryptoassets, it stipulates a strict separation approach with instruments clearly qualifying either as crypto-assets under MiCA or as financial instruments under MiFID.

Crypto-assets: old vs. new

Current German law defines crypto values (*Kryptowerte*) as digital representations of a value which is not issued or guaranteed by a central bank

Crypto-assets

- German law already regulates crypto-assets. Defined as crypto values, they qualify as a specific category of financial instruments.
- Once in force, the MiCA definition of crypto-assets will replace the current German law definitions and establish a new category of regulated product.
- Crypto-assets not covered by MiCA may still qualify as cryptographic instruments which will continue to be regulated under German law

or public authority and which does not have the legal status of currency or money, but which is accepted by natural or legal persons as a means of exchange or payment on the basis of an agreement or actual practice or which serves investment purposes and which can be transferred, stored and traded electronically. It excludes e-money or monetary values as defined under the German Payment Services Act (ZAG). Such crypto values qualify as financial instruments and, therefore, trigger regulatory requirements, including licence requirements and rules of conduct.

Under the new KMAG, crypto-assets are defined in accordance with MiCA, *i.e.*, digital representations of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology. As stated, crypto-assets only fall under MiCA if they do not qualify as financial instruments under MiFID.

Additional category of cryptographic instruments

To ensure that instruments which qualify as crypto values under current German law but do not fall under MiCA remain regulated, FinmadiG proposes a new category of regulated instruments – "cryptographic instruments".

Cryptographic instruments are defined as digital representations of a value which is not issued or guaranteed by a central bank or public authority and which does not have the legal status of currency or money, but which is accepted by natural or legal persons as a means of exchange or payment on the basis of an agreement or actual practice or which serves investment purposes and which can be transferred, stored and traded electronically. There is a carve out for e-money and monetary values as defined under ZAG consistent with the existing law, as well as for crypto-assets within the meaning of MiCA, crypto securities or crypto funds. FinmadiG does not include any examples of assets that would fall under this new definition; however, the German legislator did not want to leave room for any gaps given the ongoing innovation in this area.

As it would not be caught by MiCA, FinmadiG assumes that there is a need for national regulation of custody business in respect of cryptographic instruments. Therefore, the current licensable activity of crypto custody business will be limited to cryptographic instruments and renamed as "qualified crypto custody business".

TRANSITIONAL REGIME

Pursuant to section 49 KMAG, crypto-asset service providers properly licensed under the current German regime which were providing their services on 29 December 2024 may continue to do so for a transitional period ending on 31 December 2025.

If they require a licence under MiCA, they will need to renew their licence under the new EU regime before the transitional German regime expires on 31 December 2025. This is earlier than the 1 July 2026 deadline provided for under MiCA. FinmadiG allows such service providers to apply using a simplified procedure, which will be detailed by an ordinance of the BMF and Deutsche Bundesbank.

If they do not require a licence under MiCA but instead must notify the relevant authority submitting supporting documentation (as is the case for, amongst others, credit institutions, investment firms and e-money institutions), the

service provider would need to notify the relevant authority by the end of the periods provided for under MiCA.

TREATMENT OF CLIENT CRYPTO-ASSETS INCLUDING RESERVE ASSETS

FinmadiG also introduces and clarifies requirements around reserve assets that are required to be held by issuers of asset-referenced tokens under MiCA. The reserve assets must be held separately from other assets and other reserve assets and seizures and compulsory enforcement of reserve assets shall only take place based on the claims specified under article 39 MiCA. A corresponding set-off prohibition also applies. The reserve assets are not included in the insolvency estate if insolvency proceedings are opened against the assets of the issuer. Any crypto-assets held in custody for a client as part of any crypto custody service are deemed to belong to the client. This also applies to the share of crypto-assets in joint custody to which the customer is entitled, as well as to private cryptographic keys held in isolated custody. If the customer does not agree to segregation in insolvency proceedings over the institution's assets as part of a transfer of the entire portfolio held in custody by the institution to another institution that provides crypto custody, the customer shall bear the costs of segregation.

ADDITIONAL POWERS AND SANCTIONS

BaFin may issue orders to institutions and other relevant persons that are suitable and necessary to prevent or remedy violations of MiCA or other regulatory provisions. This includes irregularities in crypto markets that could jeopardise the security of custodied assets or impair orderly public offering, admission to trading or trading of crypto-assets or offering of crypto-asset services, or otherwise cause significant disadvantages to the economy as a whole or to the financial markets. The requirements on granting and withdrawing authorisation and the ongoing enforcement powers correspond to those in other financial market laws and supplement MiCA.

BaFin can order that a public offer or admission to trading must be suspended for up to 30 days if there are reasonable grounds to suspect a violation of MiCA or KMAg. It must prohibit a public offer if asset-referenced tokens are publicly offered without an approved crypto-asset whitepaper in accordance with MiCA. KMAg includes further intervention powers in relation to crypto-asset whitepapers and marketing communications.

Regarding the MiCA restrictions on issuing asset-referenced tokens used widely as a means of exchange, BaFin may, in particular, introduce a minimum denomination or limit the amount issued. BaFin is entitled to limit the amount of an asset-referenced token to be issued or prescribe a minimum denomination if the European Central Bank (or a central bank of a EU member state outside the eurozone) determines that one of the aforementioned types of token poses a threat to the smooth functioning of payment systems, monetary policy transmission or monetary sovereignty, and shall determine the upper limit or minimum denomination to be applied.

FURTHER CHANGES TO FINANCIAL REGULATION LAWS

A further change of the WpHG, KWG and WpIG concerns underlyings for derivatives and units of account (*Rechnungseinheiten*). FinmadiG clarifies that crypto-assets do not qualify as units of accounts and therefore crypto-assets must be defined as underlying for derivatives on a stand-alone basis. This will

put an end to the debate to what extent crypto-assets automatically qualify as financial instruments based on the argument that they are units of account.

IMPLEMENTATION OF DORA

FinmadiG also introduces amendments to align the existing German financial services regime with DORA. As DORA aims to standardise fragmented and complex regulations concerning digital resilience, implementing DORA in Germany requires changes to several laws. It confirms that BaFin is in most cases the relevant authority which will enforce DORA and it is provided with additional powers accordingly. For entities not supervised by BaFin (such as insurance brokers, which are supervised by chambers of commerce and industry and other entities supervised by local authorities), the enforcement of DORA lies with such relevant authorities, which are provided with equivalent powers for their respective remits.

NEXT STEPS

The KMAG will enter into force on 1 July 2024, with the amendments to the other financial markets laws to follow on 30 December 2024, in line with implementation deadlines for MiCA. Industry associations and other market participants have submitted comments on the ministerial draft, criticising, inter alia, the national regulation of custody business in respect of cryptographic instruments outside of MiCA. The next step in the legislative process will be the publication of a government draft.

Service providers who already provide services relating to the instruments described above need to be aware of the exact qualification of their instruments under the new regime as this is relevant to determine which steps such service providers need to undertake. There may be a need to apply for an authorisation as a crypto-asset service provider under MiCA, or for an existing authorised credit institution to notify the regulator of an intention to provide such services.

With DORA applying from 17 January 2025, financial services providers in Germany will also have to review their processes to comply with the new requirements. For further information, please see our detailed client briefings on [MiCA](#) and [DORA](#).

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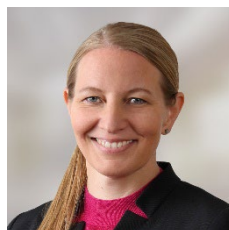
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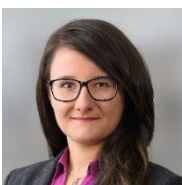
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