Ca' Foscari
University
of Venice

Master's Degree

in

Economics and Finance

Final Thesis

# The New EU Legal Architecture in Crypto-Assets: An Assessment of the Regulatory Strategies and Cross-Border Implications

**Supervisor**
Ch. Prof. Andrea Minto

**Graduand**
Ajdeli Hysenaj
Matriculation Number 893709

**Academic Year**
2022 / 2023

# Table of Contents

# INTRODUCTION

The very first jurisdiction in the world to introduce a regulatory framework aiming to create and maximize a harmonization approach for the crypto industry is exceptionally the **European Union.** The Markets in Crypto-Assets Regulation abbreviated as **"MiCAR",** entered into force at the end of June 2023. We are at the point where the regulation of "crypto-assets" (CAs) and related services is about to be unified across the European Union through "**Regulation (EU) 2023/1114 of the European Parliament** and of the **Council of 31 May 2023** on markets in crypto-assets and **amending Regulations (EU) No 1093/2010** and **(EU) No 1095/2010** and **Directives 2013/36/EU** and **(EU) 2019/1937"** (abbreviated as "**MiCAR"**). The **"MiCAR"** becomes *fully applicable* 18 months after it enters into force **(i.e., 30 December 2024)**.

**Why is this a tipping point for the crypto market?**

The conventional understanding of assets has been transformed by terms such as "virtual currency" (VC), "cryptocurrency", "tokenization", and "blockchain-based securities" which have entered the mainstream vocabulary. The virtual asset industry has been evolving since its early origination. New classes of assets, products, and services have been produced, shaping a new tokenized economy.[1] Also, the ongoing intensive development in the cryptosystem has resulted in the creation of new types of crypto-assets, new types of crypto-related services, and new types of service providers. Following this rapid evolution, classification challenges come across as being the leading challenges for regulators. Financial innovation and the role of "Financial Technology" (FinTech) regulation and supervision are intrinsically related but do not always go hand in hand. Regulators are increasingly taking issues with responding fast and

[1] Gibbs, T. (2023), "*Evolution of Legal and Regulatory Responses to Money Laundering Risks Related to Virtual Assets: The Examples of the European Union and the US"*, in Rébé, N. (ed.) Cyber Laundering: International Policies and Practices. World Scientific Publishing Europe Limited, pp. 197-233.

appropriately to provide consumers and investors protection from crypto-related risks. Consumer protection risks arise when consumers and investors such as retail investors, are unaware of or do not fully comprehend the risks associated with crypto-assets **(IMF, 2023).** Regulators also aim to provide legal certainty, ensure market integrity and financial stability, address the risks themselves, and still promote technological advancement in this area.

In many jurisdictions of the world and more precisely addressing the focus of this analysis in our area of interest, in the European Union (EU), many crypto regulatory flaws are contributing to more **legal ambiguity and national fragmentation**. Given the cross-border nature of crypto assets, the absence of global standards, the lack of common taxonomies, and reliable and consistent data on markets, a patchwork environment is created in regulation, supervision, and enforcement which is particularly challenging.[2]

The crypto-asset market could become systemically relevant at a certain point in the future **(European Systemic Risk Board; 2023).** The phenomenon of crypto assets encounters difficulties in its very first interpretation. The analysis depends mainly on their technical features, where the overall crypto-assets framework appears hugely complicated. The basic building block is the underlying technology, the Distributed Ledger Technology (DLT), but more uncertainty is revealed from the perspective of their economic implications. Here we get down to another concern that this work will furtherly consider, that is the suitability for money laundering and other criminal activities that derive from the fact that digital assets depend primarily on cryptography and distributed ledger technology (DLT), in which users are pseudonymous.

The EU is endeavoring to achieve a solid framework based on compliance with the most demanding international standards on the exchange of crypto assets to prevent criminal activity and to pose difficulties in circumventing Anti-Money Laundering rules via cryptocurrencies.

---

[2] 94th International Scientific Conference on Economic and Social Development (2023), *"The Dark Side of Management and Governance: power, ideology, tensions, and destructive traits"* (XI. OFEL) – Dubrovnik, 31 March-1 April 2023.

The Anti-Money Laundering laws apply also to crypto-assets to fight cross-border crime but only the inclusion of crypto-exchanges and **"crypto-asset providers" (CASPs)** under the area of responsibility of **Anti-Money Laundering and Countering the Financing of Terrorism (AML/CFT)** regulation and supervision has still evidenced the necessity of a more resilient regulatory approach. This is so because the fifth **EU Money Laundering Directive** abbreviated as **"AMLD5",** which covers certain crypto-assets under the term ***"virtual currencies"***[3] has shown examples of national fragmentation of the regulation of transactions related to **"virtual currencies"** or crypto-assets. Countries like Germany and Denmark have already implemented the **AMLD5,** meanwhile, The Netherlands has transposed AMLD5 into the Dutch AML Act, and Spain in like manner has transposed it employing Royal Decree-Law 7/2021.

# Cryptos' Ecosystem and Regulatory Strategies – A Comprehensive Review

The financial sector, as a whole, has broadly seen cryptos as an emerging investment strategy, potentially profitable considering *the ability to save costs, increase efficiency, and improve the standards and access to financial services*. Hereinafter this part of the work will provide **a** summarized scheme of the variety of crypto-assets and get down to the importance of recent statistics concerning the impact of "stablecoins" on market behaviour and growing interlinkages with regulated financial institutions.

[3] Article 1 (2), point (d), first subparagraph of the Directive (EU) 2018/843 defines **"virtual currencies"** as: "*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically"*.

# 1. Which are the New Narratives Created by Crypto?

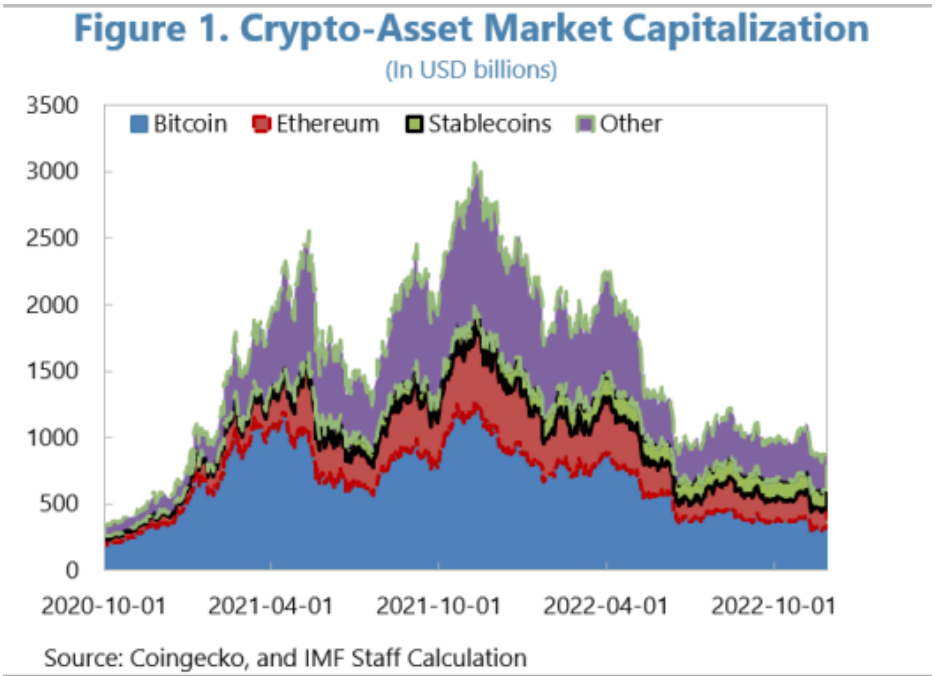
It was 3 January 2009 when an online white paper proposing a system in which all monetary transactions would be recorded digitally and managed by a decentralized network of computers brought to life the first known cryptocurrency and the most famous nowadays, Bitcoin. Today, nearly 15 years after the creation of Bitcoin different governments, institutions, authorities, and companies across the world are maintaining open the discourse on the rise of crypto-assets activities and markets secured by "Decentralized Finance" **(DeFi)** tokenization, "Blockchain Technology" **(BCT),** "Distributed Ledger Technology" **(DLT),** and "Non-Fungible Tokens" **(NFTs)** (Wronka, 2023)[4].

Persisting trends on growth and interconnectedness, based on the ***"G20 Note on the Macro-financial Implications of Crypto-Assets, 2023"***, analysis performed by the "International Monetary Fund" (IMF) has shown that, *"...the size of the crypto-asset market has fluctuated dramatically, peaking around* ***USD 3 trillion in November 2021****, before crashing to below USD* ***1 trillion in November 2022***", **(Figure 1).** This caught millions of investors unprepared (Panetta, 2023). There is a rebound in 2023.

According to data adopted from the **"94th International Scientific Conference on Economic and Social Development"**, is stated that in February 2023, there were 22,705 cryptocurrencies in circulation on 522 platforms. Also, *"[...] cryptocurrency market capitalization was $1.07 trillion, including stablecoins and tokens. The largest proportion of this market by capitalization is unbacked CAs."* As for the EU *"[...] an estimate of the value of the crypto-asset world shows it is just 0.8% of the size of the EU financial sector",* **(European Systemic Risk Board, 2023).**

[4] Wronka, Ch. (2023), *"Crypto-asset activities and markets in the European Union: issues, challenges and considerations for regulation, supervision and oversight"*, March. Journal of Banking Regulation. Available at: https://doi.org/10.1057/s41261-023-00217-8

*Figure 1: Crypto-Asset Market Capitalization.*

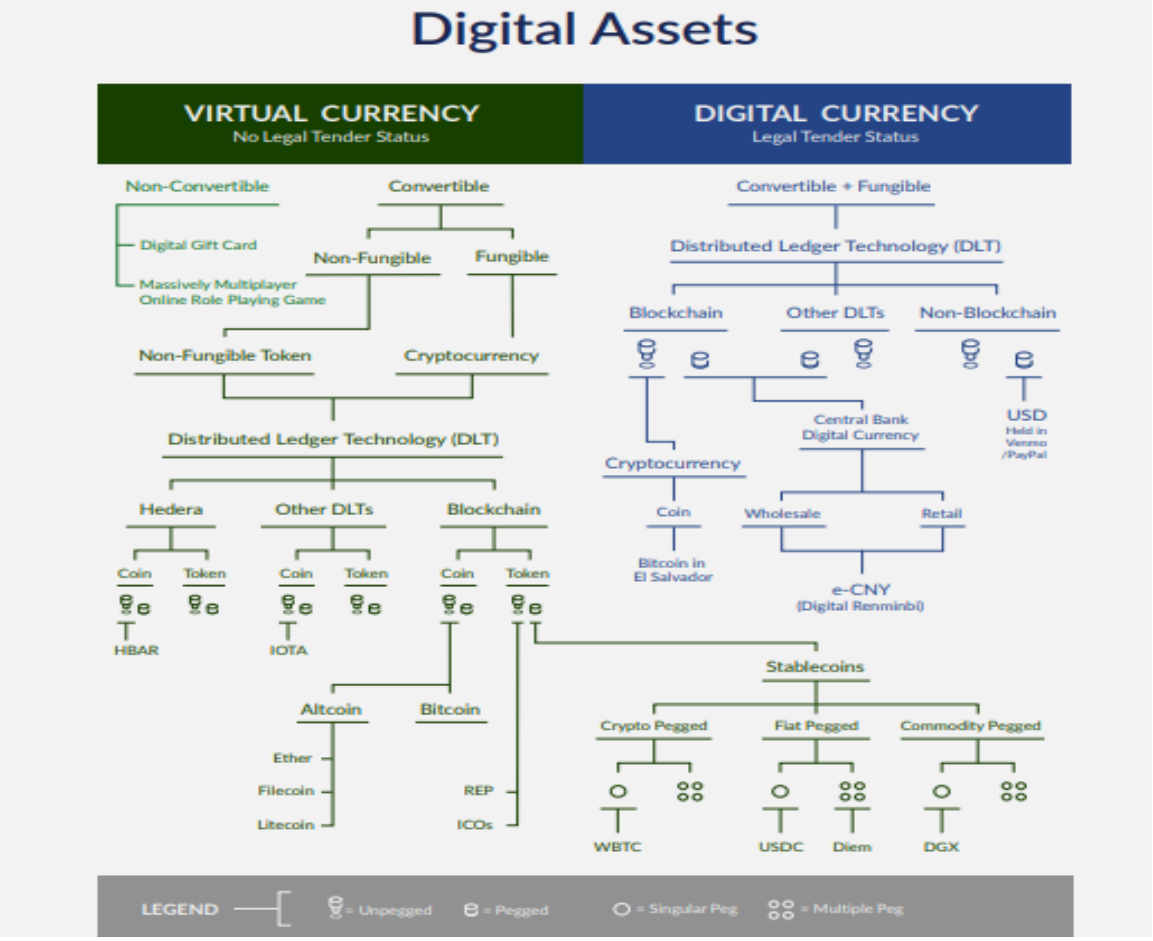



*Source 1: Coingecko, and IMF Staff Calculation (accessed: September 2023)*

More than numbers it is worth mentioning the fact that the crypto market while counting more than 10.000 types of crypto-assets and promoting decentralization and disintermediation is allowing for the creation of new centralized intermediaries. Crypto-asset issuers, exchangers, wallet providers, and more ancillary services like lending and investing are provided by centralized entities. This ongoing evolution counts also for an increased correlation between crypto-assets and other financial assets **(IMF, 2021).** It has already prompted an increasing interconnectedness with traditional systems which is seen as e threat to financial stability in the future.

Before stepping into recent market developments and observations, internationally and at the European Union level, it is necessary to understand how characteristics like scope, fungibility, convertibility, underpinning distributed ledger technology, legal tender status, and other characteristics evidenced by policymakers are setting the terminology for crypto-assets **(see Figure 2).** Two main categories of crypto-assets have come into view: unbacked and backed; meanwhile, from a financial stability perspective three categories have emerged: native tokens, reserve-backed stablecoins, and algorithmic stablecoins **(IMF, 2023; European Systemic Risk Board, 2023).**

***Figure 2: The digital asset taxonomy dendrogram.***




*Source 2: Milken Institute (accessed: August 2023)*

**The unbacked crypto-assets** are the oldest and most popular type of crypto-assets. They do not represent any underlying asset, claim, or liability, while **backed crypto assets (stablecoins)** are a subcategory of cryptocurrencies typically pegged or linked to the price of another asset (having value that depends on reserve assets). Stablecoins could be backed by a monetary unit of account such as the US Dollar or EURO, a commodity such as gold, or a currency basket. Examples of crypto-assets referenced to the US dollar (e.g. Tether, USDC, DAI, and Binance USD), lesser-known referenced to other fiat currencies (e.g. EUROC referenced to the Euro), or commodities such as gold, (e.g. PAX Gold), **(Bank of Italy, 2023).**

The unbacked crypto-assets are transferable, firstly designed to be used as e medium of exchange, and as often decentralized there are cases of them that are centrally issued and controlled. Their value fluctuates relative to a monetary unit of account depending on supply and demand. Most of them are used for speculations instead of payment purposes and their significant volatility hinders their ability to perform the role of currency.

**The European Systemic Risk Board** nominates **Bitcoin, Dogecoin, and Ether** as **native tokens**, *"[…] integral to any permissionless blockchain as they are the reward for the miners or validators adding to the chain, including clearing and setting transactions."* **Tether, USD Coin, and Binance USD** are examples of **reserve-backed stablecoins**, which are backed by traditional assets with an equal or greater nominal value in one or more fiat currencies. **Algorithmic stablecoins**, such as **FRAX,** and "on-chain" **collateralized stablecoins as DAI** follow the third category of crypto-assets. This category is designed to maintain their peg without correlating with reserve assets. They do instead rely on an "on-chain" algorithm or "smart contracts" that are in the head of the supply of tokens in circulation.

## 2. A Tumultuous Market – The (In) Stability of Stablecoins

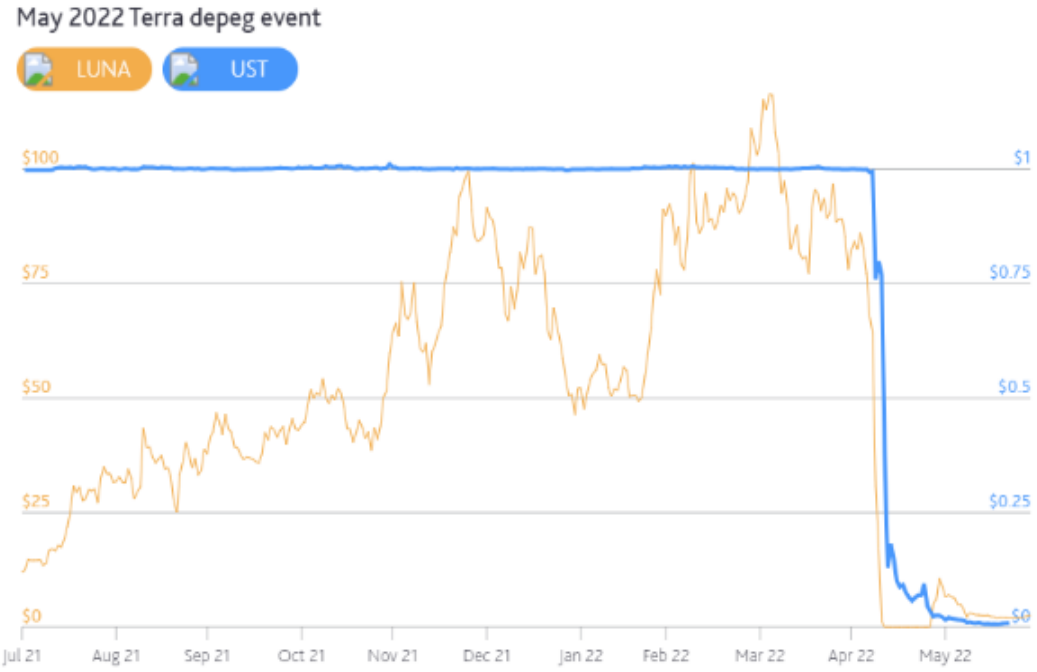
As was already hinted at in the previous part, some recent market events have further strengthened the reasoning behind the necessary attention of regulation on the way of offsetting risks posed by stablecoins growth. **The public confidence** in the entire sector was impacted by showcase events of **misconduct of crypto-related business models**. Several occasions have resulted in stablecoins **losing their pegs to reference assets** and many investors have chosen to divest their stablecoin holdings because of **the lack of transparency** around the underlying reserves that support many stablecoins **(European Central Bank, 2023; MOODY'S, 2023)**. The response of what has driven these developments relies on important factors such as **the lack of regulation in place**, **risk management issues** at a large crypto exchange, **governance issues**, and financial stress within traditional finance.

## 2.1. Unsustainable Business Models – Three Important Cases

*1.* The **Terra (UST stablecoin) collapse in May 2022**, was a big disturbance that reshaped the pressure felt by the participants through the crypto world. It is considered the third largest cryptocurrency ecosystem after Bitcoin and Ethereum and was able to destroy $20 billion in value overnight, leading to the need for a better understanding of runs in a system deprived of regulatory oversight and where the blockchain technology provides the observation one's own of the pseudonymous transactions and allows investors to react upon.[5] UST's design, associated with **Terra's native token LUNA**, was shown vulnerable because it relied on independent market participants to maintain stability, leading to UST's sharp de-peg from the US Dollar. This episode accentuates the *challenges 'algorithmic stablecoins'* face in volatile crypto markets (see **Figure 3**). The collapse of Terra/Luna determined significant downward pressures on the price of Bitcoin, part of a volatile crypto market. On this matter, Andrea Enria, the Chair of the Supervisory Board of the ECB during the "Conference on MiCAR and its coordination with EU financial markets legislation" stated that this event *"[…] shone a light on three extremely concerning aspects: the high vulnerability of the lending protocols (i.e.in this case the borrowing and lending protocol called Anchor which faced risks of insolvency); the extensive interconnections among crypto-asset players; and the unreliability of algorithmic stabilization mechanisms."*

[5] Liu, J., Makarov, I., Schoar, A. (2023), "*Anatomy of a Run: The Terra Luna Crash*", April. MIT Sloan Research Paper No. 6847-23, Available at SSRN: https://ssrn.com/abstract=4416677 or http://dx.doi.org/10.2139/ssrn.4416677

***Figure 3: May 2022 Terra de-peg event.***




*Source 3: Amberdata 2023; MOODY'S 2023 (accessed: October 2023)*

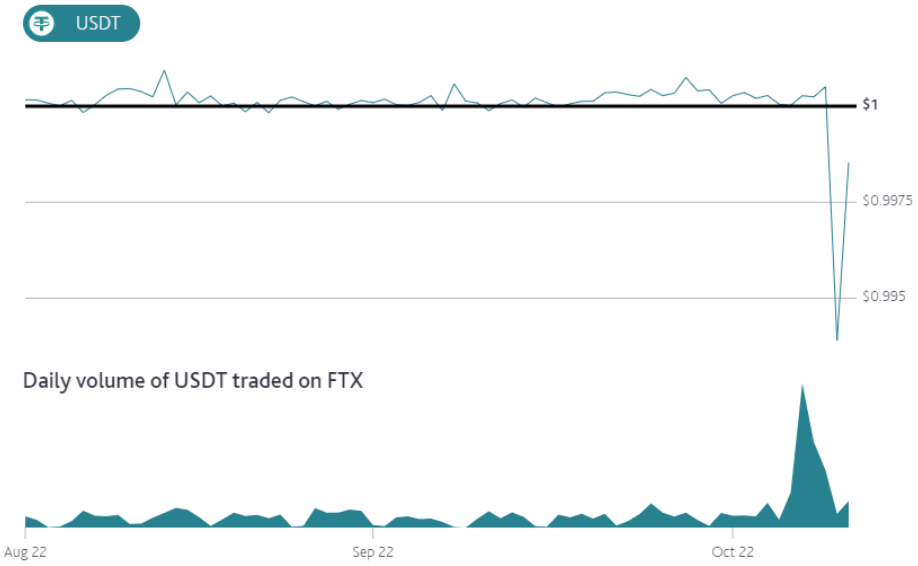
2. **FTX,** a cryptocurrency once valued at $32 billion, faced significant challenges related to components such as **governance, accounting, and risk management challenges,** ultimately leading to its **bankruptcy in November 2022**. Subsequent concerns about industry contagion contributed to a 1% drop in USTD value, on major exchanges, with data indicating a connection between FTX and USDT de-pegging **(Figure 4).** These events highlight the ***interconnected nature of the centralized crypto finance*** **ecosystem** and its potential for **far-reaching consequences**. This case highlighted the problematics of ***non-transparent corporate structure*** and vertically integrated crypto-related business model as initially insinuated. FTX is an American entity, but its platform does not directly operate in the USA.

   What was also emphasized in this case is the unclear regulation of cross-border exchanges. Why? On a document issued by the Bank of Italy on crypto-asset markets, is reasoned that the elaboration of this argument considers the fact that FTX is an offshore company based in the Bahamas and as a result is regulated by the Securities

Commission of the Bahamas while it was operating in Europe through a Cyprus Securities and Exchange Commission and was passported to the European Economic Area.

Furthermore, **an unseemly use of client funds** was made by the FTX. What happened depicts the exact opposite of what should not have happened. Funds deposited in exchange should be available on demand but instead, they were lent out to an affiliated company and afterwards **invested in risky activities**. Predictions lead to the fact that it will take time to disclose all the consequences of the FTX bankruptcy, which was at the center of a complex network of relationships with other institutional investors.

***Figure 4: November 2022 USDT de-peg event***




*Source 4: Amberdata 2023; MOODY'S 2023 (accessed: October 2023)*

3. Silicon Valley Bank runs on deposits where the US Dollar Coin (USDC) de-pegging event linked to Circle's exposure to Silicon Valley Bank (SVB), highlighted ***the unexpected volatility of fiat-backed stablecoins*** and the interconnectedness of traditional and decentralized finance. Although USDC eventually regained its peg after regulatory assurance, this incident ***revealed liquidity risks*** associated with banks in

stablecoin transactions, impacting other stablecoins like the "Binance Coin" (BUSD) and the "Dao Coin" (DAI).

The examples, provided in this part, call attention to the importance of considering a **"contagion risk"** or the so-called **"domino effect",** that crypto-asset companies cause on the financial market and the broader financial system.

## 3. The Lack of Regulation – Which are the Proposed Approaches so far?

These business developments have highlighted the lack of regulatory oversight to prevent excessive risk-taking in a volatile environment (Tolic 2023). The reserve-backed stablecoins are not subject to regulation, nor are they backed by a clear legal framework or have clear access to a lender of last resort. *Crypto-asset issuers* and *crypto-asset service providers* should be subject to a clear and effective regulatory framework. On the other hand, several crypto-asset activities are often packed together within a single entity, frequently in non-compliance with existing regulations. **The Financial Stability Board (FSB)** outlined the emergence of **"Multifunction Crypto-asset Intermediaries" (MCIs),** intermediaries that perform combined activities that could fall under different sectoral regulatory regimes and standards or that are only provided under significant restrictions and controls. The lack of governance and risk management frameworks could exacerbate the MCIs' vulnerabilities, such as technology and operational ones and interconnections.[6]

[6] See FINANCIAL STABILITY BOARD (FSB), (2023), "*The Financial Stability Implications of Multifunction Crypto-asset Intermediaries"*, November.

Examples from different jurisdictions across the world are demonstrating steps taken towards introducing new regulations covering crypto-assets or even banning them, but these approaches lack uniformity.

**Italy** falls among those jurisdictions that have not adopted any regulatory framework for the so-called 'stablecoins' or the overall digital assets. In Italy, the responsible authority for the regulation of the national financial market is the "Commissione Nazionale per le Società e la Borsa" (CONSOB). The Bank of Italia (BANCA D'ITALIA), only in June 2022 took steps forward in providing *'non-binding' guidelines* for market participants operating in the digital asset market. Of course, as among many other EU Member States, also in Italy the VASPs fall under the scope of AML provisions. With the arrival of MiCAR and its implementation, things will change in regulatory terms.

**The UK government** in February 2023, has published its consultation on the future financial service's regulatory framework for crypto-assets. Indeed, firms providing some crypto-assets activities (e.g. buying or selling) have operated in compliance with the "Money Laundering, Terrorist Financing and Transfer of Funds Regulations" (MLRs), 2017.[7] The UK is planning to regulate the core activities *related to custody and lending*, and it aims to require market participants to be authorized before they can offer services to consumers and aims also to bring *centralized crypto-asset exchanges* into financial services regulation for the very first time. **On October 31, 2023**, the government published three policy documents on crypto-assets regulation. These publications cover fiat-backed stablecoins, crypto-asset regulatory regimes, and the failure of systemic digital settlement asset firms.

[7] See for further information the **PwC Global Crypto Regulation Report (updated)**, (2023), *"Summaries from selected jurisdictions"*, December.

**Germany** has been a core example among EU Member States, mentioned also in several papers and publications regarding updates identifying the crypto-assets regulation.[8] This is because Germany in addition to existing EU financial regulation has introduced in its banking law a definition (as a new financial instrument) of crypto-assets (Kryptowert), in the German Banking Act (Kreditwesengesetz, **KWG**).[9] The adopted definition of crypto-assets in this case reflects the definition of ***"virtual currencies"***[10] **provided in the AMLD5**, Directive (EU) 2018/843, amending Directive (EU) 2015/849. Moreover, steps forward were taken when Germany introduced in 2020 requirements for cryptocurrency exchanges operating within the country, to be licensed by the "Federal Financial Supervisory Authority" (BaFin). Also, in the process of ensuring compliance with the AML Regulation, Germany introduced rules for crypto custodians.

**In China,** several government authorities, jointly on September 24, 2021, issued a 'notice' clarifying that cryptocurrency is not a legal tender. Indeed, all transactions including cryptocurrency are considered illegal in China, including also offshore exchanges providing services to Chinese citizens.

**Switzerland** has introduced new legislation[11] (in 2022), covering crypto-assets and their service providers, more precisely, the provision of cryptocurrency exchange and custodian

---

[8] Stam, H., Meinert, M., "*German regulatory framework for market participant in crypto assets"*, publication for **AIMA JOURNAL EDITION 129**, Q1 2022, p.66-70, available at: https://www.aima.org/journal/aima-journal---edition-129.html

[9] Crypto-assets under the sec. 1 (11) sentence 4 **German Banking Act** are defined as: *"Digital representations of a value that has not been issued or guaranteed by any central bank or public body and does not have the legal status of a currency or money, but is accepted by natural or legal persons as a means of exchange or payment or serves investment purposes on the basis of an agreement or actual exercise and which is transmitted electronically, can be stored and traded."*

[10] For the sake of comparison, see again Article 1 (2), point (d), first subparagraph of the Directive (EU) 2018/843.

[11] The Swiss Parliament has adopted the *"Federal Act on the Adaptation of Federal Law to Developments in Distributed Ledger Technology",* (DLT Bill). This act has amended various federal laws, such as the *"Swiss Code of Obligations"* (SCO) and financial markets regulations.

services is legal and is regulated by the "Financial Market Supervisory Authority" (FINMA). FINMA applies the *"same risk, same rules" approach.*

**In the US** particularities occur in the treatment of crypto-assets as there are many uncertainties about the governing powers related to crypto-assets, of many regulators. Which of the many authorities, such as the Securities and Exchange Commission (**SEC**), the Commodity Futures Trading Commission (**CFTC**), the Federal Trade Commission (**FTC**) the Department of the Treasury (**Treasury**), the Internal Revenue Service (**IRS**), the Office of the Comptroller of the Currency (**OCC**) or the Financial Crimes Enforcement Network (**FinCEN**) are responsible for the market in crypto-assets and what do they need to do to better coordinate their regulatory efforts?

On an international level, policy initiatives have been undertaken. **The Financial Stability Board (FSB)** and the **Standard Setting Bodies (SSBs)** progressed in reviewing the existing international standards and their applications related to crypto-assets.[12] Progress was also made by the publication of the guidance on the "Application of the Principles for Financial Market Infrastructure" (PFMI) to stablecoins arrangements, by the **Bank for International Settlements' Committee on Payments and Market Infrastructure (CPMI)** and the **International Organization of Securities Commissions (IOSCO).** These updates took place in 2022, after the market turmoil.

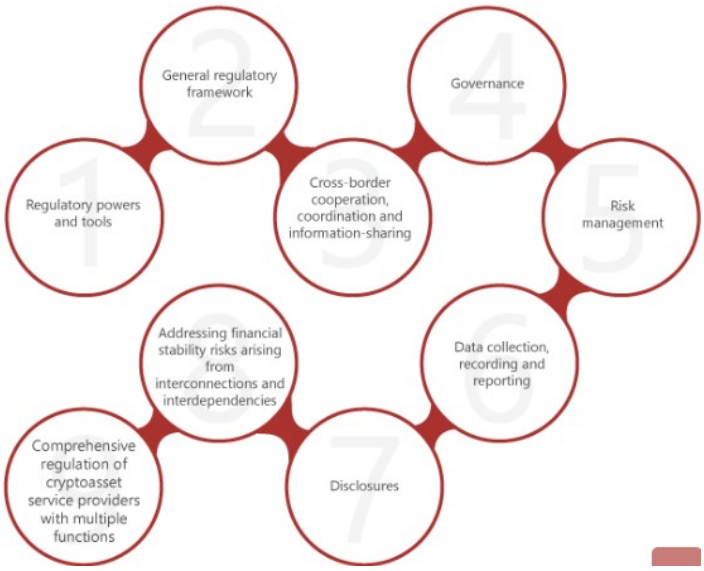
A comprehensive regulatory framework was aimed to be achieved, and FSB firmly stood of the opinion that << *"Effective regulatory and supervisory frameworks should be based on the principle of* ***"same activity, same risk, same regulation****."*>> Equivalent economic functions performed by crypto-assets, based on this proposal, require equivalent regulation. The reasoning behind this approach encompasses a framework where activities such as the issuance,

[12] The FINANCIAL STABILITY BOARD (FSB), (2023), defines crypto-assets as "*a type of private sector digital asset that depend primarily on cryptography and distributed ledger technology",* (FSB, 2023): "Hight-level Recommendations for the Regulation, Supervision and Oversight of Crypto-Asset Activities and Markets."

distribution, and trading of crypto-assets or stablecoins in a way that reflects the functions performed by traditional banks or traditional capital markets should be subject to regulation in line with global standards and the standards applied to commercial banks or markets, to achieve the same level of consumer and investor protection.

A set of proposals submitted by the **FSB (Figure 5 and Figure 6)** to the G20 Finance Ministers and Central Bank Governors in October 2022 composed as follows:

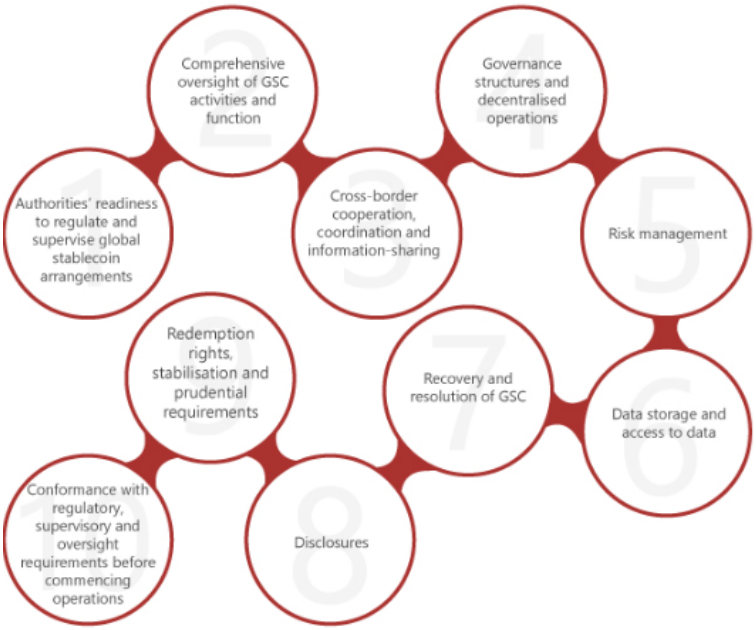
***Figure 5: The nine high-level recommendations.***




***Source 5: Bank for International Settlement (accessed: July 2023)***

*1. recommendations for the regulation, supervision, and oversight of crypto-asset activities and markets ('CA Recommendations').*

***Figure 6: The ten high-level GSC recommendations.***




***Source 6: Bank for International Settlement (accessed: July 2023)***

*2. revisions to its High-level Recommendations for Global Stablecoin Arrangements*[13] *to address associated financial stability risks more effectively ('GSC Recommendations').*

Subject to these recommendations are any type of crypto-assets in any jurisdiction, associated issuers, and service providers and they inform the regulation of all crypto-assets activities, *but they do not apply to the 'Central Bank Digital Currencies' (CBDCs) and we will later see that also MiCAR excludes the CBDCs.*

In an occasional paper issued by the Bank of Italy, a comparative and referenced analysis is performed. It brings to the attention several FSB's recommendations and confronts them to the Markets in Crypto-Assets Regulation (MiCAR) while providing proposals conforming to them. Important matters such as **the stabilization mechanism of stablecoins** pegged to fiat currencies and their necessity for *a **low-risk reserve of assets***, the disclosure matter as the up-

[13] The FINANCIAL STABILITY BOARD, (2020) report, "*Regulation, Supervision and Oversight of 'Global Stablecoin' Arrangements"* described three characteristics that distinguish a **GSC** from other crypto-assets and other stablecoins. Those characteristics include: **the existence of a stabilization mechanism, the usability as a means of payment and/or store of value, and the potential reach and adoption across multiple jurisdictions.**

to-date information provided not only by issuers of stablecoins but also from independent authorities about the composition of reserve assets, the identification and management of risks (i.e. liquidity, credit, leverage, maturity transformation) from the crypto-assets service providers and consumer protection issues are some of the key factors addressed.[14]

A hint to what will be further analyzed in this thesis considering the aforementioned transparency requirements and the frequency of the updated information, referring to MiCAR, is that MiCAR requires issuers of stablecoins referencing a basket of assets or fiat currencies (*the so-called "Asset-Referenced Tokens" ARTs*) to provide "[…] ***an accurate, clear and transparent information*** *on the value and the composition of the reserve assets and update such information at least once a month on a publicly and easily accessible place on their website."* The same is not required in this regulation for reserve assets of reserve-backed stablecoins with a single reference value (the so-called "E-Money Tokens", EMTs).

Another update in the financial crime area concerns the **Financial Action Task Force (FAFT)**, calling upon jurisdictions to implement the **"Travel Rule".** The "Travel Rule" lines up practices for crypto-asset businesses sending and receiving transactions with the practices that are common for other financial services. It extends the obligation to include information about the originator and beneficiary to crypto-asset service providers (CASPs). On a targeted update publication on Paris, 27 June 2023, the following is expressed:

"[…] *jurisdictions have made insufficient progress on implementing the Travel Rule, which is a* ***key AML/CFT measure****. Of the 151 jurisdictions that responded to FATF's 2023 Survey, more than half still have not taken any steps towards implementing the Travel Rule."*

The "Travel Rule" is part of the FATF work for preventing fraudulent criminal and terrorist use of the sector, so as part of it, FATF decided to extend its "Anti-Money Laundering and Counter-

[14] Abate, G., Branzoli, N., Gallo, R., (2023), ***"Crypto-asset markets: structure, stress episodes in 2022 and policy considerations"****,* June. Bank of Italy Occasional Papers n.783, June 2023.

Terrorist Financing" (AML/CFT) measures to *"Virtual Assets" (VAs)*[15] and *"Virtual Asset Service Providers" (VASPs).*[16]

Going back to **the UK,** it is known that from the 1st of September 2023, crypto-asset businesses will be required to *collect and share information about crypto-asset transfers*, making the way toward the implementation of the **"Travel Rule"**. The requirements cover the collection of information on beneficiaries and originators for those transactions that present a high risk of illicit finance reducing this way the use the possible illicit activities.

A legislative package issued by **the European Commission** aiming to **reform the EU's regal and institutional AML/CFT framework** was followed by a recast of the previous existing regulation and since June 2023 it has been published in the "Official Journal of the European Union" as **Regulation (EU) 2023/1113,** that acts following the FATF's work on the "Travel-Rule" **(European Banking Authority, 2023).**

**Currently the reporting and monitoring capacity is not resilient**. The facilitation and the provision of consistency of disclosures are important aspects as part of the procedure of the identification of risks to financial stability. **The crypto-asset exposure reporting** is not specifically required for financial institutions. The **"ESRB Task Force on Crypto-Assets and Decentralized Finance"** stated that "[…] *pending the application of MiCAR, crypto-asset markets, and entities largely fall outside of regulatory and supervisory perimeters and associated reporting requirements."* So, this should be a priority for responsible policymakers

---

[15] FAFT defines ***"Virtual Assets"*** as: "*a digital representation of value that can be digitally traded, or transferred, and can be used for payment or investment purposes.* Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF Recommendations."

[16] FAFT defines ***"Virtual Asset Service Providers"*** as: "*any natural or legal person who is not covered elsewhere under the Recommendations, and as a business conducts one or more of the following activities or operations for or on behalf of another natural or legal person*: exchange between virtual assets and fiat currencies; exchange between one or more forms of virtual assets; transfer of virtual assets; safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets; and participation in and provision of financial services related to an issuer's offer and/or sale of a virtual asset."

and authorities because **standardized reporting** is needed by credit institutions and other institutions of the traditional financial sector.

*Members of the European Parliament (MEPs)* want banks to disclose their exposure to crypto-assets and related services and activities and in addition to, a detailed description of the related risk management policies in place. For this purpose, on 24 January 2023, **the *European Parliament's Economics and Monetary Affairs Committee (ECON)*** approved a draft law to implement the *Basel III rules* on banking capital and liquidity requirements. This draft legislation includes ***a single clause related to crypto-assets***, requiring: *"a euro balance sheet capital for a euro of every crypto-asset held".* It is necessary to mention that a peculiar requirement like this is an interim measure running until the end of 2024. The draft law requires disclosure of crypto-asset-related activities *including those defined by the MiCAR.*

Only in December 2022, **the Basel Committee on Banking Supervision** published the "***Prudential Treatment of crypto-asset exposures".*** Prudential requirements are settled down for banks' exposures to crypto-assets. [17] The missing standardized disclosure templates are now available. It is now expected that all crypto-assets market participants and banks collaborate to reach the objectives related to **a reduction of information asymmetry in the sector.**[18]

---

[17] The requirements are specified in a new chapter of the consolidated Basel Framework (SCO60), with an implementation date of 1 January 2025. Paragraphs SCO60.128 to SCO60.130 describe the disclosure requirements that apply to banks' exposures to crypto-assets.

[18] See BASEL COMMITTEE ON BANKING SUPERVISION (BCBS), (2022), "*Prudential Treatment of Crypto-asset Exposures"*, December. According to the structure of the final standard which the Committee has agreed to implement by 1 January 2025 banks are required to classify crypto-assets on an ongoing basis into two groups:

i. Group 1: crypto-assets which *include "tokenised traditional assets" (Group 1a)* and "*crypto-assets with effective stabilisation mechanism" (i.e. stablecoins), (Group 1b)*. These crypto-assets meet in full a set of classification conditions whereas;
ii. Group 2: crypto-assets fail to meet any of the classification conditions. Group 2 crypto-assets present higher risk which includes *all "unbacked crypto-assets"* along with *any "tokenized traditional assets" and "stablecoins" failing to meet the conditions.*

Shifting the focus to MiCAR, we know that on this matter **MiCAR will not establish requirements for financial institutions** as set out in the previous paragraph regarding the financial institutions to report their exposures to crypto-assets, but if the EU implements the BCBS disclosure standards it would certainly put in place reporting requirements in the EU. What MiCAR is considering is ***the intensification of reporting requirements within the crypto-asset sector*** (i.e. requirements on entities that carry out crypto-asset activities reaching out the perimeter of this new regulation.)

The ESRB suggests the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the National Competent Authorities (NCAs) cooperate and be prepared to recognize parts and areas where the EU financial services stand in need of amendment and to develop reporting templates.

This part summarized the entrance of the crypto-assets market into a very particular phase, being broadly described as *"crypto-winter"* referring to all the aforementioned developments and failures of the last two years and overviewed the attainable legislative responses and some of the most relevant ongoing work of important supranational bodies, several supervisory authorities and legal systems, trying to address all the current and possible future challenges posed by the crypto-asset markets. There is still awareness of the need for commitment to reach a coordinated framework based on frequent collaboration and common principles to ease the supervision and oversight of the markets and reach comprehensive regulatory steps.

# CHAPTER I

# THE COMPLEMENTARY EFFECT OF MiCAR

## 1. Preliminary Remarks on the Adoption of MiCAR

As we largely discussed in the first part of this work, all the geopolitical developments, are and will further be impacting regulators and crypto businesses. European Union's position on this matter initiated a new path towards the regulation of markets in crypto-assets. It was proposed before the recent developments coupled together in the previous part of this work. It all started on 24 September 2020 with the adoption from the European Commission of the "*Digital Finance Package",* where was formulated the first proposal for the regulation of crypto-assets markets.[19] Having in mind the goal for a competitive EU financial sector the adopted package includes a "*digital finance strategy"* and is aligned with the legislative proposal on crypto-assets other two legislative proposals regard digital operational resilience, the so-called *"Digital Operational Resilience Act"* (DORA) and *a "Pilot- Regime for Market Infrastructure" based on DLT* (DLT Pilot Regime).

The bigger picture of the progressively diversified financial products and services offered by European Fintech and technology companies and the pulled-ahead business models have equipped the consumers with more solutions to face the challenges posed by the COVID-19 pandemic but simultaneously have also modified the nature of the consumers and investors related risks as well as the financial stability related risks. The Digital Finance Strategy sets out

[19] European Commission: Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *"Digital Finance Package"*, 24 September 2020.

four main priorities starting with the addressing of the fragmentation in the Digital Single Market, followed by the ability of the EU regulatory framework to guarantee digital innovation that connects with the consumers' interests and market efficiency and not be left behind the data-driven innovation and data protection and pertinent prudential supervision while considering all the risks posed by the digital transformation.

The European Parliament has adopted the new "*Markets in Crypto-Assets Regulation" (MiCAR)* and the revised "*Transfer of Funds Regulation"* (TFR)[20] on 20 April 2023.[21] All the expected beneficial impact of the MiCAR regulations relies on the fact that it establishes a homogenous and uniform order, given the fact that it is directly applicable in all Member States. The role of MiCAR is solemnly considered as a gap-filling regulation. The EU financial Law places the new crypto-asset regulation among the existing ones. Some of the relevant existing EU regulation examples on this matter are the second 'Markets in Financial Instruments Directive' (MiFID II), the 'Payment Service Directive 2', the E-Money Directive, and the Solvency II.

All the relevant matters that were initially brought to attention and that justify the European Union regulatory intervention, such as the necessary legal certainty, the users' protection, the financial stability and market integrity, the risk management and risk mitigation, the protection of monetary sovereignty and a more strengthen economic and monetary union are stated clearly in the 119 recitals of the MiCAR.

---

[20] REGULATION (EU) 2023/1113 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 31 May 2023- on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849

[21] Zetzsche, D, A., Buckley, R, P., Arner, D, W., Van. Ek, M., (2023), "*Remaining regulatory challenges in digital finance and crypto-assets after MiCA",* publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. Paper No. 23-27, 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)740083

As for the revised "*Transfer of Funds Regulation"* (TFR), it is considered the other new pillar of the EU crypto-assets regulation. Article 1 of this regulation states the subject matter as follows: *" This Regulation lays down rules on the information on payers and payees accompanying transfers of funds, in any currency, and on the information on originators and beneficiaries accompanying transfers of crypto-assets, for the purposes of* ***preventing, detecting, and investigating money laundering and terrorist financing,*** *where at least one of the payment service providers or crypto-asset service providers involved in the transfer of funds or transfer of crypto-assets is established or has its registered office, as applicable, in the Union."*

## 2. Which Crypto-Assets do not fall within the Scope of the New Regulation?

The MiCAR and the TFR, these two new pillars of the EU crypto-assets regulation, cover all the challenges posed by the centralized provision of crypto-assets while leaving out of their scope the *'fully decentralized'* services and platforms but consider implementing guidelines as measures taken to lessen risks related to 'partial decentralized' platforms. The *'fully decentralized finance'* (the so-called DeFi) does pose new serious risks but that is for now disregarded.[22] MiCAR does not apply to the most known crypto-asset with the highest capitalization, Bitcoin.[23] However, MiCAR requires 'an assessment of the development of the decentralized finance in markets in crypto-assets', as well as clarity on the feasibility of regulating the decentralized finance and sets requirements for the appropriate regulatory treatment of decentralized crypto-assets without an issuer or 'CASP'. Responsible for providing

[22] Recital (22) of MiCAR
[23] What falls outside the regulatory scope of MiCAR is the issuance of Bitcoin,

a report related to the aforementioned issues is the European Commission, with a deadline of 30 December 2024.

To understand the regulatory treatment of our subject in matter we need to provide clarity of its definitions and to have a better understanding of the complementarity design of the existing legislation that is provided by MiCAR, which is composed of 9 Titles, 149 articles, 119 recitals, and 4 annexes. Article 3, paragraph 1(5) of MiCAR provides **a broad definition** of crypto assets as follows:

*"…a digital representation of* ***a*** *value or of* ***a right*** *that is able to be transferred and stored electronically using distributed ledger technology or similar technology".*

Of course, MiCAR provides a definition for the distributed ledger technology[24] but it lacks a definition or interpretation for what regards the embraced "similar technology".

Recital (2) further elaborates on the financial benefits to market participants and retail holders[25], deriving from the crypto-assets as a *"digital representation of a value or of a right".* Medium-sized enterprises (SMEs) could trigger profit as the offers of crypto-assets, as defined under MiCAR, have the potential to allow more innovative financing ways, enhancing the competition. The other usage of crypto-assets allowing us to consider additional benefits is their role as a means of payment. These benefits encompass more efficient payment, cheaper ones, and even faster.

This broad definition is also considered to be a flexible definition as it sets a far-reaching border in including a wide range of digital assets, tokens, and coins.

"Central Bank Digital Currencies" (the so-called CBDC) and digital representations of fiat currencies are digital assets that do not fall under the scope of the MiCAR regulation. This is because there are many differences in nature when comparing CBDCs to tokens, which we will

---

[24] Pursuant to Article 3 (1) of MiCAR, the Distributed Ledger Technology is defined as: *"a technology that enables the operation and use of distributed ledgers",* where pursuant to Article 3(2) the distributed ledger is defined as: *"an information repository that keeps records of transactions and that is shared across, and synchronised between, a set of DLT network nodes using a consensus mechanism".*

[25] As defined in Article 3 (1) point (37) of MiCAR: "any natural person who is acting for purposes which are outside that person's trade, business, craft or profession".

more precisely see how are covered by MiCAR. **The European Commission** published **a legislative proposal** for the implementation of a legal framework for the 'Central Bank Digital Currency', a digital euro**, on June 28, 2023**.[26] This legislative proposal is already welcomed by the ECB and the ECB is ready to take action to provide technical input for supporting the EU co-legislators' work. The investigation phase of the *'digital euro project'* was initiated in October 2021 by the ECB and the euro area national central banks.[27] The digital euro project is still a work in progress. For the sake of proving a definition, the 'Bank for International Settlements' (BIS) defines the CBDC as a *"digital form of central bank money that is different from balances in traditional reserve settlement accounts."*

Following Recital n.17 of MiCAR, we get the exclusion of the so-called 'Non-transferable digital assets', having as a main characteristic the fact that cannot be transferred to other holders.[28] Recital n.26 of MiCAR excludes also from the scope of this regulation the 'Free crypto-assets'. These crypto-assets are offered for free or are "[…] *automatically created as a reward for the maintenance of a distributed ledger or the validation of transactions in the context of a consensus mechanism."*[29]

## 2.1. The NFTs' Discourse

The Non-Fungible Tokens (NFTs) discourse remains still a big uncertainty for many regulatory regimes, as it falls outside the scope of this regulation, given the exemption from MiCAR of

---

[26] Gesley, J., (2023) European Union: "*Commission Publishes Proposal for Digital Euro"*. [Web Page] Retrieved from the Library of Congress, available at: https://www.loc.gov/item/global-legal-monitor/2023-07-26/european-union-commission-publishes-proposal-for-digital-euro/.

[27] European Central Bank (ECB), (2023), "*Progress on the Investigation phase of a digital euro"-fourth report*, available at: https://www.ecb.europa.eu/paym/intro/news/html/ecb.mipnews230714.en.html.

[28] Pursuant to **Recital 17** of MiCAR, examples of such digital assets are loyalty schemes where the loyalty points can be exchanged for benefits only with the issuer or offeror of those points.

[29] Pursuant to the **Recital (26)**, also for the purpose of this regulation no requirements should apply to 'utility tokens', providing access to an existing good or service.

those crypto-assets that appear to be *"unique and not fungible"* including digital arts and collectibles.[30] Recital n.10 and recital n.11 provide a closer look at the reasoning and the application of NFTs' exemption from the purposes of this regulation. Some important aspects of the exclusion combine exclusion features as below:

1. "The value of such unique and non-fungible crypto-assets is attributable to each crypto-asset's *unique characteristics and the utility* it gives to the holder of the token."
2. Crypto-assets representing physical assets or services that are 'unique and non-fungible', such as *'real estate'* or '*product guarantees'* are out of the range of application of MiCAR.
3. NFTs are not readily interchangeable and "[…] the relative value of one such crypto-asset in relation to another, each being unique*, cannot be ascertained by means of comparison to an existing market or equivalent asse*t"

Meanwhile, interestingly, Recital n.11 provides, as would be liked to call them 'exclusions from the exclusions' as it, furthermore, states that *"[…] fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible."* So, we understand that, alone the element of uniqueness attached to a crypto-asset has no instant qualification or the classification power for considering it as 'unique and non-fungible'. Also "*The issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility."* Moreover, this recital explains that a crypto-asset, benefiting from the exclusion principles *"[…] may still qualify as a financial instrument and therefore be subject to other existing EU financial regulations."*

This is the case when it comes to a point where it becomes difficult to summarize the essence of the non-exclusions, because of the consideration of all possible cases related to NFTs. The

[30] Pursuant to **Article 2 (3)** we have: *"This Regulation does not apply to crypto-assets that are unique and not fungible with other crypto-assets."*

discourse continues as it is stated that MiCAR also applies to *"[…] crypto-assets which appear to be unique and non-fungible, but whose de facto characteristics or features which are linked to their de facto uses would make them fungible or non-unique"*.

Interpretive issues arise in a way where no clear definition for 'fungibility' is provided by MiCA regulation. Nonetheless, the concept of 'fungibility' considers the possibility of replacing an asset with an identical one, apropos of quality and quantity terms. Space is left for different reconsiderations by competent authorities based on contextual aspects and case-by-case analysis following a 'substance over form' approach. It is like a legislative loophole. Issuers of NFTs should be alerted to the fact that the legal question of being 'unique and non-fungible' will not depend on the branding of the token but on the actual design. The developments in the markets of NFTs will be also part of the EU Commission's report by 30 December 2024. Here MiCAR requires 'an assessment of the essential and feasibly of regulating 'offers' of 'unique' and 'non-fungible' crypto-assets', as well as service providers of these crypto-assets.

# 3. Will MiCAR cover Everything that is based on 'DLT'? - Possible Definitional or Overlapping Conflicts

Crypto-assets can have different characteristics which results in distinctive benefits and risks and requires different levels of regulatory approach. Immediately to consider is the fact that <<*crypto assets that fall under existing Union legislative acts on financial services should remain regulated under the existing regulatory framework,* ***'regardless of the technology used for their issuance or their transfer,*** *rather than this Regulation'*>>. Following this line of exclusion, this regulation leaves out of its scope crypto-assets which qualify as:

i. "Financial Instruments" (as defined in ***Directive 2014/65/EU);***
ii. "Bank Deposits" (as defined in ***Directive 2014/49/EU*** of the European Parliament and of the Council);

iii. "Structured Deposits" (as defined in ***Directive 2014/65/EU***);

iv. "Funds" (as defined in ***Directive EU 2015/2366*** of the European Parliament and of the Council), expect if qualified as **electronic money tokens ('e-money tokens'**);

v. "Securitization Positions" (as defined in ***Regulation EU 2017/2402*** of the European Parliament and of the Council);

**vi.** "Non-life or life insurance" contracts or products, (falling within the classes of insurance listed in Annexes I and II of **Directive No. 2009/138/EC of the European Parliament and of the Council);**

vii. "Pensions products or schemes", (Article 2(4) of MiCAR, concerning paragraphs (f), (g), (h), (i));

viii. "Social security schemes".

From the previously displayed content of this regulation, one can say that after this regulation is fully in force, we will be at the remaining point where three regulatory categories will distinguish the crypto products. The first option is that of a classification as a 'financial instrument' under MiFID II, followed by the qualification as a 'crypto-asset' under the MiCAR or as an unregulated product. [31] When we say 'as an unregulated product' we have in mind the Union level, as, without doubt, it becomes in a dutiful way, more complex if we parallelly consider the purely domestic notions related to the topic, which could create further definition conflicts. Is it completely true that these conflicts cease to exist with the entry into force of MiCAR or is it only theoretically so? To reflect on this fact, the most considerable case that could be mentioned is the Italian case of the so-called 'Financial Product'. [32] The domestic notation of 'Financial Product' consequently foresees the application of national prospectus

---

[31] **Recital (14)** of MiCAR explains that for the purposes of ensuring "*a clear delineation between, on the one hand, crypto-assets covered by this Regulation and, on the other hand, financial instruments"*, the European Securities and Markets Authority (ESMA) should be mandated to issue guidelines on the criteria and conditions for the qualification of crypto-assets as financial instruments.

[32] Pursuant to **Article 1 (1)(u) of the Italian Consolidated Law on Finance**: "financial products shall mean financial instruments and every other form of investment of a financial nature; bank or postal deposits without the issue of financial instruments shall not constitute financial products".

rules to assets, which are not included in the EU regimes.[33] This concept is different from the notion of the 'financial instrument' under the MiFID.

The attention of these purely domestic notions is recaptured when possible specific cases could find interpretative issues under existing EU financial regulations and the MiCAR combined, so when the crypto-asset is not qualified as a financial instrument, neither as an ART or EMT nor falls it under the category of 'other crypto-assets' rather than ARTs and EMTs. Shortcomings regarding qualifications have therefore consequences, such as the application of different regimes, more rigorous or less, regarding authorization, transparency and disclosure, transactions, and most importantly supervision.

However, for the purposes of this regulation, the European Securities and Markets Authority (ESMA) is charged to issue guidelines[34] providing the criteria and conditions for the qualification of crypto-assets as financial instruments and where those crypto-assets that are otherwise considered 'unique' and 'non-fungible' with other crypto-assets might instead, be qualified under the 'financial instruments' regime. What is not yet mentioned is that the MiCAR includes a considerable number of Level 2 and Level 3 measures that must be developed before the entry into application of this new regulation. It envisages a burden to be carried by the role of the soft law. (**Figure 7***)* summarizes the ESMA's work throughout a timeline displaying the consultation process that will be launched in three separate consultation packages.[35]

---

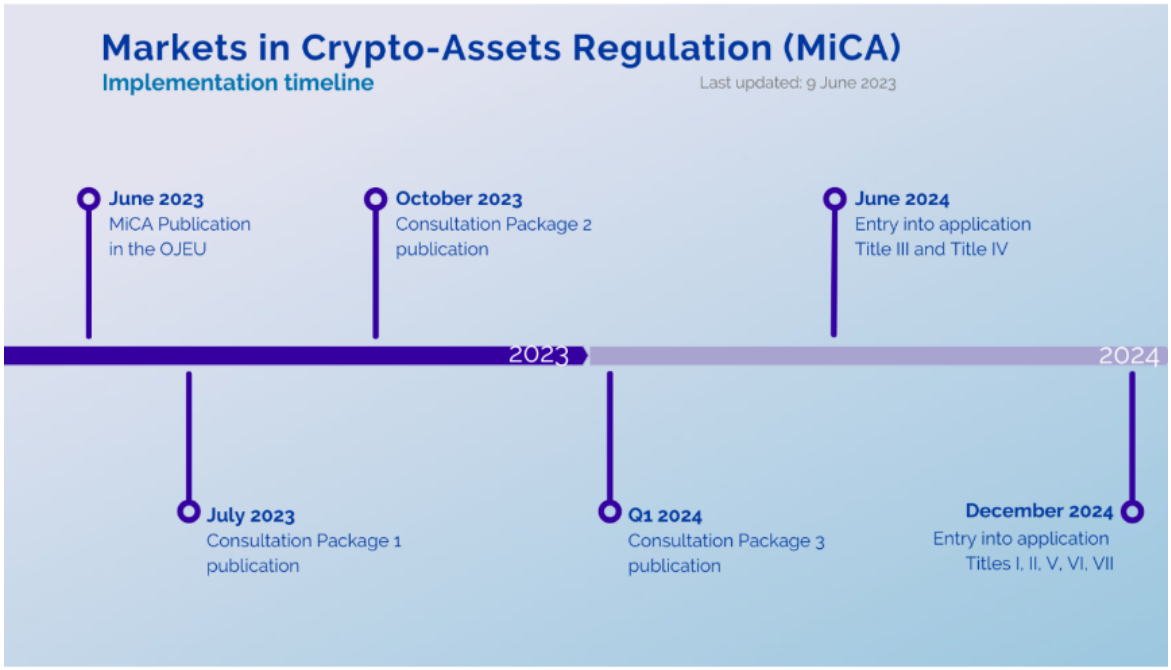
[33] To complete the picture, other examples in the EU of purely domestic notions are the following:

(i) the so-called "Vermögensanlage", in Germany;
(ii) the so-called "Veranlagung", in Austria;
(iii) the so called "beleggingsinstrument" / "instrument de placement", in Belgium.

[34] Guidelines are *not legally binding,* as they serve to all relevant stakeholders and invite them to be compliant with the guidelines, making every possible effort.

[35] The third and final consultation package of ESMA is expected to be published in Q1 2024. This final package will likely cover all those remaining mandates with an 18-month deadline, also including the issue of the qualification of crypto-assets as financial instruments.

*Figure 7: MiCAR Implementation Timeline*




***Source 7: European Securities and Markets Authority (ESMA), 2023; (accessed: December 2023)***

Moreover, the MiCAR requires the ESMA, in close cooperation with the European Banking Authority "EBA", the European Central Bank "ECB", the European Insurance and Occupational Pensions Authority "EIOPA", to develop and provide a series of Regulatory Technical Standards (RTSs)[36] and Implementing Technical Standards (ITSs)[37]. The procedure of the measures until their entry into application is conditional to the European Commission, responsible for *the adoption phase*, the European Parliament, and the Council of the EU, responsible for *the approval phase*.[38]

[36] RTSs have in view to supplement or amend EU Law and their aim is to set out detailed information on how certain provisions and requirements should be applied and how to be in compliance with.
[37] ITSs instead have in view the application of the law in a consistent way throughout the Union. ITSs provide forms or templates that should be used for the application of the legal text.
[38] Pursuant to **Article 96 (1), (2) and (3) of MiCAR** – "Cooperation with EBA and ESMA"

# 4. The MiCAR's Classification of (in)-Scope Crypto-Assets

MiCAR introduces rules related to the most delicate elements of types of crypto-assets such as E-Money Tokens[39] (the so-called EMTs), Asset-Referenced Tokens[40] (the so-called ARTs), and a third category which includes other crypto-assets. The first two types of crypto-assets are commonly referred to as 'stablecoins' as we largely discussed in the introduction part. For the purposes of MiCAR, the ARTs and EMTs, may also be qualified as **significant ARTs** (Title III - Chapter V) **and significant EMTs** (Title IV - Chapter II), based on their importance and the related systemic risks they could pose to the financial market. [41]

This regulation also sharpens the attention towards other tokens which are not categorized as E-Money Tokens or Asset-Referenced Tokens and are neither qualified under the existing EU financial services regulation as financial instruments or deposits. This third sub-category of crypto-assets covered by MiCAR refers also to the 'utility tokens.[42] As we can see MiCAR classifies crypto-assets in three categories having as a reference a fact-checking element for classification related to the function of whether crypto-assets are '*seeking to stabilize their value by reference to other assets'.*[43]

**Electronic Money Tokens (E-Money Tokens) – EMTs:** Bearing in mind the definition of EMTs as provided by Article 3, paragraph 1, point (7) of Title I, an immediate comparison with electronic money (the so-called e-money, as defined in Directive 2009/110/EC) comes to mind,

---

[39] Pursuant to **Article 3(1) (7)** of MiCAR, which defines EMTs as: "…*a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency;"*
[40] Pursuant to **Article 3 (1) (6)** of MiCAR, which defines ARTs as: "… *a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies;"*
[41]See Filippo and Annunziata., Annunziata, F., (2023), "*The Licensing Rules in MiCA*", February. *"Fintech Regulation and the Licensing Principle",* Edited by: Vicente, D, P., Duarte, D, P., Granadeiro, C. Centro de Investigaçao de direito privado, ***E*UROPEAN BANKING INSTITUTE**, (Frankfurt, 2023), Bocconi Legal Studies Research Paper No. 4346795, Available at SSRN: https://ssrn.com/abstract=4346795 or http://dx.doi.org/10.2139/ssrn.4346795
[42] Pursuant to **Article 3 (1) (9) of MiCAR**, utility tokens are defined as: "a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer."
[43] Pursuant to **Recital (18)** of MiCAR

as they pose similarities in function. MiCAR makes sure to rephrase these similarities stating that EMTs are digital tokens simulating the role of coins and banknotes and are used for making payments. To qualify as an EMT, a token must fulfill the following requirements:

(i) Reference the value of one **(one and only one)** official currency (e.g. euro or dollar)
(ii) Make it possible for payment transactions with counterparties other than just the issuer.

Recital (19) further clarifies the discussion on the similarities between electronic money[44] and EMTs. Points of divergence remain, for example in the case of electronic money, the holders of such are provided with. a claim against the issuer as some EMTs do not provide their holder with such a claim, making it easier to exclude such crypto-assets from the Directive 2009/110/EC. This aspect other than being distinctive contributes to sabotaging the holder's confidence. In fact, issuers of E-money tokens should make sure that the holders of EMTs can work out their right to redeem their tokens *at any time and at par value* against the currency referencing those tokens.[45] It is important to mention that EMTs may be considered electronic money under the Electronic Money Directive (EMD) if the directive's definition and requirement are met, but to be kept in mind is that not all e-money are EMTs under MiCAR. As we will further consider in this thesis, the issuance requirements for all the above-mentioned categories (i.e. Title II, Title III, and Title IV of MiCAR), we are providing a hint just to further elaborate on the distinction of such crypto-assets. Regarding the EMTs, this regulation is making sure to apply strict conditions on the issuance of EMTs. These strict conditions include the obligation for EMTs to be issued *'either by a credit institution authorized under Directive*

[44] Pursuant to **Article 2 (2) of the EMD** "*electronic money means electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer".*
[45] **Recital (19)** of MiCAR

*2013/36/EU of the European Parliament and the Council or by Electronic-Money Institutions (EMIs), authorized under the Electronic Money Directive (EMD)[46], Directive 2009/110/EC'.*

**Asset-Referenced Tokens -ARTs:** The second category of crypto-assets under MiCAR, as mentioned, is the 'Asset-Referenced Tokens', as defined under Article 3, paragraph 1, point (6) of Title I. This category will cover crypto-assets, other than E-Money Tokens, whose value is backed by assets.[47] ARTs are designed to preserve a stable value referencing specific assets (i.e. one or several assets), where examples of the latter could be financial instruments, fiat currencies, commodities (e.g. gold or silver), or other crypto-assets. According to the provided definition, this type of asset reference also other rights, such as obligations, claims, or a combination of rights and assets, including more than one fiat currency. Examples of such cryptographic tokens are the PAX Gold (PAXG), DIAM, or the Libra Coin from Facebook[48]. It must be clear that if a crypto-asset **references only one fiat currency it is not an ART**, but under MiCAR it falls under the EMT's definition. ARTs require more thoughtful attention and prudence because cases where ARTs reference solely one financial instrument become relevant as it risks the exclusion from MiCAR and the inclusion under MiFID. The underlying references are the key elements in the treatment of these crypto-assets.

**Crypto-Assets other than ARTs or EMTs:** Other crypto-assets are the third of the crypto-assets sub-category under the scope of MiCAR which according to Recital (18) covers a wide variety of crypto-assets, including also utility tokens, where the latter are defined as stated in Article 3, paragraph 1, point (9) as the *"type of crypto-asset that is only intended to provide*

---

[46] The EMD2 is a European Union Directive providing a legal framework for the Electronic-Money Institutions (EMIs). The issuance, the distribution and the redemption of electronic money is regulated by this Directive.

[47] We need to keep on a high note the fact that algorithmic stablecoins, which are not backed by reserve assets will not classify as ARTs.

[48] For the sake of curiosity, Libra was determined by the value 50% US Dollar, 18% Euro, 14% Japanese Yen, 11% Pound Sterling and 7% Singapore Dollar- Data from 21 Analytics.

*access to a good or a service supplied by its issuer",* different from the ARTs and EMTs that we saw in the previous paragraphs this sub-category does not entail the function of stabilizing their value through collateralization. The European Commission considers the 'utility tokens' to not have financial purposes that relate to the operation of a digital platform or digital services and as a result 'utility tokens' should be reflected as a specific type of crypto-assets.

As to conclude, activities covering the aforementioned types of crypto-assets under MiCAR, such as '*the issuance, the offer to the public'* and the *'admission to trading on a trading platform'* are regulated following uniform requirements including also the provision of services related to these crypto-assets by the crypto-asset service providers (CASPs). Specifically, Title III and Title IV of this regulation apply all the possible requirements related to all issuers of ARTs and EMTs whereas Title V applies all the possible stringent and more specific requirements related to CASPs. Titles III and IV on issuers of asset-referenced tokens (ARTs) and e-money tokens (EMTs), respectively, will fully apply as of 30 December 2024.[49] Also, CASPs according to CHAPTER V – Article (85) could be defined as significant CASPs. It is argued that entities that contemporaneously issue and provide services related to ARTs and EMTs become subject to a specific regime that incorporates from one perspective the transparency obligations laid down to the issuers and on the other hand the obligations applied to all CASPs and the provision of specific services.[50]

[49] European Commission (2023), *"Supervision of crypto-assets – criteria, procedures & fees",* Draft delegated regulation- Ares (2023)7581975.

[50] See Filippo and Annunziata, Annunziata, Filippo., (2023). ***"An Overview of the Markets in Crypto-Assets Regulation (MiCAR)".*** December. EUROPEAN BANKING INSTITUTE, Working Paper Series no. 158, Available at SSRN: https://ssrn.com/abstract=4660379 or http://dx.doi.org/10.2139/ssrn.4660379

# CHAPTER II

# THE CORE REGIMES AND REGULATORY OBLIGATIONS INDROTUDED BY MiCAR

## 1. A Forward-Looking Work Plan for the Already Existing CASPs

Before stepping into detail about what has changed related to entities providing crypto-assets services and all the rules and all the transparency and disclosure requirements for the issuance and offer of crypto-assets, the authorization process, the protection of holders and protection of clients requirements as well as the supervisory mechanisms related to significant entities, we must highlight the timeline of the arrival of MiCAR, which foresees a 18-months long implementation phase (i.e. from June 2023 until December 2024) and another 18-month long transitional phase (i.e. from December 2024 until July 2026), (**Figure 8**).

The framework carefully provides the option for Member States to implement **the 'transitional measures'** which will allow the entities or undertakings that are already active in providing crypto-asset services under their jurisdiction's applicable law, to do so during the defined transitional phase. [51] There are about 4,107 known entities (under the terminology of *'virtual assets service providers'*) providing crypto-asset services or have provided such services, which are domiciled in the EU.[52]

[51] Pursuant to **Article (143)** of MiCAR
[52] VASPnet, (2023), December.

To be more precise, referencing **Article 143 (3) and Article 143 (6)** of MiCAR we have that:

(i) Entities providing crypto-assets services in accordance with national applicable laws before December 2024 are allowed to continue to do so '*until 1 July 2026 or until they are granted or refused an authorization pursuant to Article 63, whichever is sooner.'* This is defined by ESMA as a **'grand-fathering'** clause.

*(ii)* For entities that in December 2024 were authorized under national applicable law to provide crypto-asset services granted a simplified procedure for applications for an authorization that are '*submitted between 30 December 2024 and 1 July 2026'*

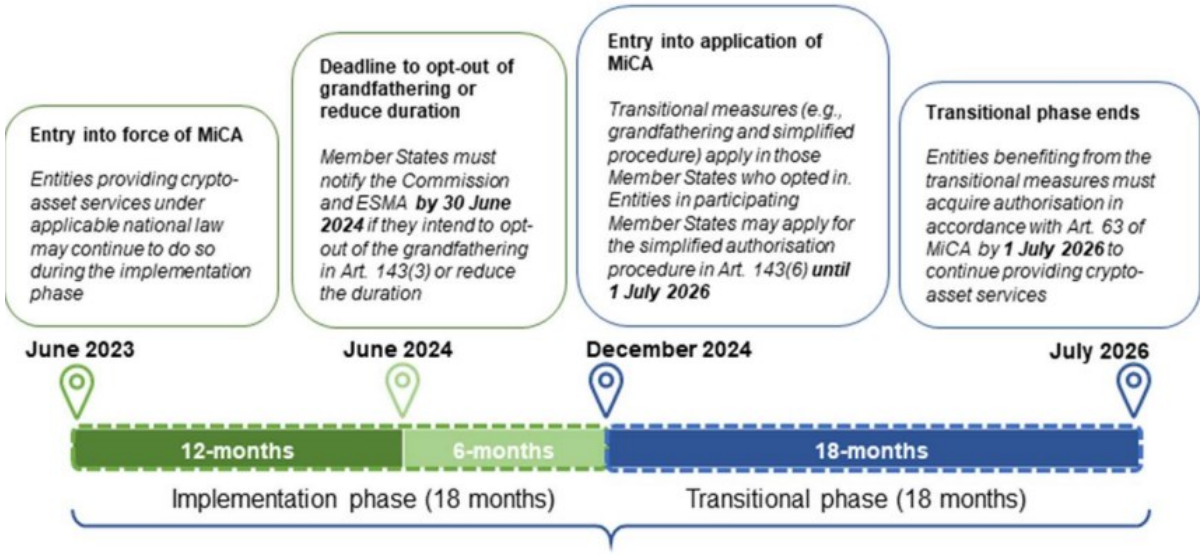
ESMA has presented a work plan that will accompany the transitional phase. The work plan has set some supervisory priorities to guide the convergence between Member States on this matter. At first, there will be confusion among existing regimes and the MiCA regime that could appear relevant for the consumers of crypto-asset services across Member States and their necessary protection. The work plan of ESMA is summarized as follows:

(i) Supervisors from the National Competent Authorities (NCAs) will have the opportunity to exchange information and views regarding practical cases in their jurisdiction.

(ii) Observing through surveys they will be able to understand how each of the Member States intends to approach the optional 'transitional measures' laid down by Article 143 (3) and (6)

(iii) As the MiCA provision might require further interpretation and clarity, ESMA is looking forward to engaging in ongoing consultations with the European Commission to provide a common ground for a better understanding of the MiCA provisions.

*Figure 8: MiCAR 36-Month Timeline for Entities Already Providing CASs.*




*Source 8: European Securities and Markets Authority (ESMA), 2023; (accessed: December 2023)*

## 2. CASPs under MiCAR

It seems that now the EU has reached the point where any business activity related to crypto assets in the EU is likely to fall under MiCAR. [53] In this part, we will see how the mechanism of MiCAR also obliges non-EU crypto-assets firms carrying out activities for EU customers to comply with all drawn requirements by MiCAR.

First to understand the services ruled by MiCAR we refer to Article 3 (16) outlining all the services **triggering a licensing requirement** which somehow appears to be similar to the existing MiFID regulation provided for investment services. The variety of explicitly listed activities in MiCAR covers the following:

[53] See PwC Global Crypto Regulation Report (updated from that of 19 December 2022), (2023). Available at: https://www.pwc.com/gx/en/new-ventures/cryptocurrency-assets/pwc-global-crypto-regulation-report-2023.pdf

(i) Custody and administration of crypto-assets on behalf of third parties;

(ii) Operation of a trading platform for crypto-assets;

(iii) Exchange of crypto-assets for funds;

(iv) Exchange of crypto-assets for other crypto-assets;

(v) Execution of orders on behalf of clients;

(vi) Placing of crypto-assets;

(vii) Reception and transmission of orders on behalf of clients;

(viii) Providing advice on crypto-assets;

(ix) Providing portfolio management on crypto-assets

(x) Providing transfer services for crypto-assets on behalf of clients.

It is a hugely discussed fact why this regulation lacks the incorporation of the activity of lending crypto-assets as a regulated activity.[54]([55]) Regarding the payment transactions related to the crypto-asset services the CASPs offer, the latter should be authorized as a "payment institution" according to Directive (EU) 2015/2366[56], in order to make those payments.[57] Each type of the aforementioned services is related to specific risks and according to this regulation, as we will further see, CASPs, depending on the type of service they offer, will be subject to specific requirements. Returning the attention to the payment services that may be provided by CASPs, Article 70 (4) of MiCAR indeed provided the possibility for *CASPs themselves or through a third party,* to provide payment services related to the crypto-asset service they offer, in the event that the CASP itself or the third party is authorized to provide those payment services,

[54]See **Recital (94)** of MiCAR and see also: Kokorin, I. (2023), "*The anatomy of crypto failures and investor protection under MiCAR"*, November. Capital Markets Law Journal, Volume 18, Issue 4, November 2023, Pages 500–525, available at: https://doi.org/10.1093/cmlj/kmad019

[55] Indeed, 18 months after the entering into force of MiCAR, the Commission will present a report on that matter to the EU Parliament and the Council, considering the assessment of the necessity and feasibility of regulating the lending and borrowing activity of crypto-assets.

[56] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC.

[57] Recital (82) of MiCAR

following the Directive (EU) 2015/2366.[58] If this is the case, the clients shall be informed on that matter concerning aspects such as:[59]

a) terms and conditions of those payment services, including references to the national applicable law and the rights of the clients;
b) whether the provision is related to the CASP directly or to the third party.

## 2.1. The Authorisation Mechanism for CASPs – A Distinction between Regulated Entities and Never Before Authorized Entities

Title V from Articles (59) to (85) covers the authorization and the operating conditions regime for CASPs. It is interesting to immediately highlight the fact that the triggered authorization regime under this regulation distinguishes between entities that were never authorized under any EU regulation to provide financial services or related activities and those entities that are authorized under one of the EU financial legislation, such as a credit institution, investment firms, electronic money institution, central security depository, market operator, UCITS management company or an authorized alternative investment fund manager.[60] To the latter is applied a simpler and easier, prior notification regime, since these entities are simply seeking to add the crypto-asset related services, meaning that these entities may provide all the listed crypto-asset services or be restricted to only some of them, under the notification procedure.

For example, **a credit institution** is permitted to provide crypto-asset services without any restrictions, if it notifies the needed information[61] to the competent authority of its home Member State *at least 40 working days before providing the services*.[62] The reason for this full

[58] Article 70 (4) of MiCAR
[59] See Article 70 (4), paragraph 2, points (a) and (b) of MiCAR
[60] Article 59 (1) of MiCAR, point (b)
[61] See Article 60(7) of MiCAR, points from (a) to (k)
[62] Article 60 (1) of MiCAR

extent of services could rely on the fact that credit institutions are considered entities providing all the necessary safeguards on the matter.

Meanwhile, **a central security depository** could instead provide *'only custody and administration of crypto-assets on behalf of clients'* following the same notification requirements and the same time frame mentioned for credit institutions.

A**n investment firm** providing investment services in the Union, whose authorization under Directive 2014/65/EU is specific to those activities, may provide crypto-asset services that are *deemed to be equivalent* to the already authorized investment services.[63]

As for **electronic money institutions,** it is stated that these entities *'shall only provide custody and administration of crypto-assets on behalf of clients'* and '*transfer services for crypto-assets on behalf of clients'* prior notification.[64]

Next on the list is the **UCITS management company** or **an alternative fund manager** which, under this regulation, may provide crypto-asset services *'equivalent'* to *'the management of investment portfolios'* and *'non-core services'* for which it authorized under Directive 2009/65/EC (UCITS Directive) or Directive 2011/61/EU (AIFM Directive), prior notification as in the other cases.[65]

**A market operator**, already authorized under Directive 2014/65/EU (MiFID II), may instead *'operate a trading platform for crypto-assets',* subject to a notification.[66]

We can see that this distinction under the MiCAR further accentuates **the lining up of this regime with other existing regimes** covering financial services in the Union. This is clear enough to be understood considering the imposed "equivalence" for crypto-services or activities and financial services or activities. This is to say that those service providers authorized under the MiFID regime will benefit from grandfathering/transitional provisions under the MiCAR.

[63] Article 60 (3) of MiCAR
[64] Article 60 (4) of MiCAR
[65] Article 60 (5) of MiCAR
[66] Article 60 (6) of MiCAR

Afterward, the responsibility shifts to the competent authority of the home Member State, which oversees assessing whether all the required information notified by the entities is provided. This needs to be done *within 20 working days* of receipt of the notification. On the next step, ESMA is involved, because the competent authorities, after verifying the provided information by the entities, shall communicate to ESMA the information.[67] In case of incorrect or incomplete information, the competent authorities are entitled to notify the entity and set deadlines for obtaining the necessary information. The commencing of operations is forbidden for the time being of the information's incompleteness. *All the mentioned entities* are not only excluded from the authorization mechanism but for the purposes of this regulation, **are not even subject** to the **prudential requirements under Article 67** and the framework covering the acquisition of CASPs **under Articles 83 and 84**.

Now we will step into the details of **the authorization mechanism as a crypto-asset service provider related to never-authorized entities** *(i.e.* ***a legal person*** *or* ***other undertaking*** *that have the intention to become a CASP in the EU)*[68]. It is to mention that CASPs can submit their applications for authorization starting December 30, 2024. MiCAR establishes that a legal entity wanting to become a CASP and be authorized (i.e. from a National Competent Authority (NCA)), under this regulation[69], **must have a registered office in an EU Member State** where they carry out at least part of their crypto-asset services. It is mentioned that *the granting, refusal, or withdrawal of authorization* as a crypto-asset service provider is provided by the competent authority *where the entity has its registered office*.[70] Following the statements under Article 59 (2), CASPs shall have *"the place of effective management in the Union and at least one of the directors shall be resident in the Union".* Here the competent authorities granting authorization under Article 63 of MiCAR have the obligation for those granted authorizations to specify the services that CASPs are authorized for[71] and if there is the case that CASPs want

[67] Article 60 (12); regarding the communicated information: Article 109 (5) of MiCAR
[68] See Article 59 (1) (a) of MiCAR
[69] More precisely. In accordance with Article 63 of MiCAR
[69] Article 81 (5)
[70] See Recital 76 of MiCAR
[71] Article 59 (6) of MiCAR

to add other services to their obtained authorization, they have the obligation to request an extension of their authorization to the same competent authority from where they obtained the initial authorization, providing and updating once again **all the necessary information covered by Article 62 of MiCAR.** [72]

This is the part covering **a thorough set of stringent obligations** and imposed prudential requirements following requirements since the start of the application process for authorization from the competent authority of the home Member State (i.e. application is submitted to the relevant national supervisory authority). [73]

A long list of 19 informative statements during the application is covered in Article 62 (2), points from (a) to (s).[74] Relevant points that we highlighted as problematic in the first part of the work are required to be well-defined. MiCAR carefully requires all applicants, among other things, to describe *the program of operations, set out all the services the applicant intends to provide, a description of the governance arrangements, to provide proof that the chosen management body is armed with all the necessary knowledge, reputation, skills and experience for managing the service provider and the provision of proof that the applicant meets the requirements for prudential safeguards,[75] as well as a description of all the internal control mechanisms, policies, and procedures for assessing and managing risks related also to the money laundering and terrorist financing,* as we already know that CASPs are a target for financial crime purposes and can be used or abused for purposes of Money Laundering (ML) and Terrorist Financing (TF).[76] The applicant is required to describe the procedures for the segregation of clients' crypto-assets and funds and complaint-handling procedures.

All these well-defined and powerful requirements aim to ensure the expertise of the management body and the staff, and their preparation to take all reasonable steps to perform their functions. It is very important that CASPs have in place strong and sound internal

---

[72] Article 59 (8) of MiCAR
[73] Article 62 (1) of MiCAR
[74] See Article 62 (2), points from (a) to (s) of MiCAR
[75] See Article 67 of MiCAR
[76] Article 62 (2) of MiCAR

mechanisms to ensure the integrity and confidentiality of the information they receive and among other requirements, CASPs should keep records of all the provided services, all transactions, and orders related to the type of crypto-asset services they provide throughout appropriate arrangements.[77]

The timeframe following the grant of authorization encompasses some relevant verifications regarding some key focus areas, to be carried out by the national competent authorities. Besides the 5 working days conferred for the acknowledgment receipt of the application following the 25 working days at disposal for assessing the completeness of the information and an afterward deadline conferred in case of missing information,

Article 63 (5) and 63 (6) of MiCAR do entitle the competent authorities *'to consult the competent authorities of another Member State'* for reasons involving *specified types of relationships* between the applicant CASP and a type of authorized entity under existing EU law, following Article 59 (b) of MiCAR. The options are those of being its subsidiary, a subsidiary of the parent undertaking that entity, or it is controlled by the same persons (natural or legal).[78]

To add on, this regulation ensures that CASPs become subject to EU AML/CFT obligations[79] and supervision and on that matter competent authorities in this first verification phase are also entitled to check whether the applicant has not been subject to investigations related to money laundering or terrorist financing or even to verify the operational perimeter of the applicant through establishments or if it relies *'on third parties established in high-risk third countries'.*[80]

The decisional timeline will be that of *40 working days* after receiving the complete application and 5 working days later the applicants shall be informed about the decision if the application has been successful or if the possibility to operate as a CASP in the EU is not granted. The authorization is refused when, according to the competent authorities, there are objective and

[77] See Recital (81) of MiCAR
[78] See Article 63 (5), points (a), (b), and (c) of MiCAR
[79] For an in-depth understanding, EBA has issued a Final Report on amending Guidelines on ML/TF risk factors on 16 January 2024, related to CASPs and their effective management regarding exposures to ML/TF risks.
[80] Pursuant to Article 63 (6) of MiCAR

attestable causes, such as the failure of the applicant to meet all the criteria and requirements of Title V of MiCAR.[81]

According to Article 63 (11) of MiCAR, **ESMA, and EBA are in charge under MiCAR to jointly issue guidelines** on the assessment of the suitability of the member of the management body of the applicant and the shareholders or members, whether direct or indirect, have qualifying holdings[82] in the applicant crypto-asset service provider. Indeed, on **October 20, 2023, a Consultation Paper (CP) was published**, on joint guidelines on the assessment of suitability, containing two drafts of Joint EBA and ESMA Guidelines having as a main goal the harmonization of the assessment process and encouraging the supervisory convergence.[83]

i. draft Joint Guidelines regarding the suitability of the members of the management body of CASPs and issuers of ARTs;
ii. draft Joint Guidelines regarding the assessment of the shareholders and members with qualifying holdings in CASPs and issuers of ARTs.

In this paper *common criteria are evidenced*, supporting the assessment of appropriate skills, and required knowledge and experience of the management body and their integrity. The joint guidelines also contribute to providing common methodologies at the disposal of the responsible competent authorities to assess the suitability of shareholders and members. This is a work in progress and the final Guidelines are expected to be available before MiCAR becomes applicable.

As we mentioned, besides the granting or refusal of authorization, another procedure which is again the responsibility of the competent authorities, is the withdrawal of authorization of a CASP. Some time-related elements are intervening, such as the fact that the granted

[81] See Article 63 (10), points (a) to (d) of MiCAR
[82] The definition as given by Article 3 (1) point (36) of MiCAR
[83] EBA, ESMA, (2023), *"CP ON JOINT EBA AND ESMA GL ON THE ASSESSMENT OF SUITABILITY"*. EBA/CP/2023/20; ESMA75-453128700-506, available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA75-453128700-506_Joint_EBA_and_ESMA_GL_on_suitability_of_the_MB_and_QH_under_MICA.pdf

authorization is not used within 12 months of the date of the authorization the missing provision of services for nine consecutive months, or the renouncement of the authorization. Other elements responsible for the withdrawal relate to the discontinuity of meeting all the conditions under which the CASPs obtained authorization or the failure to have all set effective systems for the detection and prevention of money laundering.[84]

Another consideration made by MiCAR confers to the competent authority the choice, instead of the obligation, to withdraw authorization if the CASP loses its authorization as an e-money institution or as a payment institution and if no action was taken to remedy within 40 calendar days.[85] ESMA shall be informed without undue delay together with the single points of contact of the host Member State.[86]

## 2.2. The General Conduct of Business Rules for CASPs - Considerations of Specific Crypto-Asset Services

CHAPTER II of Title V of MiCAR, concerning Articles 66 and 67, addresses its attention to obligations posed ***for all CASPs*** to ensure the much-debated consumer protection practices, financial stability, and market integrity.

Under Article 66 CASPs have the obligation to act *"honestly, fairly, and professionally in the best interests of clients".* CASPs should be prudent in following conditions that allow them to provide *"clear, complete, fair, and not misleading information"* and to carefully inform and warn the clients about the risks associated with crypto-assets and related transactions. [87]

[84] Article 64 (1), points from (a) to (g) of MiCAR
[85] Article 64 (2), point (b) of MiCAR
[86] Article 64 (3) of MiCAR
[87] See Recital (79) of MiCAR

Policies on pricing, costs, and fees shall be publicly available (i.e. in a standing-out place on their website).[88] The environmental issues are not left behind in the case of crypto-assets providers, whose disclosure matters are treated in Article 66 (5) and according to it, CASPs are obliged to also make available the information regarding the unfavorable and disadvantaged impact on the climate, of the provided activities. Once again ESMA and EBA will be prepared to develop draft RTSs related to presentation methodologies of such information.[89]

Among the prudential requirements (CHAPTER II of Title V), as part of **the prudential safeguards that CASPs shall always have in place and should comply with, in order to provide consumer protection**, are defined as at least the higher of *"the permanent minimum capital requirements"* (as specified in ANNEX IV) and *"one-quarter of the fixed overheads of the preceding year, reviewed annually"*.[90] These first requirements defer as the division depends on the type of the provided crypto-asset service. Following the reported activities and the class categorization of crypto-assets we have the following:[91]

i. Services such as the *"execution of orders"*, "*providing transfer services on behalf of clients"*, "*placing of crypto-assets", "reception and transmission of orders", "providing advice on crypto-assets", and "portfolio management", will* be subject to a minimum capital requirement of EUR 50.000. **(CLASS 1)**

ii. In addition to authorization for Class 1 type of services, the *"custody and administration of crypto-assets on behalf of clients", and "exchange of crypto-assets for funds or other crypto-assets", will* be subject to a sum of EUR 125.000. **(CLASS 2)**

iii. Finally, in addition to Class 1 and Class 2, the *"operation of a trading platform for crypto-assets"* will be required to be subject to a sum of EUR 150.000. **(CLASS 3)**

---

[88] See Article 66 (4) of MiCAR
[89] Article 66 (6) of MiCAR
[90] See Article 67 (1), points (a) and (b) of MiCAR
[91] See ANNEX IV of MiCAR: "**MINIMUM CAPITAL REQUIREMENTS FOR CRYPTO-ASSET SERVICE PROVIDERS"**

The available forms that the prudential safeguards could take, concerning Article 67 (4), points (a) and (b) are the following:

i. Own funds (i.e. Common Equity Tier 1 items and instruments)[92]
ii. An insurance policy covering the territories of the Union where the CASP provides services or a comparable guarantee.

As we insinuated, **some specific crypto-asset services are related to more specific risks which require special attention**, and more detailed and tailored-made requirements. CHAPTER III and Articles 75 to 82 of MiCAR displays all these requirements related to services such as the providing of custody and administration, the operation of a trading platform, the exchange of crypto-assets for funds or other crypto-assets, the execution of orders, the placing of crypto-assets, the reception and transmission of orders, the providing of advice and portfolio management and the providing of transfer services. Regarding each of the specific services we have the following:

i. CASPs providing **custody and administration of crypto-assets on behalf of clients**[93] are constrained to respect some duties and responsibilities that will be well established in an agreement with their clients. MiCAR is demonstrating to treat this aspect **with greater rigor**, considering all the lessons learned from the 'crypto-winter' that we previously described. This is considered to be one of the most crucial matters for MiCAR.

   Transparency, security, well-defined internal custody policies, and specification of the means of communication are the main content that the agreement shall include.

[92] Referred to Article 26 to 30 of the Regulation (EU) No. 575/2013 (i.e. the Capital Requirements Regulation)
[93] As defined in Article 3 (17) of MiCAR: "means the safekeeping or controlling on behalf of clients, of crypto-assets or of the means of access to such crypto-assets, where applicable in the form of private cryptographic keys".

[94] Each client's rights to the crypto-assets will be kept in a register of positions[95] where will be possible to register movements dictated by the clients and verified by a transaction regularly registered.

The purpose of the custody policy will be to avoid the risk of loss of a client's crypto-asset, or the loss of rights related to those crypto-assets. Clients will continue to be entitled to newly created crypto-assets or rights when it comes because of changes and modifications of client's rights (e.g. changes to the underlying distributed ledger technology or other type of events), having as a reference the client's position at the time of the occurrence of the event. Updates regarding the client's position related to transfers, value, and balance of identified crypto-assets are required to be made *once every three months* throughout the statement of position.

Another important point obliges CASPs to be in charge of ensuring that, on distributed ledger technology, their client's crypto-assets are held separately from what CASPs own.[96] **The segregation of the CASP's assets** from the ones held in custody helps the client in a way that CASP's creditors are unable to have claims on the crypto-assets held in custody. In case of accidents that result attributable to CASPs, the latter will be legally responsible to their clients. These accidents include cases of the loss of any crypto-asset or the loss of the means of access to those crypto-assets. The liability predicts setting a limit on the market value of the lost crypto-asset, at the time the crypto-asset went lost.[97]

*ii.* A lot more requirements come with the provision of the *"***operation of a trading platform for crypto-assets"[98]**. Once again, transparency becomes a key factor, where the regulation regarding Article 76 (1) requires CASPs to *'lay down, maintain and implement clear and transparent operating rules for the trading platform.'*

Among the operating rules, CASPs are required **to set approval processes** which include due diligence requirements corresponding to the money laundering or

[94] Article 75 (1), points (a) to (g) of MiCAR
[95] Article 75 (2) of MiCAR
[96] Article 75 (7) of MiCAR
[97] Article 75 (8) of MiCAR
[98] As defined in Article 3 (18) of MiCAR

terrorist financing risks. This procedure is to be applied when considering the entrance of the crypto-asset to the trading platform. [99]

The regulation takes also care in allowing CASPs to clearly define all the types of crypto-assets that are not permitted to trading and what is more important regarding trading activities, the setting of **'non-discriminatory and proportionate criteria'** which **enables fair participation for clients to the trading activity** and also set the "*non-discretionary rules and procedures to ensure fair and orderly trading".*

All the operational requirements as stated in this paragraph, are to be composed in *"an official language of the home Member State"* or in the case of CASPs operating a trading platform in another EU Member State, the rules shall be composed in *"an official language of the host Member State".*

The regulation of the trading activity by MiCAR will also require CASPs to be aware of clearly defining the conditions that ensure continued accessibility for trading or on the contrary, the suspension of trading of the crypto-assets.

In the very first phase of the assessment of the suitability of the crypto-assets, CASPs will be constrained to engage in some reliable tracking record activity and reputational aspects of the issuer of that crypto-asset. Sort of supervision powers are conferred to the competent authority regarding the engagement of the CASP on matched principal trading and its implications of conflicts of interest between the CASP and the client.[100] MiCAR makes sure that CASPs are anytime responsible for ensuring a resilient trading system that encompasses all the necessary ability, capacity, effectiveness, and robustness to manage cases of peak orders, ensure orderly trading, reject certain orders, and prevent market abuse or abuse for money laundering and terrorist financing.[101]

Article 76 (9) to (11) emphasize further transparency requirements and information to be public *"on a reasonable commercial basis and ensure non-discriminatory access to that information",* following Article 15 requiring CASPs to "*keep at the disposal of the competent authority, for at least five years, the relevant data relating*

[99] Article 76 (1), point (a) of MiCAR
[100] Article 76 (6) of MiCAR
[101] Article 76 (7), points (a) to (h) of MiCAR

*to all orders of crypto-assets that are advertised through their systems, or give the competent authority access to the order book".*

ESMA once again has the responsibility for developing draft RTs to specify necessary formats for CASPs to better make available all the necessary required information.[102]

iii. Shortly focusing on CASPs providing '**exchange of crypto-assets for funds or other crypto-assets'**[103], what we have in this case is that CASPs shall throughout 'a non-discriminatory policy', **individuate the type of clients** that CASPs agree to transact with and the conditions to necessary be met by such clients.[104] The current framework emphasizes, as a specific requirement, **the publication of a firm price** for the crypto-asset to be exchanged for funds or other crypto-assets, or a method for determining such a price.[105] To add on that publication requirement is the publication of the information about the concluded transaction, and even before that, CASPs are required to *"execute client orders at the price displayed at the time when the order for exchange is final"*.

iv. For the purposes of this regulation, of paramount importance is also the provision of **'execution of orders for crypto-assets on behalf of clients'**[106], which brings about Article 78 (1) to (6) of MiCAR to list some specific requirements. All the necessary possible elements (i.e. costs, price, speed, size, nature, the likelihood of execution and settlement, conditions of custody, and any other element), influencing the execution of the order process, are to be seriously taken into account by the crypto-asset service provider, in order to obtain the best result for the client.[107]

---

[102] Article 76 (16), points (a) and (b) of MiCAR
[103] As defined in Article 3 (19) and (20) of MiCAR
[104] Article 77 (1) of MiCAR
[105] Article 77 (2) of MiCAR
[106] As defined in Article 3 (21) of MiCAR
[107] Article 78 (1) of MiCAR

For CASPs to reach such objective, and to avoid cases such as the misuse of the relevant information relating to client orders (e.g. by the CASPs' employees), CASPs are required, according to Article 78 (2), to establish and implement effective execution arrangements throughout an *"order execution policy"*, that will have to be offered as a piece of clear information to the client.[108]

Every execution of the orders on behalf of the client has not only properly to be in line with these Articles of MiCAR, but the CASPs shall also be able to demonstrate anytime such compliance, upon the client's or the competent authority's request. [109] Taking into consideration possible cases of the execution of orders outside the trading platform, Article 78 (5) allows CASPs to do so only prior consent of their clients.

v. MiCAR carefully considers establishing a healthy relationship between the CASP providing **'placing of crypto-assets'**[110] and the offeror, the person seeking admission to trading, or any other third party acting on their behalf. This activity will be subject to prior agreement between the aforementioned parties following prior communication of some relevant information. Article 79 (2), points (a), (b), and (c) of MiCAR display situations that bring conflicts of interest[111] and deliver to the service provider the duty to have in place adequate procedures to identify and cope with these situations.

vi. The '**reception and transmission of orders for crypto-assets on behalf of clients'**[112] makes CASPs among other things, responsible for not receiving any 'remuneration, discount or non-monetary benefit' when the orders received from clients are routed to a particular trading platform for crypto-assets or another CASP.

---

[108] Article 78 (3) of MiCAR
[109] Article 78 (4) of MiCAR
[110] As defined in Article 3 (22) of MiCAR
[111] See Article 72 (1) of MiCAR
[112] As defined in Article 3 (23) of MiCAR

[113] A direct and correct transmission shall be secured by the CASP and there must be no tolerance for misuse of relevant information related to pending orders.

vii. What requires **a more in-depth knowledge of current or future clients** is the '**provision of advice on crypto-assets and the portfolio management of crypto-assets'**.[114] Providers of advice or portfolio management must guide the matching process of crypto-asset services or types of crypto-assets to the profile of the client based on the client's objectives, experience risk tolerance, financial situation, and ability to bear losses.[115]

A) **When providing advice**, MiCAR imposes more disclosure restrictions related to the way the service is provided. The distinction is between the provision of advice in an independent way or whether there are relational elements (i.e. between the CASP providing advice on crypto-assets issued or offered by certain entities and those entities).

This distinction brings about further requirements when the advice is provided formerly, so when the client is informed that the advice is provided on an independent basis the service provider must immerse in a diverse selection of crypto-assets that are not provided or issued by the same crypto-asset service provider or that does not enclose close links with the same crypto-asset service provider or that are provided by entities with economic, contractual, or legal relationships diminishing the independent basis of the provided advice.[116]

All the relevant information related to costs of the provided advice, charges, or costs of the marketed crypto-assets to the clients and draw up all the information related to the payment possibilities.

B) Same as in the case of the provision of advice, **the provision of portfolio management** does not entitle the CASP to *"accept and retain fees, commissions*

[113] Article 80 (2)
[114] As defined in Article 3 (24) and (25) of MiCAR
[115] Article 81 (1) of MiCAR
[116] Article 81 (3), point (a) and (b 1), (b2), (b3) of MiCAR

*or any monetary or non-monetary benefits paid or provided by an issuer, offeror, person seeking admission to trading, or any third party*".[117]

In addition to other requirements referring to both, the provision of advice and portfolio management, the latter obliges the service provider to issue periodic statements to their clients. The activities performed on behalf of the client, and the performance of the portfolio need to be fairly reviewed, and is necessary to update the matching profile of the client to the activities carried out, and to somehow reassess the suitability requirements and the fulfillment of the client's objectives.[118]

viii. The last service requiring specific attention is the '**provision of transfer services for crypto-assets on behalf of clients'**.[119] The agreement that should be in place at this time shall include information regarding the identity of the parties, a description of the modalities of the transfer and of the security system to be used fees, and applicable law.[120]

## 2.3. Significant CASPs

Besides the evidence of the specific services provided by crypto-asset service providers, another identification regards the parameters that grant a significant status to those service providers. CHAPTER 5 and Article 85 of MiCAR display the denomination of CASPs as significant and describe the requirements that come as a result of passing that established threshold for being considered significant. This **distinction is mainly made for the purposes of more resilient supervision**, which we will later see that it will be a power conferred to

[117] Article 81 (5) of MiCAR
[118] See Article 81 (14) of MiCAR
[119] As defined in Article 3 (26) of MiCAR
[120] See Article 82 (1), points (a) to (e) of MiCAR

ESMA, offering almost parallel supervisory powers to those conferred to EBA, regarding issuers of significant ARTs and EMTs.

More precisely, MiCAR establishes a threshold of 15 million users, meaning that *"a crypto-asset service provider that has at least 15 million active users in the Union, on average, in one calendar year, where the average is calculated as the average of the daily number of active users throughout the previous calendar year, shall be deemed significant".*[121]

The CASP should notify the competent authority within *the deadline of two months after reaching the threshold*, and the competent authority will later have the responsibility to inform ESMA after having agreed that the CASP has reached the established threshold.[122] As we mentioned, the supervisory practices on this matter will require **the home Member State competent authorities** to provide **ESMA's Board of Supervisors** with annual updates regarding the supervisory developments of these significant CASPs.[123] According to Article 85 (3) of MiCAR, points (a), (b), and (c) the supervisory developments include updates regarding the:

A) *ongoing or concluded authorization of CASPs (i.e. Article 59 of MiCAR)*
B) *ongoing or concluded process of withdrawal of authorization (covered by Article 64 of MiCAR)*
C) *the supervisory powers set out in Article 94(1), first subparagraph, points (b), (c), (f), (g), (y), (y), and (aa).*

MiCAR allows ESMA to make use of its powers under some Articles of the Regulation (EU) No 1095/2010, regarding the common supervisory culture, per reviews of competent authorities, and coordination function concerning Articles 29, 30, 31, and 31 (b). [124]

[121] Article 85 (1) of MiCAR
[122] Article 85 (2) of MiCAR
[123] Article 85 (3) of MiCAR
[124] Article 85 (5) of MiCAR

## 2.4. Cross-Border Implications for CASPs

We have not yet mentioned how the authorization obtained by a competent authority, to provide crypto-asset services is accompanied by the facilitation factor of allowing CASPs to benefit from the EU passport of the license, meaning that for the purposes of this regulation, CASPs are *<<" allowed to provide crypto-asset services throughout the Union, either through the right of establishment, including through a branch or through the freedom to provide services.">>*[125]

Moreover, it is important to consider the aspects of this regulation detailing and dictating to CASPs the course of action to follow if they want to provide services in more than one Member State. This procedure embodies a list of information to be submitted by CASPs to the competent authority of the home Member State. According to Article 64 (1) points (a) to (d) of MiCAR, CASPs shall nominate all Member states in which they intend to provide services, determine the service that CASPs want to provide on a cross-border basis, the starting date and a list of other activities intended to be provided but that are not covered by this regulation.[126]

The succeeding stage makes the competent authority of the home Member State, responsible for communicating the received information to the responsible authority of the host Member State, to EBA, and ESMA. Also, the CASPs shall be informed without delay by the competent authority responsible for granting them the initial authorization about this communication. CASPs are allowed to continue to provide services in the other Member State from the date of receiving the communication or as stated in Article 65 (4), *"...at the latest from the 15th calendar day"* after the relevant information is submitted to the competent authority.

[125] Article 59 (7) of MiCAR
[126] Article 64 (1) of MiCAR

On the other hand, MiCAR aims to protect the EU financial market by establishing specified cases under this regulation when the authorization requirements are not triggered. These rules cover the situation when **a client established in the Union** initiates ***at its own exclusive initiative*** the provision of services or activities ***by a third-country firm*****.** In this case, the authorization requirement under Article 59 of MiCAR, <<*" shall not apply to the provision of that crypto-asset service or activity by the third country firm to that client"*>>.[127]This "Reverse Solicitation" regime which is applicable when dealing with third-country firms, once again finds similarities with the MiFID II when allowing third-country firms to provide investment services to clients established in the European Union. The provisions related to these aspects and procedures find similarities between MiCAR and MiFID II.

Article 61 (1) has well emphasized the perspective under which the exclusion of the consideration of a crypto-asset service or activity is being provided "*on the client's own exclusive initiative"*. More precisely, in the case when, *a third country firm* **solicits** clients or prospective clients in the Union*, regardless of the means of communication used for the solicitation*, promotion, or advertising in the Union, <<*" it shall not be deemed to be a service which is provided on the client's own exclusive initiative."*>> Also, the specification is reinforced by what is stated in Article 61 (2), where the client's own exclusive initiative <<*" shall not entitle the third-country firm to market new types of services or activities to that client."*>> Given the importance of this aspect, ESMA is responsible for issuing guidelines (i.e. same as it did under MiFID II dealing with the provision of the investment services) that not only **regard well-specified situations** in which the third-country firm **is deemed to solicit clients** established in the Union but also concern harmonious supervision related to the risk of abusing the established rules.[128]

This means that a relevant piece of interpretative burden related to cases that could trigger solicitation is left in the hands of ESMA and ESMA's ability to prudentially identify those elements.

---

[127] This also includes a relationship which, in specific relates to that provided service or activity. See Article 61 (1) of MiCAR

[128] See Article 61 (3) of MiCAR

## 2.5. The Finishing Touch of CASPs' Groundwork

Some other aspects are to be considered to complete the overall functioning of CASPs under this regulation. On this matter, compliance with this Regulation for all CASPs is of paramount importance and they shall have in place policies and procedures which are able *to "effectively ensure compliance with this regulation*".[129] Other than the employment of personnel that can live up to the high profile of the service provided and its scale, nature, and range, CASPs remain responsible for ensuring *continuity and regularity in the provision* of the services. If any changes occur to the management body of a CASP, they have the obligation to notify immediately the competent authority and this notification shall be provided before the provision of any activity involving the new members.[130] More precisely, we refer to the necessity of "*resilient and secure ICT systems"* which is introduced and required by Regulation (EU) 2022/2554 (DORA Regulation).[131]

Recapping what is been treated so far, more than the employment of mechanisms, systems, and other procedures required by the aforementioned Regulation (EU) 2022/2554 (DORA Regulation), CASPs shall employ risk assessment arrangements to be compliant with the provisions of national law transposing Directive (EU) 2015/849.[132]

Crypto-asset service providers when holding clients' funds (i.e. funds other than e-money tokens), under this regime, are required to safeguard the ownership rights of clients through the securing of adequate arrangements in place with particular attention in cases of CASP's insolvency[133] (similar to Article 16 (8) and (9) of MiFID II). This way CASPs ensure the protection of their clients. This is done to avoid all the possible abuses when CASPs treat the

[129] Article 68 (4) of MiCAR
[130] Article 69 of MiCAR
[131] See Article 68 (7) of MiCAR
[132] Article 68 (8) of MiCAR
[133] Article 70 of MiCAR

client's funds as their own (e.g. as it happened in the case of FTX, where the clients' funds were lent out to an affiliated company and afterward **invested in risky activities)**. Notwithstanding the above, MiCAR conferees to CASPs the duty to keep the aforementioned funds with a credit institution or a central bank *in a separate account from what belongs to CASPs.*[134]

Other considerations, related to the goal of defeating all discrepancies and threats to consumer protection are the establishment of complaint-handling procedures by CASPs, allowing this way the clients to file complaints free of charge with CASPs.[135] Clients have the right to be informed about the possibility of filling complaints and CASPs are required, at the disposal of the clients, to provide templates for filling complaints and further on to keep a record of them and of any measure taken to address the complaint.[136]

The identification, prevention, management, and disclosure of conflicts of interest between CASPs and their shareholders, members, members of the management body, and other direct or indirect relations to any person, employees, and clients, is subject to effective measures to be posed by CASPs.[137]

## 3. The Special Regime Outlined for ARTs

We widely reasoned and argued the importance of a very stringent regulatory oversight able to demonstrate all the lessons learned from the failure of the issuers of the *algorithmic stablecoins*, such was the case that we brought to attention (i.e. the case of the Terra/Luna in 2022). Now we can say that MiCAR has taken full consideration and has introduced a very stringent and

---

[134] See Article 70 (3), subparagraph 1 and 2 of MiCAR
[135] See Article 71 (2) of MICAR
[136] See also Article 71 (1) which expressly requires CASPs to: *"establish and maintain **effective and transparent procedures for the prompt, fair and consistent** handling of complaints received from clients and shall publish descriptions of those procedures."*
[137] See Article 72 (1), point (a), (i) to (v) of MiCAR

special regime governing the issuance of ARTs and EMTs, but in this part, we will focus on the particular regime of ARTs and rules applying to these crypto-assets, deemed to be more complex than the EMTs (i.e. referring to a larger class of assets), and as a result, being subject to additional requirements. Moreover, this part, covering the provisions on ARTs and EMTs will become applicable starting 30 June 2024.

ARTs in MiCAR gain a contemplated function as a means of exchange rather than the functions according to the storage of value or as an investment instrument and this reasoning is subtracted by the fact that the MiCAR ***prohibits issuers and CASPs from granting interest on the holding of ARTs***.[138] The largeness of payment transactions sorted out by this function is considered under MiCAR as *a risk factor impacting the financial stability* and addressed in the Chapters dealing with ARTs' issuers. The reasoning behind such prohibition has long been debated and criticized and is concentrated on the importance of the reduction of the competition between traditional bank deposits and stablecoins. Such confrontation lies in the fact that the price stability maintained by the stablecoins, and the payment of high interests would make them preferable to holdings of fiat currency deposited with credit institutions which have a well-shaped framework and a high degree of supervision.[139]

We can immediately refer to **Article 23** and see how this regulation poses restrictions on the issuance of ARTs broadly performing such function. It is interesting to highlight the parameters that result in **ceasing the issuance of such ARTs**. The threshold is based on: << *"the estimated quarterly average number and the average aggregate value of transactions per day associated with its uses as a means of exchange within a single currency area is higher than 1 million transactions and EUR 200 000 000"* >>[140]

---

[138] On this matter see: CMS, Member Firm for Netherlands, Netherlands (2023): *"Asset-referenced tokens (ARTs) in detail"*; *"EU regulation MICAR now regulates asset-referenced tokens"*, August. Word Law Group. Available at: https://www.theworldlawgroup.com/news/asset-referenced-tokens-arts-in-detail

[139] Kokorin, I., (2023), *"The anatomy of crypto failures and investor protection under MiCAR"*, Capital Markets Law Journal, 2023, Vol. 18, No. 4, September. Available at SSRN: https://ssrn.com/abstract=4555081

[140] Article 23 (1) of MiCAR

Title III, CHAPTERs I to VI and Articles 16 from to 47 cover in detail all the authorization processes, all the obligations of issuers of ARTs, reserve of assets, acquisitions of ARTs, criteria for classification as significant ARTs and the recovery plans, listing this way all the prudential requirements, all the strict rules guiding the conduct of business, and all the transparency requirements, always in line with the optic of 'entirely' filling the gaps of the regulatory frameworks on this matter.

To be able to make an offer to the public[141], or seek admission to trading, of an asset-references token, within the Union, the person has to be the issuer of that asset-referenced token and has to be:[142]

i. a legal person or other undertaking that is established in the Union and has been authorized in accordance with Article 21 by the competent authority of its home Member State;[143] or
ii. a credit institution that complies with Article 17 of MiCAR[144]

If other persons aim to offer to the public or seek admission to trading an asset-referenced token, MiCAR provides this possibility upon written consent of the issuer of that asset-referenced token.[145] Also regarding the other undertakings wanting to issue asset-referenced tokens, they can do so if they have a legal form able to guarantee a level of protection that is deemed to be equivalent to that provided by legal persons, and in addition, they have to be subject to the same

[141] Such activity if defined under MiCAR, respective to Article 3, paragraph 1, point (12)
[142] Also, in this case exemption are provided following Article 16 (2), points (a) and (b) of MiCAR in cases when:
i. the average outstanding value of the ART, foreseeing an established timeframe of 12 months, never exceeds EUR 5 000 000, or;
ii. ARTs are offered only to qualified investors.
[143] Pursuant to Article 16 (1), point (a) of MiCAR
[144] Pursuant to Article 16 (1), point (b) of MiCAR
[145] See Article 16 (1), paragraph 2, where is also stated that those persons shall comply with Articles 27, 29 and 40 of MiCAR

prudential supervision in line with their legal form. This regulation introduces the 'White Paper' regime which is kind of a prospectus requirement[146] that must be notified to the competent authority of the home Member State. The involvement of *the competent authority of the home Member State* starts with the recipient of the applications for authorizations from legal persons or other undertakings aiming to offer or seek admission to trading of an asset-referenced token and once that such authorization is granted it has validity for the entire Union, allowing the ART's issuers to offer it to the public all over the Union.

As we will further see, together with the national competent authority other European authorities such as the EBA, ESMA, and the ECB are involved in this framework proceedings. **What about those non-EU entities that presently issue ARTs in the EU?** All these entities are invited to obtain a license by establishing a company in an EU Member State to continue their activity in the Union. Not only the non-EU entities but also all the other EU entities currently offering ARTs should start to examine to what extent the MiCA regime covers their activity, and they need to start the preparations for obtaining a license before the entrance into force of MiCAR.

**Credit institutions,** as being already subject to prudential regimes of exiting EU regulations[147] and being already authorized entities, follow undemanding steps when aiming to issue ARTs.[148] This consideration refers to the fact that credit institutions are not subject to prior authorization by the NCA but instead, they are required to notify all the necessary information to the responsible competent authority following a deadline of 90 working days before issuing the

[146] As referred to in Regulation (EU) 2017/1129 (The Prospectus Regulation)
[147] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for Credit Institutions and Investment Firms and amending Regulation (EU) No 648/2012 Text with EEA relevance.
[148] This statement is related also to the exclusion of the credit institutions from Articles 16, 18, 20, 21, 24, 35, 41, and 42 of MiCAR.

ART.[149] Of course, such entities are subject to the 'White Paper' regime which has to be drawn up, submitted, and approved by the national competent authority.[150]

Among the listed aspects to be notified credit institutions are **required to issue a legal[151] opinion** that the ART does not enter the qualification as an EMT or does not enter a category that is not covered by the scope of the MiCA regulation. This is *a remaining challenge* that will require further clarity. Such clarity may be provided when at the request of the competent authority the ESAs (such as EBA and ESMA) will be required *to issue an opinion* related to the performed evaluation of the issued legal opinion by the issuers.[152]

The ECB comes into play when it must receive a notification from the competent authority regarding the necessary received information. Into play may also come the central bank of the Member State, whose official currency where the credit institution is established is not the euro, or when the ART references an official currency that is not the euro, meaning that the competent authority in addition, has the obligation to notify the received information to that central bank.[153] Upon such notifications are issued opinions that could furtherly balk the initiation of the offering or seeking admission to trading.[154]

On the other hand, the application for authorization follows similarly the mechanism that we already went through for CASPs, where the applicants aiming to offer ARTs to the public or seek admission to trading must submit an 18 points long informative list[155] concerning all relevant aspects starting from the address of the applicant and ending up with a list of the Member States where the applicant aims to offer the ARTs or seeks admission to trading platforms. This framework has shown to be prudent in an equivalent way for CASPs and also

---

[149] See Article 17 (1), point (b) of MiCAR
[150] See Article 17 (1), point (a) of MiCAR
[151] See all together: Article 17 (1), point (b)(ii), Article 18 (2e), and Article 97 (1) of MiCAR
[152] Article 20 (5) of MiCAR
[153] Pursuant to Article 17 (5), paragraph 1 of MiCAR
[154] Pursuant to Article 17 (5), paragraph 3 of MiCAR
[155] See Article 18 (2), points from (a) to (r) of MiCAR

for the applicant issuers in this case, meaning that once again it emphasizes the indispensable proof that the issuer has to provide regarding the absence of a criminal record and the absence of penalties related to applicable financial services law, commercial and insolvency law of the members of the management body of the ART's issuer and the shareholder and members that have qualifying holding (i.e. directly or indirectly) in the applicant.[156] As we previously mentioned the procedure of granting authorization involves the EBA, ESMA, and ECB developing draft RTSs, and on the other hand EBA and ESMA developing draft ITSs for the main reason of providing **a uniform documentation procedure** for the competent authorities across the Union to receive the necessary information that the applicant has to provide. Also in this case, if there could be objectively demonstrated the failure of the issuer to meet the MiCAR's requirements it would lead to the refusal of the authorization.

**The White Paper** embraces a series of aspects to be put on view in a clear, fair, and not misleading manner for the noteworthiness of the prospective buyers of ARTs to have at their disposal all the pertinent information surrounding the purchase and to be well-informed about the risk corresponding to the offer of the ART and the ART itself. For such important reasons, MiCAR establishes that the white paper must hold circumstantial information about the ART's issuer and the ART and must specify comprehensive information on financial and legal aspects of the ARTs as well as technical and environmental aspects and information about rights and obligations related to the ART and as important as it could be displaying information about the reserve of assets.[157] In addition, the white paper must contain clear information related to the ART's loss of value, transferability, and liquidity. What if these requirements aiming to ensure a qualitative content of the white paper are not met by the ART's issuer? Such cases are indeed treated under Article 26 of MiCAR, which foresees liabilities for the issuer of the ARTs about information provided in the white paper. More correctly, the parts bearing the liability toward the holders of ARTs are the members of the administrative, management, and supervisory body of the issuer of such ARTs.[158]

---

[156] Article 18 (5), point (a) of MiCAR
[157] See Article 19 (1), points from (a) to (h) of MiCAR
[158] See Article 26 (1) of MiCAR

The holder from the other side, bearing losses, when driven by the provided information takes decisions on the purchase, sale, or exchange of that ART making full reliance on that white paper information and being misled upon such information has the responsibility to provide evidence that the issuer of such ART, has in that case has committed a breach of the regulation (i.e. Article 19 of MiCAR).[159]

## 3.1. Obligations for ARTs Issuers - MiCAR's Contribution to Financial Stability

The unreliability of the token stabilisation mechanism along with the missing governance arrangements and conduct rules were evidenced as a cause of the risks raised by these crypto-assets. MiCAR has addressed all these deficiencies by posing requirements such as the obligation for the issuer of ARTs *'to act honestly, fairly and professionally in the best interest of the holder'* of such ARTs, along with the obligation to publish the approved white paper on the issuer's website, requirements on distinctly stated market communications related to the offer or the admission to trading, ongoing disclosure of information to holders (e.g. the number of ARTs in circulation, their value and the reserve of assets' composition), setting up complaint handling procedures, the implementation of effective procedures able to identify and moreover to manage possible conflicts of interest following by the obligation to notify any changes occurred to the management body, ending up with the most concerning aspects such as the governance arrangements, the implementation of custody policies and procedures, own funds requirements and the commitment of MiCAR to oblige the issuers to ensure the stable value of their ARTs by establishing the requirement for them to put in place reserve of assets able to support the value of ARTs.

[159] Article 26 (3) of MiCAR

We identified the latter ones as the most concerning aspects because these aspects are the ones aiming to ensure the integrity of the issuers and ARTs themselves together with financial stability.

Given their importance, issuers of ARTs are obliged to have their own funds equal to an amount of at the highest of the following:[160]([161])

i. EUR 350 000;
ii. 2% of the average amount of the reserve of assets referred to in Article 36;
iii. a quarter of the fixed overheads of the preceding year.

It is interesting to notice the validity of such a requirement to be elevated in consideration to an issuer offering more than one ART. In such case point **(ii)** of the previous paragraph modifies considering now the sum of the average amount of the reserve assets also incorporating the reserve assets backing the other ART.

Another aspect to consider which further accentuates the mitigation of financial risks posed by the issuance is the opportunity of the competent authorities to react upon certain events and require the issuer of the ART to hold an amount of own funds which is up to 20% higher than what is stated in point **(ii)** of the previous paragraph.[162]

A higher degree of risk is related to a higher amount of own funds. These risky events relate to the estimation of the risk-management processes, the volatility of the reserve of assets, investment policies on the reserve of assets, and among others, once again value and number of transactions.[163]

---

[160] Article 35 (1) of MiCAR
[161] Own Funds must be of the same quality as Common Equity Tier 1 in banking, pursuant to Article 35 (2) of MiCAR
[162] Article 35 (3) of MiCAR
[163] See Article 35 (3), points from (a) to (g) of MiCAR

Events such as the interest rate shocks and operational risks aspects, entering two categories, respectively financial and non-financial stress scenarios must be taken into account by the issuers of ARTs which are required to perform stress-testing. All the results of the stress-testing matter to the point of conferring to the competent authorities the duty to impose stricter own funds requirements[164] on the issuers of ARTs, such as "*the holding of an amount of own funds that is between 20% and 40% higher than the amount established from Article 35 (1), point (b)"*.

The intervention of EBA, ESMA, and ECB is again indispensable in developing the RTSs related to well-defined procedures and criteria related to the aforementioned requirements and their proceedings when necessary.

The importance of a stabilization mechanism to rely on a reserve of assets with a low market, liquidity, and credit risk profile[165] and to strengthen its role of guaranteeing the value of the tokens in market stress events is an important policy consideration reshaped under MiCAR in Article 36. Indeed, Article 36 of MiCAR states that issuers of ARTs are required to constitute and maintain at all times a reserve of assets that aims to address all the risks entailed by the asset referenced by ARTs and all the liquidity risks related to the permanent rights of redemption of the holders.[166] Immediately to consider is the fact that this regulation provides prudent investment rules arranging the investment of parts of the reserve of assets only in '*highly liquid financial instruments'*, the one able to ensure minimal credit, market, and concentration risk.[167] ([168])As we are being repetitive regarding the significance of the stabilization mechanism of such

[164] Pursuant to Article 35 (5) of MiCAR
[165] Abate, G., Branzoli, N., Gallo, R., (2023), ***"Crypto-asset markets: structure, stress episodes in 2022 and policy considerations",*** June. Bank of Italy Occasional Papers n.783, June 2023. Available at: https://www.bancaditalia.it/pubblicazioni/qef/2023-0783/QEF_783_23.pdf
[166] Article 36 (1), points (a) and (b) of MiCAR
[167] Article 38 (1) of MiCAR
[168] Under this Regulation, UCITS are deemed to be asset with minimal market, credit and concentration risk for those expressed investment purposes – See Article 38 (2) of MiCAR

tokens, the regulation takes steps to constrain the issuers to establish clear and well-defined policies describing such mechanisms.[169]

As in the case of CASPs it is obligatory the legal segregation of such reserve of assets from the issuers' estate and in addition from the reserve of assets of other ARTs as a protection measure of the reserve assets for the holders in case of insolvency.[170] The pools of reserves of the different offered ARTs shall also be managed individually.[171] The authorities responsible for further detailing the liquidity requirements are the EBA in collaboration with ESMA and ECB. Among other RTSs to be developed, we find the determination of the fact that the *'minimum amount in each official currency referenced held as deposits in a credit institution, cannot be lower than 30% of that amount referenced'.* The avoidance of adverse impact on the market of the reserve assets makes the issuer responsible for ensuring the match of the issuance and redemption by a corresponding increase or decrease in the reserve of assets.[172]

Among several established governance arrangements regarding the issuers of ARTs, is pointed out the necessity of independent auditors to audit the reserve of assets with a frequency of every six months. Regarding Article 34 (12) in combination with Article 36 (9) and (10), such audit is to be notified to the management body of the issuer and without undue delay to the responsible competent authority.

Concerning now, an aspect that distinguishes the treatment of the purposes of such tokens from the collective investment undertaking's goals is the fact that this regulation confers asset rights to such token holders related only to the right of redemption against the issuer equivalent to the current market value of the reserve assets.[173] Upon the exercise of the right of redemption, the

[169] Article 36 (8), points from (a) to (g) of MiCAR
[170] Article 36 (2) and (3) of MiCAR
[171] Article 36 (5) of MiCAR
[172] Article 35 (6) of MiCAR
[173] Article 39 (1) of MiCAR

issuers of ARTs are required to lay out conditions, mechanisms, procedures, timeframes, and valuation principles for ensuring a sound exercise of such right. There is a clear extended prohibition for the issuers of ARTs to grant interest related to ARTs. Furthermore, as we already elaborated on for CASPs, the latter ones remain restricted to grant interest when providing services depending on ARTs.[174] More to consider on this aspect is the fact that Article 40 (3) enriches such framework by specifying that *"any remuneration or any other benefit related to the length of time during which such ARTs are held, shall be treated as interests."*

## 3.2. Significant ARTs

What distinguishes such a framework is the presence of regulatory thresholds which contribute as a criterion to qualify the entities issuing/offering and providing services as significant. The idea seems to have derived from ***the well-known 'Single Supervisory Mechanism'*** related to the qualification of credit institutions, but such criteria evidenced in the current framework pose particularities as we will see in this part for the qualification of Asset-referenced Tokens.

Before driving through the particularities of the classification criterion we have to emphasize the reasoning behind the necessity of such provisions. It is completely connected to factors related to the large volumes made when ARTs are used as a means of exchange, where such volumes are a threat to the monetary transmission channels and monetary sovereignty.[175] Such particularities are covered by CHAPTER V of Title III and Articles 43 to 45.

The emphasized criteria follow considerations regarding **(1)** *the number of holders of the ART to be larger than 10 million* **(2)** *the value of ARTs issued and the market capitalization or the*

[174] See Article 40 (1) and (2) of MiCAR
[175] Recital (102) of MiCAR

*size of the reserve of assets to be higher than EUR 5 000 000 000* **(3)** *average number and average aggregate value of transactions of the ART per day during the relevant period to be respectively higher than 2.5 million transactions and EUR 500 000 000.*[176] Such well-defined parameters are followed by other criteria describing situations and conditions bringing about the qualification as significant.

When the issuer of ARTs has a significant activity on an international scale considering the use of the ART for remittances or payments when there is proof of interconnectedness of the ART or the ART's issuer with the financial system or when the issuer is a provider of core platform services as a gatekeeper (i.e. under the Regulation (EU) 2022/1925 of the European Parliament and the Council), results in a significant status for the ART.[177]

As for the interconnectedness with the financial system EBA considers a wide approach in conjunction with a wider interpretation of the references to financial institutions such as credit institutions, alternative investment funds (AIFs), investment firms, insurance companies, money market funds (MMFs), electronic money institutions (EMIs), payment institutions (PI), pension funds, and insurance companies.[178]

The decisional responsibility for granting such classification is conferred to EBA, upon prior notification of the NCA of the issuer's home Member State to EBA and the ECB. The procedure foresees the preparation of a draft decision to be notified to the competent authority, to the ECB, and where applicable to the central bank of the concerned Member State. The very first change, after the final decision of EBA on classifying the ART as significant, is the transfer of the supervisory powers to EBA. This is to reflect upon the fact that, EBA a regulatory authority, becomes this way, under MiCAR a supervisory authority which marks a very important novelty presented by this Regulation. Such classification could be also possible in voluntary terms established in Article 44, which allow applicant in the very first phase of obtaining authorization

[176] Article 43 (1), points (a), (b) and (c) of MiCAR
[177] Article 43 (1), points (d), (e), (f), (g) of MiCAR
[178] EBA (2023), "*EBA TECHNICAL ADVICE ON MICAR DELEGATED ACTS"*, September 2023.

to notify their wish for their ART to be classified as significant and be subject to the stricter requirements attached to such classification.

The mentioned strict prudential requirements encompass the implementation and maintenance of a remuneration policy able to provide effective risk management and are in addition obliged to perform liquidity stress tests whose results may allow EBA to make further decisions in strengthening the liquidity requirements that we already mentioned. Modifications to the own funds' requirements established for non-significant ARTs consider an increase of 3% of the average amount of the reserve of assets (i.e. from 2% before). Timeframes on these matters are to be developed by EBA and ESMA.

# 4. EMTs under MiCAR – Examples of Current Issuers

The potential of ARTs and EMTs to extensively spread and related risks have been the core concerns guiding the potential risks addressed by this new regulatory framework. E-money under EMD and E-money Tokens under MiCAR, such breaking new ground concepts have required particular attention in understanding where these framework patterns separate, to what extent they relate, and how the arrival of MiCAR, in particular, affects the compliance rules for E-Money Institutions (EMIs).

Willing to quantify such gained importance and translate it in numbers, we have a considerable increase in e-money transactions made in the European Union in years starting from 2014 where the number of purchases in the EU was roughly 2.1 billion reached 7.5 billion in 2021[179] and only in the first half of 2023 there were 4.4 billion e-money payments in the euro area (ECB).[180] The number of licenses granted to EMIs in the Union has followed an increasing trend.

As we already mentioned EMTs can be issued and can be offered to the public or seek admission to trading either by **(1)** *a credit institution under Directive 2013/36/EU* or **(2)** *an EMI authorized*

[179] Statista (2022), "*Number of Money Purchase Transactions in the European Union from 2000 to 2021"*, July 2022.
[180] Data from ECB

*under the Electronic Money Directive 2 (EMD2)*[181]*,* and according to Article 48 (2) '*EMTs shall be deemed to be electronic money'.* An EMI could become subject to both these regulations and upon such fact it must be compliant with the established requirements.

Currently undergoing changes provide us with examples of the impact that this regulation is starting to have. This impact is by now felt from the E-Money Tokens referring to USD, such as the USDT, USDC, and BUSD, being considered the three largest stablecoins by trade volume. Following the expansion of digital financial technology firms' operations in the Union we can provide the example of Circle, being such a firm known to be the issuer of USDC and EUROC[182], has applied to become an EMI and a Digital Asset Service Provider (DASP), becoming so also subject to MiCAR. Meanwhile, Binance, the issuer of BUSD, and Tether Limited, the issuer of USDT are not, at the time being, authorized as an EMI or a credit institution and currently under MiCAR will not be possible to operate in the EU market without being licensed.

## 4.1. EMTs in Comparable Terms to ARTs

Title IV, Articles 48 to 58 provide all the prudential requirements for all issuers of EMTs and criteria responsible for the qualification of significant EMTs. Given the fact that the issuers of EMTs will be regulated and supervised in the same way as the issuers of e-money unless specified otherwise in the MiCA regulation[183], the latter makes on this matter a lot of references to the corresponding Directive 2009/110/EC (EMD2). Compared to ARTs there are some differences observed in their treatment under MiCAR, given the presumption that ARTs, based on their nature and definition, are riskier than EMTs, and require a more considerable set of

[181] Recital (66) of MiCAR
[182] *EURC is 100% backed by euro held in euro-denominated bank accounts so that it's always redeemable 1:1 for euro* (CIRCLE), being defined as an E-Money Token under MiCAR.
[183] Pursuant to Article 48 (3) of MiCAR we have that: *"Titles II and III of Directive 2009/110/EC shall apply with respect to e-money tokens unless otherwise stated in this Title."*

stringent requirements that are absent when dealing with EMTs. One distinction is related to the aforementioned Article 23 of MiCAR followed by the reserve of asset requirements for ARTs to be stricter than what is referenced under the EMD2 by this regulation for the EMTs. Also, in the case of EMTs, no specific authorization mechanism is introduced.

The special feature of the crypto-asset White Paper is also required to be notified to the competent authority at least 20 working days[184] before the publication date and to be published following the requirements under Article 51 of MiCAR when offering EMTs or seeking admission to trading.[185] In the case of EMTs, differently from what is established for ARTs, *no prior approval of the White Paper is required* from the competent authorities before publication.[186] The non-prior approval stands also for the market communication requirements, established in Article 53 of MiCAR.

The White Paper shall in this case contain all the relevant information regarding the issuer, the EMT, rights and obligations related to the EMT, the underlying technology, information about the related risks, and the adverse impact regarding the climate aspects.[187] Where applicable, the White-Paper shall also identify the person other than the issuer who offers the token to the public.

What is not previously seen in the EU capital markets laws is the fact that this regulation introduces a principle based on a responsibility conferred to the management body of the issuers of EMTs (and ARTs) to be personally responsible for the content of the crypto-asset White Paper and in the concrete case the White Paper shall contain a statement from the management body of the EMTs' issuers that confirms the conformity of that White Paper with Title IV and that the presented information is complete, fair, clear and not misleading, to the best of the knowledge of the management body.[188]

---

[184] Article 51 (11) of MiCAR
[185] Article 48 (1), point (b) of MiCAR
[186] Article 51 (11), paragraph 2 of MiCAR
[187] Article 51 (1), points from (a) to (g) of MiCAR.
[188] Pursuant to Article 51 (5) of MiCAR

Moreover, the losses incurred as a result of the violation of the Articles (for ARTs and EMTs) covering the content and form of the White Paper will be a liability of the issuer, its administrative, management, or supervisory body.[189] Same as the ARTs' White Paper, the EMTs' White Paper shall contain a summary, and eventually the holder shall base the related decisions on the full content of the White Paper instead of its summary. Another similarity regards the opportunity in a requirement form for the issuers of the EMTs and ARTs to report and describe in a **modified White Paper** any new factor or any other material mistake or other inaccuracies affecting the EMT's assessment, which needs again to be notified to the responsible competent authorities and to be published.[190]

This regulation provides the application of some EMD2 exemptions related to EMTs, for example, exemptions related to Article 1(4) and (5) of Directive 2009/110/EC[191] that on its side makes references to Article 3(k) and Article 3(1) of Directive 2007/64/EC[192] regarding aspects such as the so-called 'limited network of service providers or limited range of goods and services exemption' or the ' payment transactions executed through telecommunication, digital or IT device exemptions'. Title IV of MiCAR will not apply to such EMTs but it is very important to highlight that the white paper regime will continue to be applicable. Also, another example relates to EMTs exempted under Article 9(1) of Directive 2009/110/EC regarding 'Optional Exemptions' and setting up some thresholds[193] not to be exceeded. According to such exemptions, Article 48 (1) of MiCAR will not apply. Again, the need to publish a white paper remains among the applicable requirements.[194]

---

[189] Pursuant to Article 52 (1) of MiCAR

[190] Article 51 (12) of MiCAR

[191] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 *on the taking up, pursuit and prudential supervision of the business of electronic money institutions* amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

[192] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 *on payment services in the internal market* amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC.

[193] Pursuant to Article 9(1) of Directive 2009/110/EC we have *a limit established by the Member State to be "no more than EUR 5 000 000 regarding the generated average outstanding e-money".*

[194] See Article 48(7) of MiCAR

The posed similarities in the treatment of ARTs and EMTs continue to persist when also considering the investment funds in the case of EMTs, that are received in exchange for e-money tokens. Such funds, according to Article 54(a) should at least 30% be deposited in separate accounts in credit institutions, and the remaining ones are invested in low-risk assets that qualify as highly liquid financial instruments. This is to ensure what was previously established in Article 38(1) of MICAR, highlighting the presence of a minimal market, credit, and concentration risk. The denomination must be in the same official currency as the one referenced by the EMT.[195]

Regarding the recovery and redemption plan established for the issuers of EMTs we refer to Article 55 of MiCAR which states the following: "*Title III, Chapter 6 shall apply mutatis mutandis to issuers of e-money tokens."* Such requirements *do provide a level of protection for the holders of EMTs and their rights* in cases when the issuers find themselves in a situation unable to be compliant with the attached obligations under this regulation.

## 4.2. Significant EMTs

The qualification of e-money tokens as significant and the eventual specific additional obligations attached to the issuers of such significant e-money tokens and the supervisory rules will be subject to the MiCA regulation instead of the provisions standing out in the E-Money Directive (i.e. Directive 2009/110/EC).

[195] Article 54(b) of MiCAR

Likewise, CHAPTER 2 of Title IV and Articles 56 to 58 do make references to the corresponding criteria and provisions previously discussed for the classification and supervision of significant ARTs. To be precise, Article 56 of MiCAR specifies that EBA, the authority responsible for the classification of such crypto-assets, shall classify EMTs as significant e-money tokens where at least three of the criteria set out in Article 43 (1)[196] are met. Similarly, to what is settled for ARTs, the voluntary classification as significant is established also for the issuers of EMTs. Responsible for the reporting of the realization of such criteria is the competent authority of the issuer's home Member State, which is required to report to the EBA and the ECB[197], with a frequency of at least twice a year. Indeed, the EMTs will be classified as significant if during the 'the period covered by the first report' the criteria are met or during the timeline following the two consecutive reports.[198]

As part of the procedure afterward, the EBA will be responsible for preparing a draft decision for the classification that will be further notified to the issuer of EMTs, the competent authority, the ECB, and where applicable to the central bank of the concerned Member State. This procedure is the same we found applicable to ARTs and all the comments and observations related to such notification will further influence the final decision.[199] It is important to notice that such a draft decision can have its way back when the well-established criterion in this regulation is no longer met.

Article 117(4), considered without doubt as a novelty of such a regime will once again confer to EBA all the supervisory responsibilities[200] towards the issuers of significant e-money tokens.[201] The reasoning behind such transfer of supervisory powers is related to the importance

---

[196] Article 43: "Classification of asset-referenced tokens as significant asset-referenced tokens."
[197] Article 56 (3) of MiCAR
[198] Referring to Article 56(1), points (a) and (b) of MiCAR
[199] Article 56 (4) of MiCAR
[200] Of course, there is an exemption where the supervisory powers will not be transferred to EBA (See Article 56(7)).
[201] Pursuant to Article 56(6), the timeframe for the transfer of the supervisory powers to the EBA is that of 20 working days from the date that the decision of the classification is notified.

of offsetting the risks posed to the financial stability from the widespread use of significant EMTs as a means of payment, such an aspect that is time-to-time highlighted and argued in the Recitals of such regulation when considering the potential widespread use of such crypto-assets regarding certain functions justifying the prudential requirements of such regulation.

Regarding EMIs, issuing significant EMTs, and having in mind all the potential risks posed to the financial stability, they will be subject to specific rules referring to the list of rules applicable also for ARTs, instead of the correlative provisions under the E-Money Directive.[202]

## 5. Crypto-Assets Other than ARTs or EMTs

A broad category, as broad as the definition that MiCAR provides for crypto-assets, embracing what could not find a place in specifically recorded categories (i.e. ARTs and EMTs) that have for a long time been deprived of regulatory objectives, still entailing risks and for this reason finds its way into requirements, to some point, parallel to what we considered when extensively dissected parts of the framework for ARTs and EMTs.

Broad categories, broad definitions, and broad parts of the framework showing some interpretative gaps are at most explained by the fact that this new regulation is looking into the future and is aiming to cover possible new and similar types of crypto-assets and similar technologies and to find an adjustment to future market developments.

We could further justify such reasoning when focusing on Title II, Articles 4 to 15, covering the introduced obligations, rights, liabilities, and other safeguarding and operating arrangements when offering crypto-assets entering this third, broad category that is different from the ARTs and EMTs, but that do fulfill the provided general definition of crypto-assets under this regulation, aiming to capture a wide range of already unregulated crypto-assets. Not to forget

[202] Article 58 (1), points (a) and (b) refer to the detailed rules treated in Articles 36,37, 38, and 45 (1) to (4) and moreover, Article 35(2), (3) and (5) and Article 45(5).

is the fact that MiCAR attached to the broad definition a list of exclusions, contributing to providing more clarity.

When considering the requirements applied in the case a person is making an offer to the public or is seeking admission to trading of crypto-assets other than ARTs and EMTs, and making them comparable to the previously seen requirements for ARTs and EMTs, the first thing to notice is that under Article 4 of Title II of MiCAR is missing the requirement of the legal person to be established in the Union as it was required for the ARTs. The list of such requirements contains obligations related to the notion of the crypto-asset White Paper. In such case, the offeror is obliged to draw up a crypto-asset White Paper under Article 6 that highlights all the relevant content that the White Paper shall contain in transparency terms and is also obliged to notify such White Paper to the competent authority of the home Member State and to publish it along with the drafted market communications on their website to be publicly accessible following Article 9.[203]

Given that there is no obligation for the offerors or the persons seeking admission to trading of such crypto-assets to have a registered office in the Union, the competent authority where to notify the White Paper and the market communications will be considered the one where the offerors have a branch. If the case is that of the offerors being established in a third country the responsible competent authority receiving the notification of the White Paper and the market communications will be the one where they intend to offer in the Union, the crypto-assets other than ARTs and EMTs.[204]

So, as for what concerns the White Paper regime we are in line with what was established for ARTs and EMTs, apart from the approval requirement that was foregrounded for ARTs and is not present in such cases and will in addition take the form of a statement in the first page of the White-Paper.[205]

---

[203] See Article 4 (1), points (a) to (g) and Article 6, 8, and 9 of MiCAR
[204] See Recital (31) of MiCAR
[205] Article 6, (3), subparagraph 1 of MiCAR

The notification process brings us back to the challenges that the broad definition of crypto-assets under MiCAR poses. This is because the offerors, the persons seeking admission to trading, or operators of a trading platform for such category of crypto assets are required to objectively provide (i.e. alongside the notification of the White-Paper) explanations related to the non-categorization and why the crypto-asset should not be considered as an EMT, an ART or simply as a crypto-assets not covered by the MiCAR regulation. This is to be considered a time-consuming and complex task to perform, even though the offeror has at its disposal the relevant aspects characterizing ARTs and EMTs provided by MiCAR.[206]

Not a novelty remains the liability resulting from the information to be given in the crypto-asset White-Paper. We already analyzed the importance of such information, given the fact that the violation of the obligation to provide *clear, fair, complete, and not misleading information,* has consequences that accentuate the protection of holders, making the offeror, the person seeking admission to trading or the operator of a trading platform, its members of the management, administrative and supervisory body responsible for bearing losses of the holders, whose choices to purchase, sell or exchange the crypto-assets were dictated by the relevance of what was stated in the White-Paper.[207]

All the comprehensive, clear, and rigorous information aiming to ensure consumer and investor protection when offering such crypto-assets to the public and aiming to achieve the long-awaited harmonious practices in the Union is instrumental to the White Paper regime that also provides exemptions. Such exemptions relate to cases being less impactful in weakening the supervision or the stability of such markets. Article 4 (2) **states such cases exempt *offers to the public* of crypto-assets other than ARTs and EMTs if:**[208]

*(a) the offer is **made to fewer than 150 natural or legal persons** per Member State (where such persons are acting on their own account);*

[206] Pursuant to Article 8 (4), points (a) to (c) of MiCAR
[207] Article 15 (1), (4) of MiCAR
[208] Article 4 (2), points (a) to (c) of MiCAR

*(b) the offer of a crypto-asset is **addressed solely to qualified investors** (where the crypto-assets can only be held by such qualified investors;*[209]

*(c) the total consideration of the offer to the public of a crypto-asset in the Union, over a period of 12 months, **does not exceed EUR 1 000 000**, or the equivalent amount in another official currency or in crypto-assets.*

The entire regulation does not consider only **exemptions related to the White-Paper** regime but also exemptions from Title II providing requirements ***to the offers to the public*** **of crypto-assets other than ARTs and EMTs.** This means that there will be specified cases that will remain uncovered. [210] However, both the exemptions from the White Paper regime or Title II of such regulation "*will not apply when the offeror has communicated its intention to seek admission to trading of crypto-assets other than ARTs and EMTs*".[211] Also, the business-to-consumer relationships will remain protected by the Union legislative acts concerning consumer protection, even though some offers of crypto-assets other than ARTs and EMTs are exempted from the obligations established by MiCAR.[212]

Another aspect that somehow distinguishes a small set of requirements is the case when the crypto-asset is admitted to trading on the initiative of the operator of a trading platform, with no prior publication of the White Paper. In this case, the operator of the trading platform is obliged to be compliant with Article 5(1). Moreover, an agreement between the person seeking admission to trading and the operator may be reached in establishing the operator as the one responsible for complying with the requirements under Article 5(1). [213]

---

[209] Article 3 (1), point (30) of MiCAR states that: "qualified investors means persons or entities that are listed in Section I, points (1) to (4), of Annex II to Directive 2014/65/EU (MiFID)."
[210] See Article 4 (3), points (a) to (c) of MiCAR – Such exemptions are provided with the reasoning of ensuring a proportionate approach. See also Recital (26) of MiCAR
[211] Article 4 (4) of MiCAR
[212] Recital (29) of MiCAR
[213] Article 5 (2) and (3) of MiCAR

**The duration of the offer to the public** of such crypto-assets will generate different frequencies related to the requirements of *the publication of the results of the offer* to the public, depending on the fact of a posed time-limit on the offer by the offerors. In such case, the offerors will follow the requirement of publishing the result regarding a timeline of *20 working days* from the end of the subscription period while **the missing time limit** provides a publication requirement *on an ongoing basis*.[214]

A smaller list of **safeguarding arrangements** is required for offerors of crypto-assets other than ARTs and EMTs, singling out only an added requirement for those offerors setting time limits[215] on the offer, to safeguard the funds of other crypto-assets raised during that offer. More precisely Article 10 (3), points (a) and (b), requires such offerors to keep in custody the collected funds in **(1)** a credit institution, where the funds are raised during the offer to the public and/or (**2)** a CASP providing custody and administration of crypto-assets on behalf of clients.

Retail holders are protected by this regulation. They shall have a right to withdraw based on Article 13 (1) of MiCAR. This means that whenever they purchase crypto-assets other than ARTs and EMTs directly form the offeror or a CASP placing crypto-assets on behalf of the client (i.e. the offeror) shall have the right to withdraw from the agreement without bearing any costs, fees, or providing reasons.[216] The retail holder will be reimbursed for all the payments with the same means of payment used for the transaction.[217]

Union Standards shall be met in terms of systems and security protocols. Such requirements will be further elaborated by ESMA and EBA on issuing guidelines aiming to help the competent authorities identify and address the specific Union Standards.

---

[214] Article 10 (1) and (2) of MiCAR
[215] For example, following Recital (30) we have that in cases the offeror concerns **a utility token** for *"goods that do not yet exist or services that are not yet in operation"* the time limit of the offeror is predicted to *not exceed 12 months*.
[216] See Article 13 (1) of MiCAR
[217] Article 13 (2) of MiCAR

# CHAPTER III

# FUTURE IMPLICATIONS OF MICAR

## 1. Future Challenges for Market Participants

Since the beginning of this work, we mentioned that the introduction of the MiCA regulation was a turning point for markets in crypto-assets and the crypto industry in the Union with far-reaching implications involving the existing corpus of the EU financial regulation and the players in such markets as all the recent market developments resulted in a tipping point requiring a significant intervention in addressing the posed challenges. Not that all the challenges are fully addressed and as we will see in this chapter there is also space left for criticism regarding uncertainties about what is already provided by such regulation and what is still left behind.

Considering now the very significant gap between the existing (or non-existing at all), regimes in different jurisdictions of the European Union and the MiCAR framework, the crypto-assets market perceives as a result the fact that it will pose serious difficulties for the current players in such markets, and more precisely will present important unignorable efforts to be put in place by the issuers and the service providers of the crypto-assets covered by MiCAR, that aim to continue to be able to operate in the EU market and as a result to start to consider the compliance costs and timeframe of the licensing procedure required by MiCAR which is long and time-consuming. Becoming a complaint entity requires resources enabling the definition and the formalization of all the necessary procedures and to be compliant with all the requirements established under the MiCAR. Not only the limited resources but also limited supervisory

powers of the NCAs are to be considered, in the case of entities that had the option to benefit from the grandfathering clause and are allowed to continue to provide services (in their jurisdictions and depending on the national applicable law) without a MiCAR license.

Different jurisdictions among the Union will face difficulties in implementing MiCA-compliant national regimes following the MiCAR timeline and the number of CASPs that are registered in those jurisdictions for AML/CFT purposes, given the fact that this is a whole new and more comprehensive regulatory framework.[218]

ESMA has already made steps ahead and has made a call upon market players, the regulators, and the National Competent Authorities to start the preparation for the implementation, addressing to them a letter and publishing a statement. In this call, ESMA alerts some remaining risks during the MiCAR's transitional phase (i.e. ending in July 2026), forewarns the importance of an anticipated preparation, and recommends that ***"[…] To ensure a timely and orderly transition toward MiCA, ESMA encourages market participants to make adequate preparations that will reduce the risk of disruptive business model adjustments."***[219]

Given the challenges, market participants and experts remain on questionable terms when considering the aftermath of the MiCA regulation. To add on, it seems a positive aspect the fact that such a framework could bring about a crypto-asset market in the Union to be well-regulated and robust.[220]

---

[218] XREG CONSULTING LTD, (2023), "***How crypto regulation will evolve in 2024:*** *An overview of how this year's critical regulatory and geopolitical developments will impact policymakers, regulators and crypto businesses*", January. Electronically available at: https://www.xreg.consulting/articles/how-crypto-regulation-will-evolve-in-2024

[219] ESMA (2023), "***ESMA clarifies timeline for MiCA and encourages market participants and NCAs to start preparing for the transition****",* October. ESMA74-449133380-441. Available at: https://www.esma.europa.eu/press-news/esma-news/esma-encourages-preparations-smooth-transition-mica

[220] MK FINTECH PARTNERS Malta LTD, (2023), "*MiCAR is Approaching Enforceability Next Year, as Industry Stakeholders Prepare"*, December. Available at: https://mkfintechpartners.com/2023/12/04/micar-implementation-november2023-update/

The existing regulatory fragmentation before the MiCAR and the presence of a non-proportionate number of crypto-asset service providers in different jurisdictions of the Union makes them move toward the implementation at a different speed while the entities are starting to consider the most flexible and favorable regulators among the Member States that could provide to them more clarity[221] if chosen as their competent authorities granting authorization under MiCAR. Day-by-day updates and publications provide us with examples of how the regulators are moving forward.

*The Netherlands, France, Malta, Lithuania, Germany, and Austria* are among the jurisdictions that have progressed in publishing draft Decrees implementing the Market in Crypto-Assets Regulation. **In Austria,** the pre-authorization discussions have already started, and **the** "*Austrian Financial Market Authority" (FMA)* is expected to be the responsible competent authority for granting authorization of CASPs and for receiving the notification requirements under MCAR related to the intended crypto-asset services provided.[222] FMA has started to play an important role in providing further clarifications for the interested CASPs and is providing recommendations aiming to ease the authorization process.

**In the Netherlands**, the responsible supervisor of the issuers of ARTs and EMTs will be the "Dutch Central Bank" (De Netherlandsche Bank, DNB) meanwhile, another responsible authority is assigned for the supervision of CASPs and tokens other than ARTs and EMTs, being "The Dutch Authority for the Financial Markets" (*Autoriteit Financiële Markten*, the **AFM).** It is interesting to see how both Austria and the Netherlands have taken into account the ESMA's advice on the shortening of the national transition period and both such implementation Decrees have specified that it will be respectively 12 months long, ending 30th December 2025 and six

[221] It is important to notice that ESMA has made clear that during the implementation phase *"full MiCA rights and protections will not apply".*

[222] **Austrian Financial Market Authority (FMA),** (2024). Available at: https://www.fma.gv.at/en/cross-sectoral-topics/markets-in-crypto-assets-regulation-micar/roadmap-for-crypto-asset-service-providers-casps/

months long ending 30th June 2025.[223] Interestingly, the implementation Decree has provided the appointed authorities (i.e. the competent authorities being the DNB and the AFM) to impose enforcement measures (e.g. fines and orders to penalty) when facing non-compliance cases, in accordance with Article 111, CHAPTER III of Title VII of MiCAR.

**In the European Union**, one of the jurisdictions with the highest number of crypto-assets companies and at some point, a consolidated market that has for years triggered the attention of the strengthening of the legal regulation in place is **Lithuania**, reaching currently the number of ***540 registered crypto-assets companies***.[224] The responsible competent authority will be the "Bank of Lithuania" and as we anticipated the different paths and speed of implementing the MiCAR, in such case Lithuania provides another example where the draft laws have been so far considered *to not apply at all during the transitional period* in Lithuania and to start without delay the implementation of the MiCAR and its requirements thereof. As explained by the "Bank of Lithuania" the reasoning of such proposal is based on the mitigation of risks related to money laundering and terrorist financing.[225]

The considered uncertainties prior-MiCAR arising from the fragmentation of the regulatory frameworks among the Member States related to countries that have already been engaged in introducing regulation and those that have not, which will also reflect in the implementation

---

[223] Nagelkerke, F., Van der Grint, G., (2024), *"**Draft Decree implementing MiCAR and TFR published for consultation",*** posted in cryptocurrency, Crypto-Assets, Digital finance, DLT, DNB/AFM, The Netherlands. Publication on the "NORTON ROSE FULBRIGHT", available at: https://www.regulationtomorrow.com/the-netherlands/crypto-assets-the-netherlands/draft-decree-implementing-micar-and-tfr-published-for-consultation/

[224] Bank of Lithuania (LIETUVOS BANKAS), (2023), "*Lithuanian authorities: requirements for crypto-asset companies must be tightened immediately*", available at: https://www.lb.lt/en/news/lithuanian-authorities-requirements-for-crypto-asset-companies-must-be-tightened-immediately.

[225] *Ibid.*

phase of MiCAR. Countries such as the case of Malta, which introduced the "Virtual Financial Assets Act" (VFA Act) in 2018 governing crypto-assets and the "Malta Financial Services Authority" (MFSA) actions in issuing rulebooks incorporating CASPs is making it easier for entities operating under such regulation to be MiCAR-compliant, considering their business models and resources in place *for the self-assessment procedures* regarding the technicalities of the crypto-assets and related services they provide or want to provide in the future.

## 2. The Power of the Implementing Level 2 and 3 Measures

When all the relevant matters under MiCAR were analyzed and extensively assessed we observed that many of the relevant matters (such as the authorization, the trade transparency, the classification, the notification requirements, the management of conflicts of interest, the complaint handling procedures, the business continuity requirements, the reverse solicitation and much more) for the issuers and the CASPs, were accompanied by the importance of measures on Level 2 and 3 to be developed before the timeline established for the regime to become fully applicable.[226] Not to forget is the fact that feedback is expected from the experts of the crypto-asset industry. All the market participants and stakeholders remain concerned about the creation of new costs resulting from the provisions considered in the draft RTSs and ITSs developed by ESMA but ESMA intervenes to explain that there is no creation of new costs besides what arises from the MiCAR obligations, being Level 1 obligations.

---

[226] See LOYENS & LOEFF (2023), *"Crypto-assets regulation: where do we stand with MiCAR?"*, November, available at: https://www.loyensloeff.com/insights/news--events/news/crypto-assets-regulation-where-do-we-stand-with-micar/ and see also Zetzsche, D, A., Buckley, R, P., Arner, D, W., Van. Ek, M., (2023), "*Remaining regulatory challenges in digital finance and crypto-assets after MiCA",* publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. Paper No. 23-27, 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)740083

During 2024 the European Supervisory Authorities (ESAs), being the ESMA in collaboration with EBA and EIOPA, will play a crucial role in demonstrating the good use made of the extensive implementing powers that MiCAR has granted to them. Market participants and most of their difficulties related to uncertainties about the new regime will mostly depend on the expertise of the ESAs' exploitive capacity of the conferred powers by MiCAR and the resulting work employed by the NCAs.

If we focus on the **second consultation package** published by ESMA on October 2023 we can abstract the advancement of the work and its implied consequences on the implementation of MiCAR. The following has been reached so far:

(1) Based on Article 6 (12), 19(11), 51(15), and 66(6) of MiCAR: The developed RTS by ESMA requires CASPs to report on **sustainability** conforming with the rules under the "Sustainable Disclosure Regulation" (SDR) and "Corporate Sustainability Reporting Directive" (CSRD).[227]

*(2)* Based on Article 68 (10)(a) of MiCAR: Here ESMA identifies the necessity of the **business continuity requirements** to better impact the maintenance of orderly markets by limiting the immoderate clients' losses in case of disruptions. ESMA has a belief that explores both the "*precedents for business continuity found in the relevant MiFID II RTS"* and identifies space for clarifications in addressing the new risks related to crypto-assets. As a result, CASPs are obliged to comply with the new "Digital Operations Resilience Act" (DORA).[228]

---

[227] See ESMA's 2nd Consultation Paper (2023), "Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper", October 5th, ESMA75-453128700-438, available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA75-453128700-438_MiCA_Consultation_Paper_2nd_package.pdf

[228] *Ibid.*

(3) Grounded on Article 76(16) point(a) that mandates the ESMA to develop a trade transparency RTS, ESMA when assessing the pre-trade transparency requirements provides a comparison and finds similarities between the principals of MiFIR and MiCAR but accentuates the fact that MiCAR differently from MiFIR "does not include any exemption for specific types of orders or trading conditions". At this point, ESMA however proposes in its draft RTS to evaluate the transparency requirements based on "the different types of trading systems commonly used for the trading of crypto-assets". Moreover, the disclosure of orders from the crypto-assets trading platforms should be done "as close to real-time as possible" and such trading platforms are required by ESMA to disaggregate for each traded crypto-asset the "pre-and-post-trade" relevant data.[229]

(4) Grounded on Articles 6(10), 19(9) and 51(9) of MiCAR. ESMA has drafted ITS in providing standard forms and templates regarding the content of the White Paper. Once again is emphasized the investors' protection through the opportunity to have access and be informed comprehensively about the characteristics and risks of the crypto-assets they aim to invest in. Moreover, "[…] white papers should be made available in a machine-readable format".[230]

(5) Regarding Article 68(9) and (10) of MiCAR, "RTS on the data necessary for the classification of the white papers", interesting to notice is how ESMA aims to reach the point of the descriptive information to be "standardized and comparable" in order to ease the work of the NCAs that are responsible for assessing the correctness of the notified crypto-asset to be considered in the scope of MiCAR and the further correct classification in the category of crypto-assets covered by MiCAR.

Other developed RTSs relate to the "RTS on content and format of order book records", "RTS on record-keeping by crypto-asset service providers", regarding Article 109(8) of MiCAR, and

---

[229] *Ibid.*

[230] On this matter ESMA has individuated the "iXBRL" as a considerable machine-readable format that would best meet the legal requirements and policy objectives set out in MiCAR.

other developed ITS relate to the "ITS on technical means for appropriate public disclosure of inside information" regarding Article 88(4) of MiCAR.

The 3rd, being the final consultation package is expected to be published in the Q1 of 2024 as also anticipated in the other parts of this work, which will contain the *much-debated aspects of reverse solicitation and the qualification of crypto-assets as financial instruments.*

Title VII of MiCAR, CHAPTER I to V, and Articles 93 to 138 extensively identify and detail all the power conferred to the competent authorities, EBA, and ESMA. EBA is immersed in inquiring, inspecting, investigating, and imposing supervisory measures, and is included in many other issues and circumstances regarding significant ARTs and significant EMTs. EBA has so far published the 1st set of "Consultation Papers" (CPs), and the one relating to Article 18(6) and (7) of MiCAR, in July 2023. Different from ESMA in such CP, EBA performs a cost-benefit analysis and states that regarding *the RTS and ITS on information for the authorization* process for the issuers of ARTs in such case, some costs and benefits will arise. See (**Table 1: 'Costs and Benefits of the RTS on Information for Authorization'**) for ARTs.[231]

***Table 1: 'Costs and Benefits of the RTS on Information for Authorization'***

Table 1. Costs and benefits of the RTS on information for authorisation

| Stakeholders | Costs | Benefits |
|---|---|---|
| Issuers of ARTs | Need to explicitly tackle the ML/TF risk in the programme of operations | Possibility of tackling the ML/TF risk within the programme of operations, even when issuer not under AMLD. |
| Competent authorities | Resources needed to assess detailed applications | Operational efficiency, due to ensuring that the completeness of the file is assessed first, including the necessary level of detail of information |

***Source 9: European Banking Authority (EBA), 2023; (accessed: December 2023)***

[231] See EBA CP (2023), *"CONSULTATION PAPER ON DRAFT RTS AND ITS ON INFORMATION FOR APPLICATIONS FOR AUTHORISATION TO OFFER TO THE PUBLIC OR TO SEEK ADMISSION TO TRADING OF ASSETREFERENCED TOKENS"*, EBA/CP/2023/15, available at: https://www.eba.europa.eu/publications-and-media/events/consultation-information-assessment-proposed-acquisition-qualifying

The 2nd set of consultation papers was published in October 2023 and among other mandates, the one that covers *the internal governance arrangements for issuers of ARTs* is a joint CP issued by ESMA and EBA.[232] The 3rd set of CPs was issued in November 2023 and covers a lot more mandates among which the liquidity requirements of the reserve of assets.[233] The 4th consultation paper was issued on December 2023[234] and it remains in charge of the publication of another consultation paper covering the redemption plans.

# 3. A Critical Point of View and Further Considerations

The design of MiCAR is that of being a gap-filler in the EU financial markets legislation and it indeed addresses all the challenges that had remained outside the perimeter of the existing financial legislation and has, in its most considerable way reached the design of a harmonious framework covering all the new risks that the centralized provision of crypto-assets had posed to the crypto-assets ecosystem and broadly to the financial system. However, the fact of being positioned with a gap-filling design, the excluded parts from MiCAR do not prevent the linkage with the existing EU financial law that prevails in some cases (e.g. the case when the crypto-assets under MiCAR fulfilling the definition of e-money will instead be treated under the

[232] EBA (2023), *"Consultation on draft Guidelines on internal governance arrangements for issuers of ARTs under MiCAR",* EBA/CP/2023/23, available at: https://www.eba.europa.eu/publications-and-media/events/consultation-draft-guidelines-internal-governance-arrangements

[233] The set of the consultations papers is available at: https://www.eba.europa.eu/publications-and-media/consultations?text=&topic=209

[234] Article 32(5) of MiCAR and see EBA (2023). *"Draft Regulatory Technical Standards specifying the requirements for policies and procedures on conflicts of interest for issuers of asset-referenced tokens under Article 32(5) of Regulation (EU) 2023/1114",* available at: https://www.eba.europa.eu/publications-and-media/events/consultation-draft-rts-requirements-policies-and-procedures-conflicts

EMD[235] or other delineation challenges rising between the scope of MiCAR and the regulation covering the technicalities related to the "financial instruments" or "transferable securities") and requires an assessment not only of MiCAR but also of the concerned EU existing regulation.

With the above consideration, we cannot neglect some of the aspects that MiCAR has left outside its scope and that for many players of digital finance pose some further risks and it is this part where MiCAR is also welcomed with a critical eye.

We already mentioned that MiCAR does not cover *the activity of crypto-lending, borrowing, and crypto-staking and the crypto-lending platforms* (e.g. Voyager and Celsius). When listing all the crypto-asset services covered by MiCAR in Article 3(16), it explicitly excludes such activities. MiCAR leaves outside its scope those crypto-assets such as Bitcoin but argues that in cases where there is no identifiable issuer,[236] it does not miss the chance to cover the CASPs providing services[237] related to such crypto-assets. However, making use of Article 142(1) and (2) of MiCAR regarding the long journey ahead, we find stated that << "*By 30 December 2024, the Commission shall present a report to the European Parliament and the Council on the latest developments concerning crypto-assets"*>> and such report is required to contain ***<<"an assessment of the necessity and feasibility of regulating lending and borrowing of crypto-assets">>.***

Moreover, MiCAR does not cover the Decentralized Finance (DeFi)[238] and the 'fully decentralized services' that are currently developing risks, and a paper issued by ESMA considered such aspects to impact a future review of the MiCA Regulation. It is important to note that "DeFi" is not a legal term, but it refers to the disintermediation, blockchains being

---

[235] Zetzsche, D., Sinning, J., (2024) *"The EU Approach to Regulating Digital Currencies",* Law and Contemporary Problems, Vol.87, No.2, 2024. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4707830#

[236] See Recital 22 of MiCAR

[237] As listed in Article 3 (16) of MiCAR

[238] "DeFi relies on technology, in particular distributed ledger technologies (DLT) including blockchain and smart contracts, which replaces human-based functions and services".

part of the DLT, smart contracts[239] (being *"self-executing pieces of codes that fulfill the terms and conditions of a transaction in an automated manner"*), decentralization, and financial services provided in an open and permissionless way.[240]

What about considering a point of view that leads us to the case of a single crypto-asset platform offering at the same time services in a centralized and decentralized manner? The answer could not be immediate and as a starting point a full assessment of what the "fully decentralized manner" represents is needed, and of the challenges represented thereof. A second point is to identify the 'fully decentralized' service and the centralized one and then emerge the questions of how to proceed to treat them separately and how treating them separately could pose further challenges.

*Such cases leave us with only one correct answer, which is the need to assess each and every situation on a case-by-case basis at all times.*

---

[239] For further reading see ESMA (2023*), "Decentralised Finance: A categorisation of smart contracts",* October. Available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA5020852710183351_TRV_Article_Decentralised_Finance_A_Categorisation_of_Smart_Contracts.pdf

[240] See Zetzsche, D, A., Buckley, R, P., Arner, D, W., Van. Ek, M., (2023), "*Remaining regulatory challenges in digital finance and crypto-assets after MiCA",* publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg. Paper No. 23-27, 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)740083

and see also: ESMA (2023), *"Decentralised Finance in the EU: Developments and risks"*, October. Available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-20852710183349_TRV_Article_Decentralised_Finance_in_the_EU_Developments_and_Risks.pdf

# CONCLUSIONS

The epicenter of this work was the unveiling of an answer, comprehensive enough to cover and analyze the turning point for the crypto-assets market in the European Union, presented by the *Markets in Crypto-Assets Regulation (MiCAR)*, which entered into force at the end of the June 2023 and positioned the European Union as the very first jurisdiction in the world to introduce a solid regulatory framework aiming to harmonize approaches to address the presented crypto industry challenges.

The foregoing work initially aimed to outline some important market events which led to the entrance of the crypto-assets market into a very particular phase, described as *"crypto-winter",* highlighting the reasoning behind the necessary attention to overcome the fragmentation of the regulation. Some of the attainable legislative responses were assessed, coming from the ongoing work of some supranational bodies. It is shown that the information asymmetry in the crypto-asset sector, the misconduct of crypto-asset business models, and the addressing of many risks not based on common principles were an obstacle to the integrity of the market.

This work explored the gap-filling design of MiCAR and its complementary effect relating to the existing EU financial regulation, going through all the elements covered by this regulation and its provided classification for Crypto-Assets. It was shown that implementing Level 2 and 3 measures will extensively impact the operations of existing market participants (i.e. the issuers of CAs and CASPs).

What is left behind is what concerns the future, meaning that the far-reaching implications of MiCAR involving the existing corpus of the EU financial regulation and the present interpretative issues will add to future challenges posed by what is not covered by MiCAR (i.e. crypto-lending and crypto- borrowing) with an emphasis on the Decentralized Finance (DeFi). However, this new regulation is looking into the future and is remaining open to adjust to new technological developments.

# BIBLIOGRAPHY


ABATE G., BRANZOLI N., GALLO R., (2023), ***"Crypto-asset markets: structure, stress episodes in 2022 and policy considerations",*** June. **Bank of Italy,** Occasional Papers n.783, June 2023. Available at: https://www.bancaditalia.it/pubblicazioni/qef/2023-0783/QEF_783_23.pdf

**AUSTRIAN FINANCIAL MARKET AUTHORITY (FMA),** (2024). Available at: https://www.fma.gv.at/en/cross-sectoral-topics/markets-in-crypto-assets-regulation-micar/roadmap-for-crypto-asset-service-providers-casps/

Bank of Lithuania (LIETUVOS BANKAS), (2023), **"*Lithuanian authorities: requirements for crypto-asset companies must be tightened immediately*"**, available at: https://www.lb.lt/en/news/lithuanian-authorities-requirements-for-crypto-asset-companies-must-be-tightened-immediately.

BASEL COMMITTEE ON BANKING SUPERVISION (BCBS), (2022), **"*Prudential Treatment of Crypto-asset Exposures"*,** December. Available at: file:///C:/Users/39329/Downloads/BCBS%20December%202022.pdf

CMS, Member Firm for Netherlands, Netherlands (2023): ***"Asset-referenced tokens (ARTs) in detail"***; *"**EU regulation MICAR now regulates asset-referenced tokens"*,** August. Word Law Group. Available at: https://www.theworldlawgroup.com/news/asset-referenced-tokens-arts-in-detail

EUROPEAN BANKING AUTHORITY (EBA), (2023), ***"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"***, September 2023. Available at: https://www.eba.europa.eu/publications-and-media/press-releases/eba-responds-european-commissions-call-advice-significance

EBA CP, (2023), ***"Consultation Paper on Draft RTS and ITS on Information for Applications for Authorisation to Offer to the Public or to Seek Admission to Trading of Asset-Referenced Tokens"***, EBA/CP/2023/15, available at: https://www.eba.europa.eu/publications-and-media/events/consultation-information-assessment-proposed-acquisition-qualifying

EBA, (2023), ***"Consultation on draft Guidelines on internal governance arrangements for issuers of ARTs under MiCAR",*** EBA/CP/2023/23, available at: https://www.eba.europa.eu/publications-and-media/events/consultation-draft-guidelines-internal-governance-arrangements

EBA, (2023). ***"Draft Regulatory Technical Standards specifying the requirements for policies and procedures on conflicts of interest for issuers of asset-referenced tokens under Article 32(5) of Regulation (EU) 2023/1114",*** available at: https://www.eba.europa.eu/publications-and-media/events/consultation-draft-rts-requirements-policies-and-procedures-conflicts

EUROPEAN SECURITIES AND MARKETS AUTHORITY (ESMA), (2023), "***ESMA clarifies timeline for MiCA and encourages market participants and NCAs to start preparing for the transition****",* October. ESMA74-449133380-441. Available at: https://www.esma.europa.eu/press-news/esma-news/esma-encourages-preparations-smooth-transition-mica

ESMA's 2nd Consultation Paper, (2023), ***"Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) - second consultation paper"*,** October 5th, ESMA75-453128700-438, available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA75-453128700-438_MiCA_Consultation_Paper_2nd_package.pdf

ESMA, (2023*), **"Decentralised Finance: A categorization of smart contracts",*** October. Available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-2085271018-

ESMA, (2023), ***"Decentralised Finance in the EU: Developments and risks"***, October. Available at: https://www.esma.europa.eu/sites/default/files/2023-10/ESMA50-20852710183349_TRV_Article_Decentralised_Finance_in_the_EU_Developments_and_Risks.pdf

EUROPEAN CENTRAL BANK (ECB), (2019), ***"Understanding the crypto-asset phenomenon, its risks and measurement issues"***, May, electronically available at: https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201905_03~c83aeaa44c.en.html

EUROPEAN CENTRAL BANK (ECB), (2023), **"*Progress on the Investigation phase of a digital euro"-fourth report***, available at: https://www.ecb.europa.eu/paym/intro/news/html/ecb.mipnews230714.en.html

EUROPEAN COMMISSION: Directorate-General for Financial Stability, Financial Services, and Capital Markets Union, ***"Digital Finance Package"***, 24 September 2020.

EUROPEAN COMMISSION, (2023), ***"Supervision of crypto-assets – criteria, procedures & fees",*** Draft delegated regulation- Ares (2023)7581975.

FILIPPO AND ANNUNZIATA, ANNUNZIATA F., (2023), **"*The Licensing Rules in MiCA*"**, February. ***"Fintech Regulation and the Licensing Principle"****,* Edited by: Vicente, D, P., Duarte, D, P., Granadeiro, C. Centro de Investigaçao de direito privado, ***E*UROPEAN BANKING INSTITUTE**, (Frankfurt, 2023), Bocconi Legal Studies Research Paper No. 4346795, Available at SSRN: https://ssrn.com/abstract=4346795 or http://dx.doi.org/10.2139/ssrn.4346795

FILIPPO AND ANNUNZIATA, ANNUNZIATA F., (2023). **"*An Overview of the Markets in Crypto-Assets Regulation (MiCAR)".*** December. **EUROPEAN BANKING INSTITUTE**, Working Paper Series no. 158, Available at SSRN: https://ssrn.com/abstract=4660379 or http://dx.doi.org/10.2139/ssrn.4660379

FINANCIAL STABILITY BOARD, (2020) report, **"*Regulation, Supervision and Oversight of 'Global Stablecoin' Arrangements",*** available at: https://www.fsb.org/2020/10/regulation-supervision-and-oversight-of-global-stablecoin-arrangements/

FINANCIAL STABILITY BOARD (FSB), (2023), "***The Financial Stability Implications of Multifunction Crypto-asset Intermediaries"***, November, available at: https://www.fsb.org/2023/11/the-financial-stability-implications-of-multifunction-crypto-asset-intermediaries/

FINANCIAL STABILITY BOARD (FSB), (2023), ***"High-level Recommendations for the Regulation, Supervision, and Oversight of Global Stablecoin Arrangements: Final report",*** July, available at: https://www.fsb.org/2023/07/high-level-recommendations-for-the-regulation-supervision-and-oversight-of-global-stablecoin-arrangements-final-report/

GESLEY J., (2023) **"European Union: '*Commission Publishes Proposal for Digital Euro'*.** [Web Page] Retrieved from the Library of Congress, available at:

https://www.loc.gov/item/global-legal-monitor/2023-07-26/european-union-commission-publishes-proposal-for-digital-euro/.

GIBBS T., (2023), **"*Evolution of Legal and Regulatory Responses to Money Laundering Risks Related to Virtual Assets: The Examples of the European Union and the US*"**, in Rébé, N. (ed.) Cyber Laundering: International Policies and Practices. World Scientific Publishing Europe Limited, pp. 197-233. Available at: https://www.worldscientific.com/doi/abs/10.1142/9781800612839_0008

94th INTERNATIONAL SCIENTIFIC CONFERENCE on ECONOMIC AND SOCIAL DEVELOPMENT, (2023), ***"The Dark Side of Management and Governance: power, ideology, tensions, and destructive traits"*** (XI. OFEL) – Dubrovnik, 31 March-1 April 2023. Available at: https://www.esd-conference.com/upload/book_of_abstracts/Book_of_Abstracts_esdOFEL2023_Online.pdf

KOKORIN I., (2023), ***"The anatomy of crypto failures and investor protection under MiCAR"***, Capital Markets Law Journal, 2023, Vol. 18, No. 4, September. Available at SSRN: https://ssrn.com/abstract=4555081

LIU J., MAKAROV I., SCHOAR A., (2023), **"*Anatomy of a Run: The Terra Luna Crash*",** April. MIT Sloan Research Paper No. 6847-23, Available at SSRN: https://ssrn.com/abstract=4416677 or http://dx.doi.org/10.2139/ssrn.4416677

LOYENS & LOEFF, (2023), ***"Crypto-assets regulation: where do we stand with MiCAR?"***, November, available at: https://www.loyensloeff.com/insights/news--events/news/crypto-assets-regulation-where-do-we-stand-with-micar/

MK FINTECH PARTNERS Malta LTD, (2023), **"*MiCAR is Approaching Enforceability Next Year, as Industry Stakeholders Prepare"***, December. Available at: https://mkfintechpartners.com/2023/12/04/micar-implementation-november2023-update/

NAGELKERKE F., VAN der GRINT G., (2024), *"**Draft Decree implementing MiCAR and TFR published for consultation",*** posted in cryptocurrency, Crypto-Assets, Digital finance, DLT, DNB/AFM, The Netherlands. Publication on the "NORTON ROSE FULBRIGHT", available at: https://www.regulationtomorrow.com/the-netherlands/crypto-assets-the-netherlands/draft-decree-implementing-micar-and-tfr-published-for-consultation/

**PwC, (2023), "PwC Global Crypto Regulation Report"** (updated from that of 19 December 2022), (2023). Available at: https://www.pwc.com/gx/en/new-ventures/cryptocurrency-assets/pwc-global-crypto-regulation-report-2023.pdf

STAM H., MEINERT M., **"*German regulatory framework for market participant in crypto assets",*** publication for **AIMA JOURNAL EDITION 129**, Q1 2022, p.66-70, available at: https://www.aima.org/journal/aima-journal---edition-129.html

STATISTA, (2022), **"*Number of Money Purchase Transactions in the European Union from 2000 to 2021"***, July 2022.

VASPnet, (2023), December.

WRONKA CH., (2023), ***"Crypto-asset activities and markets in the European Union: issues, challenges and considerations for regulation, supervision and oversight",*** March. Journal of Banking Regulation. Available at: https://doi.org/10.1057/s41261-023-00217-8

XREG CONSULTING LTD, (2023), "***How crypto regulation will evolve in 2024:*** *An overview of how this year's critical regulatory and geopolitical developments will impact policymakers, regulators and crypto businesses*", January. Electronically available at: https://www.xreg.consulting/articles/how-crypto-regulation-will-evolve-in-2024

ZETZSCHE, D, A., BUCKLE, R, P., ARNER, D, W., VAN. Ek, M., (2023), **"*Remaining regulatory challenges in digital finance and crypto-assets after MiCA"***, a publication for the Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific, and Quality of Life Policies, European Parliament, Luxembourg. Paper No. 23-27, 2023, available at: https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)740083

ZETZSCHE D., SINNING J., (2024) ***"The EU Approach to Regulating Digital Currencies"***, Law and Contemporary Problems, Vol.87, No.2, 2024. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4707830#