

# Interview with Björn-Gunnar Flückiger

Head Legal

## SDX Fintech Conversations

In this interview, Björn-Gunnar Flückiger, Head Legal at SDX, discusses the significant impact of the Markets in Crypto-Assets Regulation (MiCA) on the EU's cryptocurrency landscape. MiCA creates a comprehensive legal framework for various crypto assets, including stablecoins and different permutations of crypto tokens, with the aim of enhancing consumer protection and market integrity. Björn highlights some of the key legal obligations for token issuers and crypto asset service providers (CASPs), which now face licensing requirements to provide their services in the European Union in a compliant manner. He also compares MiCA to Switzerland's DLT-bill, noting the differences in regulatory approaches and the implications for market participants.

**Hi Björn! MiCA, the recently introduced Markets in Crypto-Assets Regulation, is set to reshape the regulatory landscape for certain crypto assets in the EU. How does it establish a legal framework for stablecoins and crypto assets, and what are the key legal obligations for issuers and service providers under this regulation?**

Let's start with some key principles of the MiCA legal framework. MiCA essentially captures a broad range of various types of crypto assets, that can conceptually be divided into several categories: The first category contains so-called asset-referenced tokens (ARTs), commonly known as stablecoins that can reference various assets. The second category includes electronic money tokens (EMTs), typically stablecoins pegged to a single legal tender currency, such

as the euro. The third category encompasses a fallback category that contains a wide array of other crypto assets, that are neither ARTs nor EMTs. As the digital assets-environment is rapidly developing, it is important to note that there are already discussions about a potential MiCA II framework, which might adjust the scope of regulated crypto-assets in a few years.

Now, addressing the regulatory objectives – MiCA aims to ensure consumer and investor protection, improve market integrity by regulating previously unregulated or not-consistently regulated activities, and promote competition in the European market. The regulation is being seen as an essential steppingstone for European market participants because the crypto market has been regulated

inconsistently in the EU and every EU member state relied on varying and bespoke local frameworks to capture crypto asset services, leaving it potentially vulnerable to insider trading, market manipulation, and other unethical practices. By establishing a harmonized framework, MiCA seeks to create a fairer competitive landscape across the EU, which previously varied significantly between member states.

Regarding key legal obligations, it is important to distinguish between issuers, who want to issue new tokens within the EU and CASPs such as trading platforms, brokers, advisors, and custodians. Issuers and CASPs will now typically have to comply with new disclosure requirements or even require authorization or licensing, depending on their activities. These activities were previously either unlicensed altogether in the EU or, as mentioned, subject to bespoke regulations and licenses of individual EU member states.

As an example, with this new regulation, issuers must publish white papers with specified forms and levels of minimum required content, generally applying disclosure and information obligations known from established European regulations such as MiFID II. Depending on the type of token, they may be required to meet prudential capital or liquidity requirements, maintain sufficient reserves for stablecoins, and implement robust governance and safeguarding mechanisms. These measures aim to enhance consumer protection.

For CASPs, the requirements are conceptually different. They face licensing and authorization requirements and subsequent ongoing supervision by the respective national competent authorities (or NCAs for short).

These requirements include meeting minimum capital thresholds, establishing a legal entity within the EU, implementing internal controls

such as anti-money laundering measures or procedures to detect and address conflicts of interest, and ensuring fair and professional conduct in the best interest of their clients. Additionally, CASPs must comply with consumer rights mechanisms, transparency, and asset protection measures, all of which are enforceable through sanctions if violated.

**You mentioned that MiCA introduces new measures for consumer protection and anti-money laundering. How will these measures affect the daily operations of crypto-asset service providers?**

These new measures will have a certain impact on crypto-asset service providers that already operate in the European market today, as they will need to adhere to new processes and requirements, particularly in consumer protection. First of all, they will need to ensure all communications with clients, including marketing materials and service descriptions, are fair, clear, and not misleading, meeting a higher threshold for transparency. This will likely require reviewing and updating all public-facing content to meet MiCA's higher communication standards.

Secondly, CASPs must implement safeguarding mechanisms to segregate client funds from operational funds, ensuring clients' assets are protected. While this should already be standard practice, MiCA makes it a sanctionable requirement. This implies that additional audits may be required to verify compliance.

Thirdly, CASPs must have efficient complaint-handling procedures, similar to those required under other EU financial regulations like MiFID II, in place.

Lastly, CASPs are also required to provide comprehensive risk disclosures specific to the crypto assets and services they offer, ensuring clients are well-informed of potential risks.



In relation to AML requirements, MiCA itself doesn't introduce new qualitative rules but complements already existing AML standards from FATF and the EU (such as the EU Transfer of Funds Regulation). These rulesets include obligations to include know-your-customer (KYC) processes, monitor transactions for suspicious activities, avoid sanctioned addresses, maintain detailed transaction records, and report suspicious transactions to local authorities, again similar to rules existing in the traditional financial sector. These measures will add an additional layer of compliance and administrative work for CASPs.

**MiCA is expected to drive the localization, institutionalization, and consolidation of the EU crypto market. Will the new obligations and requirements for crypto-asset service providers under MiCA enable this transformation?**

MiCA will indeed drive localization by establishing harmonized standards across the EU market, reducing legal fragmentation or potential room for regulatory arbitrage, where providers might previously have shifted from one jurisdiction to another seeking less stringent requirements. Under MiCA, the same rules apply throughout the EU, eliminating this possibility. While local regulators, like BaFin in Germany or CSSF in Luxembourg, will oversee licensing and supervision within their jurisdictions, the underlying laws will be consistent across the EU.

Institutionalization is also expected. The crypto market will likely become more professional and robust as service providers meet stricter requirements. However, this transition might be less significant for institutions that are already regulated and licensed under EU jurisdictional frameworks with a mature localized ruleset for crypto asset services (e.g. in Germany), where the regulatory shift to MiCA will presumably be less impactful than in jurisdictions where CASPs were operating under mere registration obligations up to this point. Overall, the market's

institutionalization will foster greater trust and willingness among traditional financial institutions to offer crypto-asset-based services, knowing their partners are well-regulated.

It is also reasonable to assume that a limited degree of consolidation will incur as a consequence of the introduction of MiCA. As we have discussed, operating as a CASP under MiCA requires meeting new qualitative and quantitative requirements, which can be challenging for early-stage startups lacking the necessary funds, technical expertise, human resources, or size. Consequently, some smaller providers may not be able to successfully manage the transition to a MiCA-compliant status, likely leading to diminished number of active service providers in the short- to mid-term.

**How will MiCA influence the legal structure and operations of crypto exchanges and service providers within the EU?**

This is an interesting question. Under MiCA, crypto exchanges and service providers must establish a legal entity within an EU Member State, ensuring a physical foothold and legal establishment in the region. I would say that most current providers operating in the EU already meet this requirement; however, this would be new for providers from outside the EU that have historically been targeting clients domiciled in the EU (such as large cryptocurrency exchanges). It is assumed that such providers would not be able to continue servicing their European client base without a locally regulated legal entity in place.

Under MiCA, non-EU providers will therefore need to navigate local business registration processes and comply with local corporate laws, incurring additional overhead and costs. Regulators require this to ensure they can license, authorize, and supervise these entities. Additionally, there are capital and prudential requirements, generally ranging from €50,000 to €150,000, that these entities must meet.



These requirements intend to ensure that providers have sufficient operating capital, further contributing to the stability and reliability of the market.

**On a similar note, MiCA imposes significant restrictions on foreign, unregulated crypto-asset service providers. What specific legal barriers will such providers face when attempting to operate within the EU?**

As we have seen, the viability for a foreign provider to offer services on a cross-border basis into the EU will be very limited. To access the EU market, foreign providers must establish a legal entity within an EU Member State which will need to be registered and licensed. Without this, they cannot access the EU market.

Non-EU providers who cannot or do not want to establish a physical presence in the EU will only be able to service EU clients under very specific circumstances, specifically through the so-called exemption of “reverse solicitation”. In this case, the EU client must actively approach the foreign CASP outside of the EU and request their services. Furthermore, European regulators, such as ESMA, have already indicated that this exemption to the rule of non-solicitation, is to be interpreted very strictly and should not be used to circumvent MiCA’s applicability.

In essence, this means foreign providers cannot actively market services that are captured by MiCA to EU clients. The clients must discover these providers on their own and initiate contact. Consequently, most foreign CASPs with existing crypto-asset service lines into the EU will face significant restrictions on marketing, promotional activities, and attending conferences to promote their services. Any active marketing towards EU-clients will not be permitted and will not count as reverse solicitation.

**How does MiCA compare to Switzerland’s DLT-bill that was already introduced in 2021?**

**Is Switzerland now falling behind in regulatory readiness for crypto-asset services?**

MiCA and Switzerland’s DLT-bill differ significantly in approach, scope and focus. MiCA is a rule-based regulation with very detailed requirements for various crypto assets, stablecoins and asset-referenced tokens, along with CASPs that operate within this space. It aims for comprehensive regulation of the crypto market by establishing a deep and detailed set of rules governing various activities.

Switzerland’s DLT-bill, in contrast, generally follows a principle-based approach. It is focused on integrating DLT-based services into existing financial market regulations to enhance legal certainty around these blockchain-based or crypto asset services. The DLT-bill was not specifically designed as a crypto-specific framework but sought to clarify and adjust existing regulations to increase the legal certainty around DLT in financial services. It generally covers a broader legal scope, including bankruptcy law and the legal transfer of rights on DLT, areas not addressed by MiCA due to existing EU’s jurisdictional limitations. As mentioned, the DLT-bill provides clarity on how crypto assets can be treated in insolvency proceedings, ensuring that certain assets can be segregated if a provider enters bankruptcy and certain requirements are met. This is a topic not covered by MiCA, as it primarily focuses on financial market regulations without addressing civil law matters.

Switzerland also includes specific provisions about the legal transfer of rights through blockchain. In very practical terms, the DLT-bill clarified the requirements for me to e.g. transfer a share that I own from my wallet to yours in a legally binding and enforceable manner. This aspect is not covered by MiCA, primarily because issues related to insolvency laws and the legal transfer of rights fall under the competencies of local lawmakers. The EU,



as a body, can regulate financial services but cannot legislate on matters like insolvency laws, which is why MiCA was unable to include these critical elements within its scope. In Switzerland, however, the regulatory framework allows for a more holistic approach, enabling comprehensive coverage of such issues.

I believe that Switzerland continues to be an attractive hub for blockchain and crypto services, thanks to its clear legal framework and supportive regulatory environment. However, the EU's harmonized market with consistent rules offers a significant advantage in terms of market size and regulatory uniformity. Both regions have their unique strengths, and neither is necessarily falling behind; rather, they cater to different strategic goals and business needs.

### What is SDX's view on the introduction of MiCA?

Overall, SDX supports the institutionalization of the crypto market, and we believe this will

happen in Europe through MiCA. Operating within a regulated environment aligns with our goals of transparency and consumer protection. MiCA's harmonized framework will accelerate the transition to a more regulated market, fostering collaboration with partners across jurisdictions.

However, Swiss providers face challenges due to the lack of third-country equivalence. Being regulated in Switzerland does not grant market access to the EU, in principle requiring Swiss providers to establish a local legal entity and obtain the corresponding licenses in the EU.

While MiCA presents certain challenges, it is a significant steppingstone towards a more integrated and trusted crypto market in the EU, aligning with SDX's commitment to regulatory compliance and market integrity.

### Thank you, Björn!

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## About the author



### Björn-Gunnar Flückiger

Head Legal

Björn Flückiger joined SDX in February 2024, bringing over a decade of legal expertise in financial market law and fintech regulation, both in the public as well as the private sector. Amongst others, Björn was an integral part in the setup and operationalization of FINMA's Fintech unit, contributing significantly to various regulatory policies, including the development of FINMA's ICO and stablecoin guidelines. Furthermore, as a member of the Federal Department of Finance's working group, he played a pivotal role in the introduction of the forward-looking Swiss DLT bill in 2021. Prior to joining SDX, Björn worked for UBS, providing legal and regulatory advice on the bank's fintech and digital banking initiatives. Most recently, he served as Head of Legal Services and Regulatory Affairs at Crypto Finance Group, where he managed all legal and supervisory matters of Crypto Finance's FINMA-licensed entities.

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