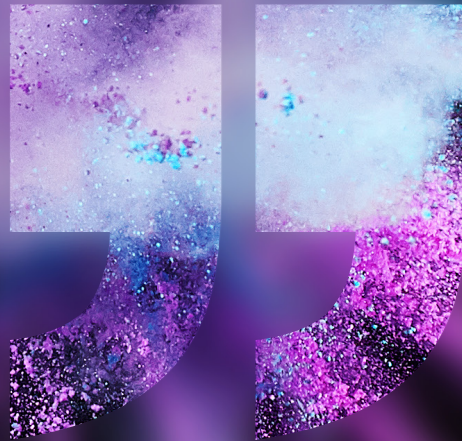


C L I F F O R D

C H A N C E



**WHAT DOES MICAR
MEAN FOR ISSUING
AND OFFERING
STABLECOINS AND
OTHER CRYPTO-
ASSETS IN THE EU?**



— THOUGHT LEADERSHIP

JULY 2024



WHAT DOES MICAR MEAN FOR ISSUING AND OFFERING STABLECOINS AND OTHER CRYPTO-ASSETS IN THE EU?

Parts of the new EU Markets in Crypto-assets Regulation (MiCAR) impacting the issuance, offering and admission to trading of stablecoins entered into force at the end of June 2024. We look at what issuers of stablecoins and other crypto-assets, and wider market participants, need to know.

MiCAR creates an EU regulatory framework for the issuance of, intermediating and dealing in, crypto-assets. It will introduce licensing and conduct of business requirements as well as a market abuse regime with respect to crypto-assets. While parts of MiCAR, including the new requirements around licensing of crypto-asset service providers, come into force from 30 December 2024, the provisions relating to the offering and admission to trading of stablecoins specifically were prioritised and came into force on 30 June 2024.

This briefing focuses on the impact of MiCAR on firms who engage in a primary

market transaction in relation to crypto-assets including stablecoins, i.e. offering crypto-assets to the public and/or seeking to admit them to trading on a crypto-asset trading venue. This includes the introduction of requirements around legal status, conduct and governance for such firms, as well as new obligations to publish and notify a white paper.

Stablecoins are a type of crypto-asset designed to include features to minimise price fluctuations and stabilise their value. Under MiCAR, stablecoins are classified as either asset-referenced tokens (ARTs) or e-money tokens (EMTs).

Useful Definitions under MiCAR

- **"Asset-Referenced Tokens" (ARTs)** - a type of crypto-asset that is not an EMT and which aims to maintain a stable value by referencing another value or right or a combination thereof – including one or more official currencies. ARTs cannot bear interest and therefore, from a policy perspective, are primarily intended to be used as a means of exchange or payment, rather than a store of value.
- **"Crypto-assets"** - a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology (DLT) or similar technology. This deliberately wide definition includes stablecoins such as ARTs and EMTs.
- **"E-Money Tokens" (EMTs)** - a type of crypto-asset that aims to maintain a stable value by referencing the value of one official currency. EMTs must amount to a claim on the issuer and be redeemable at par. From a policy perspective, like electronic money, EMTs are intended to be used as digital replacements for coins and banknotes. Like ARTs, they cannot bear interest as they are intended to be used primarily as a means of exchange.
- **"Other crypto-assets"** – all those crypto-assets which are not ARTs or EMTs, which may still include certain crypto-assets described as "stablecoins" but which are controlled by algorithms or other types of alternative stabilisation mechanic.
- **Utility token** - a type of crypto-asset that is only intended to provide access to a good or a service supplied by the issuer. Utility tokens fall within "other crypto-assets".

When does MiCAR apply to offers and admissions to trading of crypto-assets, including ARTs and EMTs?

MiCAR applies to persons (i) offering crypto-assets to the public and/or (ii) seeking to admit crypto-assets to trading on a crypto-asset trading venue.

What is an offer to the public?

An offer to the public is a communication which gives the recipients sufficient information on the terms of an offer and the crypto-assets to be offered to allow prospective holders to decide whether to purchase the assets. The communication can be in any form or by any means of delivery. This is closely aligned to the existing prospectus regime and, similar to that regime, there are exemptions which apply to certain types of offers to the public dependent on the type of crypto-asset in question.

For example, the following offers of **other crypto-assets** do not trigger the requirements that apply to an "offer to the public" under MiCAR:

- where they are offered for free;
- when they are automatically created as a reward for the maintenance of the distributed ledger or the validation of transactions;
- where the offer concerns a utility token providing access to a good or service that exists or is in operation; or
- where the holder of the crypto-asset has the right to use it only in exchange for goods and services within a limited network of merchants which have contractual arrangements with the offeror.

Offers of **ARTs** are subject to two exemptions (ART Exemptions) where:

- over a period of 12 months, the average outstanding value of the ART (calculated daily) never exceeds EUR 5,000,000, and the issuer is not linked to a network of other exempt issuers; or
- the offer is made solely to qualified investors and the asset-referenced token can only be held by such qualified investors.

Offers of **EMTs** are subject to certain exemptions in line with the E-money Directive (EMT Exemptions). This includes an exemption from authorisation requirements for EMTs that do not exceed an average outstanding amount of EUR5,000,000 (or any lower amount set by a relevant member state in its implementation) and where none of the persons responsible for the management of the business has been convicted of any financial crime offences.

In addition, with the exception of white paper requirements, MiCAR does not apply to EMTs that may be used only to make certain payment transactions:

- within a limited network of service providers or for a limited range of goods or services, e.g. an EMT that could only be used for a particular retail store; or
- for digital goods and services, where the operator does not act merely as intermediary and adds some value to the service (such as a form of access or search facilities), provided that the goods and services can only be used digitally.

What is seeking admission to trading?

Seeking admission to trading is not defined in MiCAR so the natural meaning applies. A person making arrangements with a trading venue to have a particular token admitted would likely fall within the scope of this activity.

Who can issue crypto-assets? Do issuers need be authorised or located in the EU?

There are no restrictions on who can issue **other crypto-assets** and issuers do not need to be located or authorised in the EU.

Issuers of **ARTs** and **EMTs** will need to meet certain authorisation criteria which will necessitate being located in the EU.

Only those who have obtained an authorisation or are an existing credit institution can issue **ARTs** unless an ART Exemption applies. Credit institutions who offer ARTs to the public do not need an additional authorisation. However, they will still be required to submit a white paper and have it approved (see further

below). Credit institutions must notify their competent Member State authority 90 working days before issuing an ART for the first time.

For **EMTs**, issuers must be authorised as a credit institution or an electronic money institution in accordance with the E-money Directive unless an EMT Exemption applies.

Who can make offers of crypto-assets to the public and/or seek to admit crypto-assets to trading?

Any legal person that complies with relevant requirements under MiCAR can offer **other crypto-assets** to the public, or seek to admit them to trading. This includes operators of trading platforms who wish to admit other crypto-assets to trading on their platforms at their own initiative.

The position for **ARTs** and **EMTs** is more restrictive. Only the issuers of the relevant

ART or EMT, or another person to whom the issuer has given written consent, can offer them to the public or seek to have them admitted to trading.

Where issuers of ARTs and EMTs give such written consent to other persons to enable them to make offers to the public on their behalf, the relevant provisions under MiCAR do not specifically require those other persons to be authorised. However, in many cases such persons making offers to the public would fall within the list of crypto-asset services (e.g., placing crypto-assets) that will require authorisation as a crypto-asset service provider (CASP) more widely under MiCAR when such provisions come into force on 30 December 2024. ART and EMT issuers will still be required to be authorised even where offers will only be made to the public by other persons on their behalf.

	Other crypto-assets	ARTs	EMTs
Who can issue, and are there authorisation requirements?	No restrictions.	Only credit institutions or those authorised under MiCAR, unless an ART Exemption applies.	Only those authorised as credit institutions or electronic money institutions, unless an EMT Exemption applies.
Who can offer to the public / seek to admit to trading?	Any legal person that complies with requirements, including operators of trading platforms.	The issuer or another person to whom written consent is given, who may need to be authorised as a CASP from 30 December 2024.	The issuer or another person to whom written consent is given, who may need to be authorised as a CASP from 30 December 2024.
White paper required?	Yes, unless the offer is made to fewer than 150 natural or legal persons, solely to qualified investors or total consideration in the EU does not exceed EUR 1,000,000 over a period of 12 months.	Yes, for all offers, including offers of ARTs that are subject to an ART Exemption.	Yes, for all offers, including offers of EMTs that are subject to an EMT Exemption.

How to apply for authorisation as an ART issuer

Issuers of ARTs that wish to make an offer to the public or seek admission to trading (or consent to another person doing so on their behalf) must be established in the EU and submit a detailed and comprehensive application for authorisation to the competent authority of their home Member State. Among other things the application must include administrative details (such as the legal entity identifier and address), governance documentation (including articles of association and a detailed description of key governance arrangements), and a programme of operations for the three years following authorisation covering details of the features and mechanisms of the ART, the issuer's business model, strategy, financial forecasts, risk assessment, and money laundering and terrorist financing processes.

Issuers will also need to provide a legal opinion that the ART is not an EMT or an excluded crypto-asset, and demonstrate that members of its management body are of sufficiently good repute and possess appropriate knowledge, skills and experience. In our view, this will depend on the specific features of the relevant token.

The issuer will also need to submit a crypto-asset white paper (see further below).

What requirements apply to persons offering or seeking admission to trading of different crypto-assets?

MiCAR introduces a range of requirements for offers of crypto-assets, including in most cases the obligation to publish and notify a white paper. The type of requirements that apply to issuers and those offering and seeking admission to trading vary depending on whether the token in question is an ART, EMT or other crypto-asset.

White paper requirements

What is a white paper?

The purpose of a white paper is to support investors in making an informed

decision about crypto-assets and create a standardised framework that allows for easy comparison. An issuer or other person intending to make an offer of crypto-assets or request for admission to trading must notify the competent authority of its home Member State about the white paper prior to making any offer or request for admission.

For **ARTs**, a white paper must also be approved by the competent authority in advance of the offer or admission to trading.

When is a white paper required?

All offers of **ARTs** and **EMTs** will require a white paper.

For **other crypto-assets**, the obligation to publish a white paper and notify the competent Member State authority will not be triggered where the offer is to fewer than 150 natural or legal persons (per Member State), solely to qualified investors, or total consideration in the EU does not exceed EUR 1,000,000 (or equivalent) over a period of 12 months. Operators of trading platforms can admit other crypto-assets to trading on their platforms on their own initiative, provided that they are responsible for meeting white paper requirements. Operators of trading platforms can also agree with a person seeking admission of a crypto-asset to trading that the trading platform will be responsible for meeting white paper requirements, provided that all necessary information is given to them by the person seeking admission.

The obligation to prepare a white paper for other crypto-assets does not apply where the crypto-asset is already admitted to trading on another EU trading platform and a MiCAR-compliant white paper already exists, provided that the person responsible for the existing white paper consents to its use in writing.

What must a white paper include?

All white papers must include information about the issuer, the crypto-asset, underlying technology and risks, and include a summary which uses brief and non-technical language to provide key information. Additional requirements apply dependent on the type of crypto-asset. For example, white papers for ARTs must

also include information on the reserve of assets and right of redemption. White papers for utility tokens must contain a statement that the utility token may not be exchangeable against the good or service promised in the crypto-asset white paper, especially where the crypto-asset project fails or is discontinued.

While the final delegated regulations are awaiting endorsement by the European Commission, ESMA's final draft implementing and regulatory technical standards provide some detail around what is expected to be required. The white paper will need to be machine-readable, marked up using eXtensible Business Reporting Language (XBRL), and accessible without needing specialised software. Information in the white paper must be concise, fair, clear and not misleading, and should be provided free of charge and in a non-discriminatory manner.

To enable crypto-assets to be more easily compared, detailed standardised templates have been prepared by ESMA (which are also currently awaiting adoption by the European Commission). ESMA also intends to establish a comprehensive register of crypto-asset white papers. In order to identify white papers and the underlying crypto-assets consistently in this register, an international standard identifier for digital tokens, the Functionally Fungible Group Digital Token Identifier (FFG DTI) and the Digital Token Identifiers issued by the Digital Token Identifier Foundation (DTIF) will need to be used in white papers. In particular, FFG DTIs will allow easy identification of tokens that exist across multiple chains or platforms.

Climate requirements

All white papers must include information about principal adverse impacts on the climate as well other adverse environmental impacts of the consensus mechanism which is used to issue the crypto-asset. This should consider the validation of each transaction, as well as the maintenance of the integrity of a distributed ledger of transactions by all DLT network nodes. This disclosure will need to include a section with general information on the crypto-asset and consensus mechanism, a mandatory key

indicator on energy consumption, and, where relevant, supplementary key indicators on energy and greenhouse gases emissions, plus information on sources and methodologies. This information will need to be reviewed and updated at least annually and without delay if there are any material changes. Where information relating to the climate and other environment-related indicators is not readily available to those preparing white papers, it will be necessary to provide estimates, together with details of the best efforts carried out to obtain the information. This could include, for example, conducting additional research, cooperating with third party data providers or external experts, or making reasonable assumptions.

Modification of white papers

There is an obligation on those who have published a white paper for any type of crypto-asset (whether an offeror, a person seeking admission to trading or an operator of a trading platform, where relevant) to periodically review and modify the white paper. For **ARTs** this obligation is triggered when there is a change in business model, for example, a change in governance arrangements, reserve of assets or the mechanism by which the ART is issued and redeemed, which could have a significant influence on a holder's (or prospective holder's) purchase decisions. For **EMTs** and **other crypto-assets**, this is triggered where there is a significant new factor, material mistake or material inaccuracy which is capable of affecting the assessment of the crypto-assets. Modifications to the white paper must be notified to the competent Member State authority and published.

Liability for white papers

Liability can be incurred where information in the white paper is misleading, incomplete, unfair or unclear. For **other crypto-assets**, liability can be attributed to the issuer / offeror, person seeking admission to trading or trading platform operator who has published a white paper, or members of their administrative, management or supervisory body. Where the white paper is produced by the operator of the trading platform rather than an issuer or person seeking admission to trading, the person seeking

Significant stablecoins

ARTs and EMTs classified by the European Banking Authority (EBA) as "significant" will be subject to additional requirements, for example, supervision by the EBA and requirements to maintain remuneration and liquidity management policies, as well as more stringent reserve requirements and liquidity stress-testing.

To be classified as significant, an ART or EMT must meet three or more of these requirements:

- Have more than 10 million holders.
- Market capitalisation or size of reserve assets higher than EUR 5,000,000,000.
- Average number of transactions per day is higher than 2.5 million and the average aggregate value of transactions is higher than EUR 500,000,000.
- Issuer is a provider of core platform services designated as a gatekeeper in accordance with the Digital Markets Act.
- Significance of activities of the issuer on an international scale, including use for payments and remittances.
- Interconnectedness of the ART or EMT or its issuer with the financial system.
- Issuer issues at least one additional ART or EMT and provides at least one crypto-asset service.

Applicant issuers may also voluntarily request that their ART or EMT be classified as significant.

admission to trading shall also be held liable when it provides information that is incomplete or misleading to the platform operator. For **ARTs** and **EMTs**, the issuer and the members of its administrative, management or supervisory body can be liable.

This standard will generally not apply to information provided in the summary within the white paper unless the summary is inaccurate when read in conjunction with other information in the white paper or does not provide key information.

The holder must provide evidence that their reliance on information in the white paper had an impact on their decision to purchase, sell or exchange that crypto-asset.

Attempts to exclude or limit contractual liability will not take legal effect.

FAQs

I am a foundation responsible for managing a crypto-asset (that qualifies as an "other crypto-asset") in an offshore jurisdiction. Do I have to publish a white paper and notify it?

No, there is only an obligation to create a white paper and notify if you actively make an offer to the public or actively seek admission to trading. However, if you are issuing an ART or EMT then more stringent obligations apply; see above.

I am a foundation responsible for managing a crypto-asset and have no compliance personnel in the EU. Does this mean that my crypto-asset cannot be traded in the EU?

For other crypto-assets, there are alternatives for the person seeking admission to trading that apply in cases where there is no issuer, the issuer does not seek admission to trading, or the issuer does not wish to comply with the requirements. The person seeking admission to trading and the operator of a trading platform can make an agreement in writing that the operator of the trading platform will comply with requirements under MiCAR. The agreement should state that the person seeking admission to trading must provide the operator with all the information necessary, so that the operator can satisfy relevant requirements, such as preparation of a white paper.

I intend to be a licensed crypto-asset trading platform when the CASP provisions under MiCAR take effect in December 2024. Do I have to wait for a protocol or foundation to approach me to admit their crypto-assets for listing?

The operator of a trading platform can, on its own initiative, comply with the requirements to seek admission to trading under MiCAR. However, in these situations the operator of the trading platform may face practical difficulties sourcing the information for the crypto-asset white paper.

What rights do holders of crypto-assets have?

Issuers and others offering or seeking to admit crypto-assets to trading should be aware of the rights that holders will have against them.

- **Rights of redemption** – holders of **ARTs** and **EMTs** have an express right of redemption under MiCAR. Issuers of ARTs will be obliged to either pay an amount in funds (other than electronic money) equivalent to the market value of the assets referenced by the ART or to deliver the actual assets referenced. For EMTs, holders have a right of redemption at par. This means that issuers will need to be able to redeem by paying funds, other than electronic money, equivalent to the monetary value of the EMT to the holder. This will constitute a claim on the issuer of the EMT.
- **Rights of withdrawal** – retail holders who purchase **other crypto-assets** directly from an offeror or from a CASP who places crypto-assets on behalf of the offeror will have a right of withdrawal. Holders will have a period of 14 calendar days to withdraw from their agreement without incurring any fees or costs and without giving reasons. The holder must then be reimbursed within 14 days.

Other requirements that may apply

MiCAR imposes a range of other requirements that will impact issuers and those offering crypto-assets or seeking to admit them to trading. We highlight some

of the key obligations that may have the biggest impact on crypto businesses.

Restrictions on issuance quantities

To limit the potential economic impact of large stablecoins being used widely as a means of exchange, a quantitative limit applies to the issuance of **ARTs** under MiCAR. An issuer must stop issuing ARTs where the estimated quarterly average number and average aggregate value of transactions per day associated with its uses as a means of exchange within a single currency area are higher than 1 million transactions and EUR 200,000,000 respectively, and submit a plan to the competent authority within 40 working days as to how to limit the value of transactions per day.

No specific quantitative or value restrictions apply to the issuance of **other crypto-assets** or **EMTs**, although additional requirements apply to significant EMTs (and ARTs) as outlined above.

Reserve of assets

In order to be able to meet redemption requests, issuers of **ARTs** are required to maintain a reserve of assets to back outstanding ARTs. The reserve must be actively managed to mitigate market and currency risks and legally segregated, so that it is not available to creditors in case of the issuer's insolvency. Separate reserves are required where the same issuer issues more than one ART. Reserve assets would be ring-fenced and available to holders in the event the issuer is not able to fulfil its obligations directly, for example due to its insolvency.

There are limitations on where the reserve of assets can be invested. The reserve must be composed of assets that the issuer receives when issuing the ART (such as deposits with credit institutions or commodities) and certain highly liquid financial instruments which have minimal market, credit and concentration risk (which includes certain UCITS). While the final delegated regulations are awaiting endorsement by the European Commission, the EBA's final draft specifies that generally at least 20% of the reserve should be assets or cash that are available to be realised within one day, rising to 40% for significant tokens,

and 30% within five days, or 60% for significant tokens. At least 30% of the required reserve assets must be deposits held with credit institutions for each official currency referenced by the tokens, again rising to 60% for significant tokens. Concentration limits also apply which vary dependent on the size of the credit institution.

Issuers will need to put in place detailed policies describing issuance and redemption processes, custody arrangements, stabilisation mechanics and valuation principles.

Similar reserve of asset requirements apply to e-money institutions issuing "significant" **EMTs** (see box on page Z), and may also apply to e-money institutions issuing EMTs that are not significant where the relevant competent authority requires that in order to address certain specified liquidity, operational and other risks.

Otherwise, at least 30% of EMT funds must be deposited in separate accounts with credit institutions. The rest of the funds received must be invested in secure, low-risk assets that qualify as highly liquid financial instruments with minimal market, credit and concentration risks, and which are denominated in the same official currency as the EMT. The EBA has published a final draft RTS on what qualifies as a highly liquid financial instrument. This specifies that highly liquid instruments will be composed of Level 1 liquid assets subject to a 0% haircut in accordance with delegated regulations for the Capital Requirements Regulation (the liquidity coverage ratio), Level 1 covered bonds in the liquidity coverage ratio, and financial instruments used as assets referenced or commodities or derivatives relating to them in the case of ARTs referenced to something other than an official currency of any country.

Issuers of both ARTs and EMTs are required to draw up and maintain a recovery and redemption plan for situations where they fail to comply with reserve of assets or redemption obligations.

Own funds and stress-testing requirements

In addition to the requirement to have a reserve of assets, MiCAR also introduces prudential rules in the form of an own funds requirement for issuers of **ARTs**.

This generally requires issuers to always have own funds equal to the highest of either EUR 350,000, 2% of the average amount of the reserve of assets backing the ART, or a quarter of the fixed overheads of the preceding year. This amount may be increased by up to 20% where the competent authority of the issuer determines that a higher degree of risk applies; for example, due to an evaluation of the issuer's risk management processes and controls, the composition or volatility of the reserve assets, the ART's market capitalisation or the aggregate value and number of transactions settled in the ART.

Issuers of ARTs will need to conduct regular stress tests taking into account "severe but plausible" scenarios causing financial or non-financial stress (including interest rate changes and operational crises). Competent authorities of issuers can also increase own funds requirements by between 20-40% where the results of stress-testing and the risk outlook warrant this.

Issuers of **EMTs** are also subject to prudential requirements in accordance with the E-money Directive.

ART reporting obligations

For any **ART** that has an issue value higher than EUR 100,000,000, the issuer must comply with quarterly reporting obligations in relation to the number of holders, the value of the outstanding tokens and reserve and transaction values. Competent authorities are also able to request compliance with these quarterly reporting obligations for any other ART.

Governance and conduct of business requirements

For issuers of **other crypto-assets**, MiCAR introduces certain new governance obligations, including in relation to acting and communicating honestly, fairly and professionally, in the best interests of the holders, and to

manage conflicts of interests and maintain systems and security access protocols.

More robust requirements apply in addition for issuers of **ARTs** and **EMTs**. Members of the ART's management body must be of sufficiently good repute and have appropriate knowledge, skill and experience. Members of the management body cannot have been convicted of any offences relating to money laundering or terrorist financing. Issuers of ARTs will also have to develop policies and procedures in relation to disclosure and mitigation of conflicts of interest. Issuers must also ensure that any conflicts of interest are posted on their website.

Issuers of **EMTs** are subject to governance and conduct of business arrangements in accordance with the E-money Directive.

Marketing communications

In order to release any marketing communications, issuers of any type of crypto-asset must first publish a white paper. Marketing communications, and any modifications, should then be published on a publicly accessible website and issuers may be requested to notify the competent authority of the home Member State. Various additional requirements apply to marketing communications; for example, they must be fair, clear and not misleading.

Marketing communications for **ARTs** and **EMTs** must also contain a clear statement that holders have a right of redemption. Marketing communications for **other crypto-assets** must include a clear statement that the marketing communication has not been reviewed or approved by a competent authority in any Member State.

Transitional arrangements for existing stablecoins

MiCAR contains a transitional regime that allows issuers who have issued **ARTs** in accordance with applicable law prior to 30 June 2024 to continue to do so, provided that they have applied for authorisation (or, in the case of credit institutions, notified their competent authority) before 30 July 2024. No similar transitional arrangement applies for **EMTs**.

Timing and next steps

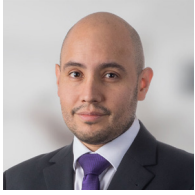
The requirements outlined above for ARTs and EMTs have been in force since 30 June 2024, although some of the detail will be set out in delegated regulations that remain to be adopted in the coming months. The remaining provisions under MiCAR, including requirements in relation to the issuance of other crypto-assets and obligations in relation to CASPs that introduce licensing requirements, will enter into force on 30 December 2024.

MiCAR does not provide for a separate third country regime, so where authorisation is required to offer ARTs or EMTs or, following 30 December 2024, provide other crypto-asset services, non-EU firms will have to obtain full authorisation in an EU member state. Firms should undertake a detailed analysis of the extent to which their activities are caught by MiCAR and what restrictions will apply. Firms that wish to become authorised must act swiftly as authorisations can take many months to secure. In the case of CASPs, it may still be possible to take advantage of transitional arrangements under MiCAR in certain circumstances.



For more on the obligations for CASPs under MiCAR, see [**EU crypto regulation: how does MiCAR impact crypto-asset service providers?**](#)

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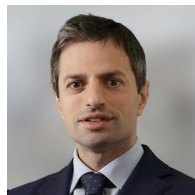
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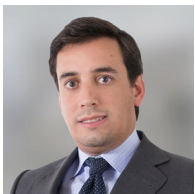
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