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AN OVERVIEW OF THE MARKETS IN CRYPTO-ASSETS REGULATION (MiCAR).

ABSTRACT

The EU has enacted its first, structured and complete legislation on crypto-assets, substantiated in the *Markets in Crypto Assets Regulation*. With this Regulation, which constitutes a new, large pillar of the Union's financial legislation, the EU finds itself in a unique position, also on a geopolitical level, as it now constitutes the sole multi-state geographic area endowed with a homogeneous and uniform discipline (as directly applicable in the Member States) on markets in crypto-assets. This paper wishes to provide an overall illustration of the structure of the MiCA Regulation and its rational, highlighting some its major interpretative issues, including taxonomy, definitions, and interplay with National legislations, also with the aim of stimulating further research.

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SUMMARY: 1. Crypto-assets: the European Union's response to a global phenomenon. 1.1. From the market... to regulation - 2. The objectives of the MiCAR. - 2.1. Some reflections on what the MiCAR does not regulate. 2.2. Taxonomy and objective scope of the MiCAR. 2.3. The "internal" boundaries of the MiCAR. - 3. The subjects governed by the Regulation. - The special regime for ARTs and EMTs issuers, between transparency and prudential supervision - 4.1. Specific obligations of issuers of ARTs. - 4.2. Reserve of assets and own funds. - 4.3. Issuers of significant ARTs. - 4.4. Issuers of EMTs (significant and non-significant) - 5. Crypto-asset service providers and the so-called 'mifidisation' of the MiCAR. - 5.1. The rules of conduct. - 6. MiCAR and market abuse. - 7. Concluding remarks.

1. Much has been written and said, in recent times, on the innovations induced, in various spheres, and in particular in the financial sector, by IT development and new technologies, and on the ethical, social, economic and legal issues they raise. In financial markets (understood in the broadest sense), full-bodied technological innovations - generically, and quite roughly, identified with the very broad term *Fintech* ([1]) - manifest themselves in

([1]) The literature is extensive. See *inter alia* R.P. BUCKLEY, D. W. ARNER, D.A. ZETZSCHE, *FinTech,* Cambridge University Press, 2023; C. RUOF, *Regulating Financial Innovation. Fintech and the Information Deficit*, EBI Series, Palgrave, 2023; I. MOOSA, *Fintech,* Edward Elgar, 2022; J. MADIR, *Fintech*, 2nd ed., Edward Elgar, 2020; V. LEMMA, *Fintech Regulation*, Palgrave, 2020; T. LYNN, J.G. MOONEY, P. ROSATI, M. CUMMINS (eds.), *Disrupting Finance: FinTech and Strategy in the 21st Century* (Palgrave Studies in Digital Business & Enabling Technologies, Palgrave Mc. Millan, 2018; R. LENER, Fintech. Law, technology and finance, Rome, 2018.

multiple and changing forms and structures. In a panorama of great complexity, two specific phenomena have recently polarised the debate on the relationship between technology and markets: on the one hand, artificial intelligence ([2]) and on the other, *Distributed Ledger Technology* (DLT), or *Blockchain* ([3]).

Leaving aside the first phenomenon - soon to be subject to a robust legislative intervention, of a horizontal nature, in Europe ([4]) - in this paper we focus on the regime recently introduced in the Union concerning crypto-assets: a new legislation enacted a few years after the development - at times impetuous, even irrational - of a global crypto market, and that is now, at least in Europe, being brought back into the meshes of a regulatory approach marked by the features of (more traditional) financial regulation.

The purpose of these notes is to provide an overall illustration of the structure of the MiCA Regulation, highlighting some of what we believe to be its major interpretative issues, without, however, any claim to completeness. The complexity of the subject matter and the vastness of the fields affected by the Regulation, coupled with the very substantial Level 2 legislation to be adopted, certainly do not allow us to address all possible issues. The aim,

([2]) N. REMOLINA - A. GURREA-MARTINEZ, *Artificial Intelligence in Finance: Challenges, Opportunities and Regulatory Developments*, Cheltenham-Northampton, 2023.

([3]) On the resulting shift of regulatory paradigm see, also for further references, C. RUOF, *Regulating Financial Innovation: Fintech and the Information Deficit*, London, 2023.

([4]) For an updated exposition of the proposal in its various versions see G. PROIETTI, *Le definizioni di intelligenza artificiale nelle proposte legislative europee. Un'analisi critica*, in *Dialoghi dir. ec.*, 2023, 1.

therefore, is to provide a not entirely unqualified "guide to mariners", also to indicate further possible avenues of research.

1.1. In everyday language, and given the outspread of the phenomenon, colloquial terms such as 'cryptocurrencies, digital currencies, bitcoin', etc., are now widely used. However, in many legal systems, legislators, supervisory authorities, and even supranational bodies are still addressing the problems and challenges posed by crypto-assets with an attempt of hopefully providing a response that ought to be as coordinated as possible, and even based on common principles ([5]). The EU, less hesitant, is now moving ahead, with a regulation designed to be comprehensive and organic.

The resounding (not entirely unexpected), failures that occurred between 2021 and 2023 showed the fragility of a market that - in stark contrast to the vaunted autonomy of technology (the well-known adage, coined by Lawrence Lessing in 1999, *code is law* ([6])) and the alleged ability of markets to regulate themselves (a recurring blunder in the historical dynamics of financial markets) - is unable to develop in an orderly manner absent a structured robust, regulatory and supervisory framework: the expression

([5]) See FINANCIAL STABILITY BOARD (FSB), *High-level Recommendations for the Regulation, Supervision and Oversight of Crypto* Assets *and Markets Final report,* 17 July 2023; BANK FOR INTERNATIONAL SETTLEMENTS (BIS), *The crypto ecosystem: key elements and risks Report submitted to the G20 Finance Ministers and Central Bank Governors*, July 2023. Also recent are the recommendations of the INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSION (IOSCO), *Policy Recommendations for Crypto and Digital Asset Markets - Final Report*, 16 November 2023.

([6]) L. LESSIG, *Code: And Other Laws of Cyberspace, Version 2.0*, New York, 2006.

'*crypto-winter*' ([7]) was coined to refer to a particularly dark phase in the development of these markets, after which the only possible solution is a legislative response that is as decisive and coordinated as possible, possibly even at a transnational level.
The EU has now enacted its first, structured and complete legislation on crypto-assets, substantiated in the *Markets in Crypto Assets Regulation* ([8]) (MiCAR or also MiCA, according to the acronyms now widespread in the literature) ([9]). With this Regulation,

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([7]) D.A. ZETZSCHE - R. BUCKLEY - D. ARNER - M. Van Ek, *Remaining Regulatory Challenges in Digital Finance and Crypto-Assets after MiCA*, Committee on Economic and Monetary Affairs (ECON), Paper No. 23-27, 2023, available at https://ssrn.com/abstract=4487516.

([8]) 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.

([9]) For an initial examination, P. MAUME, *The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?*, in *ECFR*, 2023, 265; T. VAN DER LINDEN - T. SHIRAZI, *Markets in crypto-assets regulation: Does it provide legal certainty and increase adoption of crypto-assets?*, in *Financial Innovation*, 2023, 22; R. LENER, *Crypto-assets and crypto-currencies in the light of the latest EU guidelines,* in *Giur. Comm*, 2023, 376; S. L. FURNARI - R. A. LENER, *Contributo alla Qualificazione Giuridica dell'Offerta al Pubblico di Utility Token (Anche*) alla Luce della Proposta di Regolamento Europeo sulle Cripto-Attività, in *Bocconi Legal Papers* 63, 2023; N. CIOCCA, *Servizi di custodia, negoziazione e regolamento di* cripto-tività, in *Oss. dir. civ. comm*, 2022, 79; S. CAPACCIOLI - M.T. GIORDANO (eds.), *Crypto-assets: MiCA Regulation and DLT Pilot Regime. Analisi ragionata su token, stablecoin, CASP,* Milan, 2023,193 ff; T. TOMCZAK, Crypto-assets *and crypto-assets' subcategories under MiCA Regulation*, in *Capital Markets Law Journal*, 2022, 365C. GORTSOS, *The Commission's 2020 Proposal for a Markets in Crypto-Assets Regulation ('MiCAR'): A Brief Introductory Overview (May 7, 2021*), available at https://ssrn.com/abstract=3842824. A more specific analysis, focused on access to the activity, see M. T. PARACAMPO, *I prestatori di servizi su cripto-tività. Tra mifidizzazione della MICA e tokenizzazione della Mifid*, Turin, 2023. On the 'shortcomings' of the Regulation, D. A. Zetzsche -

which constitutes a new, large pillar of the Union's financial legislation, the EU finds itself in a unique position, also on a geopolitical level, as it now constitutes the sole multi-state geographic area endowed with a homogeneous and uniform discipline (as directly applicable in the Member States) on markets in crypto-assets.

In this evolution, one can read, on the one hand, the attention and care that the EU institutions have devoted to a phenomenon that risks seriously affecting the interests, and therefore the protection, of users and consumers - defined, in MiCAR, by the term 'retail holders' ([10]) - as well as financial stability itself; on the other hand, the Union's intention to become the *standard-setter* of the rules on crypto-assets at a global level, and to be at the forefront of their development, acting as a pole of attraction for operators in the sector: in short, a *Brussels effect* in crypto-assets markets.

It is therefore no coincidence that, unlike almost all other legislative texts that form the composite framework of EU financial legislation, the Regulation does not contain provisions that open up to cooperation, passporting or even to some kind of 'dialogue' with third countries: a clear, fundamental choice, which, together

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R. Buckley - D.W.Arner - M. Van Ek, *Remaining Regulatory Challenges in Digital Finance and Crypto-Assets after MiCA*, (fn. 7).

([10]) According to Article 3(1)(37), a 'retail holder' is defined as 'any natural person acting for purposes which are outside his trade, business, craft or profession'. Regardless of the definitions, MiCAR's notion poses delicate problems of coordination with consumer protection regulations: see M. MAUGERI, *Proposal for a MiCA (Markets in Crypto-Assets) Regulation and Consumer Protection in Distance Marketing*, in *ODCC*, 2022, 229 ff.; F. DELFINI, *Consumer Protection Disciplines and Coordination with the MiCA Proposal*, ibid, 269 ff.; P. Sirena, *La tutela del consumatore nella commercializzazione a distanza di cripto- attività*, ibid., 315.

with the speed of the legislative intervention (at least compared to other relevant jurisdictions, and even taking into account the timeframe - probably too long - for the entry into force of MiCAR, scheduled to 30.12.2014) certainly does not go unnoticed.

2. Why is it necessary (and not only appropriate) to regulate crypto-assets and their markets? ([11]). The question has been raised countless times, and this is not the place to re-frame the entire debate. However, in order to understand the reasons for the choices that moved the EU legislator, it might be useful to (very briefly) rewind the tape of history.

The birth of the crypto-asset phenomenon is famously traced back to the appearance of bitcoin in 2009, which, at the time, presented itself as a project that was not only innovative from a technological point of view, but also in terms of its aims and objectives: in the *white paper* published by the promoter of the technology- the now mythical Satoshi Nakamoto, of uncertain origins and, perhaps, even existence ([12]) - bitcoin was singled out as a project whose main objective was the disintermediation of official currencies, giving rise to a means of payment issued and managed in a completely decentralised manner. Hence, also, the

([11]) See, for a general, multifaceted approach, I. CHIU - G. DEIPENBROCK (eds.), *Routledge Handbook of Financial Technology and Law*, London, 2021.

([12]) In fact, it has not been possible to establish who Nakamoto was, whether this person actually existed, whether they were a group of interrelated persons, or in any case to obtain precise information on the identity of the developers of the bitcoin project. On the relationship between technology and the evolution of monetary instruments see R. MOTRONI, I *pagamenti non monetari nella finanza digitale europea. La prospettiva italiana*, Bari, 2023; F. MATTASSOGLIO, *Moneta e tecnologia. How artificial intelligence and DLT are transforming the monetary instrument*, Turin, 2022.

tendency to exhaust the entire phenomenon in that of the so-called '*crypto-currencies*', according to a perspective that is now completely blurred, given that the phenomenon itself is certainly not limited to 'tokenised' means or instruments of payment ([13]). Against the backdrop of an ideological message centred on the democratisation of global finance, the idea was that crypto-assets - not only bitcoin but all those emulating its design - would have freed the financial market from the burden and weight of intermediation, giving rise to much more efficient and less costly markets, without central authorities. This idea, accompanied by theorisations on *smart contracts,* which were initially entrusted with the 'thaumaturgical' mission of substituting law with computer codes, in essence vaticinated a free financial world, capable of self-regulating itself and achieving very high levels of efficiency, thanks to and by virtue of the use of distributed ledger technologies.

That utopia, however, soon turned out to be illusory, since, in the face of the impetuous development of these markets, in many regions of the world, risks and problems emerged that were not at all so different from those that characterise the more traditional financial industry: information opacity; protection of weak counterparties; asymmetries; market inefficiency and risks of manipulation; financial stability risks, even at a systemic level;

([13]) The term is however still used in the literature, even in recent contributions, and well shows the origin of the phenomenon: see the broad historical-economic perspective of M. LORENZINI - M. ZULBERTI - C. IMBROSCIANO (ed.), *Criptovalute. Profili storico-economici e giuridici*, Torni, 2023; adde M. PASSARETTA, *La valuta virtuale nel sistemai dei servizi di pagamento e di investimento*, Torino, 2023.

fraud and, as noted, the well-known risks related to money laundering (14). In fact, from the very beginning, market developments in a mostly deregulated environment were characterised by failures and even frauds. The attention of legislators and supervisory authorities was nonetheless particularly intense from the outset. The resounding defaults of the *crypto winter* (15), culminating in the failure of the 'FTX' *exchange* (16), were only the most obvious examples of a long series of pathological phenomena that, from the outset, should have prompted a regulatory response both in Europe and elsewhere.

The idea of moving towards a European regulation of markets in crypto-assets first appeared in Europe as part of the EU

(14) The EU legislator has also intervened on this point, through the approval of a special regulation linked to MiCAR: 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. It is not possible, due to the limits of this contribution, to give an account of the very extensive literature on this point, nor of the various regimes, both national and European, on the relationship between crypto-assets and anti-money laundering. On the progressive 'financialisation' of the regulation of crypto-assets see D.W. ARNER, D.A. ZETZSCHE, R. P. BUCKLEY, J.M. KIRKWOOD, *The Financialisation of Crypto*, EBI Working Paper, No. 148, available at https://ebi-europa.eu/publications/working-paper-series/.

(15) Aa. Vv., *Making it through the (crypto) winter: facts, figures and policy issues*, Quaderno Banca d'Italia, Mercati, infrastrutture e sistemi di pagamento, no. 23/2003, available at https://www.bancaditalia.it/pubblicazioni/mercati-infrastrutture-e-sistemi-di-pagamento/approfondimenti/2023-038/N.38-MISP.pdf.

(16) F. FUBINI, *Crollo di Ftx, è la fine delle criptovalute?*, in Corriere della Sera, 18 November 2022, available at https://www.corriere.it/economia/finanza/22_novembre_18/crollo-ftx-fine-criptovalute-8f48feb2-6716-11ed-b05a-06c1012dfe21.shtml.

Commission's ambitious *Digital Finance Strategy* project ([17]). In that context, on 24 September 2020, the Commission formulated the first proposal for the Regulation on markets in crypto-assets ([18]), to which two other seemingly 'minor', but equally important regulations are linked: on the one hand, the satellite proposal '*Pilot-Regime for DLT-based Market Infrastructures*', focused on enabling the use of distributed ledger technology in capital markets, and, on the other hand, the '*Digital Operational Resilience Act*' (so-called 'DORA'), aimed to provide digital operational 'robustness' for the financial sector ([19]). After an articulated debate, and - in the

([17]) See https://finance.ec.europa.eu/publications/digital-finance-package_en#digital.

([18]) Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-Assets, and amending Directive 2019/1937/EU' COM(2020) 593 final, on which see D. ZETZSCHE - F. ANNUNZIATA - D.W. ARNER - R.P. BUCKLEY, *The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy*, in *Capital Markets Law Journal*, 16, 2021, 206 ff.

([19]) Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU. For initial considerations, P. MAUME - F. KESPER, *The EU DLT Pilot Regime for Digital Assets*, in *European Company Law Journal*, 2023, 1; F. ANNUNZIATA - A.C. CHISARI - P.R. AMENDOLA, *DLT-Based Trading Venues and EU Capital Markets Legislation: State of the Art and Perspectives Under the DLT Pilot Regime*, in *Italian Law Journal*, 2023, 141; A. GENOVESE, *The circulation of securities on blockchain*, in *Riv. dir. comm.*, 2023, 197 ff; D.A. ZETZSCHE - J. WOXHOLTH, *The DLT sandbox under the Pilot-Regulation*, in 17 *Capital Markets Law Journal*, 17, 2022, 212 ff; J. MCCARTHY, *A Distributed ledger technology and financial market infrastructures: an EU pilot regulatory regime*, ibid., 288 ff; A. TINA, *Centralised, Decentralised Markets. Prospettive di inquadramento della DeFi nell'attuale orizzonte MiFID,* in *ODCC*, 2022, 41 ff.; F. MATTASOGLIO, *Le proposte europee in tema di crypto-assets e DLT. First evidence*

meantime - the approval of the DLT Pilot Regime and DORA Regulations, in a context shaken by resounding global market failures, the pandemic, and an unstable geopolitical environment, the final text of the MiCA Regulation was published in the Official Journal on 9 June 2023. As mentioned, it is intended to take full effect on 30 December 2024.

The reasons justifying this massive regulatory intervention from the European Union are all well described and set out in the Recitals, and clearly reflected in the body of the text: legal certainty, support to innovation, users' protection, market integrity, financial stability, risk mitigation also in terms of the transmission channels of monetary policy, and even protection of monetary sovereignty. A mix, in short, of macro- and micro-prudential objectives, but also of informational efficiency of markets and the protection of consumers. The reasons for which, today, it has been decided to regulate crypto-assets are, therefore, multiple, articulated, but strongly interconnected, in the awareness that it is not only a matter of managing and dealing with the risks involved, but also of not hindering the development of a technology that, to the contrary, may be the harbinger of developments in a positive sense.

Awareness of the multi-dimensionality of the phenomenon, and of its extreme complexity, are therefore at the heart of the MiCA Regulation: a regulatory text that stands out for the courage of its choices and the clarity of its intentions, in an international context that, by contrast, is generally still characterised, despite some

of regulation of the crypto world or attempt to tokenize the financial market (ignoring bitcoin)?, in *Riv. dir. bancario*, 2021, 413.

interesting national experiments (see *inter alia,* Malta, France, Singapore, Luxembourg, Germany ([20])) by many uncertainties as to *what* to do and *how*.

This is certainly not meant to conceal difficulties and problems. The MiCA Regulation is not free of shortcomings and uncertainties: one finds in it the typical *huge gaps* ([21]) that often characterise the texts that compose the galaxy of the Union's financial legislation; one can readily see the compromises, the short-term choices, the tendency to postpone, and to move further down the line the definitive solution to major issues (such as those that deal with "truly" decentralised finance). All of this, however, does not draw away the fact that MiCAR constitutes, as of today, the most complete, articulated and comprehensive discipline in the world for markets in crypto-assets, which gives rise to a system of rules far more advanced than the uncertain and casuistic approaches that characterise the very markets from which the phenomenon originated, starting with the United States, where there are still attempts to govern the phenomenon through a form of harsh, but stuttering, *regulation by enforcement*.

([20]) The national regimes that, in no particular order, have been introduced in some EU jurisdictions are destined to disappear with the entry into force of the MiCAR, once the *grandfathering* periods provided for therein have expired.

([21]) The expression (translated from the Italian "*grande lacuna*") is borrowed from the thought of Gino Gorla (1906-1992) who used it to point out the lack of reflections and studies on the 'dialogue' between the Supreme Courts and the legal professions, in the systems and systems of European legal history. See in this regard, also for a summary, M. D'ALBERTI, *Comparazione giuridica tra storia e esperienza*, in *Riv. it. sc. giur*., 2019, 67.

2.1. A preliminary remark is necessary, also in order to clear the field from any misunderstandings. The Regulation is not able to regulate *all* matters gravitating around the universe of crypto-assets, let alone new technologies.

Firstly, despite what, at first glance, one might gather, the MiCA Regulation *does not* regulate crypto-assets *as such,* but only their *markets*, i.e., the phenomena comprising their offer, negotiation and exchange, as well as the provision of services related to the foregoing ([22]). Nor does one find, in the MiCAR, a regulation of *smart contracts*, which constitute the instrument that enables the conclusion of transactions on DLT, and which represent, so to speak, the *lifeblood of* trading on these systems.[23]

([22]) On the civil law qualification of tokens, and on the closely related issue of the relationship between tokens and company law, see AA.VV., *Tokenisation of shares and token shares*, Consob, Quaderni di ricerca giuridica, no. 25, 2023; S. OMLOR, *Blockchain-Token im Zivilrecht,* in *Juristische Ausbildung*, 2023, 661 ff. Concerning Bitcoin, which presents quite peculiar traits, M. LEHMANN, *Who Owns Bitcoin: Private Law Facing the Blockchain, in Minnesota Journal of Law*, in *Science & Technology*, 21, 2020, 93 ff.

([23]) On the subject, *ex multis*, F. BASSAN - M. RABITTI, *Recenti evoluzioni dei contratti sulla blockchain. Dagli smart legal contracts ai 'contracts on chain'*, in *Riv. dir. banc.*, 2023, 561 ff.; GRECO, *Gli smart contract nel settore bancario e finanziario*, in GIORDANO R. et al. (ed.), *Il diritto nell'era digitale*, Milano, 2022, 189; FA. STAZI, *Smart Contracts in Comparative Law. A Western Perspective*, Springer, 2021; M. MAUGERI, *Smart Contracts e disciplina dei contratti*, Bologna, 2021; P. GALLO, *DLT, Blockchain e Smart Contract*, in *Diritto del Fintech*, edited by M. CIAN and C. SANDEI, Milan, 2020, 146; S. A. CERRATO, *Appunti su smart contract e diritto dei contratti*, in *BBTC*, 2020, 370; G. LEMME, *Gli "smart contracts" e le tre leggi della robotica*, in *AGE*, 2019, 129-152; I. Di SARZANA - F.M. NICOTRA, *Blockchain Law, Artificial Intelligence and IoT*, Milan, 2018, 90; M. RASKIN, *The Law and Legality of Smart Contracts,* in *Georgetown Law Technology Review*, 1:304, 2017, 306, available at https://ssrn.com/abstract=2959166; K. WERBACH - N. CORNELL, *Contracts Ex Machina,* in *Duke Law Journal*, 67:313, 2017, 102, available at https://ssrn.com/abstract=2936294.

The regulation of these matters is, therefore, left to national legislators, being, moreover, closely connected with topics that are mostly outside the competence of the European legislator: in particular, private law, contract law, private remedies, company law, or insolvency law, to name but a few. In this sense, MiCAR represents an (almost perfect) homologue, in the sphere under discussion, of the MiFID discipline and, not by chance, shows affinities with the latter in its very title (and acronym): both, in fact, aim to regulate not *products* but their relevant *markets*. Ultimately, just as one does not expect to find in MiFID a regulation of individual financial instruments as such – specifically, shares, bonds, participative financial instruments, units of collective investment undertakings, emission allowances, derivatives ([24]) etc. - similarly, one does not find a regulation of crypto-assets as such in MiCAR. As was already the case in the context of MiFID, this approach naturally runs the risk of leading to misalignments and fragmentations between national legislations, also accentuating - given the global nature of the phenomenon of crypto-assets - the problems connected with international law ([25]): these are, however, limits that, in truth, cut across almost all areas of

([24]) On these issues, in particular on derivatives, see E. CALLENS, Derivative *Contracts in EU Law: Never Mind the Definition (April 29, 2022),* in *Journal of Corporate Law Studies*, European Banking Institute Working Paper Series 2022 - no. 121, available at https://ssrn.com/abstract=4096694.

([25]) J. DRÖGEMÜLLER, *Blockchain-Netzwerke und Krypto-Token im Internationalen Privatrecht (Deutsches, Europäisches und Vergleichendes Wirtschaftsrecht)*, Baden-Baden, 2023; A. BONOMI - M. LEHMANN, *Blockchain and Private International Law*, Leiden, 2023; C. VILLATA, *The Regulation (EU) 2023/1114 on crypto-assets markets: first notes from the perspective of private international law*, in *Riv. Dir. intern. priv. e proc.,* 2023, 745.

financial regulation in the Union, and which should not come as a surprise, even if it is incumbent to point out the relative shortcomings.

At the same time, the MiCA Regulation is an experiment of considerable interest, not only because it aims to regulate a new market, which in fact has arisen from (or produced by, one might say) new technologies, but also because, in doing so, it makes use, in its various areas, of the vast array of concepts, notions, approaches and methods that can be found in the context of the broader EU financial discipline. Depending on the different matters at stake, one finds in MiCAR a kind of condensation of the main foundational texts of EU financial law, starting with those on credit institutions, investment services providers, market abuse, and several others. This leads to a true exercise of *cross-sectoral regulation* (albeit precipitated in a single area) that has no parallel in EU financial law ([26]). For instance, with regard to the *issuance of* crypto-assets and their offer on the market, the model followed by MiCAR is that of public offers and of the Prospectus Regulation, although adapted and simplified to take into account an already established market practice (the so-called *white paper*). As for the regime applicable to crypto-asset service providers, the most obvious reference model is, instead, MiFID, from which structures, notions, regulatory and supervisory approaches are directly imported.

([26]) Extensive literature has generally dealt with crypto-assets and financial regulation: see S. JOHNSTONE, *Rethinking the Regulation of Cryptoassets. Cryptographic Consensus Technology and the New Prospect*, Chelthenham-Northampton, 2021, 83; P. DE FILIPPI - A. WRIGHT, *Blockchain and the Law. The Rule of Code*, Harvard, 2018.

Regarding *trading platforms*, the model is once again MiFID (with respect to trading venues), which is combined under MiCAR with an adapted version of the market abuse regime, as drawn from the *Market Abuse Regulation* (MAR). Finally, concerning crypto-assets with a *payment* function (i.e., as will be seen, *asset-referenced tokens* and *e-money tokens*), the reference is (again) the prudential regulation of credit institutions and electronic money institutions ([27]). All these approaches now converge in a single text, sometimes even applying cumulatively, as for instance in the case of entities both issuing payment tokens on the market (ARTs and EMTs) and offering related services.

However, even in the above-mentioned context, MiCAR's approach is not entirely complete. The Regulation, in fact, does not govern the phenomena ([28]) falling within the realm of fully decentralised finance (the so-called DeFI) ([29]): the reason is that in

([27]) F. CIRAOLO, *La disciplina degli e-money tokens tra proposta di Regolamento MiCA e normativa sui servizi di pagamento. Problematiche regolatorie e possibili soluzioni*, in *Riv. reg. mer.*, 2022, 239 ff.

([28]) Including exchange platforms, assuming they exhibit the traits of decentralisation: a very difficult topic on which see V. MOHAN, *Automated Market Makers and Decentralised Exchanges: a DeFi Primer*, in *Financial Innovation*, 2022, 3, available at https://ssrn.com/abstract=3722714; A. CAPPONI - R. JIA, The adoption of blockchain-based decentralised exchanges, 2021, available at https://ssrn.Com/abstract=3722714. CAPPONI - R. JIA, *The Adoption of Blockchain-based Decentralized Exchanges,* 2021, available at https://ssrn.com/abstract=3805095; A. ASPRIS - S. FOLEY - J. SVEC - L. WANG, *Decentralised Exchanges: The 'Wild West' of Cryptocurrency Trading* in *International Review of Financial Analysis*, 2021. On qualification topics, A. MINTO, *The Legal Characterization of Crypto Exchange Platforms*, in *22 Global Jurist,* 2022, 137 ff., spec. 152 ff.

([29]) See most recently I. H-Y. CHIU, The Application of the EU Markets in Crypto-asset Regulation to Decentralised Finance, in Journal of International

decentralised structures ([30]) it is difficult, or even not possible to identify a subject, or potentially a group of subjects, which, in the capacity of 'issuers' or 'service providers' can be the

Banking Law and Regulation, 2023, forthcoming, available at https://ssrn.com/abstract=4599277; I. MAKAROV - A. SCHOAR, Cryptocurrencies and Decentralised Finance (DeFi), in Brookings Papers on Economic Activity, 2022. On risk management and compliance aspects, J. SCHARFMAN, Cryptocurrency Compliance and Operations: Digital Assets, Blockchain and DeFi, Springer, 2022. For an 'institutional' attempt at defining 'DeFI' and framing the phenomenon, see EUROPEAN COMMISSION (Directorate-General for Financial Stability, Financial Services and Capital Markets), Decentralised Finance: information frictions and public policies, Approaching the regulation and supervision of decentralised finance, , available at: https://finance.ec.europa.eu/system/files/2022-10/finance-events-221021-report_en.pdf; BANCA D'ITALIA, Communication on Decentralised Technologies in Finance and Crypto Assets, 2 June 2022; AA.VV., Defi and the Future of Finance, Hoboken, 2021. For further references, see S. L. FURNARI, *La Finanza Decentralizzata. Cripto-attività, protocolli, questioni giuridiche aperte*, Rome, 2023; E. PRANDIN, Decentralized Finance: A new challenge for Regulators, in Bocconi Legal Papers, no. 16, 2021, 51-62; S. BOYKEY SIDLEY and S. DINGLE, Beyond Bitcoin, London, 2022; L. ANKER-SØRENSEN - D. ZETZSCHE, From Centralized to Decentralized Finance: The Issue of 'Fake-DeFi', 2021, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3978815; S. ARAMONTE S. et al, DeFi risks and the decentralisation illusion, BIS Quarterly Review, 2021. More recently on this topic, see BANK FOR INTERNATIONAL SETTLEMENTS report, The crypto ecosystem: key elements and risks, July 2023, 9.

([30]) There are, in fact, many different ways of understanding the notion of 'decentralisation' and also different levels and degrees of decentralisation: the relationship between MiCA and DeFI will therefore have to be better focused as, on the one hand, the market evolves and, on the other, the new regime begins to deal with an increasing number of concrete cases. V. A. WALCH, *Deconstructing 'Decentralisation': Exploring the Core Claim of Crypto Systems,* in C. BRUMMER (ed.) *Cryptoassets. Legal, Regulatory, and Monetary Perspectives*, Oxford, 2019. In a recent report, ESMA also noted, at least in Europe, a still modest degree of development of decentralised service models: see ESMA, *Decentralised Finance in the EU: Developments and Risks*, 11 October 2023, ESMA50-2085271018-3349.

addressees of the rules now introduced ([31]). What lacks, therefore, is the reference that has always underpinned the typical regulatory approach in EU financial law, still oriented towards regulating and supervising an identified subject (or group of subjects). This distancing from *decentralised finance,* however, risks creating difficulties, as it could lead certain organisations to offer crypto-asset services on the market without being authorised, for the mere fact of possessing, precisely, decentralised structures. In this regard, nonetheless, the Regulation provides for a closing rule: Article 59(3) states that 'For the purposes of paragraph 1(a), other undertakings ([32]) that are not legal persons shall only provide crypto-asset services if their legal form ensures a level of protection for third parties' interests equivalent to that afforded by legal persons and if they are subject to equivalent prudential supervision appropriate to their legal form'. Clearly, the issue concerns the interpretation of the notion of '*undertaking/enterprise*', which will have to be better defined, both by the Supervisory Authorities and, possibly, by the Courts, taking

([31]) This does not detract from the fact that, in some cases, it is possible to assume the existence, on the part of the managers of the decentralised platforms or systems, of duties of diligence and also of a fiduciary nature towards users. The debate on this point is open. It is worth mentioning, however, an important case, still in the making, in the United Kingdom, in which the Court of Appeal held (in contrast to the opinion expressed by Justice Falk) that there are 'realistic arguments' to hold that developers are subject to fiduciary duties: see Tulip Trading Ltd v Bitcoin Association For BSV [2023] EWCA Civ 83; (2023) 4 WLR 16.

([32]) On this point, D. ZETSCHE ET AL., (fn. 7).

into account the actual degree of decentralisation of the phenomenon ([33])

In light of the protean nature of crypto-assets, and the multiple functions they can perform, another fundamental choice that the European legislator had to make in the context of MiCAR relates to the rules applicable to those crypto-assets which, following a functional approach, coincide with products/assets already regulated by EU financial law: one might think, for example, of a share issued by a corporation, using DLT technology: financial instrument (at least potentially), on the one hand; crypto-asset, on the other. In such case, the choice is to follow an approach marked by the so-called principle of 'technological neutrality': beyond the form and manner used to issue the instrument, that share remains, to all intents and purposes, an "object" already known to, and regulated by, EU financial law and, therefore, is excluded from the MiCA Regulation. In this sense, all crypto-assets that, in substance, qualify as financial instruments as defined by MiFID *do not* fall within the scope of the MiCA Regulation, as they are, in fact, already regulated by MiFID itself, as also now clearly stated art. 18 the DLT Pilot Regulation, that directly modified the relevant MiFID definitions to clarify that the term "financial instrument" includes instruments issued by means of distributed ledger technology.

This principle, however, is subject to some tempering: first of all, and in partial misalignment with what has been observed above, the MiCAR regulates the issuance and circulation of electronic

([33]) And, also, national approaches on these issues. See, for example, for Italy, R. LENER - F. FURNARI, *Modelli organizzativi alla prova delle nuove tecnologie. Prime riflessioni su DAO e i principi generali del diritto dell'impresa*, Rome, 2021 (available on the website of Orizzonti del diritto commerciale).

money issued in the form of tokens, despite the fact that EU law already provides for a specific, and substantial, regime (the *E-Money Directive* or EMD, now in its second version). On top of that legislation, however, MiCAR introduces its own, and additional, rules, according to an approach that, while justifiable in terms of *rationale*, calls into question the underlying logic of the Regulation, reducing the principle of technology neutrality to a simulacrum. Secondly, it is not entirely true that the (technological) form of an instrument is (tendentially) irrelevant in terms of regulation, as the DLT raises new and complex issues that were ignored in the pivotal texts of EU financial markets law. In this sense, the MiCAR is accompanied, *inter alia*, by the DLT Pilot Regulation, which formulates a *sandbox,* transitional and derogatory regime of the MiFID, MiFIR and CSDR rules, motivated precisely by the technological peculiarities of the new phenomena ([34]).

2.2. It is pertinent to first approach MiCAR by identifying its scope of application, in particular starting from its objective scope and from the issues of taxonomy that arise therefrom.
On this point, the Regulation takes advantage of the broad debate that, also at an international level, preceded its enactment, and of the standards adopted by some jurisdictions that, in this field, were real *first movers* in imagining a taxonomy of crypto-assets,

([34]) On sandboxes see E. CORAPI, *Regulatory Sandboxes in Fintech*?, in *I diversi settori del Fintech, Problemi e prospettive*, E. CORAPI and R. LENER (eds.), Milan, 2019, 19 ff.; A. ZETZSCHE - R. BUCKLEY - D. ARNER - J. BARBERIS, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, EBI Working Paper Series No. 11, 2017.

most notably Switzerland ([35]). In fact, Article 3 MiCAR identifies the crypto-assets subject to its scope by adopting, as a first approximation, an approach generally in line with established practices and opinions.

First, the Regulation establishes a general definition of crypto-assets, meaning 'a digital representation of a value or right that can be transferred and stored electronically, using distributed ledger or similar technology' ([36]). The wording is notably very broad, as it evokes not only DLT, but also similar technologies, which may obscure the exact content of the definition and make its approach uncertain. However, such a term should be viewed under a positive lens: on the one hand, in fact, the definition is not open to *any* technologies other than DLT, but only to those that are 'analogous' to it; on the other hand, it is a more than opportune, if not even necessary, provision to allow for adequate regulatory flexibility, in the face of (often unexpected and unforeseeable) evolutions of technology. Where, on the other hand, the Regulation had limited its scope of application only to a specific technological form, it would have conferred on the DLT a *general* legitimacy and a sort of consecration at the European level that would have been

([35]) The earliest reference can be traced back to FINMA, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), published on 16 February 2018. In Switzerland, the market for crypto-assets and related services has experienced considerable development, which has in turn stimulated the attention of interpreters: see M.J. REYMOND, *Swiss Law on Financial Market Infrastructures as applied to Crypto Token Exchanges,* in *International Business Law Journal*, 2021, 215 ff.; B. HOMSY, *Aspects of Swiss financial regulation, in* D. KRAUS - T. OBRIST - O. HARI (eds.), *Blockchains, Smart Contracts, Decentralized Autonomous Organizations and the Law*, Cheltenham, 2019, 163.

([36]) Art. 3(1)(5), MiCA.

entirely undesirable and would have made itself impervious to future innovations.

Secondly, and downstream from this initial definition, MiCAR expressly defines three types of tokens, namely:

(i) tokens with a payment function, named *asset-referenced tokens* (ART), in fact similar to the so-called *stablecoins* well known in the practice and specialised literature;

(ii) e-money tokens (EMT) ([37]); and

(iii) utility tokens, which refer to a type of crypto-asset designed solely to provide access to a good or service supplied by its issuer.

This seemingly simple list should be approached with two major caveats: *(i)* it could seem, at first, that MiCAR applies *exclusively* to these three types of crypto-assets, but, in fact, this is not the case (see *below*); *(ii) the exact* scope of MiCAR must be construed primarily in the *negative*, i.e. by subtracting what is already covered by other EU financial law regimes.

In this last perspective, Art. 2(4) formulates a long list of *assets* excluded from MiCAR, specifying that MiCAR *does not* apply in relation to them, namely:

(i) financial instruments; *(ii)* bank deposits, including structured deposits; *(iii)* funds, except where they qualify as e-money

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([37]) These are, according to Art. 3, respectively:

(i) "asset-referenced token" means 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;

(ii) "e-money token" means a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency.

tokens; *(iv) securitisation* positions in the context of a securitisation; *(v)* non-life or life insurance 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 or reinsurance and retrocession contracts referred to in the same Directive; *(vi)* pension products and schemes, as defined in subparagraphs (f), (g), (h), (i) of Article 2(4), MiCAR; and *(vii)* social security schemes.

In addition to the above, MiCAR does not cover the digital euro project, which is still in the process of being developed by the ECB and the EU Commission and on which, moreover, no conclusive indications have yet emerged as to the type of technological infrastructure that will support its introduction ([38]). Despite

([38]) See, in this regard, the two Proposals for EU Regulations by the Commission, and, for up-to-date information on the relevant project, what is available on the relevant website at:

https://finance.ec.europa.eu/publications/digital-euro-package_en. On ongoing projects, also in other systems, the literature is very extensive: ex multis, R. P. BUCKLEY - M. TRZECINSKI, *Central Bank Digital Currencies and the global financial system: the dollar dethroned?,* in *Capital Markets Law Journal*, 2023, 137; P. SCHUEFFEL, *CBDCs: Pros and Cons A comprehensive list and discussion of the advantages and disadvantages of central bank digital currencies,* in *The Journal of Digital Assets*, 2023, 49; C. HOFMANN, *Which markets need Central Bank Digital Currency?,* in *Capital Markets Law Journal*, 2023, 281; A. M. MOOIJ, *A digital euro for everyone: Can the European System of Central Banks introduce general purpose CBDCs as part of its economic mandate?,* in *Journal of Banking Regulation*, 2023, 89; T. KEISTER - D. SANCHES, *Should Central Banks Issue Digital Currency?,* in *The Review of Economic Studies*, 2023, 404; L. SARTORI, *Complementary or substitute, public or private: the process of currency differentiation,* in *Stato e Mercato*, 2020, 393. More specifically on the digital euro, see, *ex multis*, L. BELTRAMETTI - G. B. PITTALUGA, *Monetary Policy Implications of Stable Coins and CBDCs,* in *Economia internazionale/International Economics*, 2023, 453; S. N. GRÜNEWALD - B. GEVA - C. ZELLWEGER-GUTKNECHT, *Digital Euro and ECB Powers*, in *Common Market Law Review*, 2021, 1029 ff.; A. A. M. MOOIJ, *European Central Bank Digital*

the affinity of certain objectives (the development of payment instruments in a natively digital form), the two projects therefore remain, for the time being, on parallel tracks, also in view of the very different nature of central bank digital currencies, compared to tokens issued by private individuals.

In light of the foregoing, it can therefore be understood that, beyond the three types of *tokens* expressly defined, MiCAR follows a rationale that, in terms of defining its perimeter of application, takes a negative approach: ultimately, the Regulation identifies its scope by way of exclusion from what is already regulated by other texts of EU financial law.

Moreover, and while attempting to formulate *its own* definition of (some) crypto-assets, this too proceeds in a negative way. Although the Regulation positively defines ARTs and EMTs, as well as utility tokens, the Regulation then makes use of an open notion, identifying, from time to time, its scope of application not limited to those three categories, but extending it to an undefined universe of tokens 'different' from the first two: see,

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Currency: the digital euro. What design of the digital euro is possible within the European Central Bank's legal framework?, BRIDGE Network Working Paper Series, 2021; D. ANDOLFATTO, *Assessing the Impact of Central Bank Digital Currency on Private Banks,* in *The Economic Journal*, 2021, 525; C. ZELLWEGER-GUTKNECHT - B. GEVA - S. N. GRÜNEWALD, *Digital Euro, Monetary Objects, and Price Stability: A Legal Analysis*, in *Journal of Financial Regulation*, 7, 2021, 284; P.M LUPINU, *Digital Euro: opportunity or (legal) challenge?*, in *Ianus. Law and Finance*, 2020; M. RASKIN - D. YERMACK, *Digital Currencies, Decentralized Ledgers, and the Future of Central Banking,* in *Research Handbook on Central Banking*, edited by P. CONTI-BROWN - R. LASTRA, 2017; H. NABILOU - A. PRÜM, *Central Banks and Regulation of Cryptocurrencies,* in *Review of Banking and Financial Law*, 2020, 1003; U. BINDSEIL, *Tiered CBDC and the Financial System,* in *ECB Working Paper Series*, 2020U. BINDSEIL, *Central Bank Digital Currency: Financial System Implications and Control*, in *International Journal of Political Economy*, 2019, 303.

emblematically, Title II of the Regulation, and, in this context, already Art. 4 that opens it ([39]), which applies to 'crypto-assets other than asset-referenced tokens or electronic money tokens'. Now, this definitional approach itself is notoriously fraught with pitfalls. A significant example of this, again with regard to EU financial law, is the Alternative Investment Fund Managers Directive (AIFMD ([40])), which, having identified its own scope of application in a negative way, with respect to what was already regulated by the earlier UCITS Directive, has raised, and continues to raise, countless questions of interpretation and application, which only an intervention by the legislator, or, perhaps, by the Court of Justice, may one day resolve. It is even more insidious in a field such as that of crypto-assets, in which the evolution of markets brings ever new phenomena to the attention of the interpreter: see, *below*, the problem of the classification of NFTs (among the latest in the universe of crypto-assets), where, moreover, the definitional framework is further complicated by the existence of national concepts and regimes which, at times, are *added to* and, in part, overlap with those of EU law (see, below, the issue related to the notion of financial product in the Italian

([39]) Respectively, "Title II - Crypto-assets other than asset-referenced tokens or e-money tokens", and Article 4 "Offers to the public of crypto-assets other than asset-referenced tokens or e-money tokens". In a similar vein, the regulation of crypto-asset service providers, whose scope is even broader, being able to include any crypto-asset, even fully decentralised ones (including bitcoin), which instead escape, inter alia, the provisions on public offerings.

([40]) Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010.

Consolidated Law on Finance, or to similar cases in other Member States).

However, what decisively brings uncertainty to the current MiCAR are the definitional ambiguities that characterise some fundamental notions of EU financial market law, most especially the concept of financial instrument in MiFID.

In truth, while the boundary between MiCAR and MiFID is fundamental it is, at the same time, unclear. The reason for this, however, is not to be found in the Regulation, but in the MiFID framework itself (and, before MiFID II or MiFID I, even the ISD of 1993). Central elements of this notion, in particular the 'negotiability' of the financial instrument, or the fact that it must be ascribable to a *class of securities* are, to say the least, problematic, as also emerges well from a well-known ESMA report of 2019, which reconstituted, so to speak, the cultural background that, at the European level, underpinned the preparation of the proposal for the MiCA Regulation ([41]).

The complexity and breadth of the issues underlying these definitional problems, all - as should be stressed - related to MiFID, not MiCAR, cannot be fully addressed in this paper: it suffices, for our purposes, to shed light on their existence. It appears, however, evident that it is precisely the problem of the MiCAR taxonomy that constitutes the main fragility of the new regulatory system, which may render its application uncertain with respect to the

([41]) ESMA, Advice. Initial coin offerings and cryto assets, 9 January 2019, ESMA50-157-1391, available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf.

other texts of EU law, in particular MiFID: indeed, a significant shortcoming.

Without belabouring the point, suffice it to add that the fact that a given crypto-asset falls, for instance, under MiFID or MiCAR has radically different consequences in terms of the applicable regulations, supervisory tools and even the supervisory architecture applicable to it. The differences are so many and such that they cannot be diminished by the observation, as some believe, that the MiCAR and/or MiFID regimes would not, on balance, present substantial differences, or such as to raise serious concerns. This is, in fact, not the case at all and, not surprisingly, MiCAR attempts to fill the gap by providing a number of different tools to streamline definitions and taxonomy, including the mandatory submission of legal opinions in the context of the various authorisation regimes, the exchange of information between the NCAs and ESMA, and a rich *menu* of guidelines from the European Authorities ([42]). Will this articulated armoury of

([42]) Article 2(5) of the MiCAR stipulates that, by 30 December 2024, ESMA shall draw up guidelines - in accordance with Article 16 of Regulation (EU) No. 1095/2010 - on the conditions and criteria for the classification of crypto-assets as financial instruments. Further provisions, reflecting how sensitive the issue of taxonomies is, result from Article 97 of the Regulation (Promotion of convergence in the classification of crypto-assets), namely:

- Pursuant to Article 97(1), by 30 December 2024, the ESAs shall jointly issue guidelines (in accordance with Article 16 of their respective founding regulations) to specify the content and form of the explanation accompanying the crypto-asset white paper referred to in Article 8(4) and the legal opinions on the qualification of asset-referenced tokens referred to in Article 17(1)(b)(ii) and Article 18(2)(e). The guidelines include a template for the explanation and opinion as well as a standardised test for the classification of crypto-assets;

- Pursuant to Article 97(2), in accordance with Article 29 of their respective founding regulations, the ESAs shall promote discussion among the

soft law tools be sufficient to overcome the shortcomings of an insufficient legal approach to taxonomy? Will it have a thaumaturgical effect? It will take a long time to answer this question, since the very instruments relied upon by the regulation will inevitably be problematic and in turn raise new questions of interpretation. For the time being, allow me to observe that, in some cases, these indications assign tasks to the European Authorities that directly pertain to *other regulatory strains of* EU financial law: in particular, to MiFID, with a solution that is, to say the least, quite original.

2.3. The relationship of mutual exclusion between MiCAR and the other founding texts of EU financial markets legislation represents what we would call the 'external' boundaries of the Regulation. There are, however, also 'internal' boundaries, which involve several elements, including the basic concept of crypto-

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competent authorities on the classification of crypto-assets, including the classification of crypto-assets excluded from the scope of MiCAR. The ESAs shall also identify sources of potential divergence in the approaches taken by the competent authorities regarding the classification of such crypto-assets and, to the extent possible, promote a common approach in this regard;

- Under Article 97(3), the competent authorities of the home or host Member State may ask ESMA, EIOPA or EBA, as appropriate, for an opinion on the classification of crypto-assets, including those excluded from the scope of MiCAR under Article 2(3);

- Lastly, pursuant to Article 97(4), the European Authorities shall jointly draw up an annual report on the basis of the information contained in the register referred to in Article 109 and the results of their activities referred to in Paragraphs 2 and 3 of this Article, which shall identify the difficulties encountered in classifying crypto-assets and the divergences that have emerged in the approaches adopted by the competent authorities.

assets adopted by MiCAR, as well as specific regulatory choices which, albeit not without uncertainty, have matured in the course of the preparatory work.

(i) Bitcoin and decentralised crypto-assets.

It has already been mentioned that the Regulation does not apply to crypto-assets that are *fully* decentralised, as expressly stated in Recital (22). It follows that MiCAR, in particular, does not apply to bitcoin ([43]), which still represents the crypto-asset

([43]) In addition to what will be discussed about the relationship between bitcoin and the notion of financial product, to confirm how its framing is problematic, it should be noted that in Germany, Bafin has directly qualified it as an instrument subject to German financial services and prospectus legislation (very close, in terms of principles and rules, to MiFID): see I. BARSAN, *Legal Challenges of Initial Coin Offerings,* in *Rev. trim. de Droit Financier,* 2017, 54. It is unclear whether, and what, will survive of these national regimes after the entry into force of the Regulation. In the Italian literature, ex multis, G. GASPARRI, *Riflessioni sulla natura giuridica del bitcoin tra aspetti strutturali e profili funzionali,* in *Dialoghi dir. econ.*, 2021, 1; G.M. NORI, *Bitcoin, tra moneta e investimento,* in *Banca Impr. Soc.*, 2021, 157; E. CALZOLAIO, *La qualificazione del bitcoin: appunti di comparazione giuridica,* in *Danno resp.*, 2021, 188; N. DE LUCA - M. PASSARETTA, *Le valute virtuali: tra nuovi strumenti di pagamento e forme alternative d'investimento,* in *Soc.*, 2020, 5, 571; *Noterelle pessimistiche sui bitcoin, in BBTC*, 2020, 3, 465; S. CAPACCIOLI, *Criptovalute e bitcoin: un'analisi giuridica*, Milan, 2015, 20; M. CIAN, *La criptovaluta - Alle radici dell'idea giuridica di denaro attraverso la tecnologia,* in *BBTC.*, 2019, 315. See also D. ARMSTRONG KC, D. HYDE, S. THOMAS, *Blockchain and Cryptocurrency: International Legal and Regulatory Challenges* (2nd edn, Bloomsbury Professional, 2023); O. MCDONALD, *Cryptocurrencies: Money, Trust and Regulation*, Agenda Publishing, 2023; AA.VV., *Handbook of Digital Currency. Bitcoin, Innovation, Financial Instruments, and Big Data*, Waltham, 2015, 45; R. BÖHME - N. CHRISTIN, B. EDELMAN, T. TYLER, *Bitcoin: Economics, Technology, and Governance,* in *Journal of Economic Perspectives*, 29, 2015, 213; P. FRANCO, *Understanding Bitcoin: Cryptography, Engineering and Economics*, Hoboken, 2014, 11; A. ANTONOPOULOS, *Mastering Bitcoin: Unlocking Digital Cryptocurrencies*, Sebastopol, California, 2014; A. BADEV - M. CHEN, *Bitcoin: Technical Background and Data Analysis*, FED Working Paper No. 2014-10.

with the highest capitalisation in the world and whose nature remains uncertain: means of payment, investment product, hybrid token or other ([44]).

(ii) Non-Fungible Tokens (NFTs).

Non-Fungible Tokens (NFTs) do not fall within the scope of MiCAR. This is stated, apparently clearly, in Article 2(3): "This Regulation does not apply to crypto assets that are unique and non-fungible with other crypto assets".

The decision whether or not to include NFTs in the Regulation was subject of a troubled process, in which all (or almost all) possible options were examined. This is reflected in the final structure of the text that is, to say the least, unstable. The point is well illustrated by the (lengthy) Recitals 10 and 11 which can be briefly summarised as follows: *(i)* fractions of a unique and non-fungible crypto-asset should not be considered unique and non-fungible; *(ii)* the issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility. The mere attribution of a unique identifier to a crypto-asset is not in itself sufficient to classify it as unique and non-fungible; *(iii)* for the crypto-asset to be considered unique and non-fungible, the assets or rights

([44]) In the *Hedqvist* case, the Court of Justice held that, from the perspective of the application of VAT, Bitcoins are not to be considered a financial instrument, but a 'direct means of payment between the operators who accept it', Court of Justice, 22 October 2015, C-264/14, EUCLI:EU:C:2015:718, Skatteverket v. David Hedqvist, nos. 42 and 55. See G. DIMITROPOULOS, *Global Currencies and Domestic Regulation,* in P. HACKER, I. LIANOS, G. DIMITROPOULOS, S. EICH (eds.), Regulating *Blockchain*, Oxford, 2019.

represented should also be unique and non-fungible; *(iv)* in any event, the exclusion of unique and non-fungible crypto-assets from the scope of the Regulation is without prejudice to the qualification of such crypto-assets as financial instruments; *(v)* the Regulation should also apply 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. ([45])

The reasons for such a complex approach are to be found in the fact that NFTs (generally) exhibit features that make them unsuitable for circulation, or exchange, on a widespread market[46]). The two fundamental parameters that the Regulation identifies are, to this end, the uniqueness of the instrument, *in conjunction with the underlying assets*. [47] A further discretional criterion consists of the (alleged) unsuitability of the NFT to perform an investment function (e.g. to the extent that the holder of the NFT

([45]) On this issue, see P. MAUME, (fn. 9), 259.

([46]) Again, see Recital 10: ' This Regulation should not apply to crypto-assets that are unique and not fungible with other crypto-assets, including digital art and collectibles. 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. Nor should this Regulation apply to crypto-assets representing services or physical assets that are unique and non-fungible, such as product guarantees or real estate. While unique and non-fungible crypto-assets might be traded on the marketplace and be accumulated speculatively, they 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 asset. Such features limit the extent to which those crypto-assets can have a financial use, thus limiting risks to holders and the financial system and justifying their exclusion from the scope of this Regulation'.

([47]) The two elements must be kept constantly in mind, and not separated from each other. See Article 2(3) and Recitals (10) and (11).

is not entitled to receive a remuneration deriving from its ownership, similarly to what would be the case for a typical financial product). Where, however, that investment function is discernible, or where the non-fungibility is only apparent (because, for instance, the underlying *asset* is fungible), the NFT falls back into the scope of regulation, either as a crypto-asset, or as a financial instrument (or. even, as a financial product within the meaning of the Cnational laws - see *below*).

That said, the boundaries between NFTs and *utility tokens* remain uncertain, to say the least. In particular, the Regulation does not provide its own definition of "fungibility", thus leaving the notion open to different interpretations on the basis also of the multiple national criteria – deriving mainly from private law - applicable from time to time depending on the specific instrument ([48]). We believe, in any case, that the notion must be construed as an autonomous concept of EU law, being formulated by a directly applicable Regulation ([49]), even if, inevitably, its meaning should be interpreted through a solid exercise of comparative law, to identify a common ground between the traditions of the different Member States.

(c) *Financial products other than financial instruments.*

([48]) For a definition of tokens (and NFTs) in civil law terms under Italian law, see F. RAMPONE, *NFTs and cryptographic tokens in civil law: from computer documents to digital atoms,* in *Dialoghi dir. Econ*., 2023, 1.

[49] See CILFIT Case - C-283/81.

Considering MiCAR's *external* borders, one must ask whether 'investment products' - excluded from MiFID but issued in the form of tokens - while falling outside the scope of the Regulation may nonetheless fall under *national* regimes that, in certain Member States, are to be found in addition to EU laws. The question is, to say the least, a complex one, and the investigation would merit a breadth incompatible with the present study, not least because of its necessarily comparative slant. In order to understand the issue, it may be useful to refer, as a first approximation, to the notion of "financial product", as set forth in Article 1(1)(*u)* of the Italian Consolidated Law on Finance, which defines it as "financial instruments and any other form of investment of a financial nature": a *domestic* notion, used in order to apply national prospectus rules to assets that are not included in the scope of the EU regime, and which must be clearly distinguished from other concepts analysed in the preceding sections (in particular, from the notion of *financial instrument*).

If the relationship between financial instrument (as per MiFID) and crypto-assets is already, in itself, complex, that between crypto-assets and financial products is even more so. This is due to the fact that the notion of financial product under Article 1(*u)* of the Consolidated Law on Finance is based on an exquisitely functional criterion: ultimately, it captures the economic purpose underlying the investment transaction, in order to apply national rules on public offerings and prospectuses. This concept differs from the EU notion of financial instrument, which tends to be (but is not entirely) closed, as it is pegged to a descriptive list.

Although, over time, the notion of a financial product (and its archetype, that of 'securities' introduced in Italy in 1983) has

always raised interpretative difficulties, these difficulties are aggravated even further by MiCAR.

To clarify such a statement, a few examples should be given. Let us take the case of a crypto-asset that presents the characteristics of an equity instrument, even of a real share, but lacks one of the elements qualifying the notion of a financial instrument, for instance because it is *not negotiable*. Such an instrument could certainly not be covered by MiFID-derived rules, nor by EU rules on public offerings and prospectuses, since it does not qualify as a financial instrument (more precisely, as a 'transferable security', a sub-category of the broader notion of the former). If, in the example at hand, the instrument was issued in cryptographic form on a DLT, one must ask what regime would be applicable to its being offered on the market and to the services possibly offered by service providers in relation to it (e.g. advisory, management, custody of the tokens, etc.). Theoretically, MiCAR itself could - or, perhaps, should - deal with this, as this particular token would then fall under the residual category of *crypto-assets other than* ARTs and EMTs (see *above*). However, one might consider that the MiCAR definition of crypto-assets is too *narrow* to encompass the example under discussion, and it would therefore follow that such token would not be included in the objective scope of the Regulation.

And it is here, however, that national laws, with their own, autonomous notions, could regain ground: if, in fact, a given crypto-asset is included within the scope of MiCAR, national rules can no longer have any place, since MiCAR is directly applicable throughout the EU. If, on the other hand, a crypto-asset falls outside the scope of the Regulation, domestic regimes might

potentially apply: in Italy, for example, one would then have to question whether the instrument could be qualified as a financial product.

The consequences are not insignificant. To return to the example, if that tokenised share were to be considered a crypto-asset within the meaning of MiCAR, its offer to the public would be subject to the comparatively lighter regime of the *white paper*, instead of the stringent prospectus rules and, above all, it would not require prior authorisation. A similar argument could also be made, for instance, regarding debt securities issued by corporations, lacking the elements proper to the notion of a financial instrument, as well as for shares in limited liability companies, where their issuance in the form of tokens is envisaged in the future.

These problems are not only exclusively found in the Italian legal system. Rather, similar issues can also be identified in other EU Member States: for example, and to limit ourselves to a few cases only, in Germany, with reference to the so-called *Vermögensanlage;* in Austria, with regard to the notion of *Veranlagung;* or in Belgium, where there is a complex, and articulated, regime applicable to investment products other than MiFID-like financial instruments, i.e. the so-called "*beleggingsinstrument*" / "*instrument de placement*", referred to in Article 3(§1) of the Law of 11 July 2018 on public offers of investment instruments and the admission of investment instruments to trading on regulated markets.

In our opinion, and while acknowledging the extreme complexity of the issue, the absorbing scope of the MiCAR, and its suitability to regulate, in fact, *any* crypto-asset that is not already subject to other EU legislative regimes, allow to conclude that

national regimes ought to be disapplied in cases similar to those described. Therefore - for instance, with regard to the Italian legal system - any instrument for the raising of capital, issued in cryptographic form using DLT, shall be regulated by MiCAR, *unless* it qualifies as a MiFID financial instrument, in which case the latter regime will apply in conjunction with EU prospectus rules. National regimes, such as the " financial product" one, should therefore no longer have place in the context under discussion ([50]).

Problems, however, do not stop there, since concepts under domestic law add further complexity to the landscape in other aspects as well. Consider, for example, NFTs: a non-fungible token that falls within MiCAR's cases of exemption would not be regulated under the Regulation but, on the other hand, could be qualified as a financial product under national regimes. For instance, and referring again to the Italian case, where the NFT is neither subject to MiFID nor MiCAR, the notion of financial product could be applicable.

These divergences between different interpretations of the notion of financial instrument, financial products (and the like), and crypto-assets demonstrate how central the issue of taxonomy is to the correct application of these regimes.

The above examples are, however, only the most immediate and obvious, as it is almost inevitable that far more complex and difficult cases will arise in practice.

([50]) See C. FRIGENI, *Il mercato primario delle cripto-attività. Offerta al pubblico e regime di trasparenza nella proposta di Regolamento MiCA,* in *ODDC,* 2022, 33.

This is not, moreover, an entirely new concern, although it is now exacerbated by MiCAR. For example, in Italy, both the supervisory practice of Consob ([51]) and the jurisprudence of the *Corte Suprema di Cassazione* ([52]) have already concluded that, under certain circumstances ([53]), bitcoin (which, with reference to its *placing on* the market, is certainly excluded from MiCAR, since it is issued in a fully decentralised form) ([54]) may qualify as a financial product (*not* a financial instrument), subject to the relevant regulation of public offerings. Although the arguments to reach this conclusion are not, in our view, agreeable, they are precedents that cannot be avoided, expressing the tensions of a system which, as a result of the dissemination of crypto-assets,

([51]) See, by way of example, Resolutions No. 19968 of 20 April 2017; No. 20346 of 21 March 2018; No. 20693 of 14 November 2018; and No. 20694 of 14 November 2018.

([52]) Italian Court of Cassation, 22 November 2022, no. 44378, according to which - in very simplistic terms - crypto-assets are assimilated to financial products insofar as they involve: (i) the use of capital; (ii) the expectation of a return; (iii) a risk directly related to the use of capital. In the same vein, Cass., 17 September 2020, no. 26807; and Cass. pen., 30 November 2021, no. 44337, in Danno e resp., 2021, 492 ss., with a note by M. GUASTADISEGNI.

([53]) In the aforementioned decisions, in fact, it is not directly stated that bitcoin is, in itself, a financial product, but rather that the transaction/activity that leads an investor to purchase bitcoin, if conducted with techniques typical of solicitation, constitutes an offer to the public subject to the relevant regulation and asset reserves.

([54]) The reason is to be found in the fact that, in the case of bitcoin, there is no identified or identifiable subject (or group of subjects) to which the regulation of token offerings can be applied. On the other hand, bitcoin enters, so to speak transversally, into the perimeter of MiCAR with regard to the regulation of crypto-asset services, as a possible 'object' thereof.

struggles to find solid criteria for their classification and consequent subjection to the applicable regimes ([55]).

(d) *Certain utility tokens.*

As seen above, according to the MiCAR definition, *utility tokens* are those which only grant the right to access a good or service. In this regard, it has long been debated whether tokens that give access to already available goods or services should be treated differently from tokens that, on the other hand, serve to collect resources for the development of *new* projects. Generally speaking, the main argument for excluding tokens from the rules governing their issuance in the first case has been based on the fact that, in such a hypothesis, the purchase of the utility token would constitute a situation analogous to that of the purchase of a good or service, without any 'financial' component to justify the application of special rules ([56]).

([55]) Even in literature, however, interpenetrations are not lacking: see C. SANDEI, *L'offerta iniziale di cripto-attività*, Turin, 2022. It should be noted that the taxonomy of MiCA instruments must remain faithful, first and foremost, to concepts under EU law and, only where the latter are inapplicable (as interpreted on the basis of Union law) can different national disciplines come into play, such as that which, in Italy, revolves around the notion of financial product (moreover, limited to the offer to the public only, and not also to the provision of services having as their object the financial products themselves).

([56]) In this sense, the already cited FINMA guidelines (fn. 35): "These tokens do not qualify as securities only if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the point of issue". In literature, P. HACKER - C. THOMALE, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law,* in *ECFR*, 2018, 645 ff., 675; P. ZICKGRAF, *Initial Coin Offerings,* in P. MAUME, L. MAUTE, M. FROMBERGER (eds.), *The Law of Crypto Assets*, Beck-Hart-Nomos, Oxford, 2022, 202.

MiCAR only partly follows this logic: *utility tokens* that 'provide access to an existing or operated good or service' are exempt from the rules contained in Title II on public offerings, but not from the entire regime. However, the exception does not apply where the offeror makes known in any communication its intention to seek admission to trading on a trading platform ([57]). The Regulation therefore addresses the matter by adopting a middle-ground solution, considering the various positions proposed in literature.

3. Less problematic, although not free of interpretative uncertainties, are the topics pertaining to the subjective scope of MiCAR: it applies, on the one hand, to issuers of crypto-assets and, on the other, to service providers in respect of the same crypto-assets (with a specific, and more stringent, regime for ARTs and EMTs).
For the former, the Regulation only provides for transparency and *disclosure* obligations, which are based, primarily, on the preparation and publication of a *white paper*, as a condition for being able to proceed with the offer on crypto-asset markets. For the latter, on the other hand, the Regulation outlines a general regime, based on rules that recall the usual regulatory obligations for EU investment service providers: initial authorisation, prudential rules, and rules of conduct and transparency.
However, entities that issue and, at the same time, provide services in relation to ARTs and EMTs are subject to a specific regime, which combines transparency obligations at issuance with rules typical to service providers. More precisely, for issuers of

([57]) Art. 4(3)(c) and (4), MiCAR.

ARTs and EMTs, the requirement to publish a white paper on the occasion of a public offering is complemented by a structured regime whereby: *(i)* the issuance of these types of tokens constitutes a reserved activity; *(ii)* access to the activity is reserved only to entities that are authorised by the competent authority, in the case of e-money *tokens*, as credit institutions or e-money institutions and, in the case of *asset-referenced tokens*, as credit institutions or based on the provisions of MiCAR itself; *(iii)* these entities are subject to a particularly dense and detailed prudential regime.

3.1. Articles 4-5 MiCAR govern the prerequisites for a person to offer to the public or request admission to trading of crypto- assets (other than asset-referenced tokens and e-money tokens) in the EU. In particular, it is necessary that the issuer meets the following requirements ([58]): *(a)* it is a legal person ([59]); *(b)* it has drawn up an information document containing mandatory disclosures on crypto-assets (the so-called crypto-asset white paper); *(c)* it has notified the crypto-asset white paper to the competent authority ([60]); (*d)* it has published the white paper; *(e)* it has drafted marketing communications in relation to such crypto-

([58]) It should be noted, however, that if a crypto-asset is admitted to trading at the initiative of the operator of a trading platform and a white paper has not been published, the operator of that trading platform is itself obliged to comply with the requirements for persons seeking admission to trading under Article 5(1) MiCAR.

([59]) Unlike issuers of ARTs and EMTs, the entity is not required to be established in the European Union.

([60]) As identified pursuant to Article 3 (1)(35) MiCAR.

assets in accordance with Article 7; (*f)* it has published any marketing communications in relation to such crypto-assets following the rules laid out in Article 9; *(g)* it complies with the obligations under MiCAR for offerors or persons seeking admission to trading.

The white paper lends itself, in the context of MiCAR, to interesting considerations in terms of its 'cultural' origins. On the one hand, in the course of the preparatory work on the Regulation it became increasingly clear that the white paper's reference model is the prospectus. Compared to the initial proposal, in which the Regulation envisaged *de minimis* rules as to the structure and content of the white paper, the final outcome brings the two instruments very close together, even if, as we shall see, there are significant differences.

On the other hand, however, it should be noted that the white paper is an instrument that was born and developed by the market, starting from the phenomenon of *Initial Coin Offerings,* which characterised, both in the United States and in other systems, the phenomenon of crypto-assets especially in the years 2018 and following, also arousing much interest in the literature, both legal and economic ([61]). In this sense, the white paper regime can be said to be a perhaps almost unique case of a

([61]) See F. ANNUNZIATA, *Speak, if You Can: What are You? An Alternative Approach to the Qualification of Tokens and Initial Coin Offerings,* in *ECFR*, 2020, 129 ff.; P. HACKER - C. THOMALE, (fn. 56), 645; P. MAUME - M. FROMBERGER, *Regulation of Initial Coin Offerings: Reconciling US and EU Securities Laws,* in *Chicago J. Int'l L.*, 2019, 548 ff.; A. GURREA-MARTÍNEZ - *N.R. LEÓN, The Law and Finance of Initial Coin Offerings,* in C. BRUMMER (fn. 30); P. ZICKGRAF, (nt. 56), 174 ff. In the Italian literature, C. SANDEI, (fn. 55).

concretisation, at a regulatory level (and, moreover, in a directly applicable EU Regulation) of a market practice.

The affinity between the white paper and the prospectus can be found, firstly, in relation to the structure and content of the information document, which must be drafted according to essentially rigid requirements, established by the Regulation itself ([62]). A second element of connection can be identified with regard to similar cases of exemptions provided for in both regimes. In particular, the white paper regime does not apply to: *(a)* an offer made to fewer than 150 natural or legal persons per Member State where such persons act on their own account; *(b)* an offer to the public of a crypto-asset in the Union, the total consideration of which, over a period of 12 months from the beginning of the offer, does not exceed EUR 1,000.000 or the equivalent amount in another official currency or in crypto-assets; *(c)* an offer of a crypto-asset addressed exclusively to qualified investors where the crypto-asset can only be held by such qualified investors (referred to in Annex II, Section I, points 1 to 4 of MiFID) ([63]).

([62]) The white paper must also contain the following warning: 'the crypto-asset white paper does not constitute a prospectus within the meaning of Regulation (EU) 2017/1129 of the European Parliament and of the Council, or another offer document pursuant to Union or national law'.

([63]) On the other hand, with regard to those seeking admission to trading on a platform, of crypto-assets already in circulation, sub-paragraphs (b), (c) and (d), do not apply where: (a) the crypto-asset is already admitted to trading on another crypto-asset trading platform in the Union; and (b) a crypto-asset white paper is prepared in accordance with Article 6 MiCA and updated in accordance with Article 12, and the person responsible for its preparation consents in writing to its use.

A significant divergence from the Prospectus regulation is, however, represented by the publication regime: there is, in fact, no requirement for the approval of the white paper by the competent authority but a mere notification procedure ([64]). This is a noteworthy distinctive element, which distances the MiCA regime from that of the prospectus, the publication of which is instead subject to the pre-approval of the competent authority. In this regard, the Regulation requires the white paper to clearly state that it has not been approved by any competent authority and that, therefore, the person publishing it - the offeror, the person asking for admission to trading or the operator of the trading platform - is solely responsible for its content.

Notwithstanding the foregoing, the issue of the taxonomy of crypto-assets emerges, once again, in the context of the rules under discussion. In particular, the notification of the white paper - to be made at least 20 days prior to its publication on the website of the offeror or entity making the request for admission to trading - must be accompanied by a statement indicating the reasons why the token should *not* be considered a crypto-asset excluded from the scope of MiCAR (e.g., a financial instrument under MiFID II), an e-money token or an asset-referenced token. In essence, the MiCAR entrusts the *issuer* with the task of qualifying the token: an exercise that is anything but easy, as emerges from the analysis already carried out, and for which it will be essential to wait for the completion of the regime (also through *soft law*

([64]) On the transparency regime of token offerings, prior to MiCAR, but still relevant today, G. FERRARINI - P. GIUDICI, *Digital offerings and mandatory disclosure: A market-based critique of MiCA*, in E. AVGOULEAS AND H. MARJOSOLA (eds.) *Digital Finance in Europe: Law, Regulation, and Governance*, De Gruyter, 2022, 87.

measures), but which might still lead to disputes or, at least, differences of opinion, both between players and authorities, and between the different authorities of the Member States. It is not, in fact, improbable that, given the complexity of the subject, and the vastly different nature of tokens, the interpretative approaches may, in the end, and notwithstanding the measures envisaged by MiCAR, turn out to be different.

Similarly to the Prospectus Regulation, MiCAR also contains rules on liability. Article 15 provides, in particular, that the offeror and the person seeking admission to trading or the operator of a trading platform and the members of its administrative, management or supervisory body shall be liable to the holder of the crypto-asset for any loss suffered as a result of the breach of the white paper requirements. There is, however, one important and noteworthy difference. In the context of MiCAR, the burden of proving that: (i) the above-mentioned entities have violated the Regulation by providing information that is not complete, fair or clear, or that is misleading; and (ii) that such information had an impact on the holder's decision to purchase, sell or exchange the token, is upon the holder of the crypto-asset. This will inevitably lead to a significant reduction of the concrete protective scope of the liability regime, as it is likely to subject the plaintiff to a particularly onerous burden. This (questionable) approach, in fact, ends up shifting protection to the level of public *enforcement*, in contrast to recent developments in prospectus regulation, and

attempts to identify a common approach to liability in the EU or even at supranational levels[65]).

Notwithstanding the above, another peculiarity of the MiCAR regime, compared to prospectus rules, lies in the fact that crypto-asset offerors are subject to rules of conduct which, in the context of EU law, are generally only applicable to service providers (in particular, such standards derive from the MiFID regime). More specifically, offerors and persons seeking admission to trading in crypto-assets are required to: *(a)* act honestly, fairly and professionally; *(b)* communicate with crypto-asset holders and potential holders in a manner that is fair, clear and not misleading; *(c)* identify, prevent, manage and disclose any conflicts of interest that may arise; *(d)* maintain all their security access protocols and systems in accordance with Union standards. These entities must also act in the best interests of crypto-asset holders and ensure equal treatment, unless preferential treatment of certain investors is provided for in the white paper and, if applicable, in marketing communications.

Lastly, MiCAR extends the principle of the EU passport to offerors and persons seeking admission to trading of crypto-assets, which, upon notification to the competent authority of their home Member State, may carry out their activities in all European Union countries. Mutual recognition, in the context under discussion, is however destined to produce unexpected effects, as it can lead to the circulation of tokens of various kinds, presenting very distinct features, across different host Member States. Given the

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([65]) *Ex multis,* G. FERRARINI - D. BUSCH - J.P. FRANX (ed.), *Prospectus Regulation and Prospectus Liability*, Oxford University Press, 2020; P.-H., CONAC - M. GELTER (ed.), *Global Securities Litigation and Enforcement*, Cambridge University Press, 2019.

uncertainties in terms of taxonomy, there exists, therefore, the risk that one crypto-asset may receive a classification in the home Member State that is not perfectly aligned, or is even divergent from that which would be found in the host Member State. This is a risk that is aggravated by the potential survival of national regimes (such as, in Italy, the regime applicable to financial products), protected, moreover, by sanctions, including those of criminal nature, which may potentially lead to nullity and/or the invalidation of the legal effects of the transactions.

4. In the context above, MiCAR outlines a special regime for issuers of ARTs and EMTs. These two assets have elements in common, but also dissimilarities. The common element lies in their function as payment instruments: simpler EMTs, more complex ARTs.
While EMTs are, to all intents and purposes, electronic money, issued, however, on the basis of DLT technology, ARTs are more complex instruments, whose origins can be traced back to market initiatives and, above all, to the ashes of Facebook's stablecoin project - first called Libra, then Diem and, finally, abandoned - which foresaw the issuance of a global currency that would be a true alternative to official currencies (66). It is precisely the debate, at times fiery, raised by that project, and some

(66) There were 28 founding members of Libra in total, see C. REICHERT -A. MORSE, *Facebook's Libra cryptocurrency loses support of five founding members,* CNET, 14 October 2019, available at www.cnet.com (last accessed 6 June 2023). On 12 May 2021, the project was abandoned: see R. BROWNE, *Facebook abandons plan to run digital currency from Switzerland, will move to the U.S.*, CNBC, 12 May 2021, available at www.cnbc.com.

serious episodes that later characterised the *crypto winter* (in particular, the failure of the issuer of the algorithmic *stablecoin* Terra Luna in 2022 ([67])) that explain the reasons for the particular stringency adopted by MiCAR on these matters. The issuance and operation of ARTs and EMTS are, on the one hand, reserved to intermediaries who either are already subject to typical EU prudential regimes, or are specially authorised entities, and, in any case, are subject to strict prudential requirements, as well as obligations on conduct of business and transparency.

In particular, pursuant to Article 16(1) MiCAR, an ART may not be offered to the public or sought to be admitted to trading unless the offeror or applicant for admission to trading is the *issuer of* that ART, and provided that such entity is, in addition ([68]): *(a)* a legal person or an undertaking established in the Union that has received the appropriate authorisation from the competent authority of its home Member State in accordance with Article

([67]) J. LIU - I. MAKAROV - A. SCHOAR, *Anatomy of a Run: The Terra Luna Crash*, MIT Sloan Research Paper No. 6847-23 (11 April 2023), available at https://ssrn.com/abstract=4416677.

([68]) As with crypto-assets other than asset-referenced tokens and e-money tokens, this requirement does not apply if: (a) over a 12-month period, calculated at the end of each calendar day, the average value of the asset-referenced token issued by an issuer never exceeds EUR 5.000,000 or the equivalent amount in another official currency, and the issuer is not linked to a network of other exempted issuers; or (b) the public offer of the asset-referenced token is addressed exclusively to qualified investors and the asset-referenced token may only be held by such qualified investors.

21 MiCAR; or *(b)* a credit institution complying with the requirements of Article 17 MiCAR ([69]).
Thus, for ARTs, a transparency regime is further supplemented by a licensing regime, which envisages the involvement of the competent national authority, European supervisory authorities (EBA and ESMA), and the ECB, each of which issuing their respective opinions on various matters.
Exceptions to this regime are credit institutions aiming to issue ARTs: they are not subject to prior authorisation by the competent authority of their home Member State but are required to notify the relevant supervisory authority (the national competent authority or the ECB, as the case may be). For credit institutions, in fact, compliance with several obligations - including licensing requirements - is already a prerequisite for the conduction of their typical activities in financial markets, as well as the subjection to direct supervision by the competent authorities ([70]).

4.1. One of the main risks identified by MiCAR lies in the fact that ARTs can be widely used as a medium of exchange to settle large volumes of payment transactions. The events of the *crypto-winter* have highlighted the risks and issues raised by these instruments, and the danger that they may also pose risks to the stability of the system as a whole. For this reason as well, the text

([69]) The Competent Authority's authorisation should be valid throughout the Union and allow the issuer of asset-referenced tokens to offer such crypto-assets in the internal market and seek admission to trading.

([70]) For the same reason, a credit institution issuing asset-referenced tokens is not subject to Articles 16, 18, 20, 21, 24, 35, 41 and 42 MiCA.

of the Regulation was gradually been enriched with various provisions outlining a particularly strict and pervasive regime.
Already in terms of conduct rules, issuers of ARTs are subject to more requirements than 'ordinary' token issuers. In addition to the duty to act honestly, fairly and professionally and to communicate with holders and prospective holders in a fair, clear and non-misleading manner, as well as observing requirements on marketing communications and periodic reporting, ART issuers are required to comply with specific provisions on conflicts of interest, complaints handling procedures, governance arrangements, own funds and reserve of assets. Additional requirements are provided with respect to the internal policies and procedures to be adopted by issuers ([71]), with particular emphasis on the one outlining the token stabilisation mechanism ([72]).

4.2. A particular aspect of the regime on ARTs concerns the prudential rules of own funds and asset reserves, which are aimed at ensuring the financial stability and soundness of both the issuers and the tokens themselves.
In particular, issuers of ARTs must at all times maintain own funds equal to at least the higher of: *(a)* €350,000; *(b)* 2% of the

([71]) *Inter alia*, relating to the following: (a) the reserve assets as specified in Article 36; (b) the safekeeping of reserve assets, including the segregation of assets, as specified in Article 37; (c) the recognition of rights to holders of asset-referenced tokens, as specified in Article 39; (d) the mechanism through which asset-referenced tokens are issued and redeemed; and (e) the protocols for validating transactions in asset-referenced tokens [...].

([72]) Art. 36(8) MiCAR.

average amount of the asset reserve under Art. 36 MiCAR; *(c)* one quarter of the previous year's fixed overhead ([73]).

With respect to the reserve of assets, issuers are required to establish and always maintain a reserve that is composed and managed in such a way that *(a)* the risks associated with the assets to which the asset-referenced tokens relate are covered; and *(b)* the liquidity risks associated with the holders' permanent redemption rights are addressed. This reserve may only be invested "in highly liquid financial instruments with minimal market risk, credit risk and concentration risk"; the assets purchased "shall be capable of being liquidated rapidly, with minimal adverse price effect" (Art. 38(1)).

The provisions concerning the maintenance of an adequate liquidity profile of the reserve were gradually enriched in the course of the preparatory works: on this point, it was correctly observed that liquidity risk brings ARTs close to money market funds and, therefore, it is no coincidence that the methodology and approach that MiCAR follows on this point is reminiscent of the rules applicable to such types of investment funds ([74]).

Notwithstanding the above, however, one must radically discard the suggestion that - based on mere assonances - could lead

([73]) The competent authority of the home Member State may require an issuer of an asset-referenced token to hold up to 20% more own funds than the amount resulting from the application of the requirement in (b), subject to the conditions set out in the Regulation.

([74]) E.D. MARTINO, *Regulating Stablecoins as Private Money between Liquidity and Safety. The Case of the EU 'Market in Crypto Assets' (MiCA) Regulation*, available at https://ssrn.com/abstract=4203885; ID., *Comparative Cryptocurrencies and Stablecoins Regulation: A Framework for a Functional Comparative Analysis*, available at https://ssrn.com/abstract=4500090.

one to assimilate ARTs to a collective investment undertaking. There are some similarities, in fact: the issuer of ARTs collects funds from the public, which are invested in the underlying reserve. However, if it is true that the reserve underlying the ARTs is well identified, in terms of composition, *ex-ante,* and therefore could present traits of resemblance to a true and proper investment policy (according to the proper notion of a collective investment undertaking), the fact remains that the employment, in that reserve, of the resources collected by the issuer does not correspond to the typical purpose of a collective investment undertaking, i.e. their management with a view to generating an *aggregate yield* for the benefit of its investors ([75]).

In addition, the only asset right granted to token holders is the right of redemption at the current market value of the "referenced" assets, there being, however, a clear prohibition on recognising interest or "any remuneration or other benefit related to the length of time during which a holder of asset-referenced tokens holds such asset-referenced tokens". Such prohibition is also extended to "net compensation or discounts, with an effect equivalent to that of interest received by the holder of asset-referenced tokens, directly from the issuer or from third parties, and directly associated to the asset-referenced tokens or from the remuneration or pricing of other products". In addition, according to Article 38(4), "all profits or losses, including fluctuations in the value of financial instruments [in which the reserve of assets is invested], and counterparty or operational risks that result

([75]) See Art. 36(7), according to which the aggregate value of the reserve is at least equal to the aggregate value of the claims of the holders of the token linked to outstanding assets against the issuer.

from the investment of the reserve of assets shall be borne by the issuer of the asset-referenced token". This, of course, runs counter to the very essence of a collective investment undertaking. Finally, the regulatory regime on ARTs provides for rules on stabilisation mechanisms, auditing of the reserve of assets, custody of the reserve, its investment, and recovery and redemption plans. To avoid contamination risks, the reserve of assets is also required to be legally separated from the assets of the issuer and from the reserve of assets of other ARTs: the issuer's creditors therefore have no claim on such reserve of assets, either under the ordinary regime or in the event of insolvency.

4.3. As anticipated, one of the main risks identified by MiCAR, stemming from both asset-referenced tokens and e-money tokens, concerns their potentially widespread dissemination. For these reasons, the issuers of *significant* ARTs are subject to stricter rules. The distinction between significant and non-significant entities is of course reminiscent of the Single Supervisory Mechanism for credit institutions, but the criteria ([76]) used for the

([76]) In terms of the criteria, materiality occurs if at least three of the criteria set forth in paragraph 1 of Article 43 MiCAR are met, namely: (a) the number of holders of the asset-referenced token exceeds 10 million; (b) the value of the asset-referenced token issued, its market capitalisation or the size of the asset reserve of the issuer of the asset-referenced token exceeds 5.000,000; (c) the average number and the average aggregate value of transactions in such asset-referenced token on a daily basis during the relevant period exceeds 2.5 million transactions and 500,000, respectively.000 respectively; (d) the issuer of the asset-referenced token is a basic platform service provider designated as a gatekeeper in accordance with Regulation (EU) 2022/1925 of the European Parliament and of the Council; (e) the significance of the activities of the issuer of the asset-referenced token on an international scale, including the use of

purpose of this distinction and the consequences thereof are different.

In particular, if the regulatory thresholds are exceeded, issuers of significant ARTs are subject to additional rules, including: *(a)* maintaining a remuneration policy that promotes sound and effective risk management; *(b)* implementing and maintaining a liquidity management policy and procedure to ensure resilient liquidity even under stress conditions; *(c)* implementing liquidity stress testing.

Beyond the strengthening of prudential requirements, however, worthy of note is the provision whereby, if an asset-referenced token is classified as significant, supervisory responsibilities with respect to the issuer are transferred from the competent authority of the issuer's home Member State to the EBA. This *institutional* aspect constitutes one of the most significant novelties of the Regulation. As a result of this provision, in fact, the MiCA Regulation impacts on the very institutional structure of European financial supervision, transforming the EBA for the first time into an agency that is no longer only a regulatory authority, but also a supervisory authority, following the model achieved, in certain areas, by ESMA.

Finally, there is one rule that, in the context of Union financial legislation, represents a true *unicum*. If, for an ART, the average number, and the estimated quarterly average aggregate value, of daily transactions associated with its use as a medium of

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the asset-referenced token for payments and remittances (f) the interconnectedness of the asset-referenced token or its issuers with the financial system; (g) the fact that the same issuer issues at least one additional asset-referenced token or e-money token and provides at least one crypto-asset service.

exchange, in a single currency area, exceeds one million transactions and EUR 200,000,000 respectively, the issuer is obliged to scale down its activity (Article 23). In particular, it is required to: *(a)* stop issuing the ART; and *(b)* within 40 working days of reaching the threshold, submit a plan to the competent authority to ensure that the quarterly average number and the estimated average aggregate value of daily transactions are kept below one million transactions and EUR 200,000,000, respectively.

The uniqueness of this provision is obvious. Within the framework of EU law, there are, in various fields, provisions which, where an economic operator exceeds certain volume thresholds, it becomes subject to special rules. In the financial sector, the most immediate reference is found in the context of credit institutions that are part of the SSM, for which the well-known distinction between *significant* and *less significant* institutions applies. A similar logic is followed in the context of the AIFM Directive, for the distinction between *above-* and *below-threshold* managers (according to the relevant definitions). To the best of our knowledge, however, there is nothing equivalent to what can be read in MiCAR so far, i.e. a rule placing a ceiling on the volume of business or the 'growth in size' of the entity. This unprecedented regime, justified by the Regulation with the rather intuitive objectives of safeguarding the stability of the system, and mitigating risks, poses fascinating interpretative questions, particularly with regard to its compatibility with the general principles of the Treaties, and of the Constitutions of the Member States, starting with principles and rules that protect the freedom of economic initiative.

4.4. Under MiCAR, electronic money tokens (EMTs) are considered, to all intents and purposes, as electronic money, and therefore subject, firstly, *to* the relevant, specific regulation, stemming from the *E-money Directive* ([77]). Also for this reason, they may be offered to the public or admitted to trading provided the request comes from the issuer, which: *(i)* is authorised as a credit institution *or* e-money institution; and *(ii)* has notified - and subsequently published - a white paper to its competent authority ([78]). For MiCAR, the issuance of e-money tokens by entities other than these is therefore excluded (including those that might be allowed to provide e-money on the basis of National law), differently from the regime applicable to ARTs.

Although, apparently, such an approach seems in line with the principle of technological neutrality, MiCAR entails a significant deviation from it where it subjects EMTs issuers to additional and special rules, justified *solely* by the issuance of the crypto-asset via DLT technology. These deviations concern, in the first place, the requirement for EMTs issuers to publish a white paper at the initial offering stage, similarly to what has already been detailed for other categories of crypto-assets. Moreover, issuers of EMT are then subject to an additional regime in terms of prudential supervision, which generally recalls, with certain

([77]) 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, OJ 10.10.2009.

([78]) Without prejudice to paragraph 1, with the prior written consent of the issuer, other persons may offer the electronic money token to the public or request its admission to trading. Such persons must, however, comply with Articles 50 and 53 MiCAR.

adaptations, the one applicable to issuers of ARTs. Thus, a body of rules clearly driven by the particular technology used for the provision of a service that, in substance, remains the same.
Finally, for EMTs there is also a special regime for significant issuers ([79]).

5. MiCAR's all-round approach also includes, in Title V, an articulated regime for crypto-asset service providers, defined as those legal persons or undertakings 'whose occupation or business consists in the provision of one or more crypto-asset services to clients on a professional basis' (Article 3(15)). In this respect, the so-called 'mifidisation' of the regulation is evident([80]), as the MiFID regime stands as the clear reference model. The services covered are, to a very large extent, those already known to MiFID, now transposed to the sphere of crypto-assets, namely: (a) custody and administration of crypto assets on behalf of clients; (b) operation of a crypto-asset trading platform; (c)

([79]) In referring to the text of the Regulation, it should be noted that significant issuers of e-money tokens are subject to the specific rules set out in (i) Articles 36, 37 and 38 on reserve assets and 45(1) to (4), instead of the corresponding provisions in the EMD; and (ii) Articles 35(2), (3) and (5) on own funds, instead of the corresponding provisions in the EMD.

([80]) M.T. PARACAMPO, (fn. 9). The phenomenon, moreover, is certainly not limited to MiCAR, as many MiFID-derived standards, in particular those concerning rules of conduct and customer relations, have influenced numerous other sectors of EU financial legislation. On this point see F. ANNUNZIATA, Towards an EU Charter for the Protection of End Users in Financial Markets. European Banking Institute Working Paper Series 2022 - no. 128, Bocconi Legal Studies Research Paper No. 4200502, available at https://ssrn.com/abstract=4200502.

exchange of crypto-assets for funds; (d) exchange of crypto-assets for other crypto-assets; (e) execution of orders for crypto-assets on behalf of clients; (f) placing of crypto-assets; (g) reception and transmission of orders for crypto-assets on behalf of clients; (h) providing advice on crypto-assets; (i) providing portfolio management on crypto-assets; and (j) providing transfer services for crypto-assets on behalf of clients.

Similarly to what MiFID provides for investment services, MiCAR also identifies the perimeter of reserved activities by requiring them to be carried out *professionally*, and intended for the *public*: two requirements that can be reconstructed by applying to MiCAR the interpretative criteria already followed in the context of the MiFID regime.

Two distinct regimes are set out for market access by crypto-asset service providers: one that can be defined as *ordinary,* i.e. applicable to entities that are not already authorised to provide other financial services or activities, and a *special* regime, which instead concerns the latter (namely, a credit institution, a central securities depository, an investment firm, a market operator, an electronic money institution, a UCITS management company or an authorised alternative investment fund manager). While the former require authorisation by the competent authority, the latter are subject to a notification procedure prior to commencing operations.

However, for financial entities, the extent of the services related to crypto-assets is different depending their regime. Credit institutions are, in fact, granted the widest scope of operations in MiCAR services, as they are not precluded from carrying out any of the abovementioned activities. In this case, the *rationale* for the exemption from the licensing requirement is not based on a

presumption of equivalence between services but rather lies on the nature of the authorisation already held by credit institutions under the current legislation, which is deemed to ensure all necessary safeguards also for transactions involving crypto-assets.
As for *investment firms*, they may only provide, without requiring a new authorisation, crypto-asset services *equivalent to* the MiFID investment services and activities for which they are specifically authorised ([81]).
Managers of collective investment undertakings are also covered by the exemption regime: for them as well, the facilitative regime applies to crypto-asset services equivalent to the corresponding investment services, for which they have been authorised. On the other hand, there are no specific provisions concerning limits, or conditions, under which a collective investment undertaking may invest in crypto-assets. These issues raise delicate questions, which must be solved in the light of sectoral regimes (UCITS and AIFMD) and national legislations. ([82])
Finally, one should note the *reverse solicitation* regime applicable to third-country investment firms providing crypto-assets services on the sole initiative of clients, again inspired by the similar

([81]) For further discussion, also to focus on the concept of equivalence, M.T. PARACAMPO (fn. 9); F. ANNUNZIATA, *The Licensing Rules in MiCA, in Fintech Regulation and the Licensing Principle*, in D. MOURA VICENTE, D. PEREIRA DUARTE, C. GRANADEIRO (eds.) *Fintech Regulation and the Licensing Principle*, Lisboa, EBI - Centro de Investigaçao de direito privado, available https://ssrn.com/abstract=4346795.

([82]) D.A. ZETZSCHE, F. ANNUNZIATA, J. SINNIG, *Digital Assets, MiCA and EU Investment Fund Law (November 18, 2023)*, available at https://ssrn.com/abstract=4637019.

MiFID regime. Accordingly, where a third-country service provider merely provides a service solely within the context of a client-initiated relationship, the authorisation requirement of Article 59 MiCAR does not apply. On the other hand, in the case of an active conduct on the part of the service provider, in the form of solicitation, promotion or advertising of the service, the exception does not apply ([83]). It should be also observed that, as already noted, this is the only provision in the Regulation that refers to service providers from third countries, confirming the particularly protective approach that the Regulation takes with regard to the EU market.

5.1. In MiCAR, as in MiFID, protection of holders of the instrument is entrusted to a substantial set of rules of conduct that crypto-asset service providers must observe.

Following the MiFID model of origin, the rules of conduct to which crypto-asset service providers are subject are divided into general obligations, applicable to all crypto-asset service providers, and specific obligations, which take into account the type of service provided.

On a general level, one finds in MiCAR the obligation to act honestly, fairly and professionally in the best interests of clients, analytical rules on transparency, information, and the obligation to identify, prevent and manage conflicts of interest. On a specific level, direct assonances with MiFID can be found in relation to advisory and portfolio management services, treated as a single

([83]) Pursuant to Article 61(3) MiCA by 30 December 2024, ESMA shall issue guidelines, in accordance with Article 16 of Regulation (EU) No. 1095/2010, clarifying the situations in which a third-country firm is deemed to be trying to obtain clients established or resident in the Union.

unit by the Regulation in Article 81: in this respect, the proximity between the two regimes is evidenced by the suitability assessment rule. Also derived from MiFID are numerous prudential requirements ([84]). In MiCAR, the centrality of technology - an element that seems to mark a point of discontinuity with MiFID II ([85]) - is singled out by the emphasis placed on the safeguards that service providers must adopt to prevent cyber risks: crypto-asset service providers must, in fact, take all reasonable steps to ensure the continuity and regularity of the provision of their crypto-asset services, including, of course, the requirements introduced by the aforementioned Regulation (EU) 2022/2554 (DORA Regulation).

Notwithstanding the above, there are, however, certain discrepancies between the MiFID and MiCAR regimes.

A first aspect relates to the rules, found in MiCAR, on custody and administration services, which here constitute *reserved activities*. The reason for this greater rigour of MiCAR, compared to the analogous MiFID ancillary service, is to be found not only in the specificities of the crypto market, but also in the lessons that emerged from the *crypto winter*, in the context of which serious structural and governance deficiencies emerged precisely

([84]) See Article 67, MiCAR. In particular, crypto-asset service providers must meet the prudential requirements to the higher of: (i) the minimum capital requirements (amounting to EUR 50,000-150,000 depending on the service provided); or (ii) one quarter of the fixed overhead, subject to annual review. Prudential safeguards take one or a combination of the following forms: (a) own funds, consisting of primary capital elements and instruments; or (b) an insurance policy covering the Union territories where cryptocurrency services are provided or a similar guarantee.

([85]) M.T. PARACAMPO, Crypto service providers (fn. 9).

with regard to the efficient and proper provision of custody. Not only for MiCAR is custody a reserved activity (and not a mere ancillary service), but it is also subject to specific and more restrictive rules. Article 75 MiCAR requires, first, a specific agreement between the service provider and the client (the content of which, however, is not fully set out in the Regulation, which instead merely indicates certain minimum elements thereof). The provision also requires service providers to carry out periodic reporting to clients and to draft a custody policy, with internal rules and procedures to ensure the custody or control of crypto-assets or the means of access to crypto-assets. It is further established that crypto-assets held in custody by the provider are legally segregated from the provider's assets in the interest of the customers, so that the provider's creditors have no claims on the crypto-assets held in custody, in particular in the event of insolvency (Article 75(3) and (7); Article 70(1) and (2)). Specific obligations are also formulated concerning the exercise of rights attached to crypto-assets and the return of crypto-assets to clients(Article 75(4) and (6) MiCAR).

With regard to the separation of the crypto-assets of individual customers, in addition to having to include in the request for authorisation a description of the procedure for the separation of the customer's crypto-assets and funds, the custodian service provider is required to establish a register of positions in the name of each customer, in order to keep a record of the transactions and movements carried out.

In the context of service providers, further peculiarities with respect to MiFID are scattered in the details of the rules applicable to individual services. For instance, and unlike in the MiFID regime, entities operating a trading platform are subject to

verification and 'control' duties regarding crypto-assets, including the obligation to 'prevent the admission to trading of crypto-assets that have an inbuilt anonymisation function' (Article 76(2) and (3), MiCAR).
Finally, there are also *significance* thresholds for service providers (Article 85). In terms of definition, a crypto-asset service provider is deemed significant if it has in the Union at least 15 million active users, on average, in a calendar year, such average being calculated as the average of the *daily number of* active users during the entire previous calendar year. Upon reaching such threshold, crypto-asset service providers shall notify the respective competent authority within two months. If the competent authority agrees that the threshold has been reached, it notifies ESMA, which then acquires certain supervisory powers, in this emulating (but not entirely replicating) the EBA, which is responsible, as noted above, for the direct supervision of issuers of significant asset-referenced tokens and significant e-money tokens.

6. The MiCAR formulates, in Title VI, its own rules on market abuse which follow, with some modifications, the provisions contained in the *Market Abuse Regulation* (MAR) ([86]).
It should be noted, however, that in the context of MiCAR, the rules on market abuse refer not only to the issuer, but also to the offerors and persons seeking admission to trading of crypto assets.
Notwithstanding the above, the similarities with the MAR are, also in this case, numerous, and can already be found in the

([86]) M. MAUGERI, *Crypto-assets and market abuse*, in *ODCC*, 2022, 413.

notion of inside information, which is formulated in an almost identical sense (Art. 87). In MiCAR, however, the significance of the effect of disclosed information on the price of crypto-assets is measured not on the basis of the reasonable investor test as per Article 7(4) MAR ([87]), but in accordance with the 'reasonable crypto-asset holder' test. The multiple uses to which crypto-assets lend themselves, could therefore lead to assessments that are not exactly coincident in these two regulatory spheres ([88]).

Also with regard to disclosure of inside information, MiCAR, while maintaining an approach that replicates the founding rules of MAR, contains specific provisions, again justified by the particular nature of crypto-assets.

Article 30(3) provides, for example, that - subject to Article 88 - issuers of ARTs (whether 'listed' or not) must disclose - as soon as possible and in a clear, accurate and transparent manner disclose, in a publicly and easily accessible place, on their website - information on any event that has or may have a significant effect on the *value of* the ARTs, or on the relevant reserve of assets (see Article 36 MiCAR).

The purpose of this provision is to provide the market, and users, with information on the valuation of ARTs, which in turn, as we have seen, depends on the value of the underlying reserves.

In case the token is traded on a trading platform, such a disclosure regime is in addition to the disclosure of *price-sensitive* information. Rules on disclosure therefore apply at two distinct

([87]) SEE M. VENTORUZZO - C. PICCIAU, *Article 7: Inside information, in Market abuse regulation: commentary and annotated guide*, edited by M. Ventoruzzo - S. Mock, 2022.

([88]) See, *amplius*, M. MAUGERI, (fn. 86).

but related levels, with no equivalent in MAR: on the one hand, information on any 'event that has or is likely to have a significant impact on the value of the asset-referenced tokens or on the reserve assets'; on the other, the notion of price-sensitive information, modelled on MAR. While the former looks, precisely, at the *value* of the instrument, the latter considers instead the impact on the *prices* of the information itself, according to two elements that become more interconnected insofar as markets in crypto-assets develop informational efficiency. In a context of increased efficiency, in fact, value and price should tend to coincide.

Delay in the disclosure of inside information is also a matter subject to specific rules, contained in Article 88(2) MiCAR, which do not entirely coincide with those under MAR: in fact, MiCAR lacks certain provisions which, instead, are crucial in the context of MAR.

In particular, MiCAR does not contemplate the so-called 'special' delay in disclosure (regulated in Article 17(5) and (6) MAR) provided for financial institutions. This is an omission that is not to justify, since MiCAR itself assigns to certain subjects, in particular issuers of ARTs and EMTs, a risk profile of even systemic importance. Moreover, the regulation of such entities is, as already mentioned, strongly modelled on the classic standards of prudential supervision, which would have made it logical to extend the relevant MAR rules also to the regulatory environment of markets in crypto-assets.

Another discrepancy between MAR and MiCAR concerns the absence of a provision granting the possibility of delaying the disclosure of inside information relating to the *intermediate stages*

of protracted processes. This omission is, however, easily explained. Indeed, Article 88 MiCAR does not expressly provide for an obligation to disclose inside information relating to a stage of a protracted process, in line with the proportional approach evoked by Recital (95) ([89]). The omission is, therefore, consistent with the rationale of the Regulation.

Still in the spirit of a certain simplification with respect to MAR, MiCAR does not provide for an obligation on the part of the issuer (or of the offeror) to disclose the information in the event that, having been the subject of *selective disclosure*, confidentiality is no longer guaranteed (Art. 17(8) MAR): once again, the reasons for this omission are not fully understandable.

With regard to the prohibitions on insider trading, MiCAR is again aligned with MAR, replicating the classic triad of prohibitions governing insider trading (in a nutshell: prohibition of *trading, communication* and *advice*).

In the second area of the subject of abuse (the market manipulation under MiCAR), Articles 91 and 92 describe abusive

([89]) "[...] as issuers of crypto-assets and crypto-asset service providers are very often SMEs, it would be disproportionate to apply all of the provisions of Regulation (EU) No 596/2014 of the European Parliament and of the Council to them".

Moreover, the EU legislator seems to be moving in this direction, in the context of the simplification measures proposed by the Commission in the so-called Listing Act. On this point, see F. ANNUNZIATA - M. ARRIGONI, *Le principali novità del Listing Act sulla comunicazione al pubblico di informazioni privilegiate,* in *Dialoghi dir. econ*., 2023, 1 ff; R. VEIL - M. WIESNER - M. REICHERT, *Ad Hoc Disclosure under the EU Listing Act,* in *Die Aktiengesellschaft,* 2023, 57 ff; F. ANNUNZIATA - M. SCOPSI, *Il rapporto ESMA del 23 settembre 2020 e le proposte di modifica al Regolamento market abuse*, in this *Journal*, 2021, 176.

conducts and prescribes the measures necessary to prevent and detect market abuse.

As in the case of MAR, the MiCA Regulation also looks at the two areas of operation-based and information-based manipulation (Art. 12 MAR) ([90]). Here too, there are, however, some simplifications with respect to the reference model. The description of the kinds of manipulation is formulated in broad terms, relying on very general expressions, then specified in non-exhaustive examples (Article 91 MiCAR). It should be noted, however, that the MAR also provides a series of non-exhaustive indicators for the specification of operation-based manipulation, which are not found in the MiCAR ([91]): this is probably due to the need to maintain a high level of adaptability of MiCAR to market development ([92]). It has been rightly observed, in fact, how the technical features of crypto-assets may not only innovate known manipulative schemes, but also lead to the emergence of completely new ones ([93]).

([90]) On market manipulation in MAR, see A. GURREA-MARTINEZ, *Article 12: Market Manipulation,* in M. VENTORUZZO, S. MOCK (eds.) *Market abuse regulation: commentary and annotated guide*, where a description of the different manipulative techniques actually used on the markets can be found. See also, in the same work, S. MOCK, *Article 15: Prohibition of market manipulation*.

([91]) Article 15(3) MAR refers, in fact, to Annex I, which identifies a non-exhaustive list of manipulation indicators.

([92]) N. GANDAL - J.T. HAMRICK - F. ROUHI - A. MUKHERJEE - A. FEDER - T. MOORE - M. VASEK, *The Economics of Cryptocurrency Pump and Dump Schemes*, CEPR Discussion Papers 13404, 2018, https://perma.cc/G85K.

([93]) M. MAUGERI, (fn. 86), in relation, *inter alia*, to so-called rug pull and stop hunting techniques.

Also in line with the cautious proportionality approach, there are no *insider* register-keeping or *internal dealing* requirements in the MiCAR. Investment recommendations are also not covered by the MiCAR.
Notwithstanding the foregoing, it cannot, however, be ruled out, and indeed seems likely, that the simultaneous application of the two bodies of law ([94]) may take place. Take the case, for example, of a credit institution whose financial instruments are traded on a MiFID *trading venue* and which is also an issuer of crypto assets traded on exchange platforms subject to the MiCAR. Consider, in this context, a relevant event relating to the issuer that is likely to significantly affect the prices of both the financial instruments and the tokens. The two regimes will cumulate, creating an obvious need for coordination, which practice and convergent supervisory approaches may suggest in the future.

7. There are many (perhaps *too many*) issues and problems that are impossible to address in this paper, but which could be further developed at a later date: to state a few, the sanctioning regime, the relationship between MiCAR and other Union regimes, e.g. that on payment services, or the relationship between MiCAR and consumer protection regulations. The complex rinterplay with the CRD IV regime, e.g. in terms of the prudential treatment of crypto-assets, would also merit further investigation, together with the interaction between MiCAR and UCITS and AIFM regimes.

([94]) See M.P. GRIMM - S. KREUTER, *Kryptowerte und Marktmissbrauch,* in *Die Aktiengesellschaft*, 2023, 177 ff.

Ultimately, the text of the MiCA Regulation is, at least at the time of writing (November 2023), an unfinished cathedral. In the coming months, the European Supervisory Authorities and the Commission are called upon to issue dozens of Level 2 Regulations, and, as already mentioned, a very large number of *soft law* instruments of a composite nature is expected: guidelines, Q&As, opinions, to compose a regulatory framework that promises to be very articulate. The cross-sectoral scope of this *corpus* of opinions and instruments (capable of affecting many other areas of EU financial law) will also have a major impact.

At the same time, the European Union will soon also have to consider whether, and how, to address the challenges of what has not yet been addressed by the Regulation, not only with regard to what has been left *out of* MiCAR, but also by imagining a coordinated approach to the various areas of the new digital finance legislation: not just MiCAR, therefore, but also artificial intelligence, the Digital Euro, DeFi, digital platforms, and more to come.

The path towards the construction of a comprehensive EU digital finance law has only just begun, but it already promises to be fascinating, at least on an intellectual level. Whether this immense work of the Union institutions is indeed suitable to support the development of digital markets in the EU is a different question, and one that we are unable to anser, due to our own limitations (of which we are well aware).

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