

ALLEN & OVERY

Interplay between MiCAR and PSD3/PSR

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Agenda

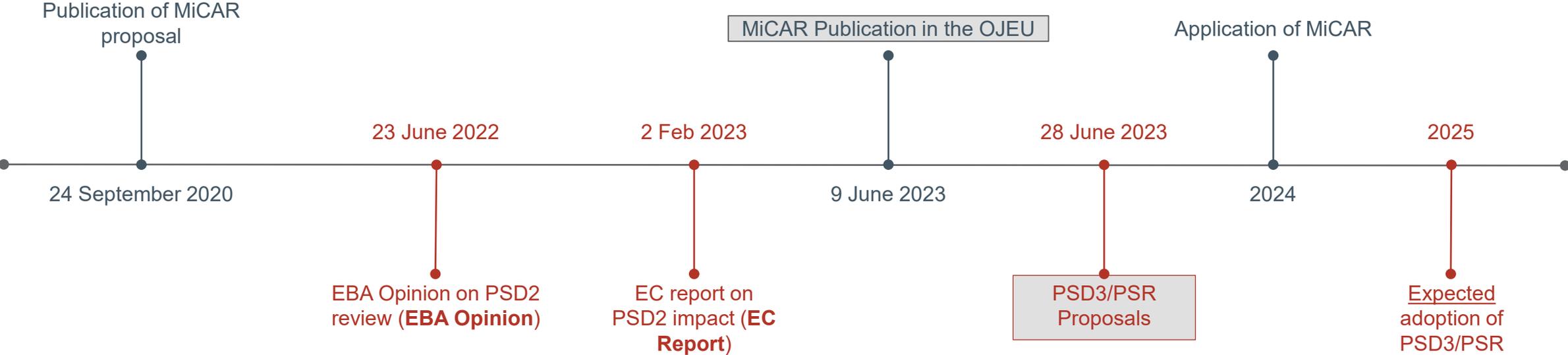
01 Timeline

02 Key areas of interplay

03 Looking into the future



Timeline



PSD3/PSR Package – Overview

PSD2 and EMD2 will be repealed and replaced by:

1 • PSD3 Proposal:

- Licensing and change of control
- Prudential and safeguarding
- Internal governance rules
- Rules on agents, branches, outsourcing and electronic money distributors
- Supervision of payment institutions

2 • PSR Proposal:

- Transparency requirements
- SCA, liability, rights and obligations of PSU and PSP



Setting the scene

MiCAR position: *“EMT shall be deemed to be e-money”* (article 48(2) MiCAR)

01

EBA Opinion:

- “[...] the potential future revised PSD2 [should] *pay close attention on the treatment of e-money tokens (EMTs), the issuers of which are proposed to be required to conform to requirements under the EMD2, and which are proposed to fall in scope of the definition of ‘funds’ for the purposes of PSD2* “
- “[...] special regard should be had to those *ARTs that are identified as being used widely as a means of exchange, including on whether the tokens should fall under the scope of the definition of ‘funds’ under Article 4(25) of PSD2, how the payment transactions with these tokens will be treated, and whether it is required to apply SCA to them*”
- “[...] it would be worth ensuring that the legal framework under MiCA and a potential revised PSD2 ensures *the same level of consumer protection and rights to the PSUs when carrying out payment transactions, irrespective of the underlying technology used*”

02

EC Report

- “There is a need for a close interplay between PSD2, MICA and the future regulation of CBDCs [...] including:”
 - Revising the definition of *funds* in the PSD2 to *cover e-money tokens*;
 - Adding *“quasi-fund”* definition to cover *asset-referenced tokens*;
 - [...]”

PSD3/PSR position

03

EC PSD3/PSR impact assessment

- “*New means of payment* have been developed since PSD2 was adopted, such as instant payments or e-money tokens (EMTs, a type of crypto asset)”
- “[...] *payment transactions with EMTs are automatically covered by the provisions of the PSD2 and EMD2 which apply to e-money*”.
- “*To preserve the technological neutrality of the regime applicable to various categories of e money, it would not be advisable to have different requirements applicable to e money tokens (DLT based e money) and other forms of e money (non DLT based).*”

04

PSD3/PSR Position:

- PSR Recital 29: “[...] *MiCAR lays down that electronic-money tokens shall be deemed to be electronic money. **Electronic money tokens are therefore included, as electronic money, in the definition of funds in this Regulation.***”
- Article 3(3) PSR: “*‘funds’ means central bank money issued for retail use, scriptural money and **electronic money***”;

Key areas of interplay

- 01 **Complementarity:** qualification of EMTs as “e-money”
- 02 **Overlap:** between payment services and crypto-asset services (CAS)
- 02 **Supervisory cooperation:** between MiCAR and PSD3/PSR CAs



Complementarity :
qualification of EMT as
“e-money”



MiCAR and PSD3/PSR: complementary regimes

Applicability of PSD3/PSR provisions (by cross-reference in MiCAR to Titles II and III of EMD2)

- Shareholding change of control notifications
- Initial capital requirements
- Own funds
- Activities that EMI may carry out (other than e-money activities)
- Out-of-court complaints and redress procedures for the settlement of disputes

MiCAR requirements applicable specifically to EMT (deviating from PSD3/PSR)

- Issuance and redeemability requirements
- Prohibition of granting interest
- Liability of issuers
- Safeguarding & reserve of assets requirements
- Recovery and redemption plans

Applicability of other PSD3/PSR provisions (consequence of qualification of EMTs as “funds”)

The principle “*same services, same rules, same obligations*” should apply

01 Possible qualification of EMI EMT wallets as “payment accounts”?

- ‘electronic money services’ means “*the issuance of electronic money, the maintenance of payment accounts storing electronic money units, and the transfer of electronic money units*” (Article 4(52) of PSR)
- payment account is “*an account held by a payment service provider in the name of one or more payment service users which is used for the execution of one or more payment transactions and allows for sending and receiving funds to and from third parties*” (Article 3(15) PSR)
[EMI are authorised under MiCAR to provide custody services]
- payment transaction is “*an act of placing, transferring or withdrawing funds, based on a payment order placed by the payer, or on his behalf, or by the payee, or on his behalf, irrespective of any underlying obligations between the payer and the payee*” (Article 3(5) PSR)



Applicability of other PSD3/PSR provisions (consequence of qualification of EMTs as “funds”)

02

Applicability of SCA to EMT transfers?

(Article 85 PSR)

1. ~~Member States shall ensure that a~~ A payment service provider ~~applies~~shall apply strong customer authentication where the payer:
 - (a) accesses its payment account online;
 - (b) accesses payment account information;
 - ~~(bc) initiates~~ places a payment order for an electronic payment transaction;
 - (ed) carries out any action through a remote channel which may imply a risk of payment fraud or other abuses.



Applicability of other PSD3/PSR provisions (consequence of qualification of EMTs as “funds”)

03 *Applicability of new anti-fraud measures to EMT?*

a

Verification of payee details by the payee’s PSP
[PSU may opt out]

b

Payer’s PSP must provide payers with post-transaction information on payees allowing to unambiguously identify the payee
[payee’s commercial trade name to be provided]

c

Additional transaction monitoring mechanisms
[based on, i.a. environmental and behavioural characteristics of PSU]

d

Data exchanges between PSP via information sharing arrangements

e

Customer warnings and staff training
[alert customers on new forms of payment fraud]



Applicability of other PSD3/PSR provisions (consequence of qualification of EMTs as “funds”)

04 *Applicability of liability rules to EMT transfers?*

01 Stricter liability requirements for PSP

02 Impersonation fraud

03 Liability of technical service providers



Overlap:
between payment services
and CAS



MiCAR and PSD3/PSR services

MiCAR crypto-asset services

Article 3(16) MiCAR

- (1) providing custody and administration of crypto-assets on behalf of clients;
- (2) operation of a trading platform for crypto-assets;
- (3) exchange of crypto-assets for funds;
- (4) exchange of crypto-assets for other crypto-assets;
- (5) execution of orders for crypto-assets on behalf of clients;
- (6) placing of crypto-assets;
- (7) reception and transmission of orders for crypto-assets on behalf of clients;
- (8) providing advice on crypto-assets;
- (9) providing portfolio management on crypto-assets;
- (10) providing transfer services for crypto-assets on behalf of clients.

PSD3/PSR payment & e-money services

Payment services (Annex I PSR)

- (1) Services enabling cash to be placed on and/or withdrawn from a payment account.
- (2) Execution of payment transactions, including transfers of funds from and to a payment account, including where the funds are covered by a credit line with the user's payment service provider or with another payment service provider.
- (3) Issuing of payment instruments.
- (4) Acquiring of payment transactions.
- (5) Money remittance.
- (6) Payment initiation services.
- (7) Account information services.

E-money services (Annex II PSR)

Issuance of electronic money, maintenance of payment accounts storing electronic money units and transfer of electronic money units.

Overlap between CAS and payment services

MiCA regulates the issuance of crypto-assets, not the provision of payment services by the issuers or by CASPs

- 1 Provision of crypto asset services (**CAS**) by EMI/CI
- 2 Provision of payment services by CASPs



Provision of CAS by EMI

1) No prior CASP authorisation for certain CAS provided by EMI (*Article 60(4) MiCAR*)

- ✓ EMI “shall only provide custody and administration of crypto-assets on behalf of clients and transfer services for crypto-assets on behalf of clients with regard to the e-money tokens it issues [...]”
- ✓ Notification to the CA of the information in Article 60(7) MiCAR, “at least 40 working days before providing those services for the first time”
- ✓ In addition to payment and e-money services, EMI are authorised to provide “**business activities other than the provision of payment services or electronic money services**, having regard to applicable Union and national law.” (Article 10(1) of PSD3)

2) No prior CASP authorisation for EMT distribution by EMD2 distributors (*Recital 92 MiCAR*)

- ✓ Distribution of EMT by EMD2 distributors would amount to the activity of placing of crypto-assets under MiCAR
- ✓ EMD2 distributors may distribute EMT on behalf of EMT issuers without prior authorisation as CASP

3) Lighter regime applicable to CI (based on a mere notification requirement (*Article 60(1) MiCAR*))



Provision of payment services by CASP

CAS include “transfer services for crypto-assets”.

However, “*depending on the precise features of the services associated to the transfer of EMTs, such services could fall under the definition of payment services in [PSD3/PSR]*”. (Recital 93 MiCAR)

CASP “*may themselves, or through a third party, provide payment services related to the [CAS] they offer provided that the [CASP] itself, or the third party, is authorised [under PSD3/PSR]*” (Article 70(4) of MiCAR)

Where payment services are provided, CASP shall inform their clients of :

- the nature and terms and conditions of those services;
- whether those services are provided by them directly or by a third party.



Cooperation between
MiCAR and
PSD3/PSR authorities



Cooperation between MiCAR and PSD3/PSR supervisory authorities

EBA Opinion: “clarifying how the supervisory frameworks [i.e. MiCAR and PSD3/PSR] will interact and how the supervisory architecture will be developed in order to ensure that these supervisors can closely cooperate with each other in carrying out their respective tasks and duties, including in the context of supervisory colleges envisaged under MiCA.”

Risks of lack of cooperation and coordination:

- ✓ Double sanctions for the same breach
- ✓ Spillover/contamination effect from one business branch to another
- ✓ Lack of coordination
- ✓ Dual reporting and administrative burdeon
- ✓ Reputational risks

Cooperation between MiCAR and PSD3/PSR supervisory authorities

Broad principle of cooperation set out in MiCAR as well as PSD3/PSR

MiCAR

Article 82(4): “Competent authorities shall exercise their functions and powers [...] *in collaboration with other authorities*”;

Article 85: “Where an *issuer of crypto-assets*, including asset-referenced tokens or e-money tokens, *or a crypto-asset service provider engages in activities other than those covered by this Regulation*, the competent authorities shall cooperate with the authorities responsible for the supervision or oversight of such other activities [...]”.

Article 93: “In the exercise of their powers to impose administrative penalties and other administrative measures under Article 92, competent authorities shall [...] coordinate their action *in order to avoid duplication and overlaps* when exercising their supervisory and investigative powers and when imposing administrative penalties and other administrative measures *in cross-border cases*.”

PSD3/PSR

Article 93: “(3) In the exercise of their investigatory and sanctioning powers, *including in cross border cases*, competent authorities *shall cooperate with each other and with other authorities from any sector concerned* [...] and ensuring the mutual assistance to other competent authorities concerned as necessary for the effective enforcement of administrative sanctions and administrative measures.

[...]

(4) The *authorities from other sectors concerned* [...] shall cooperate with competent authorities for the effective enforcement of administrative sanctions and administrative measures.”

Looking into the future



Looking into the future

Future EC report on payment services involving EMTs

“By 30 December 2024 [...] the Commission shall present a report [...] on the latest developments with respect to crypto-assets, in particular on matters that are not addressed in [MiCAR] [including] an assessment of the treatment of services associated to the transfer of e-money tokens, where not addressed in the context of the review of [PSD2]” (Article 142 MiCAR)

Possible future merger between PSD3/PSR and MiCAR?

EC Report: “From a broader perspective, the issue of the possibility of merging PSD2, EMD2 and MiCA may also be considered” [less likely however]

Open banking and open finance

FIDA proposal: evolution from “open banking” to “open finance”



Questions?

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