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STABLECOINS IN MICAR AND
THE SUPERVISORY ROLE OF
THE EUROPEAN BANKING
AUTHORITY

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BRIEF INTRODUCTION

When we think about the word “crypto” the association with something uncertain comes naturally.

This is prevalently true for most consumers and companies that do not belong to the financial sector. However, with their dynamic nature, crypto assets¹ represent a challenge even for financial market players and especially regulators. The outstanding spread in last years of crypto currencies, tokenized “products”, blockchain technologies and the recent failures related to the crypto world represented a wake-up call for all world regulators.

The Market in Crypto-Assets Regulation (MiCAR) is the attempt of the European Commission to face and reduce the uncertainty of crypto assets. Will it be enough to prevent crises and ensure the financial stability of the market? We still can't say. For sure, the role of supervisors will be essential in this respect. According to MiCAR, the vigilance tasks in the EU will be carried out by the European Banking Authority together with National Competent Authorities, designing a supervisory model that strongly resembles the Single Supervisory Mechanism. One of the most interesting aspects of this framework regards the role of the EBA which will have a totally new level of powers and responsibilities.

The first aim of this thesis is to enlighten what are the risks related to the crypto world. About that, we will illustrate some recent failures which involve crypto assets. This will be very useful to understand why regulation on crypto assets is essential but difficult at the same time. Subsequently, we will provide some examples of current national legislations on crypto-assets and how they will eventually fit with the upcoming MiCAR (which will be effective in 2024).

After the first 2 introductory chapters, the focus will be on the core of the crypto sector: stablecoins. We will discuss how they are regulated in MiCAR, underlining some of the provisions to face their risks. Subsequently, we will illustrate the MiCAR supervisory framework, describing the tasks of all supervisory authorities involved and underlining the common elements with the Single Supervisory Mechanism.

From this, the discussion will go on with one of the main topics: the role of EBA. We will illustrate its new powers and responsibilities, pointing out how important the collaboration between the EBA, other authorities and supervised entities will be.

Ultimately, we will discuss the significance parameters for stablecoins in MiCAR, trying to understand whether they are really able to capture entities posing risk on financial stability.

¹ From now on, the definition of crypto-asset will be the one present in the Market in Crypto-Assets Regulation, Art. 3:” crypto-asset means a digital representation of a value or a right which may be transferred and stored electronically, using distributed ledger technology or similar technology”.

CHAPTER 1

THE RISKY WORLD OF CRYPTO-ASSETS

1.1 Introduction

The aim of this chapter is to prepare the reader and introduce him to the delicate and complex world of crypto. We are going to generally explain the main features and characteristics of crypto-assets and what could be the main risks².

We will start by describing the speculative nature of crypto assets. After this, we will talk about stablecoins, explaining what they are and why they are essential in the crypto industry. Going on, the discussion will be about problems that may arise from the blockchain structure (which is the platform where crypto assets are prevalently traded). Specifically, we will deal with congestion and fragmentation. Later we will introduce the concept of Decentralized Finance (DeFi) and explain what the main dangers of decentralization are. Finally, the chapter will be concluded with the analysis of some recent failures in the crypto world so to understand the significant impact and risk crypto assets may have on the global economy.

1.2 Speculative nature of crypto assets

One of the main characteristics of crypto assets, and probably one of the riskiest, is their highly speculative nature. Differently from traditional financial instruments, many crypto assets (but not all) are not backed by any real-world asset. Generally, when we think to traditional securities, holders obtain rights to receive future cashflows (in case of stocks) or claims on companies' assets in case of liquidation (as it happens for bonds)³. In these 2 examples and as it normally happens for financial instruments, their value is based on something real, tangible. The same does not happen for many crypto assets, whose value depend prevalently on pure demand and offer. This causes crypto markets to be extremely speculative and subject to market risk, since prices are driven mostly by "news and technical indicators rather than fundamentals"⁴. Basically, a crypto asset might lose almost all its value due to rumors or distrust by investors⁵. Therefore, the speculative nature of crypto assets makes them unsecure as mean of payment or exchange.

² It is not possible to explain the complex and messy world of crypto with all its aspects in just one chapter, neither in one thesis. We just want to provide the reader with a general idea of how it works and what could be the risks.

³ ESMA, "Crypto-assets and their risks for financial stability", 04 October 2022

⁴ ESMA, Op.cit, p.5.

⁵ Something similar happened in the Terra USD and Terra Luna crash.

Furthermore, the global spread of crypto has been, and still is, surprising. If we consider the total market capitalization of all cryptocurrencies, it grew from approximately 18 billion USD in 2017 to 2.8 trillion USD (highest peak) in 2022⁶. Summing the high risky nature of crypto assets with their outstanding spread we might easily understand why they can be a danger, especially for retail investors. About that, the European Securities and Markets Authority (ESMA) issued a warning on the risks of crypto assets addressed specifically to European consumers⁷. Reading through the document, many dangerous characteristics are mentioned. For example, the possibility of fraud, low liquidity, lack of transparency, operational risks and security issues. At the end of the warning there is an important reference about the upcoming European regulation (Market in Crypto-Assets Regulation, MiCAR) that will try to reduce the uncertainty generated by crypto⁸.

1.3 Stablecoins

According to the Financial Stability Board, a stablecoin can be defined as a cryptocurrency that aims to maintain a stable value relative to a specified asset, or a pool or basket of assets⁹. Stablecoins represent a less speculative and volatile alternative to normal cryptos which are not backed by anything. Stablecoins are mainly used as a mean of payment for transactions of crypto assets¹⁰ and for this reason are essential in Decentralized Finance (DeFi), a concept that will be introduced later in the chapter.

Depending on the stabilization mechanism, there are 3 categories of stablecoins: fiat-collateralized, crypto-collateralized and algorithmic stablecoins.

In the first category, the stability is ensured by reserves of a fiat currency. A major part of fiat-collateralized stablecoins is backed by the US dollar. On the contrary, crypto-collateralized stablecoins stability is provided by reserves of other cryptocurrencies. Specifically, since cryptocurrencies are very volatile, these kind of stablecoins are generally overcollateralized, meaning that the value of reserve assets is significantly higher than the value of the stablecoin issued. “For example, MakerDAO's Dai (DAI) stablecoin is pegged to the U.S. dollar but backed by Ethereum (ETH) and other cryptocurrencies worth 150% of the DAI stablecoin in circulation”¹¹. Lastly, we have algorithmic stablecoins, whose stabilization

⁶ Source: Coinmarketcap

⁷ ESMA, “EU financial regulators warn consumers on the risks of crypto-assets”, 17 March 2022

⁸ We will better discuss MiCAR in next chapters.

⁹ Douglas Arner, Raphael Auer and Jon Frost, “Stablecoins: risks, potential and regulation”, November 2020

¹⁰ They are very convenient for international transactions since users do not need to convert funds as they would do with national currency.

¹¹ Adam Hayes, “Stablecoins: Definition, How They Work, and Types”, Investopedia, 06 July 2023

mechanism is based on an algorithm that controls the supply of that stablecoin. In this case, there might not be any reserve of assets¹².

Even if they appear to be safer than other crypto assets, stablecoins are still subject to market and liquidity risk. For example, negative rumors about the issuer or about the quality of the underlying asset or general distrust due to global events (like Covid-19 or Ukraine war) might trigger a sharp increase in redemption requests by investors, which would imply a significant price reduction of the stablecoin and would cause the issuer liquidity problems. These risks could be even higher if we consider that there is no uniform regulation on stablecoins across countries. Moreover, market and liquidity risk could be magnified in case the stabilization mechanism of the stablecoins (particularly in case of algorithmic stablecoins) is unable to manage and control all the redemption requests.

One of the biggest question marks related to stablecoins is if they can represent a threat to financial stability. According to the European Central Bank “financial stability risks from stablecoins are currently still limited in the euro area, but if growth trends continue at their current pace, this may change in the future”¹³. An aspect that requires attention is the increasing number of interlinkages between crypto assets and the core of the financial stability: the banking sector. We just need to look at the Market in Crypto-Assets Regulation to understand that banks will play a central role. When the regulation will be in force 2024, credit institutions can, without further authorization, issue any kind of crypto assets (Other crypto assets¹⁴, Asset-Referenced tokens¹⁵ and E-money tokens¹⁶) and provide any services related to crypto assets¹⁷ (like custody and administration, receipt and transmission of orders, exchange of crypto-assets against fiat currency or exchange of crypto-assets against other crypto-assets, etc.). Therefore, in the European context, banks will probably have a leading role in crypto markets. This implies an increase in the volume of crypto assets (and so stablecoins) issued or traded by banks, with potential consequences on the systemic risk and financial stability. Credit institutions might face liquidity problems for stablecoins issued by them, in the situation previously mentioned where the number of redemption requests is too high. Moreover, banks’ exposure to crypto assets (not necessarily issued by them but also for which they provide services) could cause losses if the price of those assets declines, which is a realistic scenario considering their high-volatile nature.

¹² An example of algorithmic stablecoin is Terra USD, whose value collapsed in May 2022. This failure will be discussed soon in the chapter.

¹³ ECB publications, “Stablecoins’ role in crypto and beyond: functions, risks and policy”

¹⁴ Title II, Markets in Crypto-assets Regulation

¹⁵ Title III, Markets in Crypto-assets Regulation

¹⁶ Title IV, Markets in Crypto-assets Regulation

¹⁷ Title V, Markets in Crypto-assets Regulation

1.3 Structural flaws and risks of the blockchain

The blockchain is a distributed ledger used to record transactions of crypto assets. Every record constitutes a block, and every block is linked with others through cryptographic keys. Without going in too much detail, a fundamental aspect of the blockchain is the validation system. Basically, each transaction is verified and added to the blockchain by the so-called validators. These subjects make sure that there are enough funds to complete a transaction and are then responsible for the security of the blockchain¹⁸. Of course, validators are remunerated for their service with transaction fees. A similar validation system embodies different flaws and grey areas.

First of all, transaction fees must be sufficiently high so that validators keep doing their job in a proper way. Specifically, the remuneration for a truthfully validation must be higher than potential gains from cheating¹⁹. Otherwise, “should rewards become too low, individual validators would have an incentive to cheat and steal funds, jeopardizing overall security”²⁰. A possible way to maintain high rewards for honest validation is to limit the capacity of the blockchain, basically reducing the number of transactions that could be validated simultaneously. In this way, users might be willing to pay higher fees to validators just to have their transactions validated before others. However, not only the cost for users of the blockchain would increase, but there would also be a serious congestion problem. This create a significant trade-off between security, in terms of honest transactions validation, and scalability, which is the ability of the blockchain to maintain its cost and processing speed constant despite the increase in users and transactions.

At the same time, the security-scalability trade-off could create fragmentation. Let’s assume that we want to ensure security in the blockchain, sacrificing scalability and creating congestion. Users of the blockchain would be incentivized to move to another blockchain with higher capacity and less transaction costs. This would create a fragmentation in the crypto markets, as secure but congested blockchain would be outperformed by newer and scalable blockchains, with increasing level of uncertainty and insecurity. A practical example of fragmentation happened recently with the Terra Luna crash: “the collapse of the Terra blockchain highlights the tendency to fragmentation through crypto’s vulnerability to new entrants who prioritize market share and capacity at the expense of decentralization and security”²¹. We will better deal with Terra Luna collapse in the final paragraph of this chapter. Beyond the flaws described until now, the blockchain technology encapsulates other

¹⁸ By Linda Orenes-Lerma, “What Is a Blockchain Validator?”, Ledger.com, April 2023

¹⁹ Bank for International Settlements, “The crypto ecosystem: key elements and risks” Report submitted to the G20 Finance Ministers and Central Bank Governors, July 2023

²⁰ Banks for International Settlements, Op. cit. p 6

²¹ Banks for International Settlements, Op. cit. p.7

potential dangers. For example, it can be vulnerable to cyber-attacks that can jeopardize the correctness of transactions; moreover, due to the high transparency of the blockchain, there might be privacy violations or identity thefts, as well as frauds²².

1.4 The concept of Decentralized Finance (DeFi)

Stablecoins, blockchains and crypto assets discussed until now are part of a broader concept known as Decentralized Finance (DeFi)²³. It is a financial ecosystem which represents an alternative to the traditional financial system (TradFi). The scope and functions of DeFi and TradFi are very similar: to create connections between demand and offer in situations of risk and uncertainty. In this respect, products offered in TradFi (like derivatives, loans and so on) are basically the same offered in DeFi ecosystem. However, the way in which these products are provided and traded is very different. Moreover, if, on one hand, intermediaries (banks, investment firms, insurances and pension funds) are trusted since they are fully regulated in TradFi, on the other hand, there are blockchain validators, computer codes, smart contracts or oracles which are currently not regulated²⁴. The main advantage (and danger) of DeFi is that everyone with an internet connection can access to its product directly, basically bypassing the intermediation phase. An important characteristic of decentralized finance is that it is “mainly self-referential, in the sense that DeFi products and services mainly interact with other DeFi products and services rather than with TradFi and the real economy”²⁵. This aspect is also favored by the fact that almost all transactions are done with stablecoins rather than classic currencies.

We will now explore deeper the characteristics of DeFi ecosystem. The first aspect that is worth mentioning regards the main elements of DeFi:

- permissionless blockchains, which constitute the ledger where transactions are recorded. The fact that this ledger is permissionless means that everyone can access it. The legitimacy of the transactions and the confidence in the blockchain is enhanced by the full transparency of the ledger.

²²By Zetzsche et al, The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain (August 13, 2017).

²³ Financial Stability Board, “The Financial Stability Risks of Decentralised Finance”, 16/02/2023

²⁴the Distributed Ledger Technology (DLT) pilot regime, the EU Data Act and the MiCA Regulation represent the first European regulation attempt, even if there is no full coverage of all DeFi elements.

²⁵ Financial Stability Board, “The Financial Stability Risks of Decentralised Finance”, paragraph 1.1.2. page 10.

- smart contracts which basically give execution to terms and conditions of a transaction in an automated manner.
- DeFi protocols which are a mix of codes and procedures that stabilize the way in which products are offered and provided.
- decentralized application (DApps) which simplify the provision of products.

After introducing the main elements of DeFi, we will discuss its risks and potential problems. A first relevant risk is the operational risk. We have already mentioned it when we discussed the blockchain (a crucial part of DeFi ecosystem), but almost every component in DeFi ecosystem (smart contracts, DApps, protocols) is subject to operational vulnerabilities (fraud, hacks, cyber-attacks and so on). Taking the example of smart contracts, they should be able to cover more states of the world, and this implies an increasing difficulty in the design which could also mean a higher risk of coding errors or malfunctions. Considering also that, once executed, smart contracts effects are not reversible we may easily understand how dangerous they could be. All of this is magnified by a very important aspect of decentralized finance: the anonymity or pseudo anonymity of its users. Not only in DeFi ecosystem there isn't (yet) any ex-post remedial in case of fraud or hack, but, due to anonymity, it's extremely difficult to identify the accountable part. Other than accountability issues, anonymity or pseudo anonymity significantly increase the risk of money laundering and terrorist financing²⁶.

Another relevant risk in DeFi, which is also typical in TradFi, is the liquidity risk. In the previous paragraph about stablecoins we mentioned how, in case of distrust in the market or negative rumors, redemption requests might strongly increase and cause liquidity problems to stablecoins issuers. Similarly, liquidity issues can also arise in DeFi lending platforms. Specifically, some of these lending platforms, in order to be more appealing, offer investors immediate redemption. Therefore, just like stablecoins issuers, lending platforms could struggle significantly in case there are too many redemptions requests²⁷.

Another dangerous feature of DeFi is the automated liquidation of collateral, which occurs when the value of the collateral falls below a certain threshold. "If these liquidations occur under stressed conditions, collateral may be forcibly liquidated into a market with low liquidity, pushing collateral prices down further, and spreading contagion"²⁸. Differently from TradFi, in decentralized finance there is no current solution for this problem, also because it's very difficult to quantify the amount of leverage.

²⁶ Just to make an intuitive example, it would be impossible to apply the Customer's Due Diligence (CDD) requirements.

²⁷ Financial Stability Board, "The Financial Stability Risks of Decentralised Finance", paragraph 2.2. page 20.

²⁸ Financial Stability Board, "The Financial Stability Risks of Decentralised Finance", paragraph 2.3. page 21.

1.5 The Terra USD and Terra Luna crash

Terra USD (UST) was one of the top five stablecoins for market capitalization (18 billion dollars²⁹) at the beginning of 2022. It was originated from a blockchain network called Terra and it was pegged to different fiat-currencies like USD and EUR. On one hand, UST was an algorithmic stablecoin, meaning that its stabilization mechanism was not based on collaterals (like crypto-collateralized or fiat-collateralized stablecoins), but on an algorithm that controlled its supply and demand. On the other hand, Terra USD had a counterpart token called Luna (also originated from the Terra blockchain). \$1 of this token could be converted with 1 UST token even if the value of UST was not \$1 and vice versa³⁰. Basically, Luna had the function of stabilizing the price of UST through arbitrage. Specifically, whenever the price of Terra USD fell below \$1, investors could exchange it with 1 Luna token with value \$1. This arbitrage would push up the price of Terra USD until it goes back to its original value of \$1. The procedure just explained was controlled by the algorithmic stabilization mechanism, which in this situation would burn UST tokens (reducing the supply) and generate Luna tokens until the prices of the 2 tokens reach their original peg (\$1).

According to experts, the reason of the crash seems to be a coordinated and massive short-selling process which led UST to lose its peg with the USD. The algorithmic stabilization mechanism could not manage the downward pressure, and UST possessors started converting their tokens into Luna tokens³¹. This implied a huge increase in the supply of Luna, which consequently pushed its price down to almost zero. In just 8 days, from the 5th to the 13th of May 2022, Luna and UST prices collapsed passing from \$87 and \$1 to \$0,00005 and \$0,2 respectively³². The capitalization of Luna went from \$30 billion to almost 10 between the 6th and 10th of May. Due to the crash, “crypto’s market cap has lost about \$300 billion”³³.

²⁹ Source: CoinMarketCap

³⁰Briola, Antonio and Vidal-Tomás, David and Wang, Yuanrong and Aste, Tomaso, Anatomy of a Stablecoin's Failure: The Terra-Luna Case, 8 August 2022.

³¹Hemenway Falk, Brett and Hammer, Sarah, Meltdown in the Wild West: The Stablecoin Collapse of 2022 and Consumer Protection Considerations (May 24, 2022).

³²Briola et al, Anatomy of a Stablecoin's Failure: The Terra-Luna Case, 8 August 2022.

³³Steven Ehrlich, Unstable Stablecoin: How Crypto’s Crash Broke The Buck For TerraUSD, Forbes, May 2022



Luna Token price May 2022, CoinMarketCap



Luna Market Cap lost \$20 billions in just 5 days

The Terra USD and Luna case represented an undeniable proof of the fragility and instability of stablecoins, especially algorithmic ones. In fact, the crash was also favoured by the fact that both Terra tokens were not collateralized or backed by anything, and the stabilization algorithm turned out to be insufficient in extreme situations. After the crash, European Central Bank³⁴ stated: “recent developments show that stablecoins are anything but stable”.

³⁴ ECB publication, “Stablecoins’ role in crypto and beyond: functions, risks and policy”.

The collapse of Terra tokens generated great uncertainty and was a sort of eye-opener for all crypto investors. Since it was the first big failure in the crypto world, everyone started realizing the risks. The Terra/Luna crash was the beginning of a difficult period for crypto assets known as “Crypto- winter”. “The year 2022 was an annus horribilis for the crypto ecosystem. In just one year, crypto lost about USD 2 trillion in market value”³⁵.

1.6 The FTX collapse

If the 2022 was already a difficult period for crypto assets, the collapse of FTX in November represented another significant hit on crypto market which, according to many, will have an impact for years to come. FTX was a cryptocurrency exchange with its own token called FTT. It all started on the second of November when CoinDesk, one of the most important information and news site for crypto, revealed that Alameda Research had a very big position in FTT (almost \$5 billions)³⁶.

Alameda Research was a quantitative trading company run by the same founder of FTX, Bankman-Fried. The fact that Alameda Research had a huge position in tokens of a “sister company” generated alarmism across investors, which started questioning the stability and financial soundness of both companies. On the 6th of November Binance, the world biggest cryptocurrency exchange, decided to sell its entire position in FTT (over \$500 millions) and this led FTX to face liquidity problems. Despite the attempt of Bankman-Fried to reassure investors about the safeness of FTX, the total value of withdrawals of FTT overcame 6\$billions and the price of the tokens dropped by more than 80%. On the 8th of November, Binance offered to acquire the business of FTX (the part outside the United States) but immediately withdrew from the deal the following day. The reasons mentioned by Binance were “the mishandling of customer funds and the U.S. investigations (on FTX and Bankman-Fried, started the same day of the withdrawal)”³⁷. On the 10th of November, Bankman-Fried admitted the liquidity crisis and the following day FTX filed bankruptcy.

According to bankruptcy documents, FTX had liabilities for almost \$50 billions. Bankman Fried was then arrested in Bahamas and subsequently extradited and charged for 8 crimes in the US. Damien Williams (The U.S. Attorney who moved charges against Bankman-Fried) called the FTX case “one of the biggest financial frauds in American history”³⁸. Undoubtedly, it was the largest collapse in crypto history and, fortunately, its effects were confined to the

³⁵Arner, Douglas W. and Zetzsche, Dirk Andreas and Buckley, Ross P. and Kirkwood, Jamieson, *The Financialization of Crypto: Lessons from FTX and the Crypto Winter of 2022-2023* (March 1, 2023). University of Hong Kong Faculty of Law Research Paper No. 2023/19.

³⁶ By Nathan Reiff, “The Collapse of FTX: What Went Wrong With the Crypto Exchange?”, Investopedia, February 2023

³⁷By Amanda Hetler, “FTX scam explained: Everything you need to know”, TechTarget, April 2023

³⁸By Saumen Datta, “U.S. Attorney Damian Williams Calls FTX One of History’s Biggest Frauds”, DailyCon, December 2022

crypto industry. Specifically, Ethereum, Bitcoin and other coins had a negative reaction to the collapse, while the traditional markets remained unaffected³⁹. However, considering the still increasing interlinkages between crypto markets and traditional finance, the effects of a future collapse like the FTX one might be significantly worst, without being limited only to the crypto world.

1.7 Chapter Conclusions

This chapter provided a general introduction to the crypto ecosystem and gave us the possibility to understand how messy and complex it can be. Moreover, the crash of Terra USD and Terra Luna tokens, followed by the collapse of FTX, represented an evidence that crypto assets are extremely risky and volatile. “The resounding defaults of the *crypto winter*, culminating in the failure of the 'FTX' *exchange*, were only the most obvious examples of a long series of pathological phenomena that, from the outset, should have prompted a regulatory response both in Europe and elsewhere”⁴⁰.

³⁹ By Tommy Johnsen, “How did the FTX collapse affect traditional assets?”, AlphaArchitect,, April 2023

⁴⁰ Annunziata, Filippo and Annunziata, Filippo, An Overview of the Markets in Crypto-Assets Regulation (MiCAR). (December 11, 2023). European Banking Institute Working Paper Series no. 158, page 9

Chapter 2

CRYPTO ASSETS BEFORE MICAR: EUROPEAN FRAGMENTATION

2.3 The current national legislations about crypto-assets

An important response to the failures of Terra/Luna and FTX arrived from the European Commission with the proposal of a Regulation regarding crypto-assets (MiCAR), which will be effective in June 2024. One of the biggest question marks of the upcoming European regulation is how it will fit with the current national regulations. First of all, other than trying to reduce uncertainty and increase the knowledge about crypto assets, the objective of MiCAR is to create a common framework across the UE so that there are no more regulatory differences between Members States. In this respect, it is worth underlying that the European Commission chose the way of the Regulation. Other than sending a strong message about the need for legal certainty, the Commission wanted to avoid differences across EU jurisdictions that could have arisen with a Directive.

We are now going to discuss the present national legislations in crypto, so to highlight the strong differences across EU members. The only legislation which has been equally implemented⁴¹ in the majority of EU Members is the 5th Anti-Money Laundering Directive (AMLD5)⁴². This Directive was the first European legislation to regulate crypto⁴³ and included “virtual assets service providers” (VASPs) in the list of obliged entities⁴⁴. Except for AMLD5, the actual European national regulatory framework is far from being uniform. There are countries in which crypto assets are partially or fully regulated and others in which there is no legislation at all. We are now going to discuss 3 countries in which crypto assets are regulated differently.

⁴¹ Being a Directive, it has been transposed according to the national legislation of each Member State. Therefore, there might be small differences across EU countries, as it happens for every transposed Directive. This fragmentation is one of the reasons why the Commission proposed in 2021 a new AML Regulation and an EU single rulebook.

⁴² Directive Of The European Parliament And Of The Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849, Brussels, 20.7.2021

⁴³ In the Directive we find the definition of “virtual currency”, a concept that has been replaced by crypto-assets in MiCAR and also in the AML Regulation

⁴⁴ These entities must apply AML requirements such as Customer Due Diligence (CDD) or reporting of suspicious transactions. AMLD5 included providers of virtual (crypto) assets and custodian wallet providers to the list of obliged entities.

2.3.1 Germany

German regulators, has classified crypto assets in 4 categories: currency tokens (such as Bitcoin and Ethereum) which has payment function, utility tokens (both fungible and non-fungible) which gives access to goods or services, security tokens (considered as financial instruments) which incorporates membership or property rights and hybrid tokens which has more characteristics of the previous tokens.⁴⁵ If we compare this classification with the MiCAR one, there are evident differences. Not only the categories do not match (even if they are based on the same principles), but Germany regulates also NFT which are in principle excluded from the European regulation⁴⁶.

These aspects rise doubts on how Germany will adapt to MiCAR when it will be effective. Being a regulation and not a directive, MiCAR will be directly applicable and won't need national transposition as required for directives. Therefore, it seems quite probable that it will immediately replace the German national regulation in 2024. This can represent a problem for potential offerors or service providers of crypto assets that already obtained or are about to obtain the German license. When MiCAR will become effective they will need a new license⁴⁷, and this represents a cost, also in terms of time and organization. At the same time, this double-license problem may discourage German companies to enter in the crypto market now and to wait until MiCAR will be in force.

2.3.2 Italy

A completely different situation is present in Italy, where there is no ad hoc national legislation on crypto assets⁴⁸, which are in principle unregulated. However, depending on their characteristics, tokens might be classified as financial instruments (for example security tokens which provide the owner with membership or property rights⁴⁹) or financial products.

Financial products are a peculiarity of Italian legislation and includes "financial instruments and any other form of investment having financial nature".⁵⁰ As we can see from this

⁴⁵ Renate Prinz, "Understanding the regulatory landscape for crypto-assets in Germany and the EU", Finextra, November 2022

⁴⁶ Non-Fungible tokens were present in the first draft of MiCAR but were then excluded from the final one. However, they could fall inside the scope of the regulation depending on their specific characteristics, according to Recital 6 of MiCAR.

⁴⁷ The MiCAR license will allow offerors and Crypto-Assets service providers of one country (like Germany) to passport in every Member State (passporting principle).

⁴⁸ Except for the Legislative Decree 231/2007, which implemented all the AML-CTF Directives, included the 5th one in 2020.

⁴⁹ Financial instruments are regulated at European level by the Market in Financial Instrument Directive (MiFID) 1 and 2, then transposed at national level. In Italy, MiFID has been implemented through the Consolidated Financial Act.

⁵⁰ Art. 1, para.1 (u), Italian Consolidated Financial Act.

definition, the category of financial products is broader than just financial instruments, and it is worth asking if this category might include also crypto assets. According to Consob⁵¹'s interpretation, there should be 3 requirements for a product to be considered "financial": the investment of capital, the expectation of a return and the assumption of financial risk associated with the investment⁵². In this respect, it is also worth considering 2 recent sentences of the Italian Supreme Court of Cassation about crypto assets. According to the first one (sentence number 44337, issued in November 2021), the Supreme Court of Cassation stated that Bitcoin can be a financial product if it is purchased with investment purposes. A very important step ahead has been done with the other sentence (number 44378), issued in November 2022. According to the Court of Cassation, crypto assets possess the 3 requirements established by Consob⁵³ and can therefore be considered as financial products. A token like Bitcoin requires the investment of capital, it is usually associated with a return if its value increases in time (even if it might be also used as a mean of payment), and there is a risk related to the investment.

At this point, it is interesting to ask ourselves what will happen with the entry into force of MiCAR. Since both financial instruments and crypto assets will be fully regulated by MIFID and MiCAR, will the category of financial products still make sense? We can assume that NFTs which fall outside the scope of MiCAR might still be considered as financial products in Italy. Another interesting issue regards the same double-license problem introduced in the previous paragraph. Entities that want to offer crypto assets qualified as financial instruments or financial products should be authorized by the Consob to publish a prospectus. Therefore, if we consider a company authorized to offer crypto assets in Italy (which fall under the category of financial products⁵⁴), it will have to obtain a new license under MiCAR and this might discourage companies to enter in the crypto market before June 2024.

2.3.3 France

In France, crypto assets have been regulated since 2019 by a law (called Pacte law) introduced in the French Monetary and Financial Code (MFC). Specifically, this law regulates Digital Assets Service Providers (DASPs) and Initial Coin Offerings (ICOs). Digital assets are a

⁵¹ One of the Italian National Competent Authorities

⁵² According to Article 1, para.1 (u), Italian Consolidated Financial Act.

⁵³ 1. the investment of capital, 2. the expectation of a return and 3. the assumptions of financial risk associated with the investment. Article 1, para.1, Italian Consolidated Financial Act.

⁵⁴ In case the crypto asset is considered as a financial instrument (which falls under the scope of MiFID) there wouldn't be any double-license problem since once authorized in Italy, entities could offer their instruments in every EU Member (passporting principle).

broad category which includes cryptocurrencies (whose definition is almost identical to the one of “virtual currencies” in AMLD5) like Ethereum or Bitcoin, and utility tokens. Interestingly, from the definition of utility tokens⁵⁵ it seems that NFTs are excluded. In this respect, “the AMF has stressed that NFTs by themselves do exclude the qualification of digital assets, depending on the token’s features.”⁵⁶This basically means that, even if NFTs are in principle unregulated, depending on the token features they might fall under the definition of digital assets (as utility tokens).

According to the regime for digital assets service providers, a mandatory registration is required if a company wants to provide one of these 4 services: custody of digital assets on behalf of third parties; buying and selling digital assets in legal tender on behalf of third parties; trading of digital assets on behalf of third parties; operation of a trading platform between users. Instead, for any other services like receipt and transmission of orders or financial advice on crypto, there is an optional license that allow companies to market their crypto services through direct solicitation and sponsorship. Without this optional license, DASPs can still provide their services (excluding the 4 mentioned before for which a mandatory registration is required), but without approaching clients directly or indirectly, so basically relying only on reverse solicitation⁵⁷. The same principle is present also in the ICOs regime, where issuers can offer their tokens even without a license (a visa in this case). However, obtaining the visa is very convenient, as it allows offerors to market their tokens through direct solicitation or sponsorship. The visa is released by the French Financial Markets Authority (AMF) if some conditions are met, regarding security, transparency and the AMLD5 requirements.

Even in the French jurisdiction, as for Italy and Germany, both issuer and service providers might face the double-licensing problem. This can be the reason why, up to March 2023, only 3 ICOs visa has been released by the AMF.

2.7 Chapter conclusions

In this chapter we have seen how the current national regulatory framework is extremely different among Member States and MiCAR will undoubtedly be an important step in the direction of a unique level playing field. However, there are still gaps about tokens and crypto

⁵⁵ “Any intangible asset representing, in digital form, one or more rights which may be issued, recorded, stored or transferred by means of a shared electronic recording device enabling the owner of the asset to be identified, directly or indirectly”, MFC, Article L. 552-2.

⁵⁶ William O’Rorke and Alexandre Lourimi, “Blockchain & Cryptocurrency Laws and Regulations 2023”, Global Legal Insights, October 2022

⁵⁷Elias Bourran, “How cryptocurrencies and digital assets are regulated in France in 2023?”, Beaubourg Avocats, March 2023.

assets that fall outside the scope of MiCAR (like NFTs). It's probable that they will be treated differently depending on the national legislation. For example, NFTs not regulated by MiCAR might be considered as financial products in Italy and utility tokens in Germany, and therefore they would be regulated in a significantly different way. This of course leaves some space for fragmentation.

CHAPTER 3

THE REGULATORY FRAMEWORK OF STABLECOINS IN MICAR

3.1 Introduction

The Market in Crypto-Assets Regulation represents the first European attempt to deal with crypto.

The most relevant contribute of the upcoming Regulation regards the provisions about stablecoins, which represent the core of the crypto sector. As mentioned in the first chapter, stablecoins are cryptocurrencies whose value is pegged to that of another asset (with low volatility). Other than representing a “stable” alternative to crypto assets, stablecoins are the most used mean of payment for crypto transactions (especially in DeFi). Considering the incredible spread of stablecoins⁵⁸ and the recent failures of Terra and FTX, the need for a regulation became impellent. In this respect, the ECB stated in a publication that “given the rapid growth of the stablecoin market, stablecoins need to be brought into the regulatory perimeter with urgency.”⁵⁹ This is exactly what the European Commission has done with MiCAR.

3.2 Classification of stablecoins in MiCAR

Under the new regulatory framework, stablecoins might be categorized as asset-referenced tokens (ARTs)⁶⁰ and e-money tokens (EMTs)⁶¹. An asset-referenced token “purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets”⁶². On the other hand, an e-money token is a “crypto-asset the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring

⁵⁸ The Total Market Cap of stablecoins increased from USD 60 billions in 2021 to more than 120 USD billions in 2023, reaching its peak in May 2022 with almost USD 190 billions (source: CoinMarketCap).

⁵⁹ Mitsu Adachi et al, “Stablecoins’ role in crypto and beyond: functions, risks and policy”, ECB publications, 2022

⁶⁰ Title III, Market in Crypto-Assets Regulation

⁶¹ Title IV, Market in Crypto-Assets Regulation

⁶² Title I, Art.3, Par. 1(3), Market in Crypto-Assets Regulation

to the value of a fiat currency that is legal tender”⁶³. By analyzing these two definitions, we can deduct that both EMTs and ARTs are crypto-assets which purport to maintain a stable value (which is a prerogative of every stablecoin). However, the main purpose of e-money tokens is to be used as a mean of payment, differently from ARTs whose main purpose is not specified⁶⁴. In addition to this, EMTs can be pegged only to one fiat currency with legal tender, while ARTs can be pegged to more than one fiat currencies, other crypto assets, commodities, or even baskets with different assets. Other than ARTs and EMTs, in the Market in Crypto-Assets Regulation there is a third category of crypto assets called “crypto assets other than asset-referenced tokens or e-money tokens”⁶⁵. As we can immediately notice, this is a residual category which embraces crypto assets that are not ARTs or an EMTs⁶⁶.

3.3 Algorithmic stablecoins

As explained in the first chapter, algorithmic stablecoins have a stabilization mechanism based on an algorithm which control the supply and demand of tokens. Differently from other stablecoins, algorithmic ones have no collateral and therefore are very risky⁶⁷. Markets in Crypto-Assets Regulation has no *ad hoc* provisions regarding this kind of stablecoins. They were initially banned in the first draft of the Regulation, and they are mentioned only once in the current version of the text (in Recital 41). According to Recital 41 “where a crypto-asset falls within the definition of an asset-referenced token or e-money token, Title III or IV of this Regulation should apply, irrespective of how the issuer intends to design the crypto-asset, including the mechanism for maintaining a stable value of the crypto-asset”. This applies also to algorithmic stablecoins “that aim to maintain a stable value in relation to an official currency, or in relation to one or several assets”⁶⁸. Therefore, every stablecoin which purports to maintain a stable value will be considered an ART or an EMT, no matter the stabilization mechanism or how the crypto asset is designed. As we will discuss soon, there is a very detailed and strict regime about the reserve of assets that must be held by stablecoins issuers. This implies that such regime would apply also to algorithmic stablecoins, thus reducing their risk significantly. Other than algorithmic stablecoins, Recital 41 mentions

⁶³ Title I, Art.3, Par. 1(4), Market in Crypto-Assets Regulation

⁶⁴ However, even ARTs are and can be used for crypto transactions. As clarified in Recital 102: “significant asset-referenced tokens can be used as a means of exchange and to make large volumes of payment transactions”. We will later explain the meaning of significant ART and significant EMT.

⁶⁵ Title II, Market in Crypto-Assets Regulation. We will also refer to this category as “other crypto assets”.

⁶⁶ This category comprehends mainly utility tokens, which are crypto assets “only intended to provide access to a good or a service supplied by its issuer” (Art. 3, Par. 1(9))

⁶⁷ One of the main reasons of the Terra (USD) crash was the inability of its algorithm to control the supply and demand of Terra and Luna tokens.

⁶⁸ Maintaining a stable value is the prerogative of every stablecoins, as we have already seen in the definition of asset-referenced tokens and e-money tokens.

algorithmic crypto assets: “offerors or persons seeking admission to trading of algorithmic crypto-assets that do not aim to stabilise the value of the crypto-assets by referencing one or several assets should in any event comply with Title II of this Regulation.” In this case we are talking about tokens that do not aim to stabilise their value, indeed they are referred to as crypto assets and not stablecoins. Algorithmic crypto assets should “in any event” be considered as “other crypto assets” and be then regulated under title II.

All things considered, even if algorithmic stablecoins (and algorithmic crypto assets that do not aim at stabilizing value) are mentioned only once in MiCAR, Recital 41 provides a very clear idea of how to deal with them.

3.4 Issuers of stablecoins

The provisions about the offer of ARTs or EMTs to the public are very detailed and articulated, especially if compared with the offer of “other crypto assets”. This is in line with the fact that stablecoins have complex characteristics and can pose greater risk on the financial stability with respect to utility tokens. According to MiCAR, the only European entities who can issue stablecoins are credit institutions (which can issue both ARTs and EMTs) or electronic money institution⁶⁹ (which can issue exclusively EMTs)⁷⁰. From the European Commission point of view, it seemed more reasonable and safer to expect that entities which are already compliant with strict requirements about governance, capital, liquidity, risk and so on, would also be compliant with additional requirements related to the offer of stablecoins. E-money institutions and especially credit institutions are already regulated under different EU legislations and are very well-supervised. On one hand, this would probably lead to a strong centralization of the offer of ARTs and EMTs (particularly around banks) which could limit the market competition. At the same time, it is very difficult to imagine a new entity (which is not a credit institution or e-money institution), not already established and regulated in the EU, which has the resources to meet and be compliant with the requirements for the issuance of ARTs. Even under the supervisor point of view, it would be easier and even cheaper (in terms of time and resources) to watch over already supervised entities with respect to new ones.

⁶⁹ Who are legal persons authorized to issue electronic money under Title II of Directive 2009/110/EC

⁷⁰ However, Art. 16 (Title III) gives the possibility to legal persons or other undertakings to issue ARTs only if they respect some strict requirements (very similar to the ones applied to credit institutions). Moreover, there is an exemption to Art.16 whether the tokens are exclusively addressed to qualified investors and the total value of the tokens does not exceed 5 million in 12 months.

3.5 Disclosure requirements for the offer of stablecoins

As we said, both ARTs and EMTs issuers need to be compliant with disclosure requirements to offer their tokens. However, these requirements differ depending on the tokens issued. Credit institutions who want to issue asset-referenced tokens shall:

- draw up a white paper which must be approved by the competent authority⁷¹
- notify the competent authority with a detailed set of information⁷²

The set of information includes: a legal opinion on the qualification of the token issued, a programme of operations which describes the business model of the issuer and other arrangements regarding governance, risk management, contractual policy, stabilization mechanism, reserve of assets, etc.

On the other hand, credit institutions and e-money institutions who intend to issue e-money tokens must:

- notify and publish a white paper (without further authorization)⁷³
- respect the prudential requirements set out in Directive 2009/110/EC⁷⁴

In this case we have a clear reference to the Electronic Money Directive, which is perfectly in line with the fact that “electronic money tokens shall be deemed to be electronic money”⁷⁵. Therefore, unless differently provided in MiCAR, the requirements (regarding governance, risk, policies, etc.) applied to issuers of EMTs are the same as the EMD. We are now going to better analyze the disclosure requirements for the offer of stablecoins, making also comparisons between ARTs and EMTs provisions.

3.6 The white paper provisions

The crypto-assets white paper is a document requested to offer any kind of crypto asset to the public. This document reminds the prospectus required to offer financial instruments⁷⁶ and the logic behind is basically the same. In fact, both prospectus and white paper aim to prevent misrepresentations and inadequate disclosures that could confuse and mislead

⁷¹ Art. 17, Par. 1(a), Markets in Crypto-Assets Regulation

⁷² Art.17, Par. 1(b), Markets in Crypto-Assets Regulation. This set of information is almost identical for other authorized entities that intend to offer ARTs.

⁷³ Art. 48, Par 1(b), Markets in Crypto-Assets Regulation

⁷⁴ Which we will refer to as e-money directive (EMD)

⁷⁵ Art. 48, par.2, Markets in Crypto-Assets Regulation

⁷⁶ REGULATION (EU) 2017/1129

investors⁷⁷. The white paper shall contain information regarding the issuer of the token, the token itself, the underlying technology, rights and obligation, the risks related and the impact on the environment. All this information must be fair, clear and not misleading. Moreover, issuers of crypto assets must include in the white paper a warning⁷⁸ that: the token may lose part or all its value, that it may not be liquid or transferable, and that it is not covered by the investor compensation schemes (under Directive 97/9/EC) and by the deposit guarantee schemes (under Directive 2014/49/EU). By including this warning in the white paper requirements, the European Commission intended to make sure that investors are as much aware as possible of the risks related to crypto assets. In case the information provided in the white paper are not complete, fair or clear, or are misleading, the issuer of the token will be directly responsible and liable for the losses occurred to the client.

The rules on the white paper apply to all categories of crypto assets regulated in MiCAR: other crypto assets, e-money tokens and asset-referenced tokens. However, there is a different treatment in terms of the white paper provisions between ART issuers (title III of MiCAR) and both utility tokens and EMT issuers (regulated in title II and IV of MiCAR). According to article 17 (MiCAR), the white paper drafted by issuers of ARTs shall receive an approval by the competent authority before they can start offering their tokens to the public. On the contrary, issuers of utility tokens might offer crypto assets to the public after drafting, notifying and publishing a white paper (Article 4, MiCAR), without the need of any authorization. This same provision applies also to EMTs, according to Article 48 (MiCAR). In this regard, both issuers of other crypto assets and EMTs shall specify in the white paper that it “has not been approved by any competent authority in any Member State of the European Union. The issuer of the crypto-asset is solely responsible for the content of this crypto-asset white paper”⁷⁹. In any case, the white paper must be published 20 days before the initial offer. This should allow competent authorities to intervene and make adjustments before the offer of tokens. A similar approach “does not really seem sufficient to ensure adequate levels of integrity and confidence in the market. Customers receiving various versions of the white paper due to *ex post* interventions may find themselves confused.”⁸⁰

It is now interesting to ask ourselves what could justify the differences in the white paper provisions between issuers of ARTs and issuers of EMTs or other crypto assets. We can

⁷⁷ On this topic: Andrea Vicari, “Il white paper nella proposta di regolamento sulle cripto-attività (MiCAR)”, *La Nuova Disciplina Europea Dei Mercati Digitali: Nuovi Paradigmi Dell’autonomia Contrattuale*, Osservatorio Del Diritto Civile E Commerciale Anno Xi, Numero Speciale/2022

⁷⁸ Art. 19, Par. 4, Markets in Crypto-Assets Regulation

⁷⁹ Art. 6, Par. 3 (Title II) and Art. 51 Par. 3 (Title IV), Markets in Crypto-Assets Regulation. It is also worth-mentioning art.8 par.3:” “competent authorities shall not require an ex-ante approval of a crypto-asset white paper, nor of any marketing communications relating to it before their publication”.

⁸⁰ D.A. Zetzsche, F. Annunziata, D.W. Arner, R.P. Buckley. *Op.cit.*, p.13

intuitively understand that, compared to utility tokens (for which the category of other crypto assets regulated in Title II of MiCAR has been mainly designed), stablecoins have a more complex structure, they are widely used as a mean of payment and can pose significant risk on the financial stability. These aspects may reasonably justify the fact that utility tokens issuers might directly offer their crypto assets to the public, without the need for approval of the white paper. We should also underline that the procedure for the approval of the white paper is very long and complex and represents an administrative cost for regulators⁸¹. Therefore, it seems reasonable that such procedure is applied only when the crypto asset issued is very complex and may pose risk to financial stability⁸².

This logic seems adequate to explain the different application of the white paper rules between other crypto assets and asset-referenced tokens. However, it does not justify a different application between ARTS and e-money tokens, since they are both stablecoins. In MiCAR we can find more than one case in which the requirements for ARTs issuers are stricter than the ones applied to EMTs issuers. An example, other than the white paper, is offered by the legal opinions which we are going to discuss in the following paragraph.

3.7 Legal opinions

A very peculiar requirement for the offer of asset-referenced tokens regards the issuance of a legal opinion. This opinion should help to explain why the token issued is an ART and does not qualify as an e money or an asset not regulated under MiCAR⁸³. Usually, these opinions are asked to experts of the private sector (lawyers, crypto market specialists, etc.) and this highlight the fact that there is low level of clarity regarding the qualification of crypto assets⁸⁴. In this way, regulators are basically relying on private sector and even though this might be coherent with the sense of cooperation and dialogue between supervisors and supervised, there could be negative implications. As stated in “The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy”⁸⁵, “this proposed private-sector- led approach risks a race-to-the-bottom among European jurisdictions as token issuers migrate to those jurisdictions in which practicing lawyers are most inclined to write accommodating legal opinions”. Therefore, if, for example, Italian lawyers tends to provide legal opinions which are more accommodating than the ones provided by Spanish lawyers, a Spanish entity would be inclined to obtain the authorization to issue ARTs in Italy and then offer its products

⁸¹ Recital 33 refers to the approval as an “undue administrative burden”.

⁸² Even in such situation it is questionable whether the procedure should be so long and complex (it may be longer than 6 months).

⁸³ Art.17, Par. 1(b), Markets in Crypto-Assets Regulation

⁸⁴ Moreover, The EBA and ESMA shall issue an opinion on the evaluation of the legal opinion.

⁸⁵ D.A. Zetzsche, F. Annunziata, D.W. Arner, R.P. Buckley. Op.cit, p. 23.

in Spain or any other Member State (due to the passporting principle). At the same time, a Member State that wish to be more appealing in the crypto sector might apply a “lighter supervision”, so to attract European entities to obtain the license in that Member State. This situation may create conflicts of interests between Member States and might also lead to regulatory arbitrage since there would be jurisdictions in which, at least in practice, the requirements are less tight.

Another question mark related to the legal opinions regards the fact that they are requested only for asset-referenced tokens. As already discussed for the white paper, the requirements for ARTs are stricter than for other tokens regulated in MiCAR. Again, we can understand a different approach between ARTs and other crypto assets considering what we said in the previous paragraph (regarding the importance of stablecoins compared to utility tokens). Nonetheless, it remains unclear the reason why there are different requirements for ARTs and EMTs issuers. An interesting consideration might be done about the nature of EMTs. We already know that they “shall be deemed to be electronic money” and even that there is an *ad hoc* Directive issued in 2009 and updated many times (Directive 2009/110/EC). This implies that the concept of electronic money is not new in Europe. Regulators, supervisors, investors, companies and all market participants have had the possibility to experience, use and acknowledge electronic money. Therefore, we might deduct that legal opinions are not required for EMTs because there is legal certainty around them (differently from ARTs which are totally new and unexperienced in the European context). This legal certainty is provided by the fact that: electronic money is already well-known in the UE and, since EMTs “shall be deemed to be electronic money”, they fall (prevalently) under the scope of Directive 2009/110/EC⁸⁶.

3.8 The reserves for stablecoins issuers

We have learned that the reserve of assets is essential to guarantee the stability of stablecoins. Taking this into account and with the aim of ensuring market integrity and financial stability, the European Commission designed in MiCAR a very detailed and complete regime about the reserve of assets for stablecoins issuers. However, we should point out that such regime applies only to asset-referenced tokens⁸⁷. As we have already seen, since e-money tokens shall be considered electronic money, they fall under the scope of Directive 2009/110/EC (Electronic Money Directive) and Directive (EU) 2015/2366 (Payment Services

⁸⁶ This is just a possible intuitive explanation as to why legal opinions shall be provided only for ARTs. There are many other factors to consider and question unsolved about the different regimes in MiCAR.

⁸⁷ Except when the EMTs are significant, as we are about to see in the next paragraph.

Directive). Specifically, the provisions that apply to EMTs are the ones about funds, which are similar but different from the provisions about the reserves in MiCAR. We are now going to discuss the main characteristics of both regimes, starting with the one about ARTs⁸⁸.

The main reasons why issuers of ARTs “shall constitute and at all times maintain a reserve of assets”⁸⁹ are mainly 3: stabilizing the value of the tokens issued, protecting holders of ARTs in case the value of the tokens decreases, and guaranteeing at any time the right of redemption. The most important requirements about the reserve of assets for asset-referenced tokens are the following:

- The reserve of assets must be legally and operationally segregated from the issuer’s estate⁹⁰. This is to guarantee that the reserve of assets is not available to potential creditors of the issuers, but only to holders of ARTs⁹¹. In case a credit institution or an authorized entity issue more than one asset referenced token, different pools of reserves shall be maintained, one for each ARTs⁹².
- The value of the reserves must be determined using market priced and it must be at least equal to the value of the tokens in circulation⁹³.
- The reserve of assets must be held in custody by a legal person who is different from the issuer of the tokens. The custodians⁹⁴ might be crypto assets service providers in case the reserves are composed by crypto, investment firms in case the reserves are composed by financial instruments, and credit institution for any kind of reserves.
- The reserve of assets can be invested only in “highly liquid financial instruments”⁹⁵ where the risk is minimal and these financial instruments must be held in custody like the reserve⁹⁶. Any profit or loss resulting from the investment of the reserve must be borne by the issuers⁹⁷.

In addition to all these arrangements, the EBA, in close cooperation with ESMA and the ECB, is appointed to draft regulatory technical standards about liquidity requirements for of the

⁸⁸ We should point out that even ARTs are subject to own fund requirements under Article 35 (MiCAR).

⁸⁹ Art. 36 par. 1, Markets in Crypto-Assets Regulation

⁹⁰ Art. 36 par. 2 and 3, Markets in Crypto-Assets Regulation

⁹¹ The absence of such guarantee was one of the main reasons of the FTX collapse.

⁹² Art. 36 par. 5, Markets in Crypto-Assets Regulation

⁹³ Art. 36 par. 7, Markets in Crypto-Assets Regulation

⁹⁴ Art. 37 par. 3 and 4, Markets in Crypto-Assets Regulation

⁹⁵ Art. 38 par. 1, Markets in Crypto-Assets Regulation

⁹⁶ Art. 38 par. 3, Markets in Crypto-Assets Regulation

⁹⁷ Art. 38 par. 4, Markets in Crypto-Assets Regulation

reserve of assets⁹⁸, and about financial instruments that might be considered “highly liquid” with minimal market risk, credit risk and concentration risk⁹⁹. In this respect, the EBA has recently launched two consultation papers which will be open until 08 February 2024¹⁰⁰.

Switching to EMTs, even if the provisions about funds have different legal basis (EMD and PSD) than the provisions about reserves (MiCAR), the objectives are still similar: to protect the holders of the tokens and to guarantee at any time the right of redemption¹⁰¹. The main provisions about funds for EMTs issuers are as follows:

- Own funds of the issuers may never fall below the required amount, which can be computed with different calculations methods (the one that gives the highest amount should be chosen)¹⁰².
- The funds received in exchange for electronic money must be safeguarded. This is done by segregating the funds in a credit institution or by investing them in secure, low risk assets¹⁰³.

Just like for ARTs reserve’s regime, this provision should guarantee that holders of tokens are safe against the claims of other potential creditors of the issuers. Alternatively, the funds received by the issuers might be covered by an insurance policy, “for an amount equivalent to that which would have been segregated in the absence of the insurance policy”¹⁰⁴. Interestingly, Article 54 of MiCAR specifies that at least 30% of the funds received by the issuers in exchange for EMTs shall be deposited in separated accounts in credit institutions. The rest should be invested in “highly liquid financial instruments with minimal market risk, credit risk and concentration risk”¹⁰⁵.

⁹⁸ Art. 36 par. 4, Markets in Crypto-Assets Regulation

⁹⁹ Art. 38 par. 5, Markets in Crypto-Assets Regulation

¹⁰⁰ EBA, “consultation paper on draft regulatory technical standards to specify the highly liquid financial instruments with minimal market risk, credit risk and concentration risk under article 38(5) of Regulation (EU) 2023/1114” and “consultation paper on draft regulatory technical standards to further specify the liquidity requirements of the reserve of assets article 36(4) of Regulation (EU) 2023/1114

¹⁰¹ The main difference is that funds are not used to stabilize the value of EMTs, as instead happens for the reserve of assets which are essential to stabilize the value of ARTs.

¹⁰² Art. 5 par. 1, Directive 2009/110/EC

¹⁰³ Art. 9 par. 1(a), Directive 2007/64/EC

¹⁰⁴ Art. 9 par. 1(c), Directive 2007/64/EC

¹⁰⁵ Art. 54, Markets in Crypto-Assets Regulation. The provisions of this article seem to overlap with the safeguarding requirements set out in the EMD2. We can consider Article 54 as a further specification of how the funds received in exchange for EMTs shall be managed.

Differently from asset referenced tokens issuers, there is no custodial provisions for EMTs issuers, nor in the EMD, neither in the PSD. Nonetheless, many EU Member States introduced some custodial provisions when they implemented the EMD¹⁰⁶.

3.9 Additional requirement for issuers of significant stablecoins

Other than all requirements discussed until now, in case a stablecoin is significant, additional obligations apply to the issuer. This is in line with the fact that significant stablecoins, just like significant credit institutions, may pose greater risk on financial stability and market integrity¹⁰⁷. A list of the significant parameters is present in Article 43 (MiCAR) and they are equal for both ARTs and EMTs. We will better analyze the significance criteria in chapter 6, for the moment our focus will be on the additional requirements. The first thing to mention is that such additional requirements are the same for both significant ARTs and EMTs. According to Article 45 (MiCAR), issuers of significant stablecoins shall:

- Adopt and maintain a remuneration policy to ensure a sound and effective risk management.
- Establish and implement a procedure to always guarantee a resilient liquidity profile.
- Regularly conduct liquidity stress tests. The EBA, depending on the stress test results, may decide to increment the liquidity requirements.

These are the main additional requirements for significant issuers and, as we can see, the primary focus is on risk management and liquidity. A very interesting aspect to mention with respect to issuers of SEMTs is that, other than the additional requirements just mentioned, they shall be also subject to the provisions about the reserve of assets¹⁰⁸, which always applies to issuers of ARTs. This implies that SEMTs and SARTs are subjects to the same provisions, differently from the case in which the tokens are not significant.

¹⁰⁶

¹⁰⁷ Under the Single Supervisory Mechanism, significant credit institutions are subject to stricter requirements with respect to non-significant ones.

¹⁰⁸ And even the one about own funds under Article 35 (MiCAR).

3.10 Preparatory steps towards MiCAR

The EBA published a recent statement¹⁰⁹ addressed to financial institutions and other undertakings which want to offer stablecoins to the public. “The statement is intended to encourage timely preparatory actions to MiCAR application [30 June 2024], with the objectives to reduce the risks of potentially disruptive and sharp business model adjustments at a later stage, to foster supervisory convergence, and to facilitate the protection of consumers”¹¹⁰. In the Annex of the statement, we can find guidelines which indicate preparatory steps and assessments that issuers of ARTs and EMTs should implement¹¹¹. The 5 guiding principles are:

- 1) The first principle regards correct and complete disclosure. Issuers of ARTs and EMTs are asked to provide their clients with all the information regarding their tokens, particularly about rights, risks and redemption policies. Moreover, marketing communications of the tokens must be “clear, fair and not misleading”¹¹². Principle 1 is also about the fair treatment of both potential acquirers and holders. Issuers should implement effective procedures in case of complaints, so to handle them in a “prompt, fair and consistent”¹¹³ way.
- 2) Principle 2 regards the program of operations. Issuers are required to have a well-defined business model which contains detailed information about sources of revenues, action plans in case of stress scenarios, the distribution model of the tokens, etc. In addition to this, issuers should also explain how the offer of tokens is in line with the risk profile and the general activity of the firm.
- 3) The third principle is referred to the structure and the governance. Issuers should have a management body with the right level of expertise and knowledge to face and detect all potential issues related to ARTs and EMTs. The organizational structure must be clear and there need to be policies regarding money laundering and terrorist financing, conflict of interests, operational risks and so on. Furthermore, another essential aspect of principle 3 is the risk management procedures. Issuers need to

¹⁰⁹ EBA, “EBA encourages timely preparatory steps towards the application of MiCAR to asset-referenced and electronic money tokens”, 12th July 2023

¹¹⁰ *ibidem*

¹¹¹ Being guiding principles they are not mandatory. However, these guidelines will facilitate the transition to Micar, mainly because, starting from 30 June 2024, issuers of ARTs and EMTs will need to be authorized. Therefore, if issuers start following guiding principles in the EBA statement, they will already have the requirements to be authorized under MICAR.

¹¹² EBA, “EBA encourages timely preparatory steps towards the application of MiCAR to asset-referenced and electronic money tokens”, 12th July 2023

¹¹³ *ibidem*

have an effective system to “identify, measure, manage and monitor”¹¹⁴ the risks related to the crypto activity.

- 4) Principle 4 is about reserve and redemption procedures. There must be a robust reserve of assets to cover the issued ARTs. Moreover, both issuers of ARTs and EMTs have to offer detailed redemptions plan and cannot grant any interest to their token’s holders.
- 5) The last principle encourages every financial institution to timely communicate the intention to carry out ARTs/ EMTs activity. They are particularly asked to provide NCA of their home country with information about the nature of the token they want to issue.

Together with the statement, the EBA also published a template that issuers can fill and send to their NCA, therefore simplifying the exchange of information.

3.11 Chapter Conclusions

In this chapter we explored many remarkable provisions about stablecoins under the MiCA Regulation. Let’s remind that one of the objectives of MiCAR is to reduce the uncertainty related to crypto-assets and to avoid potential failures like FTX or Terra/Luna. In this respect, the provisions regarding the reserve of assets under the MiCA Regulation seems to be adequate. We should remember that one of the main reasons of the Terra/ Luna crash was that there was no reserve of assets and the demand and supply was controlled only by an algorithm. A similar scenario should not happen under the MiCAR framework, also because, according to Recital 41, even algorithmic stablecoins shall be regulated under Title III or IV of the Regulation. This imply that the provisions about the reserve of assets (for ARTs) or the own funds requirements (EMTs) would be applied also to algorithmic stablecoins, thus reducing the possibility of liquidity problems for issuers.

Another interesting aspect we underlined in this chapter concerns some stricter provisions that apply only to issuers of ARTs and not EMTs. To remind some of them, the approval of the crypto-assets white paper, the necessity for a legal opinion and even the reserve of assets. In the following chapters we will also see that issuers of significant ARTs are subject to a direct supervision by the EBA, differently from issuers of significant EMTs that are subject

¹¹⁴ ibidem

to a dual supervision by the EBA and the relevant National Competent Authority. Similar differences leave some space for debate and discussions.

Therefore, even if MiCAR provides legal certainty (especially on stablecoins) under many points of views and reduce the possibility of new crypto failures, there are still some interpretative doubts.

CHAPERT 4

THE SUPERVISORY FRAMEWORK IN MICAR

4.1 Introduction

In the last chapter we explored the provisions about stablecoins in MiCAR, analyzing the different characteristics of ARTs and EMTs and pointing out the regulatory requirements for issuers of these tokens. To make sure that such requirements are respected, the European Commission has designed a clear supervisory framework in which the leading role is played by the European Banking Authority. In this chapter we will present the MiCAR supervisory framework, analyzing the main tasks of NCAs and ESMA¹¹⁵ and making some comparisons with the Single Supervisory Mechanism. Moreover, we are going to introduce the new role of the EBA, referring to the ESMA direct supervision on Credit Rating Agencies.

4.2 Supervision in MiCAR

The supervisory framework designed by the European Commission is composed prevalently by the European Banking Authority as main supervisor together with ESMA and National Competent Authorities (NCAs) of each Member State. NCAs are directly responsible for the supervision of issuers (of ARTs, EMTs and other crypto assets) and service providers (CASP). The EBA is generally responsible for issuers of stablecoins and has direct supervision on issuers of Significant¹¹⁶Asset-Referenced Tokens (SEMTs) and Significant E-Money Tokens (SEMTs)¹¹⁷. ESMA is indirectly responsible for issuers of other crypto-assets and crypto-assets service provider. Even in case of significant CASPs (in case the provider has more than 15millions active users), ESMA shall be notified and updated frequently, having also power of intervention¹¹⁸. All powers and responsibilities of NCAs, EBA and ESMA are described in Title VII of MiCAR. The division of supervisory powers between EBA and NCAs is not new in EU. A very similar supervisory approach is present in the Single Supervisory Mechanism

¹¹⁵ Powers and responsibilities of the EBA will be extensively discussed in the following chapter.

¹¹⁶ We will discuss in detail the significance parameters for ARTs and EMTs in the next chapters.

¹¹⁷ In a previous version of MiCAR (European Parliament Mandate) there was a proposal to entitle ESMA for the supervision of SARTs. However, the proposal was not accepted and therefore the EBA is responsible for both SEMTs (together with NCAs) and SARTs.

¹¹⁸ Art. 85, Markets in Crypto-Assets Regulation

(SSM) between the ECB (directly responsible for significant institutions) and NCAs (directly responsible for less significant institutions).

4.3 The decision of the EBA as main supervisor and common traits between MiCAR and the SSM

As discussed previously, according to MiCAR disposals, only credit institutions are allowed to issue both categories of stablecoins (ARTs and EMTs). This will probably determine a centralization of the offer of stablecoins around banks. It seems therefore reasonable the choice of the EBA as main supervisor in MiCAR, given its high level of expertise in the banking sector and in the functioning of a bank. A valid alternative was represented by the ECB, which is already responsible for the prudential supervision of credit and financial institutions under the SSM. We know that the European Commission decided differently, probably also because it did not want to overcharge the ECB with additional supervisory tasks. However, it will be necessary a lot of coordination to avoid supervisory conflicts and overlaps between the EBA, the ECB and NCAs¹¹⁹.

The MiCAR supervisory framework strongly resembles the Single Supervisory Mechanism in more than one aspect. Going on in the chapter with the illustration of the main tasks of NCAs, ESMA and especially EBA, we will better understand the various analogies between SSM and MiCAR. We can generally say that both are hierarchical systems with a main supervisor (ECB in the SSM, EBA in MiCAR) directly responsible for the supervision of significant entities (credit institutions in the SSM, issuers of stablecoins in MiCAR). Other entities are instead supervised by NCAs, both in the SSM (non-significant credit institutions) and MiCAR (issuers of non-significant stablecoins, other crypto-assets and CASPs). Another common characteristic of both supervisory frameworks regards the high level of cooperation, not only between ECB (EBA) and NCAs, but even between NCAs of different Member States and European entities like ESMA or EIOPA¹²⁰. In this regard, the European Commission maintained in MiCAR the optimism and confidence that through cooperation and exchange of information there might be a better and more effective vigilance.

¹¹⁹ This issue is discussed in the following paragraph when we analyze an opinion of the ECB on the MiCAR supervisory framework.

¹²⁰ Going on with the reading, we will better analyze the tasks of NCAs, ESMA and EBA in MiCAR, making comparisons with the SSM.

4.4 ESMA supervision on Credit Rating Agencies: a model for MiCAR?

According to experts (lawmakers, professors, lawyers, etc.), the transformation of EBA into a supervisory (and not only regulatory) authority in MiCAR, is the same happened to ESMA with respect to Credit Rating Agencies (CRAs)¹²¹. CRAs are regulated in Europe since 2009, when the first version of the CRA Regulation¹²² entered into force. Reading through the legislative text and analyzing the main provisions, we may understand that the role of ESMA in terms of powers and responsibilities resembles the one that the EBA will have in MiCAR. According to the CRA Regulation, every entity that intends to carry out the credit rating activity shall be registered. The phase of the registration is the one in which the CRA provides all relevant information (about the business model, governance, policies and procedures and most importantly about rating methodologies) and ESMA decide if to grant the registration status or not. The information provided in the registration phase for CRAs are very similar to those included in the MiCAR crypto-assets white paper (of course, instead of rating methodologies, we find information about the token, the reserve of assets, redemption rights and so on). At the same time, ESMA may (or may not) grant the registration status to CRA in the same way in which the EBA may (or may not) approve the crypto-assets white paper for issuers of ARTs¹²³. In both cases, the 2 ESAs shall verify that the entities fully respect the requirements set out in CRA Regulation (for CRAs) and MiCAR (for issuers of ARTs). After the registration, ESMA is entitled to directly supervise CRAs and can make use of its powers to ensure the compliance of rating agencies with the CRA Regulation. The supervisory powers of ESMA on CRAs are almost identical to the EBA ones with respect to issuers of significant stablecoins. To mention some, both ESMA (under CRA Regulation) and EBA (under MiCAR) can conduct general investigations or on-site inspections, request for information, impose fines. Another point to stress regards the issuance of regulatory and implementing technical standards. Being the main authorities, EMSA and EBA are responsible for drafting such standards respectively under CRA Regulation and MiCAR.

All things considered, it makes sense to say that the EBA in MiCAR is following the same transformation process occurred to ESMA with the supervision of CRAs¹²⁴.

¹²¹ The novelty in MiCAR regards the direct supervision of the EBA on issuers of significant tokens. This is the transformation process we are referring to, already occurred to ESMA with CRAs.

¹²² Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies.

¹²³ Of course, we know that such approval is not required for issuers of EMTs or other crypto-assets.

¹²⁴ It is clear that the range of application of the MiCAR Regulation is higher and more articulated than the CRA one. We have generally seen how the supervision in MiCAR involves more than just the EBA, but also NCAs and ESMA. Therefore, comparing the supervisory role of ESMA on CRAs and the role of EBA in MiCAR makes sense when we focus prevalently on the supervision of significant stablecoins issuers.

4.5 ECB opinion on the supervisory framework

The European Central Bank expressed its concerns about the MiCAR supervisory framework through an opinion¹²⁵ and there are many aspects that deserves to be analyzed¹²⁶. Firstly, according to the ECB, the dual supervision on SEMTs (by EBA and NCAs) “is subject to significant shortcomings” and “may blur responsibilities and add complexity to the arrangements” (3.1.3). In this regard, we can think of a conflicting case in which an entity offers both significant e-money tokens and utility tokens. This is a quite realistic situation that could lead to “duplicative or even conflicting supervisory tasks” (3.1.3) between NCAs and EBA. The ECB basically proposed to create a harmonized European framework, equal for both SEMTs and ARTs, so to enhance “coordination of supervisory actions and, at the same time, avoid regulatory arbitrage” (3.1.3). Furthermore, the ECB retains that no economic reason justifies a supervisory difference between significant e-money tokens (subject to dual supervision) and significant asset-referenced tokens (subject to a harmonized supervision by EBA), suggesting that they should be treated in the same way¹²⁷.

Another concern discussed in the ECB opinion regards the adaptability of the supervisory framework proposed in MiCAR with the existing one (SSM). Specifically, the ECB refers to the case of significant e-money tokens issuer that is also a significant credit institution. In this situation, the issuer would be supervised by 3 different entities: the national competent authority and the European Banking Authority for the significance of e-money tokens, and the ECB for the significance of the credit institution (according to the Single Supervisory Mechanism). In this regard, the ECB advice is to include the “experience and expertise” (3.1.4) of NCAs in the decision-making body of the EBA, both in the joint supervisory team (for significant credit institution) and in the supervisory colleges (for significant SEMTs). Another important concern regards the possible conflict between supervisory responsibilities and tasks of the EBA and the ECB. In this respect, “the EBA’s obligation to enforce the issuer’s compliance with the requirements laid down in the proposed regulation should not encroach upon the supervision of prudential requirements enforced by the ECB in its banking supervisory role” (3.1.5).

The last consideration comes from a very recent speech¹²⁸ by Andrea Enria (Chair of the Supervisory Board of the ECB). As he pointed out, credit institutions which offer crypto-

¹²⁵ECB, “Opinion of the European Central Bank on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, 29/04/2021”.

¹²⁶ Some of the following aspects will also be discussed in the next chapter, when we will talk about the cooperation between supervisors.

¹²⁷ This is interesting considering the differences in terms of requirements between ARTs and EMTs discussed in the previous chapter. Should they really be treated differently?

¹²⁸ Speech by Andrea Enria, Chair of the Supervisory Board of the ECB, at the Conference on MiCAR and its coordination with EU financial markets legislation, jointly organised by Ca’ Foscari University of Venice and Banca d’Italia, Venice, 14 November 2023. The speech is available on the ECB website.

assets services (being CASPs) fall outside the supervision of the ECB¹²⁹. In this way, banks that are CASPs may hide their exposure to crypto assets and prevent the ECB from applying safeguards. This loophole is the reason why Enria suggested to include “as a matter of urgency” the category of CASPs in the list of financial institutions supervised by the ECB.

4.6 The vigilance by National Competent Authorities in MiCAR

Every Member State may decide which NCA shall be responsible for the supervision in MiCAR¹³⁰, and they should guarantee that this Authority (or Authorities if more than one) has enough supervisory and investigative powers to carry out its tasks¹³¹. According to Article 94 (Markets in Crypto-Assets Regulation), NCAs can:

- Suspend or prohibit the offer of crypto-assets (stablecoins and other crypto-assets) or the provision of crypto assets services whenever the Regulation has been infringed or where there are reasonable grounds for suspecting that it has been or will be infringed. Another case in which NCAs may also prohibit or suspend the offer or services provision of crypto assets if it “would be detrimental to the interests of clients, in particular retail holders”.
- Order the “immediate cessation of the activity without prior warning” in case a person is offering crypto assets or providing services related to crypto assets without the authorization.
- Carry out on-site inspections and investigations. Such investigations may be outsourced by the NCA to auditors or other experts.
- Require issuers of crypto assets to amend the white paper¹³² or marketing communications, in case they do not comply with title II, III or VI (depending on the crypto asset issued). NCAs may also require the removal of a person from the management body of a crypto asset service provider or an issuer of ART. EMTs issuers

¹²⁹ According to the Single Supervisory Mechanism, the ECB is responsible for the supervision of credit institutions and other financial institutions (as defined in the Capital Requirements Regulation No. 575/2013). However, the category of crypto-assets service providers is currently excluded from the definition of financial institutions under CRR.

¹³⁰ Art. 93, Markets in Crypto-Assets Regulation

¹³¹ Art. 94, Markets in Crypto-Assets Regulation

¹³² It's important to remember that ARTs issuers shall receive an approval to the white paper before offering their tokens, and NCAs are the authorities that can deny or grant this approval.

are not included because, with regard to prudential requirements (so even governance rules), EMTs fall under the scope of Directive 2009/110/EC.

- Make public the non-compliance of issuers or service providers with the Regulation.
- Disclose every information which may have an impact on the interest of clients, particularly retail holders, or on the smooth operation of the market.

Another very interesting aspect to mention about NCAs is the cooperation with other NCAs and ESAs (ESMA and EBA). First of all, in case a crypto assets issuer/service provider engages in activities not regulated under MiCAR (for example the banking activity or the provision of financial services), NCAs shall coordinate with competent authorities entitled to supervise those activities¹³³. We can imagine an investment firm which offers custodial services for both financial instruments and crypto assets. In such a situation, the competent authorities of both activities (in case they are different) are required to cooperate.

Additionally, according to Article 95 par. 1 (MiCAR) “competent authorities shall render assistance to competent authorities of other Member States, and to EBA and ESMA” and “shall exchange information without undue delay and cooperate in investigation, supervision and enforcement activities.” As it happens in the SSM, even in MiCAR the cooperation between Authorities is explicitly required in the regulatory text. It is worth remembering that the “home country control principle” is valid also under the MiCA Regulation.

Therefore, if a Spanish crypto assets service provider or issuer of crypto assets wants to provide its services/issue tokens in another European country, the Spanish NCA will still be responsible for the supervision of the service provider/issuer. In such a situation, the Spanish NCA may request assistance to the competent authority of the host Member State for investigations or on-site inspections¹³⁴. In case the competent authority of the host Member State suspects that there are irregularities in the activity of the Spanish crypto assets service provider/issuer, it shall notify the Spanish competent authority and ESMA or EBA¹³⁵. Where, even after the notification and the eventual measures applied by the Spanish competent authority, the irregularities persist, the competent authority of the host Member State shall take precautionary measures to protect clients and holders of the tokens¹³⁶.

As we can deduce from the powers and responsibilities just mentioned, the role of NCAs in MiCAR is very similar to the one they have in the Single Supervisory Mechanism.

¹³³ Art. 98, Markets in Crypto-Assets Regulation

¹³⁴ Art. 95 par. 4, Markets in Crypto-Assets Regulation

¹³⁵ The notification to ESMA or EBA depends on the crypto asset issued. Specifically, in case of CASPs or issuers of other crypto assets the NCA shall notify ESMA. Instead, if the activity regards stablecoins (ARTs or EMTs), the NCA shall notify EBA.

¹³⁶ Art. 102, Markets in Crypto-Assets Regulation

4.8 The role of ESMA in MiCAR

The European Securities and Markets Authority has a double role in MiCAR: one as regulator, and the other as supervisor¹³⁷. On the regulatory side, ESMA is entitled to issue (non-binding) guidelines, opinions and recommendations. These shall enhance the understanding and clarification of the MiCAR provisions. For example, “ESMA is mandated to issue guidelines on the criteria and conditions for the qualification of crypto-assets as financial instruments”¹³⁸. This makes perfectly sense considering that ESMA has a high level of expertise in financial instruments, given its supervisory role in the Single Supervisory Mechanism. As we will see in the following paragraphs, there are different aspects of MiCAR which needs clarification and require the issuance of guidelines, opinions and recommendations. Generally, in most of the cases, ESMA act in close cooperation with EBA for the issuance of such guidelines, opinions and recommendations.

Another regulatory task of ESMA in MiCAR is to cooperate with the EBA in the draft of regulatory and implementing technical standards which are then adopted by the European Commission. According to recital 109 “it is efficient and appropriate to entrust EBA and ESMA, as bodies with highly specialised expertise” with the development of implementing and regulatory technical standards. Such standards shall refer to different areas of the MiCAR legislation, for example: the content and information that must be included in the crypto assets white paper, the liquidity requirements for the reserve of assets, the information required for the authorization to issue crypto assets or provide crypto services, the procedures to identify and manage conflict of interests and many more¹³⁹.

Switching to the supervisory side, ESMA plays a considerable role in MiCAR. This role was even more important in a previous version of the Regulation, where ESMA was designed to be the direct supervisor of SARTs¹⁴⁰. As we know, SARTs are currently directly supervised by the EBA, but the supervisory tasks of ESMA in MiCAR are still fundamental. Let’s analyze the main supervisory powers and responsibilities:

¹³⁷ Again, this is not news for ESMA which has the same double role under the SSM framework. With respect to the supervision, ESMA shall supervise the supervisors (NCAs) and ensure that they act properly. This kind of supervision (carried out also by the EBA in MiCAR with respect to issuers of non-significant stablecoins) has nothing to do with the direct supervision of the EBA on issuers of significant tokens.

¹³⁸ Recital 14, Markets in Crypto-Assets Regulation

¹³⁹ Recitals 110 and 111 offer a complete list of all areas which require the development of regulatory and implementing technical standards.

¹⁴⁰ Filippo Murino, “Vigilanza ed enforcement sui mercati delle criptoattività nella proposta di Regolamento MiCA”, *La Nuova Disciplina Europea Dei Mercati Digitali: Nuovi Paradigmi Dell’autonomia Contrattuale*, Osservatorio Del Diritto Civile E Commerciale Anno Xi, Numero Speciale/2022, p.448

- First of all, ESMA shall be notified whenever there are issues or controversies related to CASPs (even significant) or issuers of other crypto-assets. Both categories are directly supervised by NCAs, but in case these authorities do not act properly, ESMA shall use its intervention powers. In addition to this, ESMA, through an opinion, shall ensure that any measure taken by the NCA (regarding CASP or other crypto-assets) is appropriate and justified¹⁴¹.
- ESMA is also entitled to keep a register with all crypto-assets white papers, drafted by both issuers and service providers¹⁴². Such register must be publicly available and kept updated. NCAs shall inform ESMA of any changes regarding the information contained in the white papers (such as the name of the issuer/service provider, the starting date, the physical address and so on). Any out-of-date white paper must be kept by ESMA in a “separate archive”¹⁴³, specifying that it is obsolete. Interestingly, according to Article 110, ESMA is also entitled to keep another register for “non-compliant entities providing crypto-asset services”. Such register, differently from the white paper’s one, doesn’t need to be exhaustive in terms of information and represent a sort of “blacklist” with all entities which provide crypto services without authorization.
- We know that when a NCA wants to carry out an inspection in another Member State it may request assistance to the other NCA. In such a situation, one of the two NCAs, or even both, may request ESMA to coordinate the inspection¹⁴⁴.
- According to Article 103, ESMA may temporarily restrict or prohibit the marketing, distribution or any other activity related with other crypto assets (so not ARTs or EMTs) whenever there might be a threat to market integrity or financial stability¹⁴⁵. The relevant NCA must be notified before the decision is taken and such decision shall be made publicly available. The most important aspect of Article 103 is that “measures taken by ESMA pursuant to this Article shall prevail over any previous measure taken by the relevant competent authorities on the same matter”¹⁴⁶.
- ESMA is also responsible for the supervision of significant CASPs. It shall be notified by the NCA whenever a CASP reaches more than 15 million active users, which is the

¹⁴¹ Art. 106, Markets in Crypto-Assets Regulation

¹⁴² Recital 101 and Art. 109, Markets in Crypto-Assets Regulation

¹⁴³ Art. 109 par.2, Markets in Crypto-Assets Regulation

¹⁴⁴ In case the entity to be inspected is an issuer of stablecoins, the EBA shall coordinate the inspection, if requested.

¹⁴⁵ Art. 103 par. (1,2,3 and 4), Markets in Crypto-Assets Regulation

¹⁴⁶ Art.103 par.7, Markets in Crypto-Assets Regulation

parameter to consider the service provider as significant. ESMA may use its intervention power in case its necessary¹⁴⁷.

Besides all these powers and responsibilities which ESMA shall exercise by itself, there are other tasks for which ESMA is required to cooperate with the EBA. Among these tasks there are: enhancing the supervisory convergence between NCAs, encouraging a harmonized classification of crypto assets across all EU Members, taking part in the supervisory colleges, making annual reports about the status of the MiCAR implementation and its effects on markets. We should not forget that, in addition to these supervisory tasks, ESMA collaborate with EBA even for regulatory duties, such as the issuance of guidelines and opinions and the draft of technical standards¹⁴⁸.

All things considered, the role of ESMA in MiCAR is very similar to the one it has in the Single Supervisory Mechanism, under both regulatory and supervisory point of view. In this respect, the powers that ESMA exercises in the SSM come from Regulation 1095/2010, and in MiCAR there is more than one direct reference to this Regulation, underlining the affinity between MiCAR and SSM's supervisory frameworks.

¹⁴⁷ Art. 85, Markets in Crypto-Assets Regulation

¹⁴⁸ We will discuss deeper all regulatory and supervisory duties in the following paragraphs about the EBA.

CHAPTER 5

THE ROLE OF THE EUROPEAN BANKING AUTHORITY

5.1 Introduction: the role of EBA before MiCAR

From now on for the rest of the chapter our focus will be only one: the European Banking Authority. We will extensively discuss its powers and responsibilities in MiCAR, especially as supervisor of Significant Asset-Referenced Tokens and Significant E-Money Tokens, but first, let's briefly look at the current role carried out by the EBA (before MiCAR). We already know that the EBA is a component of the European System of Financial Supervisors and one of the most important authorities in the Single Supervisory Mechanism. It has both regulatory and supervisory tasks, and its powers come from Regulation 1093/2010.

On the regulatory side, the European Banking Authority shall use its knowledge and expertise in the banking sector to draft regulatory and implementing technical standards. To make an example, the EBA issued technical standards regarding the information requirements in the authorization process of credit institutions, "thus facilitating the application process and ensuring a level playing field"¹⁴⁹. It is worth underlining that all technical standards must be approved by the European Commission, which can adopt, apply amendments or even reject the draft of the EBA. The reason of this is that the regulatory powers of the EBA are task-specific and cannot go beyond certain limits. Other than drafting technical standards, the EBA has also the faculty to issue non-binding guidelines, opinions or recommendations. Even if non-binding, these guidelines, opinions and recommendations are taken into high consideration. They are used to encourage the supervisory convergence across different Member States and to create a consistent interpretation of the EU law.

On the supervisory side, the EBA is entitled to ensure that NCAs are correctly applying and interpreting the EU law. For example, it may use its investigatory powers to determine whether a financial institution is not respecting the prudential requirements set out in the Capital Requirements Regulation¹⁵⁰. If so, the EBA, through a recommendation, shall

¹⁴⁹ EBA website, "Technical standards on the authorisation of credit institutions".

¹⁵⁰ Regulation (EU) 2019/876 of the European Parliament and of the Council of 20 May 2019 amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements, and Regulation (EU) No 648/2012 (Text with EEA relevance.)

encourage the NCA to act. In case the breach has the potential to jeopardize financial stability, the EBA may use its intervention powers (to prohibit or restrict) and act directly on the financial institutions, “bypassing” the NCA¹⁵¹. This is just one of the cases in which the EBA may apply its investigatory or intervention powers. Other than supervising NCAs, there are many other supervisory tasks carried out by the EBA. To mention some, it shall coordinate stress tests to financial institutions in cooperation with the ECB (main supervisor of financial institutions) and take parts in supervisory colleges (created for significant institutions and chaired by the ECB).

5.2 The regulatory role of the EBA in MiCAR

After quickly and generally introducing the role of the European Banking Authority before the MiCA Regulation, we are now ready to discuss what are going to be the new powers and responsibilities. As done until now, we will start by focusing on the regulatory tasks of the EBA, and successively about the supervisory ones.

Under the regulatory point of view, the EBA in MiCAR is mainly in charge of drafting regulatory and implementing technical standards and issuing guidelines, opinions and recommendations. As we can immediately notice, these responsibilities are basically identical to the ones the EBA has in the SSM. With regard to the technical standards, as anticipated in the ESMA paragraph, Recital 110 (for regulatory standards) and 111 (for implementing standards) provide a list of the main areas which require the draft of such standards. As stated in its website “the EBA is responsible for developing 17 technical standards and guidelines to further specify the requirements for ARTs and EMTs”. Whenever technical standards shall be drafted under any EU legislation, there is generally a previous set of consultation packages. In the MiCA Regulation, the EBA has already launched different consultation packages starting in July 2023 and intends to launch the remaining ones before the end of 2023¹⁵².

One of the most relevant issues in the MiCA Regulation regards the interpretation and classification of crypto-assets. Since they represent something new and unexperienced, there is a consistent risk that the same product might be classified as crypto-asset in one Member State and as something else in another Member State. This is the reason why the EBA, together with other ESAs (ESMA and EIOPA), is entitled to enhance the supervisory convergence on the classification of crypto-assets through the use of guidelines, opinions and recommendations. Recital 45 specifies that “non-binding opinions of EBA and ESMA should address the classification of the crypto-asset”. Moreover, according to Art. 97, NCAs

¹⁵¹ Art. 17-18, Regulation 1093/2010

¹⁵² EBA website, “Markets in Crypto-Assets”, Policy mandates: timeline

may request for opinions¹⁵³ to the EBA on the classification of tokens. Finally, the EBA and the other ESAs shall “jointly draw up an annual report, identifying difficulties in the classification of crypto-assets and divergences in the approaches of the competent authorities”¹⁵⁴.

5.3 The EBA as supervisor of non-significant issuers

The MiCA Regulation provides EBA with unprecedented powers and responsibilities regarding supervision. In fact, for the first time, the EBA “is no longer only a regulatory authority, but also a supervisory authority, following the model achieved, in certain areas, by ESMA”¹⁵⁵. As noted previously, the EBA has direct supervisory powers on issuers of significant stablecoins and is generally responsible for any issue or problem that involve stablecoins (even crypto-assets services related to ARTs or EMTs). Before diving into the real MiCAR innovation regarding the direct supervision of significant stablecoins, we briefly mention the EBA powers and responsibilities concerning non-significant ARTs and EMTs.

- The EBA has the power to temporarily prohibit or restrict the “marketing, distribution and sale”¹⁵⁶ of stablecoins. Such powers shall be used in case: the relevant NCA has not acted or the measures taken are insufficient, there isn’t already a MiCAR provision addressed to the issue or there is a serious threat to market integrity or financial stability. The EBA shall make available on its website any prohibition or restriction and they must be reviewed at least twice a year. Most importantly, any measures adopted by the EBA “shall prevail over any previous measure taken by the relevant competent authority on the same matter”¹⁵⁷.
- the EBA shall be notified by NCAs whenever they find irregularities on stablecoins issuers or when they intend to apply precautionary measures to stablecoins issuers¹⁵⁸. Furthermore, the EBA shall issue an opinion on the measure taken by the NCA, assessing whether they are justified and proportionate¹⁵⁹.

¹⁵³ In this case the EBA and other ESAs shall issue the opinion only if requested by the NCA. This provision has nothing to do with the “opinion on the evaluation of the legal opinion” required in the ART white paper (Article 17, MiCAR).

¹⁵⁴ Art. 97 par. 4, Markets in Crypto-Assets Regulation

¹⁵⁵ Annunziata, Filippo and Annunziata, Filippo, An Overview of the Markets in Crypto-Assets Regulation (MiCAR). (December 11, 2023). European Banking Institute Working Paper Series no. 158, Page 53

¹⁵⁶ Art. 104 par. 1, Markets in Crypto-Assets Regulation

¹⁵⁷ Art. 104 par. 7, Markets in Crypto-Assets Regulation

¹⁵⁸ Art. 102 par.1, Markets in Crypto-Assets Regulation

¹⁵⁹ Art. 106, Markets in Crypto-Assets Regulation

- When a NCA wants to carry out an inspection in another Member State it may request assistance to the NCA of that Member State. In such a situation, one of the two NCAs, or even both, may request EBA to coordinate the inspection if the entity to be inspected is an issuer of stablecoins or provide services related to ARTs or EMTs¹⁶⁰.

Up to now, one interesting aspect to notice is that the powers and responsibilities of EBA on issuers of (non-significant) stablecoins are basically identical to the powers and responsibilities of ESMA on CASPs and issuers of other crypto-assets. To give an idea, if we look at Article 103-104 (MiCAR) about temporary intervention powers of ESMA and EBA respectively, it is immediately apparent that the 2 articles are specular. The only difference regards the entities over which intervention powers are used (again, issuers of ARTs and EMTs for EBA and CASPs or issuers of other crypto-assets for ESMA).

5.4 Significance of a stablecoin in MiCAR

As anticipated before, the real innovation of MiCAR is the direct supervision of the EBA on issuers of significant stablecoins. It is such role that elevates the European Banking Authority as the main supervisor of the MiCA Regulation. According to Recitals 102 and 103, the fact that significant stablecoins may pose risks to monetary transmission channels and financial stability (due to their potential large-scale use as a mean of payment) represents the reason why the EBA has been assigned with the task to supervise significant stablecoins. “Such assignment should address the very specific nature of the risks posed”¹⁶¹ by asset-referenced tokens and e-money tokens. Moreover, Recital 103 gives a very interesting explanation of why SEMTs are subject to a dual supervision. We know that when an EMT becomes significant, the issuer shall respect additional requirements. However, “since the specific additional requirements should apply only to electronic money institutions issuing significant e-money tokens, credit institutions issuing significant e-money tokens, to which such requirements do not apply, should remain supervised by their respective competent authorities”. The reason why the additional requirements do not apply to credit institutions is that they are already subject to the highest level of protection under different EU legislations (CRR, CRD, SSM Regulation, etc.).

¹⁶⁰ Art. 95 par. 5, Markets in Crypto-Assets Regulation

¹⁶¹ Recital 102-103, Markets in Crypto-Assets Regulation

Before analyzing the direct supervisory tasks of the EBA, let's briefly mention the significant parameters for issuers of stablecoins¹⁶². ARTs or EMTs are considered significant if:

- a) the number of holders of the token is larger than 10 million.
- b) the value of the token issued, its market capitalization or the size of the reserve of assets of the issuer of the token is higher than EUR 5 000 000 000.
- c) the average number and average aggregate value of transactions in that token per day during the relevant period, is higher than 2,5 million transactions and EUR 500 000 000 respectively.
- d) the issuer of the token is a provider of core platform services designated as a gatekeeper in accordance with Regulation (EU) 2022/1925 of the European Parliament and of the Council (43).
- e) the significance of the activities of the issuer of the token on an international scale, including the use of the token for payments and remittances.
- f) the interconnectedness of the token or its issuers with the financial system.
- g) the fact that the same issuer issues at least one additional asset-referenced token or e-money token and provides at least one crypto-asset service.

In the next chapter we will better analyze these parameters one by one, making also comparison with the significance criteria in the banking sector. For the moment, we just need to know that an issuer of stablecoins can be considered significant if at least three of the listed parameters are met, and this applies to both ARTs and EMTs. After establishing whether a stablecoin fulfils the requirements to be considered significant, the EBA shall eventually draft a decision. Such decision shall be notified to the NCA of the issuer's Member State and to the ECB¹⁶³. After receiving the notification, these authorities have 20 working days to express comments and observations. Then, the EBA shall duly consider such comments and observations before drafting its final decision within 60 working days. Subsequently the supervisory responsibilities on the issuer of the brand-new significant token are transferred from the NCA to the EBA. An alternative procedure might be initiated

¹⁶² Art. 43 and 56, Markets in Crypto-Assets Regulation

¹⁶³ In case the issuer is in a Member State whose currency is not the euro or if the token is referenced to a currency different from the euro, the EBA shall notify also the Central Bank of the Member State concerned. This provision applies also for the voluntary classification by the issuer and for the yearly reassessment.

by the issuer itself, who can express the intention to have its token classified as significant¹⁶⁴. In this situation, the NCA of the issuer's Member State shall notify the EBA and the ECB. Then, as in the previous case, the EBA shall draft the final decision after duly considering comments and observations from relevant authorities. Every year, based on the information provided by the competent authorities, the EBA shall verify that a significant token still respects the significance characteristics. In case it doesn't, a decision must be drafted and notified to NCA and ECB. Again, these competent authorities have the possibility to comment and then a final decision is taken by the EBA. In case the decision is to no longer classify the stablecoin as significant, the supervisory responsibilities are transferred from the EBA to the NCA of the issuer's Member State.

All these provisions, especially the transfer of supervisory responsibilities, follow the same logic of the ones applied to significant credit institutions under the SSM, where the ECB is the main supervisor. The regime regarding the supervision of significant entities is probably the most noticeable common point between the SSM and MiCAR framework. In the following paragraph we are going to discuss the supervisory colleges for significant stablecoin's issuers. Such colleges are clearly inspired to those established for significant credit institutions to supervise the banking sector. It is once again evident the intention of the European Commission to recreate in MiCAR a supervisory system that has worked for years in the banking sector, based on cooperation and collaboration between all its authorities.

5.5 EBA responsibilities on significant tokens: supervisory colleges and crypto-assets committee

Chapter 4 of Title VII (MiCAR) is entirely dedicated to EBA responsibilities as direct supervisor of significant stablecoin's issuers. Among these responsibilities, there is the creation of a crypto-assets committee and of supervisory colleges for issuers of significant stablecoins. The committee shall be internal to the EBA and the aim of it is to prepare decisions about issuers of significant tokens and also about the regulatory and implementing technical standards to be drafted (always related to the supervisory tasks)¹⁶⁵.

For what concerns colleges, according to Article 119, within 30 days from the final decision to classify a token as significant, the EBA shall "establish, manage and chair" a supervisory college. Such college should enhance "the exercise of supervisory tasks and act as a vehicle for the coordination of supervisory activities". Supervisory colleges shall be composed by EBA, ESMA, ECB, the NCA of the Member State of the significant issuer and every other

¹⁶⁴ Art.44 and 57, Markets in Crypto-Assets Regulation

¹⁶⁵ Art. 118, Markets in Crypto-Assets Regulation

Authority that may be relevant for the vigilance of the significant issuer. For example, the competent authority of the CASP who provides custodial services for the reserve of asset of the significant token shall be a member of the college. Even NCAs of Member States in which the significant token is used at a large scale shall be members. In any case, the EBA may invite any authority that consider relevant for the performance of the supervisory tasks. Being the chair of the college, it is also entitled to coordinate meetings, keep members informed, establish arrangements on the functioning on the colleges, and so on¹⁶⁶. The most relevant aspect of the supervisory colleges other than the constant exchange of information between its members, is that they can also issue non-binding opinions. Such opinions may be issued on the modified crypto-assets white paper, any change in the business model of the significant issuer, possible increase in the reserve of assets and many other situations related with the significant token's¹⁶⁷. Any opinion of the college is adopted with a simple majority of its members and shall include "any recommendations aimed at addressing shortcomings of the measure envisaged by EBA or the competent authorities"¹⁶⁸. The last noteworthy provision about supervisory colleges specifies that all members and the EBA shall duly consider the opinions issued and eventually explain any significant deviation¹⁶⁹.

5.6 EBA powers on issuers of significant stablecoins

All supervisory powers of the EBA related to issuers of significant tokens are listed in Chapter 5 Title VII (MiCAR). Let's analyze and discuss the main provisions of this chapter:

- **Request for information**¹⁷⁰. The EBA is empowered to request any kind of information that considers relevant for the performance of its supervisory tasks. Such information might be requested to issuers of significant tokens and any other persons or entity linked with the significant tokens. We can think of CASPs providing custodial services for the reserve of assets, persons of the management body of the issuer, entities providing payment services¹⁷¹ in relation to a significant token and so on. All information can be required by the EBA through a simple request or through a decision. In both cases, the EBA shall indicate the purpose of the request, the information required, the time limit and the potential fine. However, for what regards the simple request, the entity or person is not obliged to provide the information, but

¹⁶⁶ Art. 119 par. 7, Markets in Crypto-Assets Regulation

¹⁶⁷ A complete list is present in Art. 120 par. 1, Markets in Crypto-Assets Regulation

¹⁶⁸ Art. 120 par. 2 and 3, Markets in Crypto-Assets Regulation

¹⁶⁹ Art. 120 par.4, Markets in Crypto-Assets Regulation

¹⁷⁰ Art.122, Markets in Crypto-Assets Regulation

¹⁷¹ Known as Payment Services Providers according to the PSD2

in case it does, such information must be correct and not misleading (otherwise fines are applied). On the other hand, if the EBA request information through a decision, the entity or person shall provide it respecting the time limit and the information must be correct and not misleading (otherwise fines are applied). A copy of the simple request or of the decision shall be sent by the EBA to the competent authority of the significant issuer.

- **Investigatory powers¹⁷² and on-site inspections¹⁷³.** The EBA may use investigatory powers whenever it is considered appropriate for the execution of its tasks. According to such powers, the EBA can carry out interviews, request telephone and data traffic, ask explanations about facts or documents related with the investigation, examine records, data or other material retained relevant and obtain certified copies of such material. The access to data traffic or telephone records may be subject to an authorisation, and the requirements may change across Member States since they depend on the national law. This same provision applies also to on-site inspections, which may need an authorisation depending on the national law of each Member State. In case of any relevant finding from an investigation or an inspection, the EBA shall immediately inform the supervisory college of the significant issuer. Moreover, the competent authorities of the issuer's Member State entities shall be notified before the beginning of the investigation or inspection. Eventually, at the request of the EBA, such authorities may assist or attend the investigation or inspection. The EBA has even the power to entrust officials or other persons with a written authorisation which specifies the subject and the purpose of the investigation or inspection. Interestingly, when the EBA initiates an investigation through a decision, issuers of significant tokens must submit to the investigation, with the only right to have such decision reviewed by the Court of Justice. This provision applies also to on-site inspections, and in case the issuer opposes, the competent authority of that Member State shall assist the EBA with police or other enforcement authorities.
- **Exchange of information¹⁷⁴.** Other than requesting, the EBA shall also exchange information with competent authorities. Such information shall obviously regard the significant tokens and any relevant aspect related to them¹⁷⁵. The EBA might even conclude administrative agreements to exchange information with supervisory authorities of third countries.

¹⁷² Art. 123, Markets in Crypto-Assets Regulation

¹⁷³ Art.124, Markets in Crypto-Assets Regulation

¹⁷⁴ Art. 125, Markets in Crypto-Assets Regulation

¹⁷⁵ In Art.125 we find a list of entities and persons identical to that of Art. 122 regarding the request for information

- **Supervisory measures**¹⁷⁶. Article 130 emphasizes the different ways in which the EBA may act in case of any infringement of the MiCA Regulation. A full list of all infringement by issuers of significant stablecoins is included in Annex V (infringements related to SARTs) and VI (infringements related to EMTs). In the indicated situations the EBA may adopt decisions to: impose fines or periodic payments, require the cease of the infringement, order the issuer to transmit supplementary information, temporarily suspend the activity, prohibit the offer or admission to trading of a significant token, amend or prohibit market communications, remove a person from the issuer’s management body, limit the amount of the significant token issued, issue warnings or withdraw the authorization (in case of entities authorized to issue ARTs). Before taking any of these measures, the EBA shall inform ESMA, the ECB (or the proper Central Bank in case the currency of the significant token is not the euro), the competent authority of the significant token (in case it is an EMTs¹⁷⁷), the issuer of the token and also the European Commission. Any measures taken by the EBA shall be made available on its website unless it would “seriously jeopardise financial stability or cause disproportionate damage to the parties involved”¹⁷⁸.
- **Procedural rules before applying supervisory measures**¹⁷⁹. When there are “reasonable grounds to suspect” that there has been or there will be an infringement, the EBA, before applying any measures, shall engage an investigation officer to verify the suspected infringement. In order to ensure the maximum level of objectivity, the investigation officer must be completely independent from the EBA and shall not be involved in the supervision of the investigated issuer. The officer may access all relevant documents of the EBA for the purpose of the investigation and has also the power to conduct inspections and request information to the suspected issuer. During the investigation, the rights of defense of the suspected issuer must be guaranteed. In this respect, the subject shall have the opportunity to be heard on the investigated matters. At the end of the investigation, the independent officer shall submit to the EBA a file with all relevant findings. Based on this file, the EBA will decide whether there is an infringement and eventually which measure to take.
- **Fines**¹⁸⁰ **and periodic penalty payments**¹⁸¹. As we have just seen, in case of infringements, the EBA may, among other measures, impose fines or periodic penalty payments. Before applying fines (and any kind of measure) there are many factors

¹⁷⁶ Art.130, Markets in Crypto-Assets Regulation

¹⁷⁷ We should not forget that SEMTs are supervised both by the EBA and the NCA of the issuer’s Member State

¹⁷⁸ Art. 130 par. 6, Markets in Crypto-Assets Regulation

¹⁷⁹ Art. 134, Markets in Crypto-Assets Regulation

¹⁸⁰ Art. 131, Markets in Crypto-Assets Regulation

¹⁸¹ Art. 132, Markets in Crypto-Assets Regulation

that the EBA shall take into account, for example the duration and the frequency of the infringement, if the infringement was committed intentionally or negligently, the impact on the interests of holders, etc.¹⁸². The maximum amount of a fine for issuers of SARTs is 10% of the annual turnover of the preceding year and 12% for issuers of SEMTs. Alternatively, when determinable, the amount of the fine shall be twice the amount of the profits gained or losses avoided due to the infringement. For what concerns periodic penalty payments, they shall be used to make a person or an entity interrupt the conduct of an activity representing an infringement, or even when a person or an entity opposes to the request of information, an investigation or an inspection. The penalty shall be proportionate and include any day of delay. The maximum amount might be 2% of daily income in the preceding year for persons and 3% of the average daily turnover in the preceding year for entities. The decision to impose periodic penalty payments shall be reviewed by the EBA after 6 months.

- **Supervisory fees**¹⁸³. The EBA shall charge supervisory fees to significant issuers under its supervision. Such fees shall be used to cover all costs and expenditures due to the performance of the supervisory tasks. The fees must be proportionate to the reserve of assets of the significant issuers, both in case of ARTs and EMTs. The European Commission is designed to adopt a delegated act by 30 June 2024 specifying when and how the fees shall be paid, the amount and the way in which they shall be computed. In this respect, the EBA, on Commission's request, issued a technical advice about fees to be charged and also about some significance criteria¹⁸⁴ for ARTs and EMTs.
- **Delegation of tasks**¹⁸⁵. The EBA has the faculty to delegate a competent authority for the exercise of specific supervisory tasks. Before the delegation, the EBA must point out the scope of the tasks, the timetable and the information to be transmitted. The delegation of tasks may also include some of the EBA powers like the request for information or the conduct of investigations and on-site inspections. The delegated competent authority shall be reimbursed by the EBA for the costs incurred in the exercise of the delegated tasks.

Anyhow, the EBA may revoke the delegation of tasks at any time.

¹⁸² The full list is present in Art. 131 par. 2 and Art. 130 par. 3, Markets in Crypto-Assets Regulation

¹⁸³ Art. 137, Markets in Crypto-Assets Regulation

¹⁸⁴ EBA's Technical Advice in response to the European Commission's December 2022 Call for Advice on two delegated acts under MiCAR concerning certain criteria for the classification of ARTs and EMTs as significant and the fees that are to be charged by EBA to issuers of significant ARTs and EMTs, 29/09/2023.

¹⁸⁵ Art. 138, Markets in Crypto-Assets Regulation

5.7 The need for cooperation between supervisors

One essential aspect to notice in the MiCA Regulation is that coordination and cooperation between the EBA and other competent authorities (NCAs, ECB, other ESAs) will be fundamental¹⁸⁶. There are different provisions concerning the cooperation of the EBA with other authorities.

First of all, in case an issuer of significant ARTs carries out other activities like providing crypto-services or issuing other non-significant tokens (of any MiCAR category), such activities “shall remain under the supervision of the competent authority of the home Member State”¹⁸⁷. We can think about a credit institution named ALPHA that issues a significant ART and also provides custody services for crypto-assets. In a similar case, under MiCAR regime, the credit institution would be supervised by the EBA as issuer of significant ARTs and by the NCA as crypto-assets service provider¹⁸⁸. These 2 authorities shall cooperate to avoid supervisory conflicts. Things become more interesting and complicated if, other than MiCAR authorities, we also take into account other supervisors of the significant issuer. According to Article 117 paragraph 5 (MiCAR), the EBA, when exercising its supervisory tasks, is required to cooperate with other supervisors of the issuer among which: the ECB (when the issuer is a significant credit institution, according to the SSM) or other prudential supervisory authorities (like national Central Banks), relevant competent authorities under national law transposing the Electronic Money Directive 2009/110/EC (when the issuer is an Electronic Money Institution), and competent authorities under MiCAR (just like in the ALPHA example just provided).

We have mentioned that significant credit institutions fall under the direct supervision of the ECB, while other credit institutions are directly supervised by the relevant NCA. If we now assume that ALPHA, the credit institution of our previous example (issuing significant ARTs and providing custody services for crypto-assets) is non-significant, it would be subject to the direct supervision of the relevant NCA (generally it is the national Central Bank) under the SSM framework. In such a situation, ALPHA would be supervised by 3 authorities: the EBA for the issuance of significant ARTs, the NCA for the provision of custody services for crypto-assets, and the NCA for being a non-significant credit institution. We should point out that, depending on the Member State, there might be only one NCA responsible for the supervision of both CASPs under MiCAR and non-significant credit institution under the SSM. Things would be even more messy if we assume that ALPHA is a significant credit institution, then directly supervised by the ECB under the SSM, and by EBA and NCA under MiCAR. We

¹⁸⁶ We have discussed the ECB concerns about the new MiCAR supervisor framework in the previous paragraph.

¹⁸⁷ Art. 117 par.2, Markets in Crypto-Assets Regulation

¹⁸⁸ For the moment, to keep things simple, we are not considering the supervision of the credit institution under the SSM.

can easily understand from the displayed cases that coordination and cooperation between the supervisory authorities involved would be essential for the performance of their tasks. In this respect, as discussed above, a fundamental role would be played by the supervisory colleges. Specifically, if ALPHA is a significant credit institution, there would be 2 supervisory colleges (one for the significance of the credit institution chaired by the ECB, and the other for the significance of the tokens issued chaired by the EBA). Both colleges will have as Members the EBA, the ECB and every other authority relevant for the supervision of ALPHA regarding the banking and crypto-related activities. To the scenarios just displayed we may also add the possibility that ALPHA issues significant EMTs (subject to a dual supervision by EBA and NCA), or that it provides financial services like portfolio management or transmission of orders (under the supervision of a NCA responsible for investment firms), or even insurance products or services (requiring the supervision of another NCA). All these elements would further complicate the supervision of ALPHA, for which an even higher level of coordination would be required between all involved authorities. One aspect that should be stressed is that the example of ALPHA is not utopian. We have already mentioned more than once that the offer of crypto-assets (particularly stablecoins) in Europe will probably concentrate around banks, due to their affirmed status and the fact that they don't need a further 62authorization to issue tokens¹⁸⁹. To this, we should also include the fact that credit institutions, other than the banking one, already carry out activities like the provision of financial services or the offer of insurance products. It seems therefore reasonable to imagine a credit institution like ALPHA in the upcoming future: a (significant) bank that issues significant tokens, providing also crypto and/or financial services and offering insurance products.

After all the considerations, it should be clear that the upcoming MiCAR framework will increase the number of supervisory tasks, and, consequently, the possibility of conflicts or overlaps. The only way to avoid these issues is through the close cooperation of all authorities involved.

¹⁸⁹ As explained previously, these 2 aspects make difficult for other entities to enter in the crypto markets, due to the need for the authorisation and the high cost to meet the requirements (regarding governance, reserves, disclosure, etc.)

5.8 The collaborative approach

We have now gained enough information to understand how important and delicate the new role of the EBA will be with MiCAR. Being the main supervisor, the EBA is making a lot of efforts to be as ready as possible for the MiCAR entry into force¹⁹⁰.

About that, in a recent interview, EBA's chairperson José Manuel Campa considered as a "major concern" the recruitment of specialized staff in the field of crypto, technology and digitalization¹⁹¹. Just like EBA, other European institutions are in high demand of trained people. If this, on one hand, highlights the general worries about the capacity of these institutions to properly supervise the crypto markets, on the other hand, it represents a concrete step in the right direction.

Another interesting aspect that deserves attention is the required cooperation between supervisors (particularly EBA) and supervised which is not new in the European legislation. MiCAR regulators and supervisors are not just making and applying the law; on the contrary, they are looking for a genuine dialogue with supervised entities. The idea is that, through collaboration, the uncertainty of crypto assets can be faced more effectively. As Campa declared in another recent interview, the dialogue between industry and supervisors could enhance the understanding of new opportunities and risks, and even potential gaps that could obstacle responsible innovation.¹⁹²In this respect, it's worth noticing that the EBA has already launched all consultation packages before the end of 2023¹⁹³. Public consultations are not new in European legislation and allow market players to express their concerns with respect to the new regulatory framework¹⁹⁴. These concerns will be taken into consideration by the EBA for the draft of regulatory and implementing technical standards. This is another sign of the constant dialogue between the EBA and supervised entities.

¹⁹⁰ In the last paragraph of chapter 3 we discussed a statement of the EBA which "encourages timely preparatory steps towards the application of MiCAR to asset-referenced and electronic money tokens".

¹⁹¹ Laura Noonan, "European banking regulator 'concerned' about finding staff to oversee crypto", Financial Times, July 2022

¹⁹² Jose Manuel Campa, "European Banking Authority chair: Expect tougher enforcement as new crypto rules come into force", Financial News, October 2022

¹⁹³ EBA website, Markets in Crypto-Assets section

¹⁹⁴ As it already happened for other European directives and regulations, ESAs are responsible for the draft of regulatory and implementing technical standards.

CHAPTER 6

THE SIGNIFICANCE PARAMETERS

6.1 Introduction

In this last chapter we are going to analyze the significance parameters for stablecoins, trying also to understand whether there already are or might be significant issuers according to such parameters.

Let's start by mentioning again the significance parameters for stablecoins issuer¹⁹⁵. An important thing to keep in mind is that at least 3 of the following criteria shall be met to consider a stablecoin significant and such criteria are equal for both issuers of ARTs and EMTs:

- a) the number of holders of the token is larger than 10 million.
- b) the value of the token issued, its market capitalization or the size of the reserve of assets of the issuer of the token is higher than EUR 5 000 000 000.
- c) the average number and average aggregate value of transactions in that token per day during the relevant period, is higher than 2,5 million transactions and EUR 500 000 000 respectively.
- d) the issuer of the token is a provider of core platform services designated as a gatekeeper in accordance with Regulation (EU) 2022/1925 of the European Parliament and of the Council (43).
- e) the significance of the activities of the issuer of the token on an international scale, including the use of the token for payments and remittances.
- f) the interconnectedness of the token or its issuers with the financial system.
- g) the fact that the same issuer issues at least one additional asset-referenced token or e-money token and provides at least one crypto-asset service.

¹⁹⁵ Art. 43 and 56, Markets in Crypto-Assets Regulation

6.2 Parameters with a numerical threshold (a, b and c)

The first 3 significance parameters (**a**, **b** and **c**) have a numerical threshold and it can be interesting to ask ourselves whether these thresholds are reasonable or not. If they are too low, a lot of stablecoins would meet the significance parameters, even those who don't really represent a threat to financial stability or market integrity. At the same time, if the thresholds are too high, risky stablecoins would be excluded and the additional requirements would not apply. Actually, it is too soon to say with certainty if the thresholds in parameters **a**, **b** and **c** are able to capture the "right" stablecoins. However, it can be interesting to analyze what current stablecoins would meet one or more MiCAR significance numerical criteria¹⁹⁶.

If we consider the parameter **b**, stablecoins pegged to EURO are very far from the threshold of EUR 5 billion (market capitalization). To give an idea, the first EURO-pegged stablecoin by market cap, Stasis EURO, has a value of almost EUR 124 million¹⁹⁷ which is not even close to 5 billion. Stasis is a fintech European company set up in Malta, therefore it's likely that it will fall under the scope of MiCAR when it will be in force. If we extend our view to all current stablecoins (considering also those pegged to other currencies), there are only two that would meet the MiCAR significance criteria **b**: Tether USDt and USDC¹⁹⁸. Both stablecoins are pegged to the USD, so we should convert their values in EURO¹⁹⁹. Tether USDt is the first stablecoin by market cap with \$95 billion (almost EUR 87,5 billion), followed by USDC with more than \$25 billion (roughly EUR 23,5 billion)²⁰⁰. Apart from these 2, no other stablecoin in the world would currently reach a market capitalization of EUR 5 billion²⁰¹.

Switching to parameter **a**, it is difficult to know exactly the number of holders of a stablecoin. Due to anonymity and pseudo anonymity the same investor may purchase from different wallets. Moreover, the fact that the same stablecoin may be traded on different blockchains make it more difficult to obtain a totally reliable value. With these aspects in mind, we might still try to check whether there are some current stablecoins with more than 10 million holders. One way to do this is by using "Glassnode Studio", a website which provides data and metrics from the most popular blockchains. To know the total number of holders, we can consider the "total number of unique addresses that ever appeared in a transaction of

¹⁹⁶ All of the following data are taken from CoinMarketCap.com, one of the top websites regarding crypto.

¹⁹⁷ Such value remained relatively stable considering a 1-year period (January 2023-January 2024).

¹⁹⁸ These stablecoins are currently issued in the US. However, it can still be interesting to assess whether they would be considered significant if they fell under the scope MiCAR.

¹⁹⁹ The exchange rate USD/EUR used is equal to 0.92.

²⁰⁰ We should point out that even if these data are taken on 19/01/2024, the market capitalization of Tether USDt and USDC has never fall below respectively 66 billion USD (about 61 billion EURO) and 22 billion USD (roughly 22 billion EURO). Therefore, both stablecoins would have easily met the significance parameter b if they fell under the scope of MiCAR.

²⁰¹ It is worth mentioning that the stablecoin DAI (pegged to USD) has a current market cap of 4,9 billion EURO (value at 19/01/2024) and, during the last year, it reached a peak of 6 billion.

the native coin in the network”²⁰². According to Glassnode, the number of holders of Stasis EURO is 22.439²⁰³, not even close to the threshold of 10 million (we should remember that Stasis EURO is currently the first EURO-pegged stablecoin by market cap in the world). As done before, it can be interesting to take into account the top 2 stablecoins (by market cap) in the world: Tether USDt and USDC. The number of holders of both token is roughly equal to 35 million and 12.5 million respectively²⁰⁴. Currently, these 2 stablecoins appear to be the only ones capable of exceeding the threshold of 10 million holders set in criteria **a**.

Let’s now focus on parameter **c**. We are going to consider the second threshold of EUR 500 000 000 regarding the “average aggregate value of transactions per day”. Once again, we will use Stasis EURO as an example of EURO-pegged stablecoin and then the 2 largest stablecoins (by market cap) Tether USDt and USDC. For the purpose of our evaluation, we can consider the 24h volume of the stablecoin. Such measure might be very volatile from day to day, it is therefore better to use a longer period (the last 30 days in our case²⁰⁵). According to CoinMarketCap.com, the aggregate volume of the last 30 days²⁰⁶ for Tether USDt and USDC is roughly equal to EUR 712 billion and EUR 86 billion respectively. This implies that the average aggregate value of transactions per day corresponds to EUR 23.7 billion for Tether USDt and EUR 2.86 billion for USDC²⁰⁷. Other than these two stablecoins, the only other one which overcomes the threshold of EUR 500 million set in parameter **c** is First Digital USD, with an average aggregate value of transactions per day of nearly \$3.8 billion. If we consider the same measure for Stasis EURO, we obtain a value lower than EUR 1 million (approximately 923 thousand)²⁰⁸.

After all these general considerations, we might conclude that the current parameters **a**, **b** and **c** are very difficult to meet. We have seen how Stasis EURO, the largest EURO-pegged stablecoin by market cap currently issued in Europe, is actually very far from meeting the aforementioned parameters. Only the 2 largest stablecoins in the world by volume and market cap, Tether USDt and USDC, are actually able to overcome the current MiCAR thresholds. It seems therefore difficult to imagine a stablecoin, issued under MiCAR, capable of meeting parameters **a**, **b** and **c** as done by USDt and USDC with their outstanding numbers.

²⁰² Studio.Glassnode.com

²⁰³ Updated at 22/12/2023. It’s worth underlining that such value is the highest in 2023 for Stasis EURO.

²⁰⁴ The values are updated at 22/12/2023 and for both stablecoins is the highest recorded in 2023. This highlights a clear increasing trend for USDt and USDC regarding the number of holders.

²⁰⁵ 3- or 6-months periods would be even better (also because the significance of a stablecoin in MiCAR would be revised at least twice a year). However, for the purpose of our general analysis, a 1-month period is sufficient to deduct a conclusion.

²⁰⁶ From 22/12/2023 to 21/01/2024

²⁰⁷ We easily obtained these values by dividing the aggregate volumes of the last 30 days by the number of days.

²⁰⁸ In 2023, the highest average aggregate value of transactions per day for Stasis EURO was recorded in April, with EUR 9.1 million (still very far from EUR 500 million). Such value decreased significantly as we can see from the last measure of EUR 923 thousand.

Does this mean that, except from Theter USDt and USDC, all other stablecoins in the world are safe and do not pose risk on financial stability or market integrity? It is difficult to believe so.

More reasonable is the possibility that the current thresholds are too high and that, if they remain unchanged, no stablecoin issued under MiCAR will be considered significant under parameters **a**, **b** and **c** for a while.

6.3 Parameters d and g

Parameters **d** and **g** do not depend on numbers or thresholds to exceed, they are instead connected with the activities carried out by the issuer. Specifically, according to MiCAR, the issuance of a token *per se* should not pose a threat to financial stability or market integrity (unless its numbers exceed the thresholds mentioned in the previous paragraph). Things may change when the same entity, other than issuing a stablecoin, is also a gatekeeper²⁰⁹ under Regulation (EU) 2022/1925 (parameter **d**) or decides to issue other stablecoins and to provide crypto-services (parameter **g**). Following the MiCAR interpretation, being involved in such activities, other than the issuance of a stablecoin, may pose greater risk on financial stability or market integrity and justifies the application of the additional requirements for significant issuers.

Criteria **d** and **g**, especially if compared with **a**, **b** and **c**, are much “easier” to meet. In fact, it is “sufficient” for an entity issuing a stablecoin to be a gatekeeper, or a CASP and to issue another stablecoin, to meet parameter **d** or **g** (respectively), no matter the trading volumes and the market cap of the stablecoins issued.

6.4 Parameters e and f

The last 2 parameters to discuss are **e** and **f**, which result ambiguous and difficult to interpret as they appear in the MiCAR text. Specifically, when can a stablecoin be considered significant on an international scale (**e**)? At the same time, how can we measure if a token is interconnected, and eventually how much, with the financial system (**f**)? These doubts are the reason why the Commission will adopt delegated acts to further specify the

²⁰⁹ Art. 2, par. 1 and 2, Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (OJ L 265, 12.10.2022)

interpretation of criteria e and f²¹⁰. In this respect, the EBA, on request of the Commission, published a technical advice at the end of September 2023²¹¹. In such document there are some suggestions about indicators that could be used to assess whether a stablecoin or its issuer are interconnected with the financial system or considered significant on an international scale. The EBA proposed core and ancillary indicators for each parameter. On one hand, core indicators should identify “the main elements of significance”²¹², while, on the other hand, ancillary indicators should be useful to assess additional aspects in case the result from the core indicators “do not lead to a conclusive determination of significance”²¹³. According to the EBA, an exhaustive significance assessment “should ultimately be subject to a holistic/collective assessment of core and ancillary indicators”²¹⁴.

Concerning parameter f, we should remind that for every stablecoin issued, credit institutions shall keep as deposits no less than 30% of the amount referenced in each official currency (this applies only to ARTs²¹⁵) and at least 30% of the funds received by the issuer of EMTs in exchange for EMTs (this applies to EMTs²¹⁶). According to the EBA, since the risk arising from the deposits of both ARTs and EMTs is already addressed by MiCAR (under Articles 36 and 54), “assessing the non-deposit part of the reserve of assets of issuers of ARTs or EMTs is key in the assessment of the issuer’s interconnectedness with the financial system”²¹⁷. Following this logic, the main core indicators proposed in the EBA’s Technical Advice are 2: the *share of non-deposit reserve assets that are financial instruments issued by financial institutions*²¹⁸ and the *share of ART/EMT issuer’s asset holdings relative to total supply of specific financial instruments*²¹⁹. The first indicator should address the direct interconnectedness of a stablecoin and its issuer with the financial system (through the reserve of assets). On the other hand, the second indicator should capture the indirect interconnectedness²²⁰.

Other than the two core criteria mentioned, the EBA underlined 3 elements that can be useful to assess the interconnectedness with the financial system and represent ancillary

²¹⁰ Art. 44, par. 11, Markets in Crypto-Assets Regulation

²¹¹ EBA’s Technical Advice in response to the European Commission’s December 2022 Call for Advice on two delegated acts under MiCAR concerning certain criteria for the classification of ARTs and EMTs as significant and the fees that are to be charged by EBA to issuers of significant ARTs and EMTs, 29/09/2023.

²¹² Idem, Recital 19

²¹³ Idem, Recital 22

²¹⁴ Ibidem

²¹⁵ Art. 36, par. 4(d), Markets in Crypto-Assets Regulation

²¹⁶ Art. 54, Markets in Crypto-Assets Regulation

²¹⁷ EBA’s Technical Advice, Recital 32

²¹⁸ There are two sub-indicators regarding specifically ARTs and EMTs. For issuers of ARTs, the share of non-deposit reserve assets that are derivatives; and for issuers of EMTs, the share of non-deposit reserve assets that are covered bonds issued by credit institutions.

²¹⁹ There is another core indicator proposed but it’s currently unapplicable due to the lack of data.

²²⁰ In case of financial distress, a stablecoin issuer may be forced to fire sell its asset holdings. This would imply a decrease in the value of those assets which could indirectly affect all financial institutions holding similar assets.

indicators: the ownership structure of the issuer²²¹, the concentration of the reserve of assets²²² and the portfolio overlap of reserve assets with other stablecoin issuers²²³.

Let's now turn to the indicators suggested by the EBA to assess the "significance on an international scale" stated in parameter e. In this case, the EBA proposed two core and one ancillary indicators. The first core indicator is based on the *market share of value of cross-border transactions with ARTs/EMTs into and from the EU*. This measure should be able to capture how much an ART or an EMT is traded into and from the EU with respect to the total number of transactions made with stablecoins into and from the EU. The second indicator is almost identical, but it considers only transactions where ARTs or EMTs *are associated as means of exchange*. It's important to remember that stablecoins are largely used as a mean of payment, but they can also be used for other reasons (for example as a form of investment). Therefore, on one hand, the first indicator captures *in general* the significance on an international level of an ART or EMT (considering even transfer where the stablecoin is not used as a mean of exchange). On the other hand, the second core indicator addresses *specifically* the use of an ART or EMT as a mean of exchange. This second measure should be able to analyze the substitution effect between fiat currencies and stablecoins.

One essential aspect to underline is that both indicators proposed shall be divided into 2 sub-indicators: "one sub-indicator where the payer is within the EU and the payee outside (outflow) and another where the payee is within the EU and the payer is outside (inflow)"²²⁴. This can be useful to capture the effects of inflows and outflows, which may be different. Another interesting element to point out is that the indicators proposed by the EBA shall not consider the case when both the payer and the payee are outside of the EU²²⁵. Other than the 2 core indicators, the EBA suggested even an ancillary indicator. As explained previously, it provides additional information useful to assess the significance in case the results from the core indicators are insufficient. The ancillary indicator is based on the *ratio of the total value of cross-border transactions with an ART or EMT used as means of exchange as compared to total value of cross-border payment transactions into and from the EU*. If an ART or an EMT is largely used as a mean of payment and there are disruptions on the DLT network where it is traded, the implications for financial stability may be dangerous.

²²¹ For example, a situation in which the owner of the issuer is a financial institution may be a sign of interconnectedness.

²²² According to the EBA, "allocating reserve assets in a low number of financial institutions or in a highly concentrated degree is an indication of higher interconnectedness with the financial system" (EBA's Technical Advice, Recital 51).

²²³ This indicator can point out the interconnectedness between different stablecoins issuers (which are included in the financial system). By measuring the amount of assets that are common to different issuers we may understand how strong the contagion effect in case of financial distress would be. In case an issuer fire sells an asset, the downfall in its price may affect other market players (financial institution in the core indicator, other issuers now) who own similar assets.

²²⁴ EBA's Technical Advice, Recital 65

²²⁵ And, obviously, neither the case in which both payer and payee are in the EU since we could no longer talk of "international scale".

Therefore, the growth of a stablecoin in cross-border payments (with respect to transactions made with traditional payment systems) may be a good indicator of significance on an international scale.

6.5 The importance of data

After discussing the MiCAR significance parameters, we should now underline the importance of data for their assessment. As we have seen, except for **d** and **g**, other criteria are based on numerical thresholds. Therefore, the availability of data is essential to assess whether an ART or an EMT can be considered significant or not. For example, other than the 2 core indicators for parameter **f**, the EBA proposed a third parameter which is unapplicable due to the lack of data²²⁶.

In paragraph 6.2 we tried to apply parameters **a**, **b** and **c** to current stablecoins. Except for the market capitalization which is largely used, other measures such as the number of holders, the average number and average aggregate value of transactions per day were more difficult to find or even unavailable²²⁷. Without such data it is impossible to properly assess and update the significance of a stablecoin. Fortunately, there already exist reporting provisions under MiCAR requiring issuers of stablecoins to provide data. However, according to the EBA, there are some gaps in the MiCAR reporting obligations which could not only limit the application of the significance criteria, but also obstacle other supervisory activities carried out by the EBA. One example of these gaps is present in Article 22²²⁸, since the reporting provisions of such article apply only to issuers of ARTs and EMTs referencing non-EU currencies (and not to issuers of EMTs referencing EU currencies). The solution suggested by the EBA to these reporting gaps is to develop “own initiative Guidelines (under Article 16 of its Founding Regulation) to complement the ITS under Article 22 MiCAR “²²⁹.“This is considered the best available approach to secure consistent reporting of data in accordance with common formats and templates, which is urgently needed to ensure a proper application of MiCAR after 30 June 2024”²³⁰.

²²⁶ The indicator is based on the *Share of ART/EMTs issued that are held by financial institutions*. According to the EBA, credit institutions and other types of financial institutions will not be subject to reporting obligations regarding holdings of crypto-assets (which is the key data to assess the aforementioned indicator) until 2026/2027.

²²⁷ For example, to obtain the average aggregate value of transactions we used the volume of transactions for a 30-day period and then divided it by the number of days.

²²⁸ According to Article 22 (MiCAR), a stablecoin issuer shall report: the number of holders, the average number and average aggregate value of transactions per day, the value of the token issued and the size of the reserve of asset, an estimate of the average number and average aggregate value of transactions per day during the relevant quarter that are associated to its uses as a means of exchange within a single currency area. All these information are essential for the assessment of the significant parameters under Article 43 (MiCAR).

²²⁹ EBA’s Technical Advice, Recital 86.

²³⁰ Idem, Recital 87.

6.6 Chapter conclusions

In this chapter we discussed the MiCAR significant parameters, obtaining some important insights. From the general analysis conducted in paragraph 6.2, it turned out that, with the current thresholds, parameters **a**, **b** and **c** will probably be very difficult to meet. Only Theter USDt and USDC would exceed such thresholds²³¹. These 2 are by far the top stablecoins considering market cap and traded volumes, and their popularity grew over years²³². It is therefore difficult to imagine an ART or an EMT issued under MiCAR, able to get close to Theter USDt and USDC' numbers and thus even to significance parameters **a**, **b** and **c**, at least in the immediate future. Of course, the fact that an ART or an EMT isn't able to meet the thresholds in criteria **a**, **b** and **c** doesn't necessarily mean that it can't still pose significant risk on financial stability or market integrity. In this respect, other MiCAR parameters may capture the significance of a stablecoin irrespective of the dimension²³³ of the issuer.

We have seen that criteria **d** and **g** are not based on thresholds, but rather on the activities carried out by the issuer of an ART or an EMT. Therefore, no matter the market cap or the trading volumes (and other numbers), a stablecoin might still be significant if its issuers is also a gatekeeper under Regulation (EU) 2022/1925 (parameter **d**) or decides to issue other stablecoins and to provide crypto-services (parameter **g**).

In addition to this, differently from parameters **a**, **b** and **c** which present a fixed numerical threshold, the core indicators suggested by the EBA for parameters **e** and **f** are expressed through a share of something (for example the share of non-deposits reserve asset or the market share of cross-border transactions). Therefore, an ART with a low market cap might still have the same "share of non-deposits reserve asset" of another ART with a very high market cap, even if the reserves of the two tokens are very different in absolute values. This same principle is valid for all core indicators proposed by the EBA for criteria **e** and **f**, implying that the significance of a stablecoin would be captured irrespective of the dimension and the popularity of the issuer.

Actually, we still don't know if the European Commission, in the delegated acts required to clarify criteria **e** and **f**, will follow the EBA's Technical Advice by using the proposed indicators as they are or if, instead, amendments will be applied. What we can say now is that the approach suggested by the EBA seems exhaustive. Combining both core and ancillary indicators should offer the possibility to capture different aspects for the assessment of significance²³⁴.

All things considered, given their variety and diversity, the MiCAR significance parameters should be able to capture issuers of ARTs or EMTs posing risk on financial stability or market

²³¹ If issued under MiCAR.

²³² We should consider that they were first issued in 2015 (Theter USDt) and 2018 (USDC).

²³³ in terms of market cap, trading volumes, number of holders and many other numerical factors.

²³⁴ Particularly about the use on an international scale (parameter **e**) and the interconnectedness with the financial system (parameter **f**)

integrity. However, we should not forget that a stablecoin, to be considered significant under MiCAR, shall meet at least 3 significance criteria. Given that the thresholds in parameters **a**, **b** and **c** are currently too high for the reasons explained, the risk that there won't be significant issuers in the immediate future is concrete²³⁵.

²³⁵For example, we can imagine an issuer of an ART or an EMT that do not reach the thresholds in parameters **a**, **b** and **c**, and does not carry out other activities as in parameters **d** and **g**. In a similar situation, additional requirements cannot be applied to such issuer, even if the token issued is significant on an international scale (**e**) and/or interconnected with the financial system (**f**).

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