universität wien

MASTER THESIS

Titel der Master Thesis / Title of the Master‘s Thesis

„The future of crypto-assets within the European Union – an analysis of the European Commissions' proposal for a Regulation on Markets in Crypto-assets"

verfasst von / submitted by

Mag.iur. Beat König

angestrebter akademischer Grad / in partial fulfilment of the requirements for the degree of

Master of Laws (LL.M.)

Wien, 2021 / Vienna 2021

Studienkennzahl lt. Studienblatt / Postgraduate programme code as it appears on the student record sheet:	A 992 548
Universitätslehrgang lt. Studienblatt / Postgraduate programme as it appears on the student record sheet:	Europäisches und Internationales Wirtschaftsrecht / European and International Business Law
Betreut von / Supervisor:	Univ.-Prof. Dr. Siegfried Fina

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List of Abbreviations

AFME	*Association for Financial Markets in Europe*
AIFMD	*Alternative Investment Fund Manager Directive*
AML/CFT	*Anti Money-Laundering/Combatting the Financing of Terrorism*
AMLD	*Anti Money-Laundering Directive*
ART	*asset-referenced tokens*
Cap Mark Law J	*Capital Markets Law Journal*
CASP	Crypto-Asset Service Provider
CRD IV	*Capital Requirement Directive*
CRR	*Capital Requirements Regulation*
CSDR	*Central Securities Depositories Regulation*
DeFi	*Dezentralized Finance Applications*
DLT	*distributed ledger technology*
DMFSD	*Distance Marketing of Financial Services Directive*
EBA	*European Banking Authority*
EBOR	*European Business Organization Law Review*
ECB	*European Central Bank*
ECSP	*European Crowdfunding Service Providers Regulation*
EIOPA	*European Insurance and Occupational Pensions Authortiy*
EMD2	*Second E-Money Directive*
EMT	*e-money tokens*
ESA	*European Supervirsory Authorities*
ESMA	*European Markets and Securities Authority*
EU	*European Union*
FATF	*Financial Action Task Force*
GDPR	*General Data Protection Regulation*
GesRZ	*Der Gesellschafter - Zeitschrift für Gesellschafts- und Unternehmensrecht*
HLJ	*Hastings Law Journal*
ICO	*Initial Coin Offering*
ICT	*Information and Communications Technology*
JBBA	*Journal of the British Blockchain Association*
JBV Insights	*Journal of Business Venturing Insights*
JOLTI	*Case Western Reserve Journal of Law, Technology & the Internet*
Law Financial Mark Rev	*Law and Financial Markets Review*
MAR	*Market Abuse Regulation*
MiCA	*Commissions' proposal on a Regulation on Markets in Crypto-assets*
MiFID II	*Markets in Financial Instruments Directive II*
MiFIR	*Markets in Financial Instruments Regulation*
MJECL	*Maastricht Journal of European and Comparative Law*
MTF	*Multilateral Trading Facility*
NCA	*national competent authority*
NFT	*Non-Fungible Token*
NJCL	*Nordic Journal of Commercial Law*
ÖBA	*Österreichisches BankArchiv*
OTF	*Organized Trading Facility*
PR	*Prospectus Regulation*
PRIIP	*Packaged Retail and Insurance-based Investment Products*
PSD2	*Second Payment Services Directive*
RdF	*Recht der Finanzinstrumente*
RdW	*Recht der Wirtschaft*
SME	*Small and medium-sized enterprise*
SSMR	*Single Supervisory Mechanism Regulation*
TLR	*Tilburg Law Review*
UCITS	*Undertakings for the Collective Investment in Transferable Securities*
ZBB	*Zeitschrift für Bankrecht und Bankwirtschaft*
ZFR	*Zeitschrift für Finanzmarktrecht*

1. Introduction

Digitalization seems to be unstoppable – not least because European citizens had to endure several lockdowns during the past year, digitalization has entered even the most analogous households. Finance has seen this development for a long time already and it goes on to rise to unprecedented levels. In this context, the last years also showed an influx of several so-called FinTechs, i.e., undertakings seeking to improve and automate the delivery and use of financial services.[1] Innovations are rapidly changing and disrupting established principles on how financial service providers operate and approach customers in the European Union and all around the world. New investment opportunities for consumers are flooding the market.

Like most disrupting and innovative changes, opportunities and risks come hand in hand. As the latest step in order to regulate and thereby mitigate anticipated risks for the market as a whole as well as the individual affected by new technologies in financial services the European Commission published the 'Digital Finance Package'[2] in September 2020 stating '[t]he future of finance is digital […]'[3] in its very first sentence. It aims to 'make Europe fit for the digital age'.[4] The heart of the Digital Finance Package – as of this thesis – is a new regulatory approach on crypto-assets and the distributed ledger technology (DLT).

As the European Securities and Markets Authority (ESMA) argued, while some crypto-assets[5] already fall within the scope of EU legislation, the classification is not always straightforward. The existing EU legislation leaves vast room for uncertainty and lack of clarity for both regulators as well as market participants. At the same time, most crypto-assets fall outside the scope of EU financial services legislation and are therefore not regulated, hence their use lacks consumer protection and bears risks on market integrity.[6] Some Member States already

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[1] Julia Kagan, 'Financial Technology – Fintech' (Investopedia, 28 August 2020) <https://www.investopedia.com/terms/f/fintech.asp> accessed 4 September 2021.

[2] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a on a Digital Finance Strategy for the EU' COM (2020) 591 final.

[3] COM (2020) 591, 1.

[4] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937' COM (2020) 593 final, 1.

[5] The author is aware of the fact, that several terms are in regular use to describe crypto-assets, such as 'crypto-currencies', 'coins' or 'tokens'. While Section 2.3. will briefly discuss the terminology, the author wishes to point out already at his stage of the thesis, that for reasons the thesis will elaborate at the given places, the term 'crypto-asset' will be used to describe all the above mentioned throughout the thesis.

[6] ESMA, 'Advice on Initial Coin Offerings and Crypto-Assets' (ESMA50-157-1391, 9 January 2019) <www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf> accessed 4 September 2021.

attempted to legislate on issues related to crypto-assets, thereby leaving market fragmentation in the European Union.[7]

While the European Commission emphasizes its aim to facilitate digital innovation in the interest of consumers and market efficiency,[8] soon after the publication of the Digital Finance Strategy, several market players raised concerns about the possible negative impact the proposed regulatory framework – especially the proposal for a Regulation on Markets in Crypto-assets[9] (hereinafter referred to as 'MiCA'[10] or 'the Commissions' proposal') which will the core proposal discussed in the course of this thesis – might have on the booming market of Decentralized Finance[11] as well as on the market of purely decentralized, in the sense of 'issuerless', crypto-assets. Namely, the absence of a central authority to issue crypto-assets, was one of the main selling points of Bitcoin, as set out in the groundbreaking white paper of Bitcoin drafted by the unidentified person or group of persons called 'Satoshi Nakamoto' in 2008.[12] Though, from a regulatory point of view decentralization and the lack of an organization structure and transparent rules of responsibilities pose a problem for legislators.[13]

This thesis aims to analyse the Commissions' attempt for a regulatory solution on how to deal with future developments in financial markets within the European Union, in particular concerning the markets in crypto-assets. The author will first outline some technological aspects as well as terminology used in the crypto-community and then briefly describe the status quo of the regulatory approach on crypto-assets in the legal framework within the European Union. Secondly, the MiCA will be presented, described and analysed. Thirdly, the author will pose and try to answer the question if certain phenomena in the world of crypto-assets and crypto-asset services will stay unregulated. The underlying aim of this thesis is to provide a comprehensive insight and overview on the possible future regulatory framework in

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[7] COM (2020) 593, 2.
[8] COM (2020) 591, 4.
[9] COM (2020) 593.
[10] Some authors refer to the proposal for a Regulation on Markets in Crypto-assets as 'MiCAR', where the 'R' stands for 'Regulation'. The author of this thesis holds the opinion that it is not appropriate to include the attribute 'Regulation' in an abbreviation of a proposal on a Regulation and therefore will refer to the proposal as 'MiCA'.
[11] E.g., the Total Locked Value (TLV) of USD locked in DeFi Applications rose in 2020 within one year from 500 million USD to 5,2 billion USD, see BitcoinSuisse, 'Was ist DeFi?' (BitcoinSuisse Blog, 27 October 2020) <www.bitcoinsuisse.com/de/fundamentals/was-ist-defi> accessed 4 September 2021.
[12] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008) <https://bitcoin.org/bitcoin.pdf> accessed 4 September 2021.
[13] See e.g., Asress Adimi Gikay, 'Regulating decentralized Cryptocurrencies under Payment Services Law: Lessons from the European Union Law' (2018) 9 JOLTI 1, 2.

the world of crypto-assets. In order to achieve this aim, the author has proposed the following research questions, that will be dealt with in the course of this thesis:

i. What kind of crypto-assets are covered by the MiCA?

ii. How is the European Commission planning to regulate markets in crypto-assets in the European Union and how do these plans fit into the existing legal framework?

iii. How is the European Commission seeking to mitigate anticipated threats to financial stability posed by ‘global stablecoins’?

In Chapter 2, the author will shortly describe the basic notions on which crypto-assets rely upon, i.e., the distributed ledger technology and its most prominent use case, the blockchain, as well as provide the reader with a short overview of what is considered to fall under the umbrella term ‘crypto-assets’. Chapter 3 is dedicated to briefly describe the European Commissions’ proposal on a Digital Finance Strategy in general, whereas in Chapter 4 the status quo of the regulatory understanding of crypto-assets will be briefly discussed. In Chapter 5, the core of this thesis, the MiCA will be presented and discussed in detail. This will be followed by a glance into the crystal ball in Chapter 6, putting the newly proposed regulatory framework and the status quo together and thereby describing the possible regulatory future of crypto-assets within the European Union. In Chapter 7, the author will conclude on the findings and provide answers to the research questions.

2. The distributed ledger technology and crypto-assets

2.1. Introductory remarks

For the purpose of this chapter, it is already to be noted that the common descriptions of the DLT differ from the approach the Commission took in drafting the relevant provision in the MiCA. As the World Bank in its FinTech Note on ‘Distributed Ledger Technology (DLT) and Blockchain’ of 2017 pointed out, the terminology in this field is still evolving and universal definitions have not been formalized yet.[14] This stands true also in the present year 2021. This chapter does neither claim to comprehensively discuss the DLT and the terminology used in

[14] Solvej Karla Krause, Harish Natarajan, Helen Luskin Gradstein, ‘Distributed Ledger Technology (DLT) and blockchain (English)’ (FinTech note;no. 1 World Bank Group, 2017) <http://documents.worldbank.org/curated/en/177911513714062215/Distributed-Ledger-Technology-DLT-and-blockchain> accessed 4 September 2021, 2 and 3; see also Christian Steiner, *Krypto-Assets und das Aufsichtsrecht* (Finanzverlag 2019) 8.

the crypto-community nor does it claim to cover all aspects that might be viewed as crucial for a full understanding of this topic. However, it aims to briefly explain some technical aspects of the distributed ledger technology on a high level whose basic understanding will be of use for the reader, in particular to follow the discussion about the MiCA more easily. For the same reason, this chapter seeks to provide the reader with a basic notion of the terminology in the vast field of crypto-assets in order to be able to benefit from the further contents of this thesis.

2.2. The distributed ledger technology (DLT) and the blockchain technology

The World Bank describes the distributed ledger technology as 'a novel and fast-evolving approach to recording and sharing data across multiple data stores (ledgers), which each have the exact same data records and are collectively maintained and controlled by a distributed network of computer servers, which are all called nodes'.[15] The Bank of International Settlements (BIS) defined DLT as a term referring 'to the protocols and supporting infrastructure that allow computers in different locations to propose and validate transactions and update records in a synchronized way across a network.'[16] In the authors opinion, both definitions describe the DLT accurately as both comprise the central elements of what constitutes the DLT: (i) It is a technique to (ii) record, share and validate data (iii) synchronized (iv) in a distributed network. Hence, in a nutshell, DLT is a technology that supports the distributed, synchronized storage, maintenance and validation of a set of data.

The terms 'blockchain technology' and 'blockchain' are to be differentiated from the DLT: 'Blockchain technology' represents a particular type of the DLT – a DLT where pieces of information are bundled in blocks that are connected through a cryptographic procedure in an ever-growing chain – the 'blockchain'.[17] The groundwork and core ideas of the blockchain technology were already set in the late 1980s[18] and further elaborated by *Wei Dai* in 1998,[19] proposing a system of an anonymous and distributed method of issuing coins called 'B-

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[15] Krause and others (n 14) 1.
[16] Bank for International Settlements (BIS), 'International banking and financial market developments' (BIS Quarterly Review, September 2017) <https://www.bis.org/publ/qtrpdf/r_qt1709.htm> accessed 4 September 2021, 58.
[17] Dylan Yaga, Peter Mell, Nik Roby, Karen Scarfone, 'Blockchain Technology Overview' (NISTIR 8202, 2018) <https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8202.pdf> accessed 4 September 2021, 3 and 7; Philipp Hacker, Chris Thomale, 'Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law' (2018) 4 ECFR 645, 649 et seq.
[18] Yaga and others (n 17) 2.
[19] Wei Dai, 'B-money' (1998) <www.weidai.com/bmoney.txt> accessed 4 September 2021.

money'. The groundworks and the 'B-money'-concept were later combined and applied by an unidentified person or group of persons under the pseudonym 'Satoshi Nakamoto' in a ground-breaking paper[20] that preceded the establishment of the Bitcoin blockchain network and Bitcoin as a digital asset in 2009.[21] *Nakamoto* described the technology as an 'an electronic payment system based on cryptographic proof instead of trust, allowing any two willing parties to transact directly with each other without the need for a trusted third party.'[22] Persons can send each other assets peer-to-peer just like sending an e-mail, without the need e.g. of a bank to act as a trusted third party.

The blockchain technology was designed in order to solve a core vulnerability of the DLT, i.e. the problem of 'double-spending' in absence of a trusted third party:[23] In a purely distributed peer-to-peer system of ledgers for managing ownership, the ledgers that keep track of ownership information are maintained by the individual members instead of a central database.[24] If the ownership of an asset is transferred from one person to another, in a distributed peer-to-peer system all the ledgers in the system need to be updated. The process of forwarding this updated information might take time, therefore not all members of the network have the same information at the same time and thus are in the risk to be exploited by anyone that already has the latest information, e.g., by the vendor of an asset by selling the asset again. This problem is referred to as the problem of 'double-spending'.[25]

The strength of the blockchain resides on the fact that it couples decentralization with mathematical verification techniques[26] in order to maintain the integrity and soundness of the information stored on the chain. If a transaction is initiated on the blockchain, it must be approved by the majority of nodes in the network, i.e., the majority of the members of the network.[27] This process is called 'consensus mechanism' and can differ in its specific features from one blockchain implementation to another. Most importantly, the node validating transactions by adding a new block to the chain that is accepted by the majority of nodes, is rewarded through a newly generated crypto-asset (block reward) and transaction fees (to be

[20] Nakamoto (n 12).
[21] Yaga and others (n 17) 2.
[22] Nakamoto (n 12) 1.
[23] Krause and others (n 14) 3.
[24] E.g., a public land register that is maintained by a public authority (i.e., the trusted third party) in order to document the correct ownership of real estate and thereby serving the public interest of the protection of transactions.
[25] Daniel Drescher, *Blockchain Basics: A Non-Technical Introduction in 25 Steps* (Apress, 2017) Step 7, 49 et seq.
[26] Hacker/Thomale (n 17) 650 with further references.
[27] Adress Adimi Gikay, Catalin Gabriel Stanescu, 'Technological Populism and Its Archetypes: Blockchain and Cryptocurrencies' (2019) NJCL 64, 75.

paid in the native crypto-asset, i.e. a crypto-asset that is native to the respective blockchain).[28] This mechanism serves two purposes: It creates the incentive[29] for the nodes to support the network and it distributes coins into circulation.[30] The two most prominent models[31] of consensus mechanisms would be the 'proof-of-work verification' and the 'proof-of-stake verification': While the latter is based on a system where the amount of crypto-assets held by the individual node is crucial – meaning that the more native crypto-assets the node holds, the higher are its chances to validate the transaction and therefore claim the reward[32] (so-called 'staking') –, the former is based on a race between nodes to solve a cryptographic puzzle first, in order to be able to add the next block, hence invest time and computing power[33] (so-called 'mining').

With the consensus mechanism as a way to maintain the integrity of the information stored in the blockchain, a competition between the nodes with a two-step rhythm is established. Every node in the system is at any given point in time in either of the following two phases, as *Drescher* describes it:[34] Either (i) evaluating a new block that was created and submitted by one of the peers or (ii) trying to be the next node that creates a new block that in turn must be evaluated by all other nodes. This ensures the validation of transaction data and blocks as well as that all nodes have an identical working rhythm, in order to ensure that all blocks maintain an identical history of transaction data.[35]

Where two blocks are added by different nodes nearly simultaneously or where delays in sending new blocks across the network occur, the result is two conflicting sub-chains. This poses a collective decision-making problem that is solved by the so-called 'distributed consensus'.[36] In this case, the chain that attracts more computing power for the generation of the next blocks, is considered to be the authentic chain.[37] As the updated chain is propagated from node to node, the correctness of the new block is mathematically verified by each node through cryptographic hash functions based on the previous elements of the chain.[38] If a block

[28] Hacker/Thomale (n 17) 649 et seq.
[29] *Drescher* figuratively describes this mechanism as 'ruling a group of computers with carrot and stick', see Drescher (n 25) 153.
[30] Nakamoto (n 12) 4.
[31] Other consensus mechanisms would be e.g., Round Robin, Proof of Authority, Proof of Elapsed Time, etc.; for further on this topic reading see e.g., Yaga and others (n 17) 18 et seq.
[32] Yaga and others (n 17) 21 et seq.
[33] Ibid 19 et seq.
[34] Drescher (n 25) 159.
[35] Ibid.
[36] Drescher (n 25) 165 et seq.
[37] Ibid.
[38] Ibid 81 et seq; Krause and others (n 14) 8 et seq; Yaga and others (n 17) 7.

is found incompatible with the previous blocks of the chain, it is rejected. For this reason, as all blocks are interlinked on the chain, the blockchain and the information contained in it is generally considered tamper-proof.

For the purposes of this thesis, a certain differentiation criterium between different forms of blockchain implementations is of interest, i.e. a differentiation based on the permission-model which determines who can maintain the blockchain.[39] Permissionless blockchain networks are open to anyone, participants can join and leave the network at will without being pre-approved by any authority.[40] There is no central owner or administrator of the network, identical copies of the ledger are distributed to all network participants.[41] In order to prevent malicious users from altering or exploiting the system, multiparty agreement and/or consensus mechanisms as described above are required, usually promoting non-malicious behaviour through rewards (such as the block reward).[42] Permissioned blockchain networks, on the other hand, are networks where some sort of authority – be it centralized in the form of an organization, administrator, etc. or decentralized – authorizes users and controls the network.[43] Different degrees of transparency as to the ledger are possible as well as restricted access to transactions for certain members.[44] In reality however, hybrid approaches are employed and the categorization is rarely ever as binary as outlined above.

Finally for this section, it is of relevance to briefly discuss one further technique used in DLT, which is a core element for blockchain implementations and crypto-assets in particular: 'asymmetric-key cryptography'. As *Drescher* describes it, it is the foundation for identifying users in the blockchain and protecting their property.[45] Each network participant has a pair of keys, a public key and a private key. These two keys are mathematically related to each other.[46] The public key, that is – as the name tells – public to all members of the network, serves to identify an account in the network.[47] The private key on the other hand, that is kept safe and private by the network participant, is used to digitally sign transactions and thereby stating agreement of the owner of the account handing off ownership.[48] The private key encrypts a transaction, anyone with the public key can decrypt it and thereby prove that the

[39] Yaga and others (n 17) 5.
[40] Ibid; Krause and others (n 14) 11.
[41] Krause and others (n 14) 11.
[42] Yaga and others (n 17) 5.
[43] Krause and others (n 14) 11 et seq.
[44] Yaga and others (n 17) 5.
[45] Drescher (n 25) 93.
[46] Yaga and others (n 17) 11.
[47] Drescher (n 25) 99.
[48] Ibid 107.

signer of the transaction has access to the corresponding private key.[49] The public and private key act together to verify the integrity and authenticity of transactions while at the same time allowing transactions to remain public.[50] In essence, it is a security concept based on the separation of (i) the publicly known information serving as an address of a mailbox and (ii) the private information that is the key for opening that mailbox and accessing its contents.[51] If a private key is lost, any crypto-asset associated with that key is lost, as it is computationally infeasible to regenerate the same private key.[52]

2.3. The different types of crypto-assets

As mentioned, *Nakamoto* created something that was initially meant to be a payment system.[53] However, the use cases of the blockchain technology are not limited to payment purposes. Generally speaking, a blockchain implementation is a distributed database where digital assets can be generated, stored and transacted on. 'Cryptocurrencies', 'virtual currencies', 'token', etc. are the names generally used to refer to those digital assets. The umbrella-term the author will use to refer to all such digital assets is 'crypto-assets', which became the most common term to do so.[54] Many of the different terms are not used in a stringent manner throughout the crypto-community and a comprehensive analysis of all the different understandings of these terms would go beyond the scope of this thesis. Nevertheless, it is of use to briefly sketch out some of the different terms elaborated in time that are now captured under the umbrella-term 'crypto-assets' as the underlying notions provide the reader with further insights to the use cases of the DLT, in particular in connection with the blockchain technology, and highlight the key differentiation between the different types of crypto-assets that the Commission seeks to regulate with the MiCA.

A first distinction of different crypto-assets is usually made between 'protocol token' and 'application token'.[55] According to *Rohr/Wright*, the term protocol token refers to crypto-assets, that are created and initially distributed as a reward for members of a network that

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[49] Yaga and others (n 17) 11.
[50] Ibid.
[51] Drescher (n 25) 94.
[52] Yaga and others (n 17) 13.
[53] Nakamoto (n 12) 1.
[54] As evidenced e.g., by the title of the Commissions' proposed Regulation 'Markets in Crypto-assets' which is the core element of this thesis; see also Steiner (n 14), 8 with further reference, describing the common use of the term 'crypto-asset' even before the publication of MiCA; see also Valeria Ferrari, 'The regulation of crypto-assets in the EU – investment and payment token under the radar' (2020) 27 MJECL 325, 327.
[55] Jonathan Rohr, Aaron Wright, 'Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets' (2019) 70 HLJ 463, 470 et seq.

contribute to the maintenance of the blockchain and its network,[56] as described in the prior chapter as incentive for the nodes to support the network and to distribute coins into circulation. Once the miner receives such a crypto-asset for adding the newest block, it can serve other purposes as well, such as payment, store of value or speculation. An application token, in contrast, is a crypto-asset that is not created through the protocol of a blockchain but through a smart contract that creates an application on a blockchain. They typically serve as access to more centrally controlled online services and networks[57] and tend to have more specific objectives such as granting the holder certain rights, claims or privileges.[58] A protocol token can also be described as the native token of a certain blockchain, an application token would be the native token of an application that is created on a blockchain.

The differentiation between protocol token and application token is made along the lines of the creation of the crypto-asset. Further, literature typically differentiates crypto-assets into three 'archetypes' according to their predominantly intended use case:[59] payment, utility or investment.

The first archetype reflects what Bitcoin was intended to be, i.e., a mean of payment.[60] This intended use is most likely the main root for the often-used term 'cryptocurrency' or 'virtual currency' to describe such crypto-assets intended to be used as digital cash. Hence, literature describes this first archetype as 'payment tokens'[61] or 'currency tokens'.[62] The use of the term 'currency' however was criticized to be misleading, as these crypto-assets do no constitute currencies in the sense of an official currency that is legal tender.[63] Therefore, the author will use the term 'payment tokens' in order to refer to this first archetype. Many payment tokens seek to maintain a stable value e.g., through a specific protocol or through a peg on stable assets (so-called 'stablecoins') in order to be attractive for payment purposes. Some payment tokens may put emphasis on the preservation of the privacy of their users' transactions through anonymization functions (so-called 'privacy coins'). Typically, payment tokens are

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[56] Ibid.
[57] Rohr/Wright (n 55) 474.
[58] Rohr/Wright (n 55) 475.
[59] Hacker/Thomale (n 17) 652 et seq; Steiner (n 14) 20 et seq; see also ESMA, 'Annex 1 – Legal qualification of crypto-assets – survey to NCAs' (ESMA50-157-1384, January 2019) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf> accessed 4 September 2021, Appendix 1.
[60] Nakamoto (n 12) 1, where the need of '*an electronic payment system*' is highlighted; However, Bitcoin is nowadays, due to its lengthy transaction durations and costs, most commonly used as a store of value rather than as a mean of payment, see Ferrari (n 54) 327.
[61] Steiner (n 14) 20.
[62] Hacker/Thomale (n 17) 652.
[63] See Steiner (n 14) 8.

used as means of exchange/payment for goods and services provided by third parties and do not grant the holder rights towards the issuer.[64]

The second archetype would be the type of crypto-asset that grants the holder some functional utility other than payment for external goods or services, commonly in the form of access to a product or service of the issuer of the crypto-asset.[65] This crypto-asset is typically referred to as 'utility tokens'. A utility token can be designed to be primarily used on a digital platform of the issuer as well as to represent access to physical goods or services.[66] In contrast to a payment token, a utility token typically does not enable the holder to buy external goods offered by third parties, for example to pay for a pizza ordered online. In its archetypical form, the utility is provided directly by the issuer of the utility tokens.[67]

Additionally to the two archetypes of payment and utility tokens, literature describes the 'investment tokens' as the third archetype, sometimes also called 'security tokens' and thereby pointing to its proximity to financial instruments such as securities. It might be a crypto-asset that represents a derivative, shares in a company, bonds, etc. An investment token typically grants the holder property-like rights and/or claims on positive future cashflows from the issuer.[68]

Even though the differentiation based on the creation of a crypto-asset – protocol or application – and on the functionality of the crypto-asset – payment, utility or investment – serves well in order to provide a broad first approach in classifying individual crypto-assets, it must be stressed that most crypto-assets are hybrids, i.e., arguably having elements of more than one of the archetypes and thereby leaving uncertainty for users, issuers as well as regulators. In the course of the next chapters of this thesis, the author will discuss the approach the Commission proposed to tackle the outlined uncertainty.

[64] Ibid 22.
[65] Hacker/Thomale (n 17) 652 et seq; Steiner (n 14) 23 and 123 et seq.
[66] Steiner (n 14) 23 with further references.
[67] Hacker/Thomale (n 17) 652.
[68] Steiner (n 14) 22.

3. The Digital Finance Package

3.1. Background and Contents

With the emergence of technology companies in the field of finance within Europe, the European Commission launched in 2018 the FinTech Action plan[69] mandating the European Supervisory Authorities (ESAs), the ESMA, the EBA and the European Insurance and Occupational Pensions Authority (EIOPA), to assess the current EU regulatory framework with a special view on its applicability and suitability on crypto-assets.[70]

In its advice from January 2019, ESMA argued that while some types of crypto-assets do fall within the scope of EU legislation, applying the existing legislation poses challenges to regulators due to the lack of clarity as to how the regulatory framework is to be applied.[71] At the same time, ESMA highlighted specific gaps in the existing legislation as to when certain crypto-assets do not fall within the existing legislation, thus posing substantial risks for consumers.[72]

Similarly, EBA argued that 'typically crypto-assets fall outside the scope of EU financial services regulation' thus specific services relating to crypto-assets do not constitute regulated activities under EU financial services law.[73] For this reason, EBA advised the Commission to undertake a comprehensive cost/benefit analysis to determine what action is required to address the outlined issues, 'specifically with regard to the opportunities and risks presented by crypto-asset activities and new technologies that may entail the use of crypto-assets.'[74]

Following this background, a public consultation and digital finance outreach events held in the first half of 2020, the Commission set out its strategic objective for digital finance in Europe as well as its priorities and related actions it intends to take with the Digital Finance Package.[75]

[69] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Region on a FinTech Action plan' COM (2018) 109 final.
[70] Ibid 13.
[71] ESMA, Advice (n 6) 4.
[72] Ibid 5.
[73] EBA, 'Report with advice for the European Commission on crypto-assets' (EBA Report, 9 January 2019) <https://www.eba.europa.eu/eba-reports-on-crypto-assets> accessed 4 September 2021, 4.
[74] Ibid.
[75] COM(2020) 591, 1.

3.2. Contents

In order to promote new opportunities offered by digital finance and at the same time to protect the consumers 'wherever appropriate',[76] the Commission has outlined four priorities in its Digital Finance Strategy:

- Tackling the fragmentation in the Digital Single Market for financial services;
- Ensuring that the EU regulatory framework facilitates digital innovation in the interest of consumers and market efficiency;
- Creating a European financial data space to promote data-driven innovation;
- Addressing new challenges and risks associated with digital transformation.[77]

The Digital Finance Strategy includes several legislative proposals such as – as already mentioned – the MiCA,[78] proposals of a Regulation on a Pilot Regime for market infrastructures based on distributed ledger technology[79] and on a digital operational resilience for the financial sector.[80] Furthermore it includes proposals to amend and clarify certain EU financial services rules,[81] most notably a clarification that the definition of financial instruments according to the Markets in Financial Instruments Directive (MiFID II[82]) also includes such instruments issued by means of distributed ledger technology.[83] In addition, the Commission announced to publish several proposals and initiatives in the upcoming months and years, including initiatives on anti-money-laundering and combating the financing of terrorism, legislation to set up an EU-funded infrastructure for public disclosure, a strategy on supervisory data, a new open finance framework and further adaptions to the existing

[76] COM(2020) 591, 5.
[77] COM(2020) 591, 4 et seq.
[78] COM(2020) 593.
[79] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology' COM(2020) 594 final.
[80] European Commission, 'Proposal for a Regulation of the European Parliament and the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014' COM(2020) 595 final.
[81] European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341' COM(2020) 596.
[82] Directive 2014/65/EU of the European Parliament and of the Council of 14 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 [hereinafter referred to as 'MiFID II'].
[83] COM(2020) 596, Art 6 (1); on this topic also see Section 4.2.

financial services legislative framework with respect to consumer protection and prudential rules.[84]

3.3. The goal of the Commissions' Digital Finance Strategy and especially the MiCA

As already mentioned, the Digital Finance Strategy seeks to support the digital transition in the EU and thereby move Europe forward as a global digital player while at the same time protecting users of financial services against risks stemming from increased reliance on digital finance.[85] It points out key priorities and objectives for digital finance in Europe based on output from extensive contacts with stakeholders.[86]

Concerning crypto-assets, the Digital Finance Package *inter alia* proposes a legislative clarification, that financial instruments issued by means of distributed ledger technology do in fact fall under the definition of 'financial instruments' according to the MiFID II. With the proposal of a Regulation on a Pilot Regime for market infrastructures based on distributed ledger technology, the Commissions proposes to provide a safe environment to allow for experimentation with distributed ledger market infrastructures and thereby collect evidence for possible further amendments to the legal framework.[87]

For the purposes of this thesis, the goal of the Commissions' proposal for a Regulation on Markets in Crypto-assets (MiCA) in particular deserves a more detailed analysis: MiCA seeks to replace existing national legal frameworks on crypto-assets not covered by EU legislation and thereby harmonize the rules for crypto-assets service providers and issuers on EU level in order to provide legal certainty for this developing market of the future.[88] Further, the proposal seeks to cover all crypto-assets falling outside existing EU financial services legislation as well as 'electronic money tokens' and 'e-money tokens', i.e. tokens with functions very similar to 'electronic money' as defined in the Second E-Money Directive (EMD2).[89] In order to safeguard a level playing field between newly emerging market participants and already established existing financial institutions, the Commissions' proposal

[84] COM(2020) 591, 1 et seq.
[85] COM(2020) 591, 1.
[86] COM(2020) 591, 18.
[87] COM(2020) 593, 2.
[88] COM(2020) 593, 10.
[89] 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 [2009] OJ L 267/7 [hereinafter referred to as 'EMD2'], Art 2 (2).

seeks to pay particular attention to the ‘same activity, same risk, same rules’-principle.[90] Further, the Commission recognizes that a lack of a harmonized framework can lead to a lack of users’ confidence in crypto-assets, hindering the development of a market and likely leading to missed opportunities.[91]

The Commission has outlined four general and related objectives of the MiCA: [92]

Firstly, since crypto-asset markets develop rapidly within the EU but lack of a legal framework, the Commission feels the need of **legal certainty**. Secondly, the Commission seeks to **support innovation** and thereby promote the development of crypto-assets and the distributed ledger technology with a safe and proportionate legal framework. Thirdly, given the fact that crypto-assets pose similar risks as established financial instruments, one objective is **to instil appropriate levels of consumer and investor protection and market integrity**. Last but not least, the fourth objective is **financial stability**: In light of the ongoing discussion about the issuance of a potentially global stablecoin *Diem*, formerly known as *Libra*, through the Diem Association, an association founded by Facebook Inc. and several other tech-giants planning to build a global payment network based on the *Diem*,[93] and the fear of regulators that, if such a stablecoin is widely adopted through network effects from firms promoting it, a special threat to financial stability in the European Union could be posed.

3.4. Conclusion

As outlined above, the Commission proposed ambitious legislative acts and measures in its Digital Finance Strategy in order to make the ‘EU regulatory framework for financial services is fit for the digital age’.[94] Most notably and of the most importance for the purpose of this thesis, a core legislative proposal included in the Digital Finance Strategy constitutes the MiCA, an attempt to harmonize the regulatory framework for crypto-assets.

In order to understand what gap MiCA seeks to fill, it is of use to examine the status quo, i.e., the existing regulatory framework applicable to crypto-assets. In the following Chapter 4, the current status of the regulatory framework on crypto-assets will be briefly described to outline

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[90] COM(2020) 591, 5.
[91] COM(2020) 593, Recital 4 [subsequent citations of recitals or articles from COM(2020) 593 – i.e., the MiCA – will be made without the citation COM number].
[92] COM(2020) 593, 2.
[93] Diem Association, Whitepaper v2.0 (April 2020) <www.diem.com/en-us/white-paper/> accessed 4 September 2021.
[94] COM(2020) 591, 10.

the basis on which the Commission has founded its proposal for a new Regulation on Markets in Crypto-assets.

4. Status Quo – the current regulatory understanding of Crypto-assets in the Union

4.1. Introduction

This chapter aims to briefly provide an overview of the current regulatory understanding of crypto-assets in the Union, in order to illustrate what gap MiCA seeks to fill and at the same time to highlight where currently no gap exists. However, this chapter will not exhaustively discuss in deep the specific consequences of the application of existing EU legislative frameworks on crypto-assets and activities in connection with those crypto-assets. For the purposes of this thesis, merely an overview to the current regulatory understanding shall be provided while highlighting certain regulatory implications of legal qualifications of crypto-assets.

As already pointed out in Section 2.3., scholars typically differentiate crypto-assets into three archetypes, according to the predominant use case of the crypto-asset in question, i.e., investment, payment and utility. Reality however poses the challenge of hybrid tokens, i.e., crypto-assets that have functions that overlap between the three different archetypes. Further, a temporal dimension to the challenge of crypto-assets' legal classification exists, as in different phases of a crypto-assets' lifecycle different functions might (co)exist.[95] For this reason, ESMA as well as EBA highlight their regulatory 'substance over form'-approach[96] in classifying each individual crypto-asset on a case-by-case basis and thereby assessing how and under which rules a certain crypto-asset and subsequently the entities attributable to or providing services in connection with that crypto-asset are to be supervised. As reply to the Commissions' request to the European Supervisory Authorities in its 2018 FinTech Action Plan,[97] both, ESMA and EBA, recently issued reports on the supervisory treatment of crypto-assets. The discussion in this thesis about the current regulatory understanding of crypto-assets will be based along the lines of these two statements, discussing the current regulatory understanding from an EU financial securities law perspective (ESMA) and with regards to

[95] Ferrari (n 54) 329 et seq.
[96] ESMA, Advice (n 6) 4; EBA, Report (n 73) 12.
[97] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Region on a FinTech Action plan' COM (2018) 109 final.

EU payment instruments law perspective, in particular the EMD2 and PSD2[98] (EBA). Further, while currently no legal definition of crypto-assets in the beforementioned areas of law exists, in the EU Anti-Money Laundering legislation, a relevant definition on 'virtual assets' was introduced with legal consequences and compliance implications for activities in connection crypto-assets. This will be briefly outlined in a further section of this chapter.

4.2. Financial securities law

On a supervisory level ESMA has for long been a 'passive observer'[99] of the developments in the crypto-community. However, in 2017 ESMA issued an alert concerning ICOs,[100] i.e., initial coin offerings, to warn investors about the risks of ICOs. ESMA describes ICOs as innovative ways of raising money from the public for businesses or individuals through online campaigns that put crypto-assets for sale in exchange for official currencies or other crypto-assets.[101] The alert highlighted *inter alia* that ICOs might operate in an unregulated space and are therefore vulnerable to fraud or illicit activities.[102]

On the same date, ESMA issued a further alert addressed at firms involved in ICOs,[103] 'reminding' those firms that – depending on the structure of the ICO – it might constitute a regulated activity and hence the firms would have to comply with the relevant legislation.[104]

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[98] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35 [hereinafter referred to as 'PSD2'].

[99] Asress Adimi Gikay, 'How the New Generation Cryptocurrencies Decoded the Investment Contract Code: Analysis of US and EU Laws' (2018) 10 Bocconi Legal Papers 313, 330.

[100] ESMA, 'ESMA alerts investors to the high risks of Initial Coin Offerings (ICOs)' (ESMA50-157-829, 13 November 2017) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-829_ico_statement_investors.pdf> accessed 4 September 2021.

[101] ESMA, ESMA alerts investors (n 100) 2.

[102] Ibid 1; but see Dan Liebau, Patrick Schueffel, 'Crypto-Currencies and ICOs: Are They Scams? An Empirical Study' (2019) 2 JBBA 1, pointing out that the initial estimate that 80% of all ICOs where scams is flawed and that the magnitude of ICO scams might be much smaller

[103] ESMA, 'ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements' (ESMA50-157-828, 13 November 2017) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf> accessed 4 September 2021.

[104] ESMA, ESMA alerts firms (n 103) 1.

The relevant legislation mentioned by ESMA in this case would be in particular the Prospectus Directive,[105] MiFID II,[106] AIFMD[107] and AMLD[108].

ESMA further elaborated on this topic in January 2019 with its 'Advice on Initial Coin Offerings (ICOs)',[109] including an Annex 1 in which ESMA highlighted the outcomes of a survey to national competent authorities (NCAs) in the Union on their opinion on the legal qualification of different crypto-assets.[110] Following the 'substance over form'-approach, according to ESMA[111] and literature,[112] a key consideration to the legal qualification of crypto-assets in financial securities law is whether they may qualify as financial instruments as defined in the MiFID II.[113] Financial instruments are *inter alia* 'transferable securities', 'money-market instruments', 'units in collective investment undertakings' and various derivative instruments, such as options, futures or swaps.[114] According to ESMAs survey, there is a wide consensus among NCAs that if a crypto-asset meets the necessary conditions to qualify as a financial instrument it should be regulated as such[115] and therefore the legislative framework on financial instruments shall be applicable to activities in connection with that crypto-assets. Thus, if the substantial aspects of a specific crypto-asset qualify it as a financial instrument as defined in the MiFID II, a comprehensive set of specific regulatory frameworks is to be applied. This understanding is supported by the proposed amendment to

[105] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, no longer in force; now applicable Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L 168/12 [hereinafter referred to as 'PR'].

[106] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 [hereinafter referred to as 'MiFID II'].

[107] 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 [2011] OJ L 174/1 [hereinafter referred to as 'AIFMD'].

[108] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73.

[109] ESMA, Advice (n 6).

[110] ESMA, Annex 1 (n 59); ESMA designed the survey to determine how the Member States transposed the MiFID II into their national law and based on that, questioned the NCAs whether a sample of six different crypto-assets issued in an ICO qualified as 'financial instruments' according to the national law of the Member States.

[111] ESMA, Advice (n 6) 18.

[112] See e.g., Hacker/Thomale (n 17) 657 et seq; Ferrari (n 54) 333 et seq; Dmitri Boreiko, Guido Farrarini, Paolo Giudici, 'Blockchain Startups and Prospectus Regulation' (2019) 20 EBOR 655, 678 et seq; Steiner (n 14) 34 et seq.

[113] Art 4 (1) (15) of the MiFID II in connection with the specifications in Section C of Annex I of the MiFID II.

[114] Section C of Annex I of the MiFID II.

[115] ESMA, Advice (n 6) 20, para 83.

the MiFID II, seeking to clarify beyond any legal doubt[116] that crypto-assets qualifying as financial instrument shall be treated as such.

Therefore, if a crypto-asset qualifies as a financial instrument, activities in connection with that crypto-asset might be subject to the

- Markets in Financial Instruments framework (MiFID II and MiFIR);
- Alternative Investment Fund Managers Directive (AIFMD), if it is further to be qualified as a unit in a collective investment undertaking;
- Prospectus Regulation (PR), if it is further to be qualified as a transferable security;[117]
- Transparency Directive,[118] if it is further to be qualified as a transferable security and is admitted to trading on a regulated market situated or operating within a Member State;[119]
- Market Abuse Regulation (MAR)[120], if it is
    - o admitted to trading on a regulated market or for which a request for admission to trading on a regulated market has been made;
    - o traded on an MTF, admitted to trading on an MTF or for which a request for admission to trading on an MTF has been made;
    - o traded on an OTF; or
    - o the price or value of which depends on or has an effect on the price or value of a financial instrument referred to in the previous points, such as contracts for differences;[121]

[116] COM(2020) 596, 5.
[117] As defined in Art 4 (1) (44) of the MiFID II; see Art 2 (a) PR.
[118] Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L 294/13 [hereinafter referred to as 'Transparency Directive'].
[119] Art 1 (1) and Art 2 (1) (a) Transparency Directive.
[120] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 [hereinafter referred to as 'MAR'].

- Directive on investor-compensation schemes;[122]

- Settlement Finality Directive,[123] if it is further to be qualified as a transferable security;[124]

- Central Securities Depositories Regulation (CSDR);[125]

Further, irrespective of the qualification as a financial instrument, if the crypto-asset qualifies as a packaged retail investment product as defined in the PRIIP-Regulation[126], i.e. in particular if the crypto-assets is an investment, whose amount payable to the investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased with that crypto-asset, the PRIIP-Regulation might be applicable.[127]

4.3. Electronic money as defined in the EMD2

In its report from 2019, EBA *inter alia* examined the applicability of the EMD2 and PSD2 to crypto-assets as well as issues arising in relation to crypto-asset custodian wallet provision and to crypto-asset trading platforms[128] to complement ESMAs analysis of whether crypto-assets may qualify as 'financial instruments' (see Section 4.2.).[129]

Firstly, EBA noted that crypto-assets are not recognized in any of the Member States or by the European Central Bank as official currency,[130] 'deposits' or as 'other repayable funds' as

[121] Art 2 (1) MAR.
[122] Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes [1997] OJ L 84/22.
[123] Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems [1998] OJ L 166/45.
[124] Art 2 (h) Directive 98/26/EC.
[125] Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L 257/1.
[126] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1, Art 4 (1).
[127] See Ralph Rirsch, Roland Dämon and Stefan Tomanek, 'PRIIP-VO Der vergessene Anwendungsbereich - Veranlagungen nach KMG und Crypto-Asset inkl Checkliste für die Anwendbarkeit der PRIIP-VO' [2020] ÖBA 37.
[128] EBA, Report (n 73) 6.
[129] Ibid 12.
[130] As opposed to El Salvador, which recently adopted Bitcoin as legal tender, see e.g., Nelson Renteria, Tom Wilson, Karin Strohecker, 'In a world first, El Salvador makes bitcoin legal tender' (Reuters, 10 June 2021) <www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/> accessed 4 September 2021.

defined in the Capital Requirements Regulation (CRR).[131] According to the EBA, crypto-assets are also neither banknotes, coins nor scriptural money.[132]

In its report, EBA however pointed out that several NCAs reported cases to EBA in which proposals for a business model entailing crypto-assets would, in the opinion of these NCAs, qualify as ‘electronic money’ as defined in the EMD2. This might in particular be the case, where the crypto-asset is (a) electronically stored, (b) has monetary value, (c) represents a claim on the issuer, (d) is issued on receipt of funds, (e) is issued for the purpose of making payment transactions and (f) is accepted by persons other than the issuer.[133] If a crypto-asset fulfils these criteria it will fall under the scope of the EMD2 and an authorization of the issuer as ‘electronic money institution’ is mandatory prior the issuance of the crypto-asset.[134]

This leads EBA to the conclusion,[135] that – if a crypto-asset qualifies as electronic money – it will fall under the definition of ‘funds’ as set out by the PSD2, as ‘electronic money’ is explicitly mentioned in it.[136] Subsequently, a person carrying out a ‘payment service’ as defined in the PSD2,[137] such as the execution of payment transactions, with a crypto-asset that qualifies as ‘electronic money’, that activity would fall under the scope of the PSD2 and the person might need to be authorized as a payment institution.[138]

Further, EBA stated in its report that the warnings and opinions it raised in the preceding years concerning the risks arising from crypto-asset trading platforms and custodian wallet providers remain valid, i.e., *inter alia* the risks for consumers through the absence of harmonized organizational, transparency and prudential requirements applicable to the providers of that services.[139]

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[131] Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012 [2013] OJ L 176/1, Art 4 (1) (1).
[132] EBA, Report (n 73) 14.
[133] See Art 2 (2) EMD2.
[134] Unless exempted by Art 9 EMD2; e.g., see Monerium EMI ehf, an entity based in Iceland claiming to be the first electronic money institution authorized to issue electronic money on the blockchain under the EMD2, <https://monerium.com/> accessed 4 September 2021.
[135] EBA, Report (n 73) 14.
[136] Art 4 (25) PSD2.
[137] Annex I to the PSD2.
[138] Arts 5 et seq PSD2.
[139] EBA, Report (n 73) 15 et seq.

4.4. Anti-Money Laundering/Combatting the Financing of Terrorism legislation

In summer 2018, with the fifth amendment[140] to the Anti-Money Laundering Directive[141] (AMLD5), the first legal act on Union level explicitly targeting crypto-assets came into force. With it, the legislative definition of 'virtual currencies' emerged, defining the term as meaning

'a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically;'[142]

As pointed out in Section 2.3., different terms and definitions in the crypto-field are often used synonymously. It is however established that what the author chose to call 'crypto-asset' may fall under the scope of 'virtual currencies' as defined in the AMLD5, if the individual substance of the crypto-asset fulfils the criteria set out by the definition.[143]

The AMLD5 further added two new addressees of the provisions of the AMLD. Firstly, the 'custodian wallet provider', i.e. 'an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.'.[144] Secondly, it added the provision of services of natural or legal persons engaged in 'exchange services between virtual currencies and fiat currencies'.[145] Providers of these two services *inter alia* have to be registered by the NCA[146] in the Member State they wish to provide their services at and are subject to customer due diligence requirements.[147] However, the registration-obligation does not come with a passporting right. Due to this,

[140] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43 [hereinafter referred to as 'AMLD5'].
[141] Directive (EU) 2015/849.
[142] Art 3 (d) (18) Directive (EU) 2015/849 as amended by the Art 1 (2) (d) AMLD5.
[143] E.g., indicated by ESMA, Advice (n 6) 18, footnote 40; see also EBA, Report (n 73) 10 et seq, paras 15 et seq giving an overlapping definition on crypto-assets with reference to the approaches taking by international standard setting bodies such as the BCBS and the FSB; see also Sophie Schock, 'Virtuelle Währungen – 5. GeldwäscheRL, FM-GwG, WiEReG' (Lexis Briefings in lexis360.at, state 5 November 2020) <https://360.lexisnexis.at/d/lexisbriefings/virtuelle_wahrungen_5_geldwascherl_fm_gwg_wiereg/h_80004_4982011684304865824_92b72c7326?origin=gs&searchId=202108060651462> accessed 4 September 2021.
[144] Art 2 (1) (3) (h) Directive (EU) 2015/849 as amended by the Art 1 (1) (c) AMLD5.
[145] Art 2 (1) (3) (g) Directive (EU) 2015/849 as amended by the Art 1 (1) (c) AMLD5.
[146] Art 47 (1) Directive (EU) 2015/849 as amended by the AMLD5.
[147] Art 10 et seq Directive (EU) 2015/849 as amended by the AMLD5.

entities providing services in connection with crypto-assets on a cross-border basis, will have to seek for registration in every single Member State they intend to offer their services at.[148]

4.5. Summary

To sum up, the current regulatory understanding of crypto-assets in the Union follows a 'substance over form'-approach, classifying each crypto-asset on a case-by-case basis. The most comprehensive legislative framework currently applicable to crypto-assets is the financial markets framework. It is applicable, if the crypto-asset is to be classified as a 'financial instrument' as defined in the MiFID II. If so, one must differentiate as which kind of financial instrument the crypto-asset is to be qualified, in order to determine which rules will be applicable. In the case where a crypto-asset does not fall under the scope of the definition of financial instruments according to the MiFID II, it might however be still under the scope of the PRIIP-Regulation, due to its scope not referring to the MiFID II. From the three archetypes mentioned in Section 2.3., these crypto-assets most likely represent the archetype 'investment tokens'.

If a crypto-asset does not fall under the scope of the EU financial securities framework but is to be qualified as 'electronic money' as defined in the EMD2, it will be subject to the EMD2-framework with the consequence that it is to be regarded as 'fund' as defined in the PSD2. Such crypto-assets would represent the archetype 'payment tokens'. It is to be noted however, that the scope of the EMD2 is very narrow and very strict prerequisites must be fulfilled by the crypto-asset and its issuer in question to meet the definition. Therefore, not all crypto-assets that might represent the archetype of 'payment tokens' will be under the scope of EU financial services law, on the contrary, most 'payment tokens' will fall outside its scope.

Further, AML/CFT provisions may apply to persons engaged in activities in connection with crypto-assets, if the crypto-asset in question falls under the scope of the 'virtual currencies' definition provided by the AMLD5. This definition will most likely apply to all three archetypes.

However, if a crypto-asset does not fall under any of the abovementioned legal classifications, it most likely falls out of the scope of current EU financial services legislation. Consequently,

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148 As highlighted by the Digital Asset Association Austria (DAAA), 'Feedback on the Proposal a regulation on markets in crypto-assets and on the Proposal for a pilot regime for market infrastructures based on distributed ledger technology' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1439672_en> accessed 4 September 2021, 7.

also activities in connection with such crypto-assets are not subject to EU financial services legislation.[149] This includes, but not exclusively, also the not yet in this section mentioned archetype ‘utility tokens’. Further, most payment tokens will fall outside the scope of the EMD2, as the ‘electronic money’-definition is narrow. In general, the currently regulated types of crypto-assets are little in comparison to the different structures crypto-assets can have – leaving the vast majority of crypto-assets outside the current regulatory framework in the Union. This is the legislative gap, MiCA seeks to fill.

5. The Commissions’ proposal on a Regulation on Markets in Crypto-assets (MiCA)

5.1. Subject matter and scope

The Commissions’ proposal seeks to provide a harmonized framework for markets in crypto-assets. It thereby lays down uniform rules for transparency and disclosure requirements for the issuance and admission to trading of crypto-assets as well as for consumer protection for the issuance, trading, exchange and custody of crypto-assets.[150] Additionally, MiCA provides uniform rules for the authorization and supervision of crypto-asset service providers as well as issuers of asset-referenced tokens (ART) and issuers of e-money tokens (EMT), while also setting out rules for the operation, organization and governance of issuers and service providers.[151] Lastly, the proposal contains rules for measures to prevent market abuse to ensure the integrity of crypto-asset markets.[152] MiCA shall be applied to all persons that are engaged in the issuance of crypto-assets or provide services related to crypto-assets.[153]

The full exemptions from its scope are two-fold: On the one hand, MiCA exempts certain types[154] of crypto-assets from its scope, i.e., crypto-assets that qualify as

- financial instruments as defined in the MiFID II,[155]

[149] EBA, Report (n 73) 15.
[150] Art 1 (a) and (d).
[151] Art 1 (b) and (c).
[152] Art 1 (e).
[153] Art 2 (1).
[154] Art 2 (2).
[155] Art 4 (1) (15) MiFID II; Note that with the MiCA, the Commission also published a proposal on an amendment of the definition of financial instruments in Art (1) (15) MiFID II, to explicitly include ‘such instruments issued by means of distributed ledger technology’ in its scope, see COM(2020) 596 final, Art 6 (1).

- electronic money as defined in the EMD2,[156] except, where these crypto-assets qualify as EMT (see Section 5.3.5.),
- deposits as defined in the DGSD,[157]
- structured deposits as defined in the MiFID II[158] or as
- securitization as defined in Securitisation Regulation.[159]

On the other hand, MiCA fully exempts certain entities and persons from its scope[160], i.e.

- the European Central Bank, national central banks of the Member States, when acting in their capacity as monetary authorities, and other public authorities,[161]
- insurance undertakings or undertakings carrying out reinsurance and retrocession activities as defined in the Solvency II Directive,[162] when carrying out the activities referred to in the Solvency II Directive,
- liquidators or administrators acting in the course of insolvency proceedings, except for the case they are acting for the purpose of an orderly wind-down of an issuer of ART,
- persons providing crypto-asset services exclusively within a group of companies which they form part of,
- the European Investment Bank,
- the European Financial Stability Facility and the European Stability Mechanism and
- public international organizations.

Further, the Commissions' proposal provides exemptions for credit institutions and investment firms from certain parts and provisions of the MiCA. These will be presented and discussed in the appropriate sections of this thesis.

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156 Art 2 (2) EMD2.
157 Art 2 (1) (3) Directive 2014/49/EU.
158 Art 4 (1) (43) MiFID II.
159 Art 2 (2) of Regulation (EU) 2017/2402.
160 Art 2 (3).
161 Recital 7.
162 Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L 335/1.

5.2. The Structure

MiCA is structured into nine Titles. While Title I sets the subject matter and definitions, Titles II to IV provide rules for issuers of crypto-assets. Title V sets out provisions on the authorization and on operating conditions of crypto-asset service providers (CASP), whereas Title VI contains prohibitions and requirements to prevent market abuse involving crypto-assets. Title VII details on the powers of NCAs, the European Banking Authority (EBA) and the European Markets and Securities Authority (ESMA) while Title VIII contains provisions empowering the Commission to adopt delegated acts specifying certain details, requirements and arrangements. Title IX contains the transitional and final provisions.

Within the Titles providing rules for issuers of crypto-assets, MiCA differentiates the rules for issuers of two specific kinds of crypto-assets that fall under the archetype 'payment tokens' and are to be considered as stablecoins. The rules for issuers of these crypto-assets are found in Title III and IV and distinguish themselves on how exactly these stablecoins seek to stabilize their value. Title II contains the rules for issuers of crypto-assets, that do not fall under the definition of these two specific payment tokens and further do not fall under the existing regulatory framework of the European Union (see Chapter 4).

5.3. MiCAs definition of the DLT and its taxonomy of crypto-assets

5.3.1. Introduction

As already outlined above, a core element of the Digital Finance Package is the regulation of the usage of the distributed ledger technology in finance. Thus, the definition of the distributed ledger technology is a core definition of the MiCA as it is the smallest common denominator of all crypto-assets. Before turning to the individual definitions of the different categories of crypto-assets proposed by the MiCA, it is necessary to first discuss the proposed definition of the one attribute every crypto-asset has in common, in order to provide a basic understanding of the taxonomy of crypto-assets introduced by MiCA.

5.3.2. Distributed Ledger Technology as defined in the MiCA

The underlying concepts of the distributed ledger technology as it is commonly understood was already outlined in Section 2.2. As mentioned there, the Commissions' approach differs from that understanding. According to the Commissions' proposal 'distributed ledger technology' or 'DLT' for the purposes of the MiCA shall be defined as a 'type of technology that support [sic] the distributed recording of encrypted data'.[163]

This approach on defining the DLT was heavily – and in the authors opinion rightfully – criticized in the consultation process as it does not describe hardly any existing DLT-system, most notably not the currently largest crypto-assets Bitcoin and Ether.[164] As discussed in Section 2.2., the core elements of a DLT are the following:

(i) It is a technique to

(ii) record, share and validate data

(iii) synchronized

(iv) in a distributed network.

Encryption might be an element of the sub-category of the DLT, the blockchain technology. So, one could be inclined to believe that the Commission actually had the blockchain technology in mind by drafting the definition of the DLT. Though, also this would not be technically accurate, as a blockchain does not necessarily *record* encrypted data. Most blockchains do not encrypt the recorded data at all, in fact in the Bitcoin network all transactions are transparent and open to the public.[165]

While there certainly are some so-called 'privacy-preserving crypto-assets' or 'privacy coins', that operate with techniques that in fact seek to encrypt also the stored data on the blockchain so that the incoming and outgoing amounts of assets from one address are not publicly

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[163] Art 3 (1) (1).

[164] See e.g. Association for Financial Markets in Europe (AFME), 'Position Paper - European Commission Legislative Proposals on Crypto-Assets' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1437912_en>, 3; Börse Stuttgart, 'Statement Börse Stuttgart on the MiCAR' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1437907_en>, 1; German Banking Industry Committee, 'Additional comments on the "proposal for a regulation on markets in crypto assets" as part of the European Commission's Digital Finance Package' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1408664_en>, 4; European Parliament, 'Entwurf eines Berichts über den Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über Märkte für Kryptowerte und zur Änderung der Richtlinie (EU) 2019/1937' 2020/0265(COD) <https://www.europarl.europa.eu/doceo/document/ECON-PR-663215_DE.pdf>, 3; all accessed 4 September 2021.

[165] Leaving aside certain 'anonymization functions' such as the use of Schnorr signatures in Bitcoin for multi-signature wallets, making multi-signature transactions less distinguishable from other transactions but not impossible to distinguish.

visible.[166] Encryption takes place in the 'asymmetric-key cryptography', serving to *identify* users in the blockchain and *protecting* their property (see already Section 2.2.), but not necessarily to conceal the recorded data.

As pointed out above however, the Commissions' proposal seeks to catch all currently unregulated crypto-assets under its umbrella, therefore it is unlikely to assume that it shall only be applicable to privacy-preserving crypto-assets. On the contrary, MiCA even explicitly seeks to exclude the trading of crypto-assets with an inbuilt anonymization function from trading platforms for crypto-assets.[167] Hence, it is impossible that the drafters only had such crypto-assets in mind while drafting the definition, otherwise there would not be any eligible crypto-assets under the scope of MiCA left for trading on a trading platform for crypto-assets and the provisions concerning the operation of a trading platform for crypto-assets would be useless.

The Commissions' proposal already includes in the definitions that base on the definition of DLT, such as the definition of crypto-assets (see below), the phrase 'distributed ledger technology <u>or a similar technology'</u> in order for the definitions to be 'as widely as possible and capture all types of crypto-assets […]'.[168] It is however unsatisfying that the currently two largest crypto-assets by its market capitalization[169] would most likely – if at all – only fall within the scope of MiCA through the phrase 'or a similar technology'. This can hardly be intended by the drafters.

Though, MiCA empowers the Commission to adopt delegated acts to specify technical elements of its definitions and to adjust those definitions to market and technological developments.[170] Though, it is to be noted, that the current draft of the MiCA does apparently not aim to empower the Commission to adopt such delegated acts for an indeterminate time,[171] but only for 36 months MiCAs entry into force. The reasons and usefulness for such a short timeframe however remain unclear.

[166] One prominent example of such protocol would be the Monero blockchain, using ring signatures which allow for hidden amounts, origins and destinations of transactions, see Shen Noether, Adam Mackenzie, Monero Core Team, 'Ring Confidential Transactions' (Monero Research Lab, 2016) <www.getmonero.org/resources/research-lab/pubs/MRL-0005.pdf> accessed 4 September 2021.
[167] See Art 68 (1) subpara 4; also see in more detail Section 5.5.4.2.
[168] Recital 8.
[169] I.e., Bitcoin and Ethereum, see <https://coinmarketcap.com/> accessed 4 September 2021.
[170] Art 3 (2).
[171] As in contrast to e.g., Art 89 (1) MiFID II or Art 44 PR.

Nevertheless, it is therefore to be expected, that the definition of the DLT, as it is of such a crucial importance for the remaining provisions of the MiCA, will be revised to a technically more accurate definition.

5.3.3. Crypto-asset

According to the Commissions' proposal 'crypto-asset' shall mean 'a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology'[172]

Similar to the proposed definition of the distributed ledger technology (see Section 5.3.2.) the proposed definition of crypto-assets seeks to be as broad as possible in order to function as a catch-all-definition, capturing all types of crypto-assets currently falling outside the scope of Union legislation on financial services.[173] For reasons of the objective to combat money laundering, it corresponds to the definition of 'virtual assets' as set out by the Financial Action Task Force (FATF).[174] However, it has to be noted that the definition laid down by the FATF does only cover the digital representation of 'value' while MiCA covers the digital representation of 'value or rights', insofar the proposed definition of crypto-assets presents itself broader in scope.[175] Consequently, also virtual currencies as defined by the AMLD5[176] can be crypto-assets.

5.3.4. Asset-referenced tokens (ART)

The term 'asset-referenced tokens' (ART) according to the MiCA shall mean 'a type of crypto-asset that purports to maintain a stable value by referring to the value of several fiat currencies that are legal tender, one or several commodities or one or several crypto-assets, or a combination of such assets'.[177]

Following the proposed definition, one must note that an ART is first of all a crypto-asset according to Art 3 (1) 2. It therefore is a sub-category of crypto-assets. The special

[172] Art 3 (1) (2).
[173] Recital 8.
[174] Financial Action Task Force (FATF), 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation' (2012-2020) as updated in October 2020 <www.fatf-gafi.org/recommendations.html> accessed 4 September 2021, 130; Recital 8.
[175] See FATF (no 173) 130: 'A virtual asset is a digital representation of value that can be digitally traded, or transferred, and can be used for payment purposes. Virtual assets do not include digital representations of fiat currencies, securities and other financial assets that are already covered elsewhere in the FATF recommendations.'
[176] Art 3 (d) (18) Directive (EU) 2015/849 as amended by the Art 1 (2) (d) AMLD5; see Section 4.4.
[177] Art 3 (1) (3).

characteristics of an ART are that it (i) seeks to maintain a stable value by (ii) referring to the value of several official currencies,[178] one or several commodities or one or several crypto-assets or a combination of such assets.

Due to the emphasis on the crypto-asset purporting to maintain a stable value, the Commission anticipates that such ART aim to be used as means of payments/exchange or trade to obtain goods and services as well as means of store of value.[179] However, it is to be noted that the definition of ART does not cover all crypto-assets that aim at maintaining a stable value: So-called 'algorithmic stablecoins', i.e. crypto-assets whose value is controlled by a protocol by reacting to changes in demand through automatically increasing or decreasing the supply of such crypto-assets shall not be considered as ART, as long as they do not reference their value to one or several assets.[180]

In terms of rights the ART grants the holder towards the issuer of the ART, the Commission took a quite liberal approach in an attempt to catch all structures an ART-business model could have.[181] Rights could include e.g., direct redemption rights or claims on reserve assets (see Section 5.4.3.3.). It is also possible to only grant specific holders certain rights. Generally, it can be said, that issuers will have a certain margin of discretion for the individual structure of the rights of holders of ART and the business model.

5.3.5. Electronic-money tokens or e-money tokens (EMT)

The Commissions' proposal defines 'electronic money tokens' or 'e-money tokens' (EMT) as 'a type of crypto-assets the main purpose of which is to be used as a means of exchange and that purports to maintain a stable value by referring to the value of a fiat currency that is legal tender'.[182]

As ART, EMT are first and foremost a sub-category of crypto-assets. However, while for ART it is only expected that due to the aim at stabilizing their value by referring to one or

[178] As the European Central Bank (ECB) pointed out, the term 'fiat currencies that are legal tender' the Treaties and Union monetary law do nowhere refer to the euro or the Member States' currencies as 'fiat' currencies, thus the ECB deems it 'not appropriate' to use this term, see ECB, 'Opinion of the European Central Bank of 19 February 2021 on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (CON/2021/4) 2021/C 152/01' [2021] OJ C 152/1, Section 2.1.5. In order to not further antagonize the ECB, the author will subsequently use the ECBs terminology in that respect and refer to what the MiCA refers to as 'fiat currency' as 'official currency'.
[179] Recital 9.
[180] Recital 26.
[181] Recital 40.
[182] Art 3 (1) (4).

several reference assets, ART will be used as means of exchange or payment (see above Section 5.3.4.), for EMT this aspect is explicitly included in the definition. Furthermore, EMT shall be defined as to purport to maintain a stable value by referring to the value of only *one* official currency. As soon as a crypto-asset aims to maintain a stable value by referring to a second official currency, the crypto-asset falls outside of the scope of the definition of EMT and within the scope of the definition of ART.

The function of EMT is deemed to be very similar to the function of electronic money as defined in the EMD2.[183] Such crypto-assets shall be electronic surrogates for coins and banknotes and used for making payments.[184] As described in Section 4.3., already today, some crypto-assets that meet the criteria of electronic money as defined in the EMD2, fall under the scope of the EMD2. The difference between electronic money and EMT lies in the rights the respective instrument grants its holder. Most notably, electronic money – by definition – provides the holder with a claim on the issuer, while crypto-assets referencing to one single official currency regularly do not.[185] These would therefore fall outside the definition of electronic money. This leaves room for circumvention of the EMD2-regime, thus the Commission proposes to include crypto-assets with a similar intended use case as electronic money in the MiCA and thereby stipulates a new regime inspired by the EMD2 but at the same time addressing the specific challenges to consumer protection and market integrity posed by the aspect that an EMT is a crypto-asset.[186]

5.3.6. Utility tokens

The third sub-category of crypto-assets defined by the MiCA are 'utility tokens'. According to the proposal, utility tokens 'means a type of crypto-asset which is intended to provide digital access to a good or service, available on DLT, and is only accepted by the issuer of that token'.[187]

As ART and EMT, utility tokens are a sub-category of crypto-assets. In contrast to ART and EMT, utility tokens have a non-financial purpose,[188] meaning utility tokens do not provide the holder with financial claims on the issuer (as opposed to security tokens) and do not serve

[183] Art 2 (2) EMD2.
[184] Recital 9.
[185] Recital 10.
[186] Recital 10.
[187] Art 3 (1) (4).
[188] Recital 9.

payment purposes to third parties (as opposed to payment tokens)[189] but rather provide the holder to access to the operation of a digital platform or digital services of the issuer.[190]

As the wording of the definition indicates, the term utility tokens shall only include those crypto-assets that provide access to digital platforms or digital services of the issuer *that are available on DLT*, otherwise the phrase *available on DLT* in the definition would seem redundant as a crypto-asset is already, by definition, available on DLT (see Section 5.3.3.). This view is also supported by the Commissions' statement in its Communication on a Digital Finance Strategy, stating that utility tokens 'can serve as enablers of decentralised blockchain networks'.[191]

However, this understanding of utility tokens seems rather narrow as it limits its application to DLT networks and would likely not cover crypto-assets that represent vouchers for off-network goods and services. On the other hand, the digital representation of a right to access off-network goods or services would, if said digital representation is transferrable and storable electronically using DLT or a similar technology, nevertheless fall under the scope of the definition of crypto-assets. As will be seen in Section 5.4.2. the issuance of utility tokens is proposed to be regulated together with all other crypto-assets under the scope of MiCA that are not ART or EMT under Title II of the MiCA, only adding few special transparency rules for the issuance of utility tokens. Therefore, from a practical point of view the limitation to goods and services on DLT networks will not have much effect.

5.3.7. Conclusion

To conclude this Section, first it has to be noted that the DLT is the smallest common denominator of all crypto-assets. Secondly, all crypto-assets are a digital representation of value or rights and might be transferred and stored electronically, using the DLT or a similar technology. ART, EMT and utility tokens are sub-categories of crypto-assets, with certain special features or structures.

[189] See Steiner (n 14) 128.
[190] Recital 9.
[191] COM(2020) 591 final, 9.

The following figure sums up the definitions of different crypto-assets provided by the MiCA:

MiCAs crypto-asset taxonomy and scope

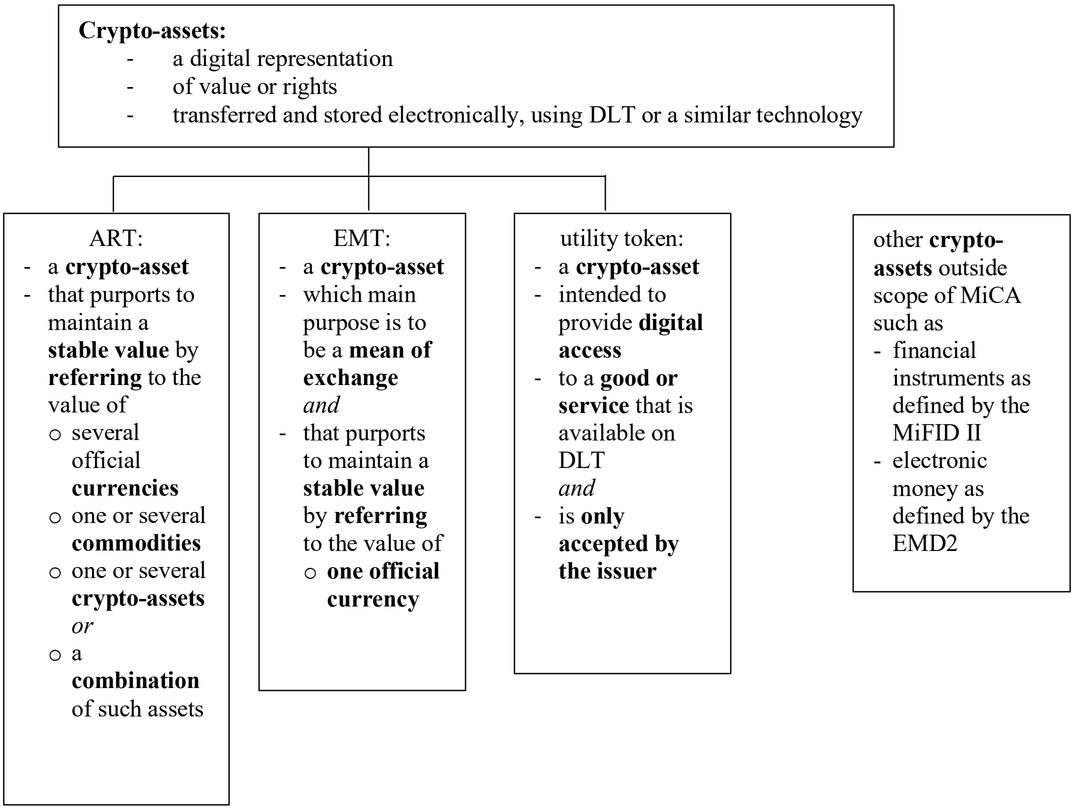

Figure 1 – MiCAs crypto-assets taxonomy and scope

5.4. Issuance of crypto-assets

5.4.1. Issuers of crypto-assets in general

As outlined in Section 5.1., MiCA seeks to prescribe uniform rules for the issuance and for persons engaged in the issuance of crypto-assets. Remarkably, the central term 'issuance' itself is not specifically defined, as *Zetzsche and others* point out.[192] The definition of the term 'issuance' however can be deducted from the definition of the 'issuer' and the provisions addressed at the issuer, therefore, the term 'issuance' will mean 'to offer crypto-assets to the public or to search for admission of such crypto-assets to a trading platform for crypto-assets'.[193]

[192] Dirk A. Zetzsche, Filippo Annunziata, Douglas W. Arner, Ross P. Buckley, 'The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy' (2021) 16 Cap Mark Law J 203, 222.
[193] See Art 3(1) (6), Art 4 (1), Art 15 (1) and Art 43 (1) all mentioning the offer to the public and the admission to a trading platform for crypto-assets.

Although obviously inspired by existing financial services legislation, such as the Prospectus Regulation, MiCA took a different approach on defining the different addressees of the provisions concerning the issuance: The Prospectus Regulation defines the 'issuer', as a legal entity, which issues or proposes to issue securities.[194] Additionally it defines the 'offeror', a legal entity or individual which offers securities to the public[195] and further mentions the 'person asking for the admission to trading on a regulated market'.[196] These three players are the addressees of the obligations laid down in the Prospectus Regulation, depending on the individual circumstances and obligations to be fulfilled. They can act in personal union or as separate entities. However, the 'issuer' will always be the legal entity, against whom the holder of the security would have a claim out of the acquired security or contract[197] but only little provisions of the Prospectus Regulation only address the issuer, such as the provision for the determination of the home Member State.[198] While the offeror or the person asking for the admission to trading on a regulated market are the addressees of the central scope of the Prospectus Regulation, i.e. most notably the prohibition to offer securities without a prospectus, the issuer is the factual addressee of the main process of drawing up a prospectus, as this is factually not possible without the issuer involved.

MiCA on the other hand, does not generally mention or define the person with whom the holder of a crypto-asset has a contractual relationship and/or subsequently a claim out of the acquired crypto-asset.[199] The 'issuer' according to MiCA shall be the legal person[200] that offers crypto-assets to the public or seeks admission of such crypto-asset to a trading platform for crypto-assets. MiCA does not specifically mention the 'offeror', the person that offers crypto-assets to the public shall simply be considered as the issuer. The definition of the 'offer to the public' in the MiCA is broad and already covers an offer to third parties to acquire a crypto-asset in exchange for official currency or other crypto-assets.[201] It is not as detailed as

[194] Art 2 (h) PR.
[195] Art 2 (i) PR.
[196] See e.g., Art 4 (1) or Art 11 PR.
[197] Christian Zib, Alexander Russ, Heinrich Lorenz, *Kapitalmarktgesetz: Kommentar* (LexisNexis ARD ORAC, 1. Edition 2008) § 1 KMG, para 21 and 22.
[198] Art 2 (m) PR.
[199] An issuer of ART or EMT however shall grant its holders claims, see Section 5.4.3. and 5.4.4. Also, an issuer of utility token will grant the holder a claim, i.e., access to its digital good or service. Nevertheless, at least from its definition, it is not imperative that an issuer grants any claim or is in a contractual relationship to the holders of its issued crypto-assets.
[200] Note that the draft is redundant in this respect as it stipulates that the issuer shall, by definition, be a legal person, while it simultaneously stipulates the prerequisite for issuances to be that the issuer must be a legal entity, see Art 4 (1), Art 15 (2) and Art 43 (1) (a).
[201] Art 3 para 1 N 7.

the corresponding definition in the Prospectus Regulation,[202] however the author argues that the definition in the Prospectus Regulation should serve as guidance to interpret the definition in the MiCA. This, however, will most likely lead to the same problems of delimitation as the provision in the Prospectus Regulation poses. The 'application to admission of a crypto-asset at a trading platform for crypto-assets' is not specifically defined.

The definition of the issuer is broad enough to also include a distributor or even an exchange for crypto-assets or other crypto-asset service providers.[203] If several persons offer the same crypto-asset to the public – and/or seek admission to a trading platform for crypto-assets respectively – , one crypto-asset could have several issuers. If several issuers exists, the question will arise, if all of these several issuers of the very same crypto-asset or if only one – e.g., the first issuer in time – shall be the addressee(s) of the provisions and therefore subject to the obligations MiCA stipulates for the 'issuer' of a certain crypto-asset. Similarly, it poses the question how subsequent offers and offers on a secondary market should be treated. The current wording of the proposal indicates that all issuers[204] and all issuances are subject to said provisions.

The chosen approach was most likely taken due to the fact that, as opposed to the issuance of securities, with regards to crypto-assets it is often not trivial to pinpoint the person that wrote or can be attributed to the underlying code of the crypto-asset, which would be the closest to the act of the creation and issuance of securities. Particularly, Bitcoin, the first known crypto-asset created, was explicitly created in order to have no central authority as an issuer.[205] Many other crypto-assets claim to also have no central authority governing that crypto-asset.[206] Already years before the Commissions' proposal was published, *Hacker/Thomale* posed the related question whether the company or group of core developers initiating the crypto-asset sale or rather the blockchain based organization itself should be considered as the issuer of a

[202] See Art 2 (d) PR.
[203] As pointed out e.g., by Facebook in the public consultation, see Facebook Ireland Ltd, 'Facebook's response to a regulatory framework for crypto-assets' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1433058_en> 6 et seq.
[204] This view is also supported by Art 41 (5) concerning additional requirements for issuers of significant ART: 'Where several issuers offer the same asset-referenced token […] each of those issuers shall be subject to the requirements set out […]'; see also Section 5.4.5.
[205] Nakamoto (n 12) 4.
[206] However, as *Gikay* points out, for many crypto-assets decentralization is often rather a narrative than the truth. In most 'new generation' crypto-assets decentralization is non-existent. Similarly, while in earlier generation crypto-assets decentralization is in theory possible, it usually is not as existent as claimed, see e.g., in Bitcoin, where concerning major changes to the protocol, the not democratically elected group of core developers has much more significance and impact than the 'small miners down the ladder', see Gikay (n 13) 8 et seq.

crypto-asset.[207] The drafters of MiCA chose a variation of the first option: The ‘issuer of crypto-assets’ shall be a legal person, that offers any type of crypto-assets to the public or seeks the admission of such crypto-assets to a trading platform for crypto-assets,[208] irrespective of who indeed initiated the *first* sale as well as who are the core developers.

What the Prospectus Regulation differentiated with three different terms, the MiCA refers to with one single term – the ‘issuer of crypto-assets’. In other words, according to the current wording of the draft, every person that offers crypto-assets to the public or seeks admission of crypto-assets to a trading platform shall have to fulfil the prerequisites and requirements laid down by the MiCA. First and foremost, said person shall be a legal entity,[209] in order to ensure the proper monitoring and supervision by competent authorities.[210]

This is however at odds with the contents of the provisions addressed at the issuer, as these clearly are only targeted at the person responsible for the crypto-asset and/or the business model in connection with that crypto-asset. One very important responsibility of issuers of crypto-assets e.g., is to inform prospective purchasers of crypto-assets about the characteristics, functions and risks of the respective crypto-asset as well as the issuer itself and the projects’ design and development. In order to ensure consumer protection, issuers of crypto-assets therefore should produce a so-called ‘crypto-asset white paper’[211] (hereinafter referred to as ‘white paper’), i.e., an information document similar to a prospectus according to the Prospectus Regulation with mandatory disclosure obligations, among others in relation to the issuer, the project, the risks, the rights and obligations attached to the crypto-assets. All information provided by the issuer of crypto-assets, including marketing communications, shall further not be misleading but shall be fair and clear. The issuer of crypto-assets shall be liable for damages caused to holders of crypto-assets due to the infringement of the issuers’ duties in connection with the provision of information and communication with holders of crypto-assets.[212] The competent authority to monitor and supervise an issuer of crypto-assets

[207] Hacker/Thomale (n 17) 691.
[208] Art 3 (1) (6).
[209] Beat König, Lorenz Marek, ‘Der Kommissionsvorschlag einer Verordnung über Märkte für Kryptowerte – ein erster Überblick’ (2021) 33 RdW_digitalOnly <https://lesen.lexisnexis.at/_/der-kommissionsvorschlag-einer-verordnung-ueber-maerkte-fuer-kry/artikel/rdw_digitalonly/2021/15/RdW_digitalOnly_2021_15_033.html> accessed 4 September 2021.
[210] Recital 13 indeed at first only mentions the need for issuers of crypto-assets other than ART or EMT to be legal entities, however further mentioning this prerequisite to be applicable to all issuers of crypto-assets.
[211] Recital 14.
[212] Recital 24, Arts 14, 22, 47.

shall be the NCA as designated by each Member State.[213] Again, as the current wording of MiCA indicates, when several persons qualify as 'issuer', all these persons would be subject to MiCAs obligations addressed at the issuer, including the obligation to produce a whitepaper for which contents the issuer is liable. Consequently, in certain cases, NCAs of different Member States could be mandated to supervise different issuers of the very same crypto-asset.

It has to be stressed that this approach evidently sought to solve the regulatory problem of 'issuerless' crypto-assets – i.e., crypto-assets whose creator or group of creators are not identifiable, e.g., deployed through a permissionless blockchain network[214] – where pinpointing the responsible behind the crypto-asset is practically almost impossible. In case such crypto-asset is offered to the public or admission to a trading platform for crypto-assets is sought, i.e., 'issued' according to the MiCA, the person doing so shall be the responsible issuer according to the Commissions' proposal, notwithstanding the design of the provisions addressed at the issuer, which are evidently not targeted at mere distributors or exchanges as 'issuers' but at the responsible for the creation of and the business plan in connection with the crypto-asset. Further, problems of delimitations might arise concerning the 'offer to the public' as there is no – so far – no guidance exists on how to treat subsequent offers to the public and the trading in secondary markets after the initial issuance.

5.4.2. Issuers of crypto-assets other than asset-referenced tokens (ART) or e-money tokens (EMT)

Title II of the MiCA concerns 'crypto-assets, other than asset-referenced tokens or e-money tokens' and provides the obligations of the issuer of such crypto-assets. With this approach, MiCA sets out rules for the issuance of *all* crypto-assets within its scope and further lays down completely different requirements and rules for the issuance of 'special' crypto-assets, being ART and EMT. In other words, if a crypto-asset within the scope of MiCA does not fall under the definition of ART or EMT, its issuer must comply only with the rules laid down in Title II that are described below. This also includes utility tokens and algorithmic stablecoins.

[213] Art 3 (1) (24); except for issuers of 'significant' ART or EMT, where EBA will have supervisory powers, see Section 5.4.5.
[214] See Section 2.2.

5.4.2.1. Requirements to issuers of crypto-assets other than ART or EMT

MiCA stipulates that no issuer of crypto-assets other than ART or EMT shall be allowed to offer such crypto-asset to the public or seek an admission of such crypto-assets to a trading platform for crypto-assets unless the issuer (a) is a legal entity, (b) has drafted, (c) notified and (d) published a white paper and (c) complies with the rules of conduct pursuant to the MiCA.[215]

(a) Legal entity

The prerequisite of the issuer being a legal entity is highlighted on several occasions in the Commissions' proposal. Firstly, as already mentioned, the general definition of 'issuers of crypto-assets' already includes the requirement of being a 'legal person'.[216] Secondly, Recital 13 explicitly states that all issuers should be legal entities in order to secure the proper monitoring and supervision by competent authorities. Thirdly, although some issuances and issuers shall be exempted from their duties to draft, notify and publish a white paper (see Section 5.4.2.2.), according to the Commissions' proposal they shall never be exempted from the prerequisite of being a legal entity.[217] MiCA does not however require said legal person to be established in a Member State,[218] subsequently legal persons established in a third country shall be eligible to be issuers of crypto-assets other than ART or EMT in the Union.

(b) The 'crypto-asset white paper' (white paper)

Any issuer of crypto-assets other than ART or EMT, shall draft a white paper in order to ensure consumer protection and a properly informed decision through a purchaser.[219] The white paper shall be a dated,[220] machine-readable document[221] in at least one official language of a Member State or in a language customary in the sphere of international finance[222] containing mandatory disclosures and information, in particular a detailed description and information of

[215] Art 4 (1).
[216] Art 3 (1) (6).
[217] Art 4 (2).
[218] Art 4 (1); Recital 18.
[219] Recital 14.
[220] Art 5 (8).
[221] Art 5 (10).
[222] Art 5 (9).

i. the issuer as well as the main participants involved in the project,[223]

ii. the project itself, the type of crypto-asset, the reason for the public offer and the planned use of the collected assets through the public offer,[224]

iii. the characteristics of the public offer such as the number of crypto-assets to be issued, the issue price as well as the subscription terms and conditions,[225]

iv. the rights and obligations attached to the crypto-assets as well as the procedures and conditions to exercise those rights,[226]

v. the underlying technology and standards applied by the issuer,[227]

vi. the risks relating to the issuer, the crypto-assets, the offer to the public and the implementation of the project[228] and

vii. the disclosure of further details about the above-mentioned topics specified in Annex I of the MiCA containing a detailed list of disclosure items such as details of the issuers financial track record for the last three years.[229]

The information contained in the white paper must be concise and comprehensibly drafted in a fair, clear and not misleading manner, without material omissions.[230] Further, as the issuer is liable for any damages incurred to a holder of crypto-assets due to the issuers' infringement of its obligations concerning the drafting of a white paper,[231] the whitepaper shall contain several statements, such as a statement of the issuers' management body that the white paper complies with the applicable requirements laid down by the MiCA,[232] a statement of sole responsibility of the issuer for the content of the white paper as well as of the fact that no competent authority has reviewed or authorized the white paper.[233] Additionally, the white paper shall clearly and unambiguously state that the crypto-assets may lose their value in part

[223] Art 5 (1) (a).
[224] Art 5 (1) (b).
[225] Art 5 (1) (c).
[226] Art 5 (1) (d).
[227] Art 5 (1) (e).
[228] Art 5 (1) (f).
[229] For further details see Annex I of the MiCA .
[230] Art 5 (2).
[231] Art 14.
[232] Art 5 (6).
[233] Art 5 (3); as in contrast to white papers concerning the issuance of ART, see Section 5.4.3.

or full, may not always be transferable and may not be liquid.[234] If the offer concerns utility tokens, an additional statement that the utility tokens may not be exchangeable against the good or service promised shall be included.[235] Further, the white paper shall contain a summary of the key information and essential elements contained in the whitepaper including a warning that the summary is merely to be read as an introduction and that the decision to purchase the crypto-asset should be based on the whole content of the white paper. Lastly, it shall include a warning that the white paper does not constitute a prospectus as referred to in the Prospectus Regulation or other offering documents pursuant to national or Union legislation and that the offer to the public does not constitute an offer or solicitation to sell financial instruments.[236]

(c) Notification of the white paper

The notification of the white paper is the first instance where an NCA is included in the process for an issuer of crypto-assets other than ART or EMT. Even though competent authorities shall not require *ex ante* approval of a white paper,[237] the issuer shall notify the white paper to the NCA of their home Member State at least 20 working days before the actual publication of the white paper.[238] If the issuer is not established or has no branch in a Member State, the issuer shall be able to choose the 'home Member State' to be either the Member State where the crypto-assets are intended to be offered to the public for the first time or the Member State where the first application for admission to trading on a trading platform for crypto-assets will be sought. The NCA of that Member State shall be the competent authority for the purpose of Title II of the MiCA[239] and thus have the supervisory powers, i.e., *inter alia* the NCA power to suspend or prohibit an offer to the public or the admission to a trading platform for crypto-assets.[240]

With the notification, the issuer shall provide an explanation why the crypto-asset concerned is to be considered a crypto-asset under the scope of MiCA.[241] Even though, MiCA does not specifically state so,[242] in practice it nevertheless will most likely be a legal opinion that

[234] Art 5 (5) (a) – (c).
[235] Art 5 (5) (e).
[236] Art 5 (7).
[237] Art 7 (1).
[238] Art 7 (2).
[239] Art 3 (1) (22) (c); see also recital 18.
[240] Art 7 (2), Art 81 (1); Recital 20.
[241] Art 7 (3).
[242] As opposed to the similar provision for issuers of ART, Art 16 (1) (d), specifically obligating the issuer to provide a 'legal opinion' on that matter, see Section 5.4.3.4.

examines the economic purpose of the concerned crypto-asset and provides arguments why said crypto-asset is not to be considered as a financial instrument, electronic money or other instruments outside the scope of MiCA.

Further, the issuer shall inform the home NCA[243] of the starting date of the offer or the intended admission to a trading platform and provide the competent authority with a list of 'host Member States', i.e. the Member States where the issuer intends to offer the crypto-assets to the public or to seek admission of said crypto-assets to a trading platform other than the home Member State.[244] The competent authority shall then notify the competent authority(s) of the host Member State(s) within two working days.[245] This provision is obviously inspired by the EU-passporting-regimes in existing financial services legislation, such as for securities according to the MiFID II, Prospectus Regulation or the European Crowdfunding Service Providers Regulation (ECSP).[246] According to the Prospectus Regulation, if an issuer, offeror, person asking for admission to trading on a regulated market or the person responsible for drawing up the prospectus requests so, the competent authority of the home Member State shall notify the competent authority of the host Member State with a certificate of approval attesting that the prospectus has been drawn up in accordance with the Prospectus Regulation.[247] Similarly, the ECSP obliges an authorized crowdfunding service provider that seeks to offer its services on a cross-border basis in other Member States than its host Member State to (i) submit a list of the Member States it intends to provide its services, (ii) the identity of the person responsible for said provision in those Member states, (iii) the starting date and (iv) a list of any other activities provides by the crowdfunding service provider not covered by the ECSP.[248] The crowdfunding service provider is however only allowed to offer its services after it receives a communication of the NCA of the home Member State that it informed the host Member States of its intend to provide its services or at the latest 15 days after submitting the above mentioned information.[249] A very similar provision for cross-border provision of services of investment firms is also contained in the

[243] Art 7 (4) states that the 'home Member State' shall be informed (not the NCA), however the NCA of its home Member State will be the designated single point of contact, see Art 81.
[244] Art 3 (1) (23).
[245] Art 7 (4) subpara 2.
[246] Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ L 347/1 [hereinafter referred to as 'ECSP'].
[247] Art 25 (1) PR.
[248] Art 18 (1) ECSP.
[249] Art 18 (4) ECSP.

MiFID II.[250] Also MiCA contains such a provision, but only for crypto-asset service providers seeking to provide cross-border services.[251]

The provision in the MiCA concerning the offer to the public of crypto-assets other than ART or EMT however is different to the above mentioned EU-passporting provisions: The obligation of the issuer of crypto-assets other than ART and EMT to provide a list of potential host Member States which the home Member States' NCA shall inform, is, by design, different from the abovementioned EU-passporting provisions and most importantly does not constitute the same legal effects, being most notably that the notification and the receipt of the notification of the home Member State is no legal requirement to be allowed to offer crypto-assets other than ART or EMT to the public in a different Member State than the home Member State. Similarly, unlike a prospectus, the white paper for crypto-assets other than ART or EMT shall not be subject to approval, therefore no certificate of approval will be issued by the NCA. The due notification and publication of the white paper shall suffice in order to offer crypto-assets other than ART or EMT to the public in the whole Union,[252] the provision of the list of potential host Member States seems to be merely informative and – according to the current draft – will have no further legal effects hindering the issuer to offer its crypto-assets to the public in a host Member State.

(d) Publication of the white paper

No later than at the beginning of the offer to the public or the admission to a trading platform for crypto-assets, the duly notified white paper shall be published on the publicly accessible website of the issuer of the crypto-asset concerned and remain to be published on said website as long as the crypto-assets are held by the public.[253] After the publication,[254] the competent authority shall have the power to request additional information to be included in the white paper.

With the due publication of the duly notified white paper, the issuer may offer its crypto-assets other than ART or EMT in the whole Union and seek admission to a trading of the crypto-assets to a trading platform and shall not be subject to any other information

[250] Art 35 MiFID II.
[251] Art 58; see also Section 5.5.2.
[252] Art 10, Recital 20.
[253] Art 8 (1).
[254] Art 7 (1); Recital 19.

requirements.[255] In particular, as already mentioned, there is no requirement that the white paper must be approved by the competent authority.[256]

(e) Rules of conduct

With the issuance of crypto-assets other than ART or EMT, the issuer has to fulfil certain obligations in connection to their conduct of business with its holders and their operations. These obligations include the duty of the issuer to act honestly, in a fair manner and professionally and communicate with holders of their crypto-assets in a fair, clear, truthful and not a misleading manner.[257] For the operative part, issuers of crypto-assets other than ART or EMT shall have systems in place to prevent, identify, manage and disclose any conflicts of interests that may arise and maintain their systems and security access protocols to appropriate Union standards.[258] Equal treatment among holders of crypto-assets is not a requirement but preferential treatment of any holders must be disclosed in the white paper.[259] If an offer to the public is cancelled for any reason, the issuer shall ensure the refund of the funds collected from purchasers as soon as possible.[260] MiCA mandates ESMA, in cooperation with EBA, to develop guidelines to specify Union standards.[261]

5.4.2.2. Exemptions from the obligation to draw up a white paper

The Commission recognizes that the burden to draft, notify and publish a whitepaper might not be proportionate in some circumstances and for that reason exempts the issuer from the obligation to draft, notify and publish a white paper for issuances of certain types of crypto-assets. Exemptions are intended for the following types of issuances:

(a) the crypto-assets are offered for free[262]

In recent practice, such issuances usually where named 'airdrops' and where mainly used as a marketing method for start-ups in the crypto-space to promote awareness of a new crypto-asset[263] and increase network effects.[264] MiCA explicitly states that crypto-assets shall not be

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255 Art 10; Recital 20.
256 Recital 19.
257 Art 13 (1) (a) and (b); Recital 23.
258 Art 13 (1) (c) and (d);
259 Art 13 (2).
260 Art 13 (3).
261 Art 13 (1) subpara 2.
262 Art 4 (2) (a).
263 Jake Frankenfield, 'Cryptocurrency Airdrop' (Investopedia, 19 August 2021) <www.investopedia.com/terms/a/airdrop-cryptocurrency.asp> accessed 4 September 2021.
264 Boreiko and others (n 112) 670 with further references.

considered to be offered for free where the purchasers are required to provide personal data in exchange for the crypto-assets, or where the issuer receives any third party fees, commissions monetary or non-monetary benefits in exchange for the crypto-assets from the prospective holders of the crypto-assets. This means, that the existing model of airdrops where the delivery of 'free' crypto-assets in exchange for small promotional services, such as a promotional tweet on Twitter, would not fall under the exemption provided and the issuer would still have to draw up and publish a white paper.

(b) the crypto-assets are automatically created through mining as a reward for the maintenance of the DLT or the validation of transactions[265]

This exemption provides relief for issuances where crypto-assets are created through the protocol of a DLT, so-called 'protocol tokens'[266], be it in the case of a proof-of-work verification, a proof-of-stake verification or other verification mechanisms that create crypto-assets as a reward for the active participation in the network. The acquirer of the crypto-asset in this case is part of the DLT network and gains the crypto-asset as a reward for services for the network such as the operation of nodes of the network as part of the consensus mechanism (see Section 2.2.). It is therefore a reward for a service the individual user provides for the network and at the same time the creation and allocation of new crypto-assets. Bitcoin e.g., being a system without central authority and issuer,[267] uses this system to initially distribute coins into circulation and to create an incentive for nodes (i.e., members of the network) to support the network. With the creation of a new block, the 'first transaction in a block is a special transaction that starts a new coin owned by the creator of the block'.[268]

(c) the crypto-assets are unique and not fungible with other crypto-assets

So-called Non-Fungible-Tokens (NFT) gained widespread popularity in recent months.[269] They are unique crypto-assets, presently mainly used for art in the virtual and real world, digital collectibles as well as for unique objects within computer games.

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[265] Art 4 (2) (b).
[266] Rohr/Wright (n 55) 14 et seq.; see also already Section 2.3.
[267] Nakamoto (n 12) 4.
[268] Ibid.
[269] Most notably the sale of a digital piece of art in form of an NFT from the artist Beeple through Christie's for $ 69 Million in March 2021, see e.g., Jacob Kastrenakes, 'Beeple sold an NFT for $69 million' (The Verge, 11 March 2021) <www.theverge.com/2021/3/11/22325054/beeple-christies-nft-sale-cost-everydays-69-million> accessed 4 September 2021.

(d) the crypto-assets are offered to fewer than 150 natural or legal persons per Member State

(e) over a period of 12 months, the total offer to the public in the Union does not exceed EUR 1.000.000,00 or the equivalent amount in another currency or in crypto-assets

(f) the offer to the public is solely addressed to qualified investors and the crypto-assets can only be held by such qualified investors

The exemptions for issuances as mentioned in (d), (e) and (f) are similar to the exemptions of the obligation to publish a prospectus enshrined in Art 1 (4) (a) (less than 150 persons per Member State) and (b) (solely addressed to qualified investors) and the exemption of the whole Prospectus Regulation enshrined in Art 1 (3) (total offer to the public does not exceed EUR 1.000.000,00 calculated over 12 months) of the Prospectus Regulation. In contrast to the Prospectus Regulation however, according to the MiCA, Member States shall not be free to decide to exempt offers to the public of crypto-assets other than ART or EMT from the obligation to publish a white paper for offers to the public up to EUR 8.000.000,00.[270]

Concerning (f), the case where the offer is solely addressed to qualified investors and the crypto-assets can only be held by such qualified investors, the term 'qualified investor' shall be defined as in the Prospectus Regulation.[271]

Nevertheless, it must be stressed that even though the issuer of such issuances is exempted from its obligations in connection with a white paper, the issuer shall always have to be a legal entity (see Section 5.4.2.1. (a)) and will have to follow the rules of conduct[272] (see Section 5.4.2.1. (e)). Further, according to the recitals, horizontal EU legislation for the protection of consumers shall remain applicable to offers exempted from the obligation to draw up a whitepaper, including any information obligations, if these offers involve business-to-consumer relations.[273]

A legal challenge that might arise in practice would be the case where an issuer of crypto-assets other than ART or EMT that falls under one of the above-mentioned exemptions nevertheless decides to draw up and publish a white paper. While EU legislation ensuring

[270] See Art 3 (1) (b) PR, where this possibility to exempt such offers from the obligation to publish a prospectus is provided.
[271] Art 3 (1) (20) referring to Art 2 (e) PR.
[272] Recital 23.
[273] Recital 16.

consumer protection will remain applicable to offers to the public involving consumer-to-business relations and the issuer will always have to follow the rules of conduct enshrined in the MiCA, it remains unclear if an issuer voluntarily drawing up and publishing a white paper would thereby be opting-in to the notification-regime and therefore would have to notify the white paper according to the MiCA and – even more important – if the NCA would have the same powers in connection to that issuer as it would have if said issuance would not fall under an exemption of the obligation to draw up and publish a white paper provided by the MiCA. Further it is unclear, if the voluntary white paper would have to meet the requirements laid down by the MiCA. From an investor protection point of view, it might be desirable to apply the same rules on voluntarily drafted white papers as to white papers that have to be drafted pursuant to MiCA. However, from a dogmatic perspective, MiCA does not provide a legal ground for a NCA to act against an issuer that has no duty to draw up and publish a white paper, nevertheless does publish a white paper but said white paper is not in accordance with the rules of the MiCA. While NCAs still have powers supervising the issuer in terms of the rules of conduct and thereby will have the power to e.g., publish the fact that an issuer of crypto-assets fails to comply with its obligations,[274] these obligations will not contain an obligation to (duly) draft a white paper and hence there could be no legal basis for an NCA to act on an unduly drafted voluntary white paper.

5.4.2.3. Marketing communications

If an issuer decides to issue marketing communications relating to the offer to the public or the admission on a trading platform, the issuer has to notify these marketing communications to the competent authority of its home Member State 20 working days prior the publication on the website of the issuer.[275] Like with the white paper, the competent authority shall not require an ex ante approval of a marketing communication.[276] All such marketing communications shall be clearly identifiable as such, inform in a fair, clear and not misleading manner and be consistent with the information in the white paper. Further, such marketing communications shall clearly refer to the published white paper and indicate the website of the issuer.[277]

[274] Art 81 (1) (s).
[275] Art 7 (2) and Art 8 (1).
[276] Art 7 (1).
[277] Art 6.

5.4.2.4. *Modifications to the published white paper and marketing communications*

Any change or new fact that might have significant influence on the purchase decision of any potential purchaser or the decision of holders to sell or exchange a crypto-asset shall oblige issuers of crypto-assets other than ART or EMT to modify their published white paper and – if applicable – marketing communications.[278] The modified white paper and marketing communications shall be notified to the competent authority of the home Member State at least seven working days prior to the obligatory publication on the website of the issuer.[279] The publication shall include a summary of the reasons of the modification,[280] the notification to the competent authority however shall include a more detailed reasoning for the modification.[281] The competent authority of the home Member State in turn, shall inform the competent authorities of the host Member States the issuer listed in the first notification of the white paper.[282]

5.4.2.5. *Time-limited offers to the public*

In some cases, offers to the public of crypto-assets other than Art or EMT might contain a time limit. If so, issuers shall publish the result of the offer – most likely being the funds collected and the crypto-assets sold through the public offer – on their website within 16 working days from the end of the subscription period. During the subscription period, such issuers shall have effective arrangements in order to monitor and safeguard the raised funds during the offer, i.e. by ensuring that the received funds or other crypto-assets collected are kept in custody by either a credit institution or an authorized crypto-asset service provider for custody and administration of crypto-assets on behalf of third parties.[283] This provision is to be understood in context with the obligation of the issuer to return any funds collected in the case where the offer to the public is cancelled for any reason.[284]

Additionally, where an offer of crypto-assets other than ART or EMT concerns utility tokens for a service that is not yet in operation – e.g., if the service is still in development – the offer

[278] Art 11 (1).
[279] Art 11 (4).
[280] Art 11 (2).
[281] Art 11 (4).
[282] Art 11 (5).
[283] Art 9; see Section 5.5.4.1.
[284] See already above in Section 5.4.2.1.(e); Art 13 (3).

to the public shall not exceed 12 months. If this is the case, this information shall be provided in the white paper.[285]

5.4.2.6. Right of withdrawal

To further ensure consumer protection, MiCA obliges the issuer of crypto-assets other than ART or EMT to grant its purchaser a right of withdrawal for 14 days, starting with the day of the consumers' agreement to purchase the crypto-assets. This right of withdrawal shall apply to any consumer that buys such crypto-assets directly from the issuer or an intermediary placing crypto-assets on behalf of that issuer.[286] The consumer shall not be obliged to give any reasons for its withdrawal, neither is the issuer entitled to incur any costs on the consumer for the withdrawal. All payments, including any charges, shall be reimbursed to the consumer within 14 days from the consumers' statement of withdrawal. The issuer is further obliged to inform the consumer of its right of withdrawal *in the white paper*.[287] Again, MiCA does not consider the case where an issuer is exempted from its duty to draw up a white paper, which leads to the case where the requirement to inform a consumer in the (probably non-existing) white paper runs into the void. Nevertheless, from a teleological point of view, it could be argued that the right of withdrawal is not only limited to issuances that are not exempted from the duty to produce a whitepaper and therefore an exempted issuer must grant the consumer the right of withdrawal anyway. While Art 12 (1) subpara 2 MiCA explicitly states that the 14-day period shall begin on the day of the consumers' agreement to purchase the crypto-assets from the issuer, in light with the ECJ decisions on life-assurance policies[288] it could be argued that the period only starts on said date, if the issuer duly informed the consumer of its rights. Also, one must bear in mind that existing EU horizontal consumer protection legislation remain applicable, including any information obligation contained therein, remain applicable,[289] thus, issuers would be well-advised ensure that the consumer is duly informed of its right in order to avoid long lasting litigation on such matters.

If the crypto-assets are admitted to trading on a trading platform for crypto-assets, in which case the price of the crypto-assets would depend on fluctuations in the crypto-asset markets,

[285] Art 4 (3).
[286] Art 12 (1).
[287] Art 12 (3).
[288] See e.g. the ruling of the European Court of Justice in Joined Cases C-355/18 to C-357/18 and C-479/18 *Barbara Rust-Hackner and Others v Nürnberger Versicherung Aktiengesellschaft Österreich and Others* [2019] ECLI:EU:C:2019:1123, concerning comparable cases of life-assurance policies where the policy holder was not duly informed of its withdrawal (cancellation) right and the ECJ ruled that in this case the withdrawal period shall not start to run, even if the policy holder becomes aware of its existence by other means.
[289] Recital 16.

the right of withdrawal shall not apply.[290] This exemption is consistent with the exemption of the right of withdrawal for financial services whose price depends on fluctuations in the financial market outside the suppliers control as enshrined in Art 6 (2) of the Distance Marketing of Financial Services Directive (DMFSD).[291] Similar, if a time limit was set on the offer to the public, the right of withdrawal shall not be exercisable after the end of the subscription period.[292]

5.4.2.7. Grandfathering-Clause

Typically, a grandfathering-clause would be discussed at other sections of a thesis. Nevertheless, in the MiCA the most important grandfathering-clause concerns issuers of crypto-assets other than ART or EMT, hence it is of use to discuss it within this section. Issuers of crypto-assets other than ART or EMT, that have be issued before the entry into force of the MiCA, shall, in order to not disrupt established market participants that provide services and activities in relation to those crypto-assets,[293] not be subject to the abovementioned requirements.[294] This grandfathering-clause exempts already existing issuers as well as, like in the case of Bitcoin, non-identifiable or factually non-existing issuers of crypto-assets other than ART or EMT from the application of Title II of the MiCA and thereby evidently aims to solve problems that would have been likely to be created through the requirement to be a legal entity to be eligible as issuer for the handling of established crypto-assets without (known) issuers. These – existing or non-existing – issuers shall *inter alia* not be obliged to provide a white paper according to the MiCA. However, it exempts only the issuer of its obligations. Crypto-asset service providers providing services in connection with such crypto-assets shall not be exempted from their obligations, likewise rules on the prevention of market abuse shall remain applicable also concerning these crypto-assets.[295]

5.4.2.8. Summary to issuers of other crypto-assets than ART or EMT

To sum up this Section, firstly it must be observed that MiCAs defines requirements for issuers of crypto-assets that are not ART or EMT and thereby delimits the application of

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[290] Art 12 (4); Recital 23.
[291] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16 [hereinafter referred to as 'DMFSD'].
[292] Art 12 (5); see also Section 5.4.2.5.
[293] Recital 77.
[294] Art 123 (1).
[295] See Sections 5.5. and 5.6.

Title II negatively. Crypto-assets other than ART or EMT include utility tokens, hybrid tokens, other payment tokens than ART or EMT, etc. In other words, Title II covers the issuances of all crypto-assets under the scope of MiCA, except of those crypto-assets that qualify as ART or EMT, and no such crypto-asset shall be issued unless certain requirements are met.

Such issuers shall first and foremost be legal entities. If not exempted, these issuers shall draw up, notify and publish an information document for potential holders of the crypto-asset for which contents the issuer shall be liable towards holders. The NCA shall have no right to approve the white paper or the issuance, however it *inter alia* shall have the right to suspend the offer to the public and request additional information to be included in the white paper. After the due publication, the issuer may offer its crypto-assets to the public or search for admission to a trading platform for crypto-assets in the whole Union, without being subject to further information requirements. With this, MiCA provides an *ex post* supervision regime for issuers of crypto-assets other than ART or EMT.

Due to a grandfathering-clause, issuers of crypto-assets other than ART or EMT that issued or will issue these crypto-assets before the entry into force of the MiCA, shall not be subject to the requirements set out by Title II.

5.4.3. Issuers of asset-referenced tokens (ART)

While Title II of the MiCA sets down the rules for issuers of crypto-assets other than ART or EMT, Title III provides the regulatory framework for issuers of ART. In comparison to Title II, which 'merely' contains eleven Articles, Title III, with its six chapters and 28 Articles, presents itself very detailed and comprehensive. Since the Commission anticipates that ART, as they aim at stabilizing their value by referring to more than one official currency or one or more commodities or crypto-assets, would be likely to be widely adopted by users to transfer value or as means of payment and thereby could pose an increased risk for consumers and market integrity,[296] stringent requirements to its issuers are provided by the MiCA.

Like with issuers of crypto-assets other than ART or EMT, the general principle for issuers of ART can be stated as follows: No ART shall be offered in the Union or sought to be admitted to a trading platform for crypto-assets unless the issuer fulfils certain requirements.[297] For issuers of ART however, the requirements are more stringent than for issuers of crypto-assets

[296] Recital 25.
[297] Art 15 (1).

other than ART or EMT: Firstly, while issuers of crypto-assets other than ART or EMT shall merely have to be legal entities, issuers of ART shall have to be legal entities established in the European Union.[298] Secondly, while issuers of crypto-assets other than ART or EMT shall not be obliged to be authorized by an NCA but merely must – if not exempted – duly notify and publish a white paper, issuers of ART shall be subjection to authorization requirements and the white paper shall be subject to approval by the competent authority of their homer Member state prior the issuance of the ART,[299] hence an *ex ante* supervision regime for issuers of ART is proposed.

Exemptions from the requirement to be authorized exist for offers of ART below the threshold of EUR 5.000.000,00 within 12 months as well as for offers, where the ART are only offered to qualified investors and can only be held by such qualified investors.[300] Where exempted, issuers nevertheless would have to produce a white paper and notify that white paper 20 days prior to its publication.[301] According to the current draft of the MiCA, for exempted offers, issuers of ART shall also not be subject to the obligation to be established in a Member State,[302] however would still have to be legal persons.[303]

Credit institutions that are already authorized in accordance with the CRD IV[304] shall need no further authorization but nevertheless still have to produce and submit – not notify – a white paper to the competent authority of their home Member State for approval.[305] However, it is unclear if this provision in its current form is valid: Art 2 (4) exempts credit institutions from the application of Title III, Chapter I, except Arts 21 and 22.[306] Interestingly, the beforementioned exemption from the authorization requirement as well as the obligation for credit institutions to produce and submit a white paper for approval is enshrined within Title III, Chapter I, and not in Art 21 or Art 22, therefore, strictly speaking would not be applicable. Neither would be the provision dealing with the content of the white paper for

[298] Art 15 (2); Recital 27.
[299] Art 15 (1), Art 19; Recital 28.
[300] Art 15 (3).
[301] Art 15 (3) subpara 2 referring to Art 7.
[302] Art 15 (2) *e contrario*: The text of Art 15 (2) states that only legal entities established in the Union shall be granted an authorization 'as referred to in paragraph 1', therefore if the offer exempts the issuer from the authorization requirement, it does not need to be established in the Union.
[303] Art 3 (1) (6).
[304] Directive 2013/65/EU of the European Parliament and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338.
[305] Art 17 (4) subpara 2; EBA is mandated by Art 17 (7) to develop draft regulatory technical standards to specify the procedure for the approval of the white paper in this case.
[306] Art 2 (4) (a).

ART.[307] Though, the provisions on the modification of (Art 21) and liability (Art 22) for the contents of the white paper are to be applied on credit institutions and Recital 28 explicitly mentions the requirement also for credit institutions to produce a white paper. This strongly indicates that the Commission nevertheless regards the production of a white paper to be of crucial importance, also for credit institutions and therefore it is likely that the scope exemption in Art 2 (4) presents an editorial mistake that is to be cured in the final version of the Regulation.

To secure that ART are mainly used as means of exchange and not as store of value, the Commissions' proposal provides a prohibition for issuers as well as crypto-asset service providers to grant holders interests or any other benefit related to the length of time of holding the ART.[308]

For reasons of readability and understandability, the following sections of this thesis will start with a description of the special obligations an issuer of ART has to fulfil, followed by a brief description of the rules on the reserves of assets and the obligatory contents of the white paper. This structure deviates from the structure the Commission chose in drafting the MiCA, however the author holds the opinion that it is advantageous for the minimization of cross-referencing between subchapters to first discuss the obligations in order to better understand why certain provisions were drafted for the content of the white paper and the authorization procedure.

5.4.3.1. Obligations for issuers of ART

Similar to the obligations for issuers of crypto-assets other than ART and EMT, issuers of ART have to obey certain **rules of conduct** in order to ensure consumer protection.[309] First and foremost, issuers of ART shall be obliged to act honestly, in a fair manner and professionally and communicate with the holders of their ART in a fair, clear and not misleading manner.[310] They shall act in the best interest of the holders of their ART and treat them equally, unless any preferential treatment is disclosed in the white paper or in marketing communications.[311]

[307] Art 17.
[308] Art 36; Recital 41.
[309] Recital 32.
[310] Art 23 (1).
[311] Art 23 (2).

Marketing communications shall be clearly identifiable as such and, as any communication with the holders and potential holders, fair, clear and not misleading. Further, marketing communications shall be consistent with and reference to the white paper and shall indicate where it is published.[312] As outlined already in Section 5.3.4., issuers of ART have a certain discretion on the rights they offer holders of their ART. If no direct claim or redemption right is granted to any of the holders however, marketing communication shall contain a clear and unambiguous statement of this fact.[313]

Issuers of ART shall further ensure **ongoing information** to the holders of their ART on the issuers' website in a clear, accurate and transparent manner. In particular, the issuer shall provide monthly information on the amount of ART in circulation and the value and composition of the reserve assets and every six month disclose information about the outcome of the obligatory independent audit[314] of the reserve assets.[315] Additionally, the issuer shall 'as soon as possible' disclose any event that has or is likely to have a significant effect on the value of the ART or the reserve assets,[316] regardless of the fact that the ART is admitted to trading on a trading platform for crypto-assets or not.[317]

To further ensure consumer protection, issuers of ART shall be obliged to establish and maintain effective and transparent **procedures for handling of complaints** of holders of ART, also in the case where the ART are distributed through an intermediary.[318] The complaint procedure shall be free of charge and give the holders the opportunity to file complaints through a template provided by the issuer.[319] Complaints shall be handled in a timely and fair manner and the outcomes of the investigations shall be communicated to the holders within a reasonable period of time.[320]

A further obligation to issuers of ART shall be to put in place a policy to prevent, identify, manage and disclose **conflicts of interests** that could arise from the relations of the issuer with their shareholders, members of their management body, employees, other persons with

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[312] Art 25 (1).
[313] Art 25 (2).
[314] Art 32 (5).
[315] Art 26 (1) and (2).
[316] Art 26 (3).
[317] Recital 31; see also the provisions on the prevention of market abuse, especially Art 77, which provide an obligation for ad-hoc-information for such events too, but shall only be applicable when the crypto-asset is admitted to trading on a trading platform, see Section 5.6.
[318] Art 27 (1).
[319] Art 27 (2) and (3).
[320] Art 27 (4).

decisive influence on the issuer, holders of ART or third party service providers.[321] Information about the general nature, sources and the steps taken to mitigate such conflicts of interests should be disclosed to the holders of ART and prominently displayed on the website of the issuer in a sufficiently precise way in order to enable holders and potential holders to take an informed decision about the purchase or sale of the ART.[322]

Within its corporate structure, issuers of ART shall have to comply with certain **corporate governance** requirements. These include the obligation to have a clear organizational structure with well-defined and transparent lines of responsibilities and effective processes to mitigate risks the issuer might be exposed to. Further, MiCA lays down governance rules for members of the management body and other natural persons with decisive influence on the issuer to be fit and proper.[323] These rules are similar to the ones enshrined in the CRD IV[324] and the MiFID II,[325] ensuring that members of the management body and natural persons with decisive influence have good repute, sufficient expertise and are required that they commit sufficient time to perform their duties.[326] Particularly, none of these persons shall have been convicted of offences in relation to money laundering, terrorist financing or other financial crimes.[327]

In order to address the risks to financial stability of the wider financial system,[328] issuers of ART must, at all times, have **own funds** equal to an amount of at least the higher of either EUR 350.000,00 or 2 % of the average amount of the reserve assets[329] (see Section 5.4.3.2.). MiCA however empowers the NCA of the issuers home Member State to impose higher or lower own fund requirements to certain issuers on the basis of an assessment of the risk the ART poses to financial stability, assessing *inter alia* the types of rights granted by the issuer to the holder of its ART or the importance of the markets on which the ART are offered and marketed.[330]

[321] Art 28 (1); Recital 33.
[322] Art 28 (2) – (4).
[323] Art 30 (2) and (3).
[324] Art 91 CRD IV.
[325] Art 9 MiFID II.
[326] Recital 34.
[327] Art 30 (4).
[328] Recital 36.
[329] Art 31 (1).
[330] Art 31 (3).

5.4.3.2. Reserve of assets

Issuers of ART shall at all time constitute and remain a separately managed and segregated reserve of assets for each ART the issuer has offered to the public, in order to stabilize the value of the individual ART.[331] The 'reserve assets'[332] are defined as 'the basket of fiat currencies that are legal tender, commodities or crypto-assets, backing the value of an asset-referenced tokens [sic], or the investment of such assets'.[333] MiCA sets out diverse obligations for issuers of ART in order to safeguard these reserve assets, such as the obligation to prudently manage those reserve assets and that any creation and destruction of ART must be matched by a corresponding increase or decrease in the reserve of assets. At the same time, if such increase or decrease occurs the issuer shall ensure that it does not harm the market of the asset itself.[334] Therefore, issuers of ART shall be obliged to establish and maintain a detailed and clear policy that describes the stabilization mechanism by depicting *inter alia* the composition of the reserve assets, a determination of the types and the allocation of the reserve assets, an assessment of the risks resulting from them, the procedure by which the ART are created and destroyed and its consequences, whether the assets are invested or not and if yes, an additional description of the investment policy, and the procedure by which ART will be purchased and redeemed against the reserve assets including a list of persons or categories of persons who are entitled to do so.[335] The reserve of assets shall be independently audited every six months[336] and put into segregated custody at a carefully selected credit institution or crypto-asset service provider.[337] MiCA sets out that the custodian shall be liable for any loss of a financial instrument or crypto-asset in the reserve of assets, unless it proves that such loss has arisen from an external event beyond reasonable control (*force majeure*).[338] As pointed out *inter alia* by the Association for Financial Markets in Europe (AFME) in the consultation process,[339] this liability rule is rather strict and does currently only exist for the

[331] Art 32 (1) and (2); Recital 37.
[332] The terms 'reserve assets' and 'reserve of assets' are used in the MiCA as well as in this thesis synonymously.
[333] Art 4 (1) (21).
[334] Ibid.
[335] Art 32 (4).
[336] Art 32 (5); this provision is without prejudice to the obligatory audit of the issuer itself according to Art 30 (11).
[337] Art 33.
[338] Art 33 (8); Recital 38.
[339] AFME (n 164) 4.

custody of financial instruments if they are held under UCITS Directive[340] and AIFMD[341] rules.

Additionally, the reserve assets shall not be encumbered or pledged and at all time promptly accessible to the issuer to meet any redemption requests of holders of ART.[342] If the issuer receives reserve assets in exchange for the ART, they shall be held in custody by no later than 5 business days after the issuance by either a crypto-asset service provider in the case of crypto-assets and for all other types of reserve assets by a credit institution.[343] The issuer shall be free to invest a part of the reserve assets, however only in highly liquid financial instruments with minimal market and credit risk.[344] All profits and losses, fluctuations in the value of the invested reserve assets as well as any counterparty or operational risk shall be borne by the issuer of the ART.[345]

Though it would not be far-fetched to assume that the composition of the reserve assets ought to reflect the reference assets, MiCA does not state so. On the contrary, the proposed text differentiates between the 'reference assets' and the 'reserve assets'.[346] This leads to the assumption, that – at least according to the current proposal – the issuer shall be free to reference its ART on e.g., 50/50 on the EUR and the USD but have the reserve assets exclusively composed of financial instruments. As pointed out above, the issuer bears the risk of such a construction, nevertheless such a freedom for the issuer of ART is remarkable considering the dense regulatory framework MiCA seeks to create upon the issuance of ART. However, it is to be noted that EBA is mandated to draft regulatory technical standards *inter alia* taking into account the various types of reserve assets that can back an ART and the correlation between the reserve assets and the financial instruments the issuer may invest in,[347] hence it is not unlikely that some kind of link between the reference assets and the reserve assets will be stipulated in the future.

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[340] Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32 [hereinafter referred to as 'UCITS Directive'], Art 24.

[341] Art 21 (12) AIFMD.

[342] Art 33 (1) (c) and (d).

[343] Art 33 (2).

[344] Art 34 (1); Note that MiCA does not state any requirements to the proportions of that 'part' of the reserve assets that the issuer is free to invest.

[345] Art 34 (3).

[346] See Art 35 (4) subpara 2.

[347] Art 34 (4) (a) and (b).

5.4.3.3. Rights of holders on the issuer or on the reserve of assets

As already outlined in Section 5.3.4., issuers of ART shall enjoy a certain discretion as to their business model, in particular with regards its contractual relationship with the holders of its ART. The issuer shall be free to choose if it grants the holders of its ART direct claims or redemption rights on the issuer itself or on the reserve assets or if it grants the holders none of the beforementioned. It shall even be free choose if it only grants certain persons or groups of persons such rights. Though, certain minimum requirements to protect the holders of ART are provided by MiCA.[348] In any case, the issuer of the ART shall establish, maintain and implement clear and detailed policies and procedures on the specific rights granted to the holders, including *inter alia* the conditions to exercise those rights, mechanisms and procedures including in stress market circumstances or in the case of an orderly wind-down or cessation of the activities of the issuer.[349] Further, the issuer shall establish a policy on the valuation of the ART and the reserve assets if such a right is exercised, the settlement procedure as well as – if applicable – the fees incurred on the holder when exercising its right.[350] If only certain persons or groups of persons are granted such rights, this fact shall be specified as well.[351] These fees must however be proportionate to the actual costs incurred by the issuer.[352]

While the provisions on the reserve assets in the MiCA do certainly indicate that the value reserve of assets should reflect the value of ART,[353] these provisions do not explicitly state any thresholds as to the proportion of corresponding values. Nevertheless, regardless of how the specific rights of the holders are designed, as a further minimum requirement MiCA provides that in case the market value of the ART varies 'significantly' from the market value of the reserve asset or the reference assets, holders shall have an obligatory redemption right directly on the issuer.[354] As already mentioned in Section 5.4.3.2., the reserve assets must be liquid, in order to meet the redemption request of a holder.[355]

[348] Recital 40.
[349] Art 35 (2) (a) and (b), (4) subpara 3.
[350] Art 35 (2) (c) – (e).
[351] Art 35 (3).
[352] Art 35 (2) subpara 2.
[353] See e.g., Recital 37 'In order to stabilise the value of their asset-referenced tokens, issuers of asset-referenced tokens should constitute and maintain a reserve of assets backing those crypto-assets at all times.[…]' indicating a close connection between the value of the ART and the reserve asset.
[354] Art 35 (4) subpara 2.
[355] Art 33 (1) (d).

5.4.3.4. Authorization procedure

The competent authority to authorize an issuer of ART shall be the competent authority of the home Member State of the issuer,[356] i.e., the NCA of the Member State where the issuer of ART has its registered office.[357]

The application shall contain a variety of information concerning the applicant issuer, such as the address, articles of association and the business model the applicant intends to follow.[358] Further, the applicant issuer shall provide a detailed description of its governance arrangements, disclose the identity of its members of the management body as well as provide proof that the management body and – if applicable – natural persons with decisive influence on the issuer have good repute and competence.[359] Additionally, the applicant shall provide a white paper (see Section 5.4.3.5.) and information on its policies and procedures, control mechanisms and systems that it is obliged to have according to MiCA (see Section 5.4.3.1.).[360] Additionally, the applicant issuer shall provide a legal opinion stating that the ART would not qualify as one of the instruments or assets out of the scope of MiCA.[361] Remarkably, the applicant issuer has no obligation to proof that it fulfils the own fund requirement of at least EUR 350.000,00.[362]

After the competent authority received the application, it shall have 20 working days to assess whether the application and the white paper is complete. In the case the application and/or the white paper is not complete, the NCA shall be empowered to set a deadline by which the applicant will have to provide the missing information. If the application and the white paper is complete, the NCA shall immediately notify the applicant and within three months draft a fully reasoned preliminary decision whether the applicant issuer complies with the requirements set out in the MiCA and therefore is to be granted authorization or not. This draft decision then shall be sent to the applicant who in turn shall have the right to submit comments and observations on the draft. The draft decision and the whole application shall further be sent to the EBA, ESMA and the European Central Bank (ECB). If the issuer is

[356] Art 16 (1).
[357] Art 3 (1) (9) (d).
[358] Art 16 (2) (a) – (c) .
[359] Art 16 (2) (e) – (h).
[360] Art 16 (2) (i) – (o).
[361] Cf Art 7 (3) stipulating for issuers of crypto-assets other than ART or EMT to only provide an 'explanation' as opposed to a legal opinion, see already Section 5.4.2.1.(c).
[362] As pointed out by Christopher Rennig, 'FinTech-Aufsicht im künftigen EU-Recht' (2020) 6 ZBB, 385, 392; this provision is also in contrast to the authorization procedure for crypto-asset services providers that in fact shall have to proof the existence of the prudential safeguards, see Section 5.5.2; see also already Section 5.4.3.1.

registered in a Member State that is not in the eurozone or a currency that is not the euro is included in the reserve assets, the central bank of that Member State shall also be consulted. These institutions shall have the right to issue non-binding[363] opinions within two months which, as the observations and comments by the applicant, shall be duly considered by the competent authority.[364]

Within one month after having received the supervisory authorities' non-binding opinions, the NCA shall take a fully reasoned decision granting or refusing authorization and notify the decision to the applicant within 5 days. With the authorization, the white paper shall be deemed to be approved.[365] The authorization and the approval of the white paper shall be valid for the entire Union and allow the issuer to offer the ART for which it has been authorized throughout the Union or to seek admission of these ART to trading on a trading platform for crypto-assets,[366] without the possibility for Member States to impose further requirements.[367] If authorization is granted, the granting competent authority shall inform the EBA, ESMA and ECB (and if applicable the national central bank) of such authorization and ESMA shall include the necessary information concerning the issuer and the ART as well as the white paper in its register of crypto-asset service providers.[368] The authorization shall then act as the EU-passport since it shall be valid for the entire Union and allow an issuer to offer the ART for which it has been authorized throughout the Union or to seek an admission of the ART to trading on a trading platform for crypto-assets.[369]

The competent authority shall however refuse the authorization where the applicant issuer or its management body fails to meet or is likely to fail to meet the requirements laid down in the MiCA, such as the fit & proper requirements, or when the business model may pose a serious threat to financial stability, monetary policy transmission and monetary sovereignty.[370] For this purpose, it seems likely that most NCAs will nevertheless ask for proof of the existence

[363] During the consultation process, the ECB criticized the proposal *inter alia* for the provision that its opinion and the opinion of the national central banks shall not be binding and suggested the amendment that such opinions shall in fact be binding as the threats and risks certain business models of issuers of ART might pose to the smooth operation of payment systems and monetary policy might fall within their exclusive competence, see ECB, Opinion (n 178) Section 2.1.4. subpara 2.

[364] Art 18.

[365] Art 19 (1).

[366] Art 15 (5) and (6).

[367] Recital 29.

[368] Art 19 (3); Art 57; Note that Art 57 only refers to crypto-asset service providers, however the Recital 53, Art 7 (5) and Art 19 (3) explicitly state that this register shall also include white papers notified to the NCAs and published by issuers.

[369] Art 15 (5).

[370] Art 19 (2); Recital 29; see also the ECBs criticism with regards to its competence to issue (non-)binding opinions, ECB, Opinion (n 178) Section 2.1.4. subpara 2.

of sufficient own funds, even though MiCA does not explicitly oblige the issuer to provide such proof in the application procedure.[371]

The authorization of an issuer of ART however does not mean, that the issuer is free to issue further (different) ARTs: An authorized issuer of ART that seeks to issue an additional ART – different to the one for which it was authorized – must apply for the authorization again and endure the above described procedure, easily lasting more than 6 months from the date of the application. Therefore, according to the current draft, the issuers' authorization will only be granted for the ART which was included in the application and therefore does not authorize an entity to issue ART. The authorization of the issuer is necessarily linked to the very ART for which the authorization was sought.

5.4.3.5. White paper

The crypto-asset white paper for ART shall in principle contain the same information and fulfil the same formal requirements as the white paper for crypto-assets other than ART or EMT – Art 5 MiCA applies subsidiary to Art 17 MiCA, the provision setting out the special requirements for the white paper for ART.[372] In addition to that, it shall also contain further information on ART-specific issues, such as a description of the issuers' governance arrangements,[373] the reserve of assets including the custody arrangement for the reserve assets.[374] Further, if the reserve assets are invested, the investment policy shall be described in detail.[375] In the case where the issuer grants certain rights to the holders of its ART, such as a direct claim or redemption right on the reserve assets, detailed information on the nature and enforceability of these rights including how these rights may be treated in case of insolvency of the issuer shall also be included in the white paper.[376] If no direct right on the reserve assets is offered by the issuer, the issuer shall state a clear and unambiguous warning of that fact in the white paper[377] and provide detailed information on the mechanism to ensure the liquidity of the ART.[378] In any case, the issuer of ART shall also disclose information on the obligatory complaint handling procedure.

[371] See already Section 5.4.3.4.
[372] Art 17 in its actual form refers to Art 4 which ought to be an editorial mistake.
[373] Art 17 (1) (a).
[374] Art 17 (1) (b) and (c).
[375] Art 17 (1) (d).
[376] Art 17 (1) (e).
[377] Art 17 (1) subpara 2; Recital 30.
[378] Art 17 (1) (f).

The white paper and any modifications of the white paper must publish their approved white paper publicly accessible on the issuers' website no later than at the starting date of the offer to the public of the ART or the admission of the ART to trading on a trading platform. It further shall remain available on the issuers' website for as long as the ART are held by the public.[379]

5.4.3.6. Modifications to the business model

If, after the authorization of the issuer and the approval of the white paper, the issuer intends to change its business model and such change would have significant influence on the purchase decision of any actual or potential holder of ART, the competent authority of the issuers' home Member State shall be notified by the issuer. MiCA provides a non-exhaustive and demonstrative list of changes that are likely to have such a significant influence on holders or potential holders of ART, among others including changes of the reserve assets and the custody of assets, changes of the rights granted to the holders, changes in the protocols for validating the transactions or changes of the functioning of the underlying DLT.[380]

When the issuer notifies the NCA of such an intended change, the issuer shall produce a draft modified white paper that is consistent in its order with the original white paper. After receiving the draft modified white paper, the NCA informs the issuer of the receipt within two days and shall grant its approval or refuse to approve the draft within 20 days after the information of receipt. If the NCA requests further information or justification on the draft modified white paper, the 20 working days commence only when the NCA has received the additional information. It may also consult the EBA, ESMA and the ECB and, if applicable, the national central bank referred to in Section 5.4.3.4.[381] With the approval of the modified white paper, the NCA may also request the issuer of the ART to put in place mechanisms to ensure the protection of holders of ART, if it finds that the change could have material effect on the value, stability or risks of the ART or the reserve assets. It shall further be empowered request appropriate corrective measures if it sees the change in the business model to be a threat to financial stability.[382]

[379] Art 24.
[380] Art 21 (1).
[381] Art 21 (2).
[382] Art 21 (3).

5.4.3.7. Acquisition of issuers of ARTs

Like several other EU financial markets legislative acts, also MiCA provides for rules on the acquisition or divestiture of qualified holdings in issuers of ARTs. In the case of direct or indirect acquisition or divestiture of a qualifying holding in an issuer of ARTs, the person or persons acting in concert shall notify the NCA of the intent to do so.[383] A qualifying holding is defined as any direct or indirect holding in an issuer of ART which represents at least 10% of the capital or the voting rights according to the Transparency Directive or a holding which makes it possible to exercise a significant influence over the management of an investment firm in which that holding subsists.[384] The lowest threshold to be reached in order to trigger the notification requirement for an acquisition however is with 10% lower than e.g. the lowermost threshold of 20 % in Art 6 (1) PSD2, Art 3 (3) EMD2 and Art 11 (1) MiFID II. It is unclear why the threshold deviates from the established thresholds in existing EU legislation.

Similar to the provisions concerning the acquisition of investment firms in the MiFID II, the NCA shall inform the proposed acquirer within two working days of the receipt of the notification and shall assess the intended transaction within further 60 working days from the date of the written acknowledgement of receipt of the notification, including the information on the date on which the assessment will be finalized.[385] For its assessment, the NCA shall have the right to request additional information and may halt the assessment until it receives the requested additional information, but for no longer than 20 (if the proposed acquirer is situated or regulated in the Union) respectively 30 (if the proposed acquirer is situated or regulated outside the Union) working days.[386] The assessment shall include an examination of the suitability of the proposed acquirer, among others its reputation, experience and financial soundness, as well as the financial soundness of the intended acquisition.[387]

Where the NCA does not oppose the acquisition before the date indicated in the written acknowledgement of receipt of the notification, or if applicable with addition of the halting periods due to the NCAs request for further information from the proposed acquirer, the intended acquisition shall be deemed to be approved.[388]

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[383] Art 37 (1) and (2).
[384] Art 3 (1) (26).
[385] Art 37 (4).
[386] Art 37 (5).
[387] Art 38.
[388] Art 37 (7).

If the NCA decides to oppose the acquisition, it shall notify the proposed acquirer within two working days, but in any case, before the date indicated in the written acknowledgement of receipt of the notification, or if applicable with addition of the halting periods due to the NCAs request for further information from the proposed acquirer. That notification shall be reasoned.[389]

5.4.3.8. Orderly wind-down

Additionally, MiCA requires issuers of ART to have an appropriate and regularly reviewed and updated plan in place for the situation where the issuer stops its operations in order to assure an orderly wind-down of their activities under the applicable national insolvency law, including contractual arrangements, procedures and systems to ensure that the proceeds from the sale of the remaining reserve assets are paid to the holders of the ART. With such a plan, the issuer should be able to demonstrate its ability to carry out such wind-down without causing undue economic harm to the holders or to the stability of the markets of the reserve assets.[390]

5.4.3.9. Summary to issuers of ART

The provisions MiCA stipulates for issuers of ART are stringent. The issuer shall be established in the Union, authorized for each ART it wishes to issue and the respective white papers must be approved by the NCA. The authorization procedure can easily last 6 months.

Further, an issuer of ART shall be subject to own fund requirements, the obligation to hold reserve assets for each ART it issues, corporate governance requirements and obligations to put in place systems and procedures to handle complaints and avoid conflicts of interests. Importantly, the reserve assets must not be confused with the reference assets by reference to which the ART seeks to maintain a stable value.

Further, an issuer of ART shall be subject to the obligation to inform its holders, firstly before the ART is purchased *inter alia* of any rights attached to it, its investment policy on the reserve assets as well as its custody arrangements, and secondly, after the purchase of the ART, on an ongoing basis on the amount of ART in circulation, the value of the reserve assets and any event, that might have significant impact on the value of the ART or the reserve assets, independently of the fact if the ART is traded on a trading platform or not. Further,

[389] Art 37 (6).
[390] Art 42; Recital 43.

issuers of ART are subject to rules of conduct ensuring consumer protection and the fair treatment of holders of ART.

5.4.4. Issuers of e-money tokens (EMT)

As the previous sections highlighted, issuers of ART are subject to stringent requirements and MiCA lengthily covers the regulatory framework in which they shall operate in the future. Most notably, issuers of ART are subject to an authorization requirement. For issuers of EMT on the other hand, no authorization requirement exists directly out of MiCA does not,[391] but rather an indirect one: Issuers of EMT shall be – prior to the offer to the public or the admission to a trading platform for crypto-assets – authorized as a credit institution or as an 'electronic money institution' according to the EMD2.[392] In other words, to be eligible in the first place to be an issuer of EMT, the prospective issuer shall be authorized as credit institution or electronic money institute. Further, the prospective issuer of EMT must comply with the requirements applicable to electronic money institutions set out in Title II and II of the EMD2, unless a *lex specialis* exists within the MiCA. Additionally, the issuer shall notify and publish a white paper. With this, also issuers of EMT *inter alia* shall be subject to own fund requirements of at least EUR 350.000,00 or 2 % of the average outstanding EMT,[393] safeguarding requirements for the funds that have been received in exchange for the issued EMT[394] and information obligations to the NCA in case of an acquisition of a qualifying holding[395] or in case of material changes in measures taken for the safeguarding of funds received in exchange for EMT.[396] A comparison between these rules and the corresponding obligations for issuers of ART shows that the drafters of MiCA looked at the EMD2 in drafting the obligations for issuers of ART.[397] For example, even though issuers of EMT are not obliged to provide for reserve assets, according to the Art 43 (1) (b) MiCA in connection with Art 7 EMD2 referring to the payment services regime, rules for safeguarding of funds that have been received in exchange for EMT exist,[398] and thereby also providing requirements for the segregation of those funds from the own funds of the issuer and an insurance policy or similar safeguards must cover these funds.[399] If the funds are invested,

[391] Even though the headline of Art 43 is 'Authorisation', which is misleading at first sight.
[392] Art 2 (1) EMD2.
[393] Art 5 EMD2 in connection with Art 43 (1) subpara 2.
[394] Art 7 EMD2.
[395] Art 3 (3) EMD2.
[396] Art 3 (2) EMD2.
[397] As pointed out by Zetzsche and others (n 192) 213 et seq.
[398] Art 9 PSD2.
[399] Zetzsche and others (n 192) 214 et seq.

they shall be invested in secure, low-risk assets denominated in the same currency as the one referenced by the EMT in order to avoid cross-currency risks.[400] Like the obligation for issuers of ART to implement an complaint handling procedure,[401] issuers of EMT shall also be obliged to have in place and apply adequate and effective complaint resolution procedures.[402]

These provisions are to be seen in close connection to the definition of EMT and the possibility to include certain crypto-assets under the definition of electronic money as provided in the EMD2. However, if the use case of an EMT is the same as electronic money, currently issuers of crypto-assets that refer to one official currency are not obliged to e.g., grant its holders rights as an issuer of electronic money by definition does, therefore would not fall under the scope of the EMD2. To avoid circumvention and regulatory arbitrage, the Commission chose to design strict conditions on the issuance of EMT, along the lines of the EMD2.[403] As EMT are crypto-assets, the Commission however chose not to simply include EMT under the scope of the EMD2,[404] as it is anticipated that EMT could raise specific new challenges in terms of consumer protection and market integrity specific to crypto-assets, but to dedicate an own Title in MiCA to them to address these special challenges.[405]

Exemptions from the requirements for issuers of EMT to be authorized as a credit institution or electronic money institution and comply with the requirements of Title II and III of the EMD2 shall exist for issuances where the EMT are marketed, distributed and held by qualified investors and can only be held by such and if the average outstanding amount of EMT does not exceed EUR 5.000.000,00 over a period of 12 months, calculated at the end of each day.[406] If a Member State has used its discretion given by the EMD2 and set a lower threshold for such an exemption, this threshold shall apply.[407] In any case however, issuers of EMT shall be obliged to produce and publish a white paper and notify it to their NCA.

Any EMT referencing to a Union currency shall be deemed to be offered in the Union.[408]

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[400] Art 49; Recital 48.
[401] Art 27, see already Section 5.4.3.1.
[402] Art 43 (1) (b) in connection with Art 13 EMD2 in connection with Art 101 PSD2.
[403] Recital 10.
[404] As the Commission chose to do with crypto-assets that are to be qualified as financial instruments as defined in Art 4 (1) (15) MiFID II, see COM(2020) 596, Art 6 (1).
[405] Recital 10.
[406] Art 43 (2).
[407] Art 43 (2) subpara 2.
[408] Art 43 (1) subpara 3.

As for electronic money and ART, also for EMT a prohibition to grant interests or any other benefit related to the length of the holding is imposed on issuers as well as crypto-asset service providers.[409]

5.4.4.1. Issuance and Redeemability

While, in principle, Title II and III of the EMD2 shall be applicable to issuers of EMT, MiCA shall derogate Art 11 EMD2, dealing with the issuance and redeemability. MiCA provides the direct obligation of issuers of EMT to provide holders of the EMT with a claim on the issuer and prohibits the issuance of any EMT that does not provide such a claim.[410] Further, EMT shall only be issued at par value and on the receipt of funds within the meaning of Art 4 (25) PSD2 (i.e., banknotes and coins, scriptural money or electronic money).

As provided by the EMD2, also according to the MiCA, at the request of the holder, the issuer shall redeem at any moment and at par value, the monetary value of the EMT to the holder, either in cash or by credit transfer.[411] The redemption might be subject to a fee, but only if the holder was informed about this fee already in the white paper.[412]

To safeguard the redemption for the holder, MiCA provides that if the issuer does not fulfil a legitimate redemption request within maximum 30 days,[413] the obligation to redeem applies to entities ensuring the safeguarding of the funds received in exchange for the EMT or any natural or legal persons in charge of distributing EMT on behalf of the issuer.[414]

5.4.4.2. White paper and marketing communications

As already mentioned, unlike as for issuers of ART, issuers of EMT shall not have to apply for authorization and consequently shall not have to ask for prior approval of the white paper by the NCA of its home Member State. Nevertheless, issuers of EMT shall have to produce, notify and publish a white paper prior to the offer to the public or seeking admission to a trading platform.[415] The required content of the white paper is very similar to that required for issuers of crypto-assets other than ART or EMT. The white paper must be published on the

[409] Art 45 explicitly derogating Art 12 EMD2.
[410] Art 44 (2).
[411] Art 44 (4).
[412] Art 44 (6).
[413] The issuer can set a shorter time period in the white paper, see Art 44 (7).
[414] Art 44 (7); It is to be noted, that the provision wrongly refers to 'the obligation set out in paragraph 3', which provides the provision to issue on receipt of funds as defined in the PSD2, while paragraph 4 is actually meant (the provision setting out the redemption right of the holder against the issuer).
[415] Art 46 (1).

issuers' website and include the same descriptions as required for white papers of crypto-assets other than ART or EMT (see Section 5.4.2.1.) with additional information on the EMT-specific redemption right at par value as explained in the previous section as well as the procedures, conditions and fees applicable to said redemption right.[416] All the contents shall be fair, clear and not misleading, without any material omissions.[417] It shall further include a statement from the management body confirming the compliance with the applicable provisions of MiCA.[418] The draft white paper is to be notified, as well as – if applicable – the marketing communications, to the NCA at least 20 working days before the date of its publication[419] on the website of the issuer.[420] Any changes or new facts after the publication of the white paper likely to have significant influence on the purchase decision of any potential purchaser or on the decision of holders of the EMT to sell or exchange their EMT shall be described in a modified white paper which shall be notified to the NCA 20 days prior to its publication on the issuers' website.[421]

Likewise, all marketing communications are to be drawn up as in other issuances described in this thesis, with the additional requirement to contain a clear and unambiguous statement that all holders of the EMT have a redemption right at any time and at par value on the issuer.[422]

As with all other issuers under the scope of MiCA, the issuer or its management body shall be liable for any damage occurred to holders of the EMT out of incomplete, unfair, unclear or misleading information.[423]

5.4.4.3. Summary to issuers of EMT

While certain crypto-assets already could be classified as 'electronic money' and thereby bringing the issuer under the scope of the EMD2, in order to avoid circumvention and regulatory arbitrage the drafters of MiCA chose to create a framework for crypto-assets with the same intended use as electronic money, but not meeting the criteria to fall under the definition of electronic money.

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[416] Art 46 (2).
[417] Art 46 (3).
[418] Art 46 (4).
[419] Art 46 (9).
[420] Art 46 (1).
[421] Art 46 (10).
[422] Art 48 (2).
[423] Art 47.

The provisions clarify the regulatory approach to crypto-assets referencing only to one single official currency and ban such crypto-assets that are not structured and grant rights like electronic money. For this reason, issuers of EMT shall generally comply with the requirements of the EMD2, unless MiCA specifies otherwise in order to mitigate the specific risks crypto-assets pose to consumer protection and market integrity. In short, the gap in existing legislation MiCA seeks to fill with this provision is all those crypto-assets that reference to one single currency but do not grant its holders the same rights as electronic money.

MiCA provides an indirect authorization requirement, as only authorized credit institutions or electronic money institutions shall be eligible to be issuers of EMT in the first place. A white paper shall be drafted, notified and published just like the white paper for crypto-assets other than ART or EMT and for this reason, there is also no approval procedure for the white paper.

5.4.5. Issuers of significant ART or EMT

5.4.5.1. Background

A main driver for the drafting of the MiCA was the announcement of a 'global stablecoin' to be used in a payment system by a conglomerate of international tech companies – the *Diem*.[424] It is feared that such stablecoins with a potentially large customer base, high market capitalization and significant size of the reserve assets as well as a potentially high number of transactions, cross-border use and interconnectedness with the financial system could pose great risks to financial stability, monetary policy transmission and monetary sovereignty.[425] This fear exists for large scale ART as well as for large scale EMT. The goal behind the regulatory requirements for issuers of such – as MiCA refers to them – 'significant' ART or EMT is the prevention and control of the systemic risk such crypto-asset may pose.[426] Thus, issuers of such 'significant' ART or EMT shall be obliged to operate under more stringent requirements, being *inter alia* higher capital requirements, the need of liquidity management policies in place, custody arrangements and investment rules. Further, MiCA provides for a supervision by EBA and in some cases even a layered supervision where not only NCAs shall have supervisory competences, but also the EBA and even in some cases the ECB are mandated to supervise issuers of significant ART or EMT in order to tackle the anticipated risks appropriately.

[424] Formerly known as *Libra*.
[425] Recitals 41, 42 and 49.
[426] Zetzsche and others (n 192) 216.

5.4.5.2. Classification criteria

Both, ART and EMT, are to be classified by the EBA as 'significant' where criteria that indicate whether the crypto-asset poses specific challenges in terms of financial stability, monetary policy transmission or monetary sovereignty and thus should be subject to more stringent requirements and supervision.[427] MiCA provides a list of criteria to asses such indication and empowers the Commission to specify those criteria through the adoption of delegated acts, in particular through guidelines to determine under which circumstances an ART or EMT and/or their issuer shall be considered as interconnected with the financial system[428] and minimum thresholds for quantitative criteria.[429] Where at least three of the following criteria are met, EBA shall classify an ART or EMT as 'significant':[430]

i. Size of the customer base of the promoters of the ART or EMT, the shareholders of the issuer or any third-party entity[431] for operating the reserve of assets, the investment, custody of the reserve of assets or the distribution of the ART or EMT; the threshold shall not be lower than two million natural or legal persons; [432]

ii. The value of the ART or EMT or – if applicable – the market capitalization; the threshold shall not be lower than EUR 1 billion;[433]

iii. The number and value of transactions in those ART or EMT; the threshold shall not be lower than 500 000 transactions per day or EUR 100 million per day respectively;[434]

iv. The size of the reserve of assets of the issuer; the threshold shall not be lower than EUR 1 billion;[435]

v. The significance of the cross-border activities of the issuer, including the number of Member States where the ART or EMT are used, their use for cross-border payments and the number of Member States where the third-party entities mentioned in i. are established; the threshold shall not be lower than seven different Member States;[436]

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[427] Recital 41.
[428] Art 39 (6) (b).
[429] Art 39 (6); Art 50 (1) in connection with Art 39 (1) and (6).
[430] Art 39 (1); Art 50 (1) in connection with Art 39 (1) and (6).
[431] Art 30 (5) (h)
[432] Art 39 (1) (a) and (6) (a) (i).
[433] Art 39 (1) (b) and (6) (a) (ii).
[434] Art 39 (1) (c) and (6) (a) (iii).
[435] Art 39 (1) (d) and (6) (a) (iv).
[436] Art 39 (1) (e) and (6) (a) (v).

vi. The interconnectedness with the financial system of the ART or EMT and their issuer;[437]

Further, the Commission shall be empowered to determine the contents and formats of the information flow between the EBA and the NCA as well as the procedure and timeframe for the assessment through the EBA.[438]

5.4.5.3. Procedure

MiCA provides two paths for an ART or EMT to become 'significant'. The first path is provided for the case, where an ART or EMT is issued as a 'regular' ART or EMT but through time becomes large in scale through e.g., a wide adoption. To monitor such a development, the NCA of the issuers' home Member State shall provide the EBA at least annually with information on the abovementioned criteria.[439] If, on the basis of this information provided by the NCA, EBA holds the opinion the ART or EMT is to be deemed 'significant', it shall draft a decision to that effect and notify the issuer as well as the NCA with that draft decision and give both the opportunity to present written 'observations and comments' which shall be duly considered by EBA.[440] Within three months after the issuance of the notification to the NCA and the issuer, EBA shall take its final decision and immediately notify the issuer and the NCA of the final decision.[441]

The second path to become a significant ART or EMT starts prior its issuance. Applicant issuers shall have the possibility to request in their application for authorization – or in the case of issuers of EMT already authorized as credit institutions or electronic money institutions in their notification of the white paper to the NCA[442] – to classify their ART or EMT as 'significant'. In this case, the NCA shall immediately notify the request to the

[437] Art 39 (1) (f) in connection with Art 39 (6) (b).
[438] Art 39 (6) (c) and (d).
[439] Art 39 (2); Art 50 (2) in connection with Art 39 (1) and (6).
[440] Art 39 (3).
[441] Art 39 (4).
[442] As described in the foregoing chapters, future issuers of ART are obliged to apply for an authorization, issuers of EMT on the contrary need to already be authorized as credit institution or electronic money institute and MiCA (only) requires them to notify their white paper to the NCA prior the issuance without further authorization requirements. Nonetheless, future issuers of EMT can apply to become a credit institution or electronic money institution and with this application indicate that they wish to issue significant EMT. If not already in the application, the wish to have the EMT classified as 'significant' will need to be included in the notification of the white paper. For this reason, MiCA uses the term 'applicant issuer' to describe a future issuer of significant ART but uses 'issuer or applicant issuer' to describe a future issuer of significant EMT. For reasons of readability, the author uses the term 'applicant issuer' for both, future issuers of significant ART as well as future issuers of significant EMT.

EBA.[443] The applicant issuer should demonstrate through the description of its business model that the ART or EMT is likely to ought to be classified as 'significant', i.e. that at least three of the abovementioned criteria will be met.[444] If, on the basis of the demonstrated business model, the EBA considers the ART or EMT is deemed to be classified as 'significant', it shall prepare a draft decision and notify that draft decision to the NCA of the applicant issuer and provide it with the opportunity to provide observations and comments in writing, which – again – shall be duly considered by the EBA.[445] Remarkably, MiCA does not stipulate a notification requirement to the applicant issuer if EBA seeks to follow the applicant issuers' request to qualify its ART or EMT as 'significant'.

Only in the case where the EBA does not intend to qualify the ART or EMT as 'significant', also the applicant issuer is to be – like the NCA – notified by the draft decision and shall have the opportunity to present observations and comments on the draft decision, which also need to be duly considered by EBA.[446] As in the 'first path', the EBA shall take its final decision within three months after the notification of the draft decision and immediately inform the applicant issuer and the NCA thereof.[447]

5.4.5.4. Additional obligations for issuers of significant ART or EMT

Once an ART or EMT is classified by the EBA as 'significant', their issuers shall be subject to additional, more onerous requirements. Firstly, such issuers shall be subject to the obligation to have a renumeration policy in place that promotes a sound and effective risk management without creating incentives to relax risk standards.[448] Further, MiCA subjects issuers of significant ART or EMT to certain interoperability requirements, in particular the obligation to ensure that the crypto-assets can be held in custody by different crypto-asset service providers also outside the issuers' group on a fair, reasonable and non-discriminatory basis.[449] To meet redemption requests or the exercise of other rights of the holders and to ensure that the reserve assets have a resilient liquidity profile, additionally a liquidity management policy and procedures shall be established that enable the issuer to continue operating normally under stress-scenarios.[450] Moreover, higher capital requirements apply:

[443] Art 41 (1); Art 51 (1).
[444] Art 40 (1) subpara 2; Art 51 (1) subpara 2.
[445] Art 40 (2); Art 51 (2).
[446] Art 40 (3)
[447] Art 40 (4).
[448] Art 41 (1); Art 52 (b).
[449] Art 41 (2); Art 52 (b).
[450] Art 41 (3); Art 52 (b).

For issuers of ART, rather than 2 % of the average amount of the reserve assets, the threshold for issuers of significant ART is raised to 3 %.[451] For issuers of significant EMT, the same threshold applies, i.e. 3 % of the average amount of funds received in exchange for EMT[452] by derogation of the otherwise applicable Art 5 EMD2.[453]

When an EMT is classified as 'significant', by derogation of Art 7 EMD2, MiCA obliges the issuer to the same rules on the custody and investment of the funds received in exchange for EMT as issuers of ART (see Section 5.4.3.2.) and further subjects the issuer of a significant EMT to have an orderly wind-down plan in place, same as issuers of ART (see Section 5.4.3.8.).[454]

Concerning only significant ART, MiCA further clarifies that if several issuers offer the same significant ART, each of those issuers shall be subject to the abovementioned requirements.[455]

5.4.5.5. Supervision of issuers of significant ART or EMT

Additionally to the special obligations for issuers of ART or EMT, the classification of an ART or EMT shall also lead the issuer to be subject to the supervision of the EBA, in order to avoid supervisory arbitrage across Member States.[456] In order to ensure a smooth transition in the case where an ART or EMT becomes that large at scale to be classified as 'significant', MiCA firstly dictates that the NCA and EBA shall cooperate[457] and secondly differentiates between the transition of the supervisory competences between significant ART and significant EMT: For issuers of significant ART, one month after the notification of the final decision of the EBA, the supervisory authority shall be transferred to the EBA.[458] In the case of significant EMT, no such transitional provision exists. This is due to the fact that MiCA stipulates a major difference in the supervisory competences for the EBA in their supervision of significant ART on the one hand and significant EMT on the other hand: Issuers of significant ART shall generally carry out their activities under the supervision of the EBA.[459]

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[451] Art 41 (4).

[452] Issuers of EMT are not required to maintain a 'reserve of assets' as described in Art 32 et seq, therefore Art 52 (c) in connection with Art 41 (4) has to be applied *mutatis mutandis*, i.e., meaning the 'funds received in exchange for EMT' which represent the average total amount of financial liabilities the issuer bears towards the holders of its EMT; see also Art 2 (4) EMD2.

[453] Art 52 (c).

[454] Art 52 (a) and (d); Recital 49.

[455] Art 41 (5); the applicable provision on issuers of significant EMT does not refer to the corresponding provision applicable to issuers of significant ART, see Art 52, in particular (c).

[456] Recital 66.

[457] Art 39 (5) subpara 2.

[458] Art 39 (5); Art 98 (1).

[459] Art 98 (1).

Additionally, after the classification as a significant ART, EBA shall conduct a supervisory reassessment and examine if the issuer complies with the general obligations for all issuers of ART.[460] If an issuer of a significant ART also provides crypto-asset services or issues other crypto-assets, these activities shall remain supervised by the NCA, including the issuance of other ART issued by the same issuer but not classified as 'significant'.[461] Issuers of significant EMT on the other hand shall be subject to a dual supervision, i.e. the EBA supervising the issuers' compliance with the specific additional requirements that come with the classification of the EMT as 'significant'.[462] The activities of the issuer itself and the issuers' compliance with all other requirements provided by the MiCA shall remain to be supervised by the NCA. As the ECB pointed out in the consultation process,[463] this proposed dual supervisory arrangement could even lead to a triple supervision in the case where the issuer of a significant EMT is a significant credit institution supervised by the ECB on the basis of the Single Supervisory Mechanism Regulation (SSMR),[464] leaving a complex supervision framework and the potential for overlapping competences.

To facilitate and exercise its supervisory tasks under the MiCA, the EBA shall establish, manage and chair a consultative college of supervisors within 30 days of the decision to classify an ART or EMT as 'significant'.[465] The Commission argues that as those issuers are usually at the centre of a network of entities ensuring the issuance, transfer and distribution of crypto-assets to holders and therefore the college of supervisors shall consist of all the competent authorities of the entities in such a network including next to the EBA, as the Chair and the NCA of the issuers' home Member State *inter alia* the ESMA, NCAs of the most relevant crypto-asset service providers.[466] The most important task of such a college will be to issue consultative non-binding opinions on supervisory measures.[467]

5.4.5.6. Summary to issuers of significant ART or EMT

Due to the possibility that certain ART or EMT could become such large in scale and the risks these crypto-assets with such a significance can pose to financial stability in the Union, MiCA stipulates that issuers of such significant ART or EMT shall be under more stringent

[460] Art 98 (3).
[461] Art 98 (2).
[462] Art 98 (4); Recital 68.
[463] ECB, Opinion (n 178), Section 3.1.3 et seq.
[464] Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63.
[465] Art 99 (1) and Art 101 (1).
[466] Recital 67 and 69; Art 99 and Art 101.
[467] Art 100 and Art 102.

supervision than ‘regular’ issuers, including EBA as supervising authority, and subjects them to stricter prudential and operational requirements. If an EMT becomes significant, its issuer is additionally required to have rules on the custody of reserve assets as well as on the investment of the funds received in exchange for its EMTs and an orderly wind-down plan in place.

5.4.6. Conclusion on issuers of crypto-assets under the scope of MiCA

In order to examine the scope of the regulatory requirements an issuer of crypto-assets under the scope of MiCA has to fulfil one has to differentiate: If the crypto-asset concerned is to be considered an EMT – i.e. a crypto-asset stabilizing its value by referring to one single official currency and intended to be used as means of exchange – Art 43 et seq MiCA will be applicable and subject its issuer to a regime similar to the electronic money regime provided by the EMD2 but with certain special provisions of the MiCA that seek to mitigate risks especially posed by crypto-assets.

If the crypto-asset in assessment does not qualify as EMT, the next step would be the question whether the crypto-asset is to be classified as an ART. This will be the case if the crypto-asset aims at stabilizing its value by referring to several official currencies, commodities, crypto-assets or a combination of such assets. If this is to be answered positively Art 15 et seq MiCA are to be applied, providing a new comprehensive legal framework with strict requirements for the issuer, most notably an authorization requirement. For both, issuers of ART and issuers of EMT, MiCA stipulates a prohibition to pay interests to its holders, which seeks to ensure that ARTs and EMTs are payment, rather than securities/investment tokens by attempting to avoid circumvention of EU securities law by e.g., a promise to pay interests and thereby blur the lines between means of exchange and a bond.[468] In the case where both steps are to be answered negatively, the catch-all element of the definition of crypto-assets by Art 3 (1) 2 MiCA becomes visible: In this case, Art 4 et seq MiCA shall be applicable, the crypto-asset shall be considered a ‘crypto-asset other than an ART or EMT’. Algorithmic stablecoins and utility tokens will fall under this category, their issuance shall be subject to Art 4 et seq.

In the category of crypto-assets other than ART or EMT, one last element has to be checked, which is the question whether the crypto-asset qualifies as a utility tokens, i.e., providing the holder with digital access to a good or service of the issuer. In this case, additionally to the

[468] Zetzsche and others (n 192) 216.

general provisions of Art 4 et seq MiCA, certain special provisions have to be complied with as well, namely provisions for issuances of utility tokens for services that are not yet in operation.

An issuer of crypto-assets other than ART or EMT shall always be a legal entity and follow certain rules of conduct towards the holders of the crypto-assets. If not exempted, the issuer shall be obliged to draw up, notify and publish a white paper. With due publication of the white paper, the issuer shall be free to offer its crypto-assets in the whole union without being subject to further requirements imposed by NCAs of host Member States. In contrast to the rules on issuers of ART and EMT that provide for extensive *ex ante* supervision, the rules on issuers of crypto-assets other than ART or EMT provide mainly an *ex post* supervision through the competent authorities. In the case an ART or EMT becomes that large in scale, that it presents systemic risks, MiCA provides a mechanism to classify such a crypto-asset as 'significant' and thereby subjects the issuer to more stringent requirements and obligations as well as a transition of supervisory powers to the EBA.

The following figure provides a high level overview to the different requirements provided by the Commissions' proposal for issuers of different crypto-assets under the scope of MiCA:

Issuers of crypto-assets other than ART or EMT	**Issuers of ART**	**Issuers of EMT**
Legal entity White paper - Notified - Published Rules of conduct	Legal entity established in the Union + Authorized by the NCA White paper - Approved - Published Rules of conduct Own fund requirements Continuous information Complaint handling procedures Reserve of assets - Rules on custody of the reserve assets - Rules on investment of the reserve assets Orderly wind-down plan	No direct authorization requirement in MiCA But: Authorized as - Credit institution or - Electronic money institution White paper - Notified - Published Own fund requirements Complaint handling procedures Funds received in exchange for EMT - Safeguarding requirements - Rules on the investment of funds received in exchange of EMT
Supervision: NCAs	Supervision: NCAs	Supervision: NCAs
	Issuers of significant ART	**Issuers of significant EMT**
	Additional requirements: Higher own funds requirements Interoperability requirements Liquidity management policy Remuneration policy	*Additional requirements:* Higher own funds requirements Interoperability requirements Liquidity management policy Remuneration policy Rules on the custody of funds received in exchange for the significant EMT Additional rules on the investment of the funds received in exchange for the significant EMT Orderly wind-down plan
	Supervision: EBA	Supervision: NCAs + EBA

Figure 2 - Overview: Different requirements for issuers under the scope of MiCA

5.5. Crypto-asset service providers (CASPs)

5.5.1. Definition and crypto-asset services

According to the Commissions' proposal, a crypto-asset service provider (CASP) shall be defined by 'any person whose occupation or business is the provision of one or more crypto-asset services to third parties on a professional basis'.[469] This definition is close to the corresponding definition of an investment firm according to the MiFID II,[470] but unlike MiFID II, the Commissions' proposal does not provide the possibility for Member States to include in the definition undertakings that are not legal persons. According to the MiCA only legal entities shall be authorized to provide their crypto-asset services.[471]

The recitals of the MiCA stipulate, that it seeks to regulate two categories of crypto-asset services.[472] The first category of services shall contain

- the custody and administration of crypto-assets or the access to such crypto-assets on behalf of third parties, i.e., the safekeeping or controlling crypto-assets or the means of access to such crypto-assets – in many cases through the form of safekeeping the private cryptographic keys – on behalf of third-parties;[473] this activity is presently commonly referred to as the activity of a 'custodian wallet-provider';

- the operation of a trading platform for crypto-assets, i.e., managing one or more platforms on which multiple buying and selling interests of third parties can interact in a manner that results in a contract, be it by exchanging different crypto-assets or crypto-assets for an official currency[474] and

- the exchange of crypto-assets against official currencies or other crypto-assets by dealing on own account, i.e., concluding purchase or sale contracts for crypto-assets with third parties against official currency[475] or other crypto-assets[476] by using proprietary capital; this activity is presently referred to as the operation of a 'crypto-exchange'.

[469] Art 3 (1) (8).
[470] Art 4 (1) (1) MiFID II.
[471] Art 53 (1); Recital 50.
[472] Recital 12.
[473] Art 3 (1) (10).
[474] Art 3 (1) (11).
[475] Art 3 (1) (12).
[476] Art 3 (1) (13).

Further, the second category shall include

- the execution of orders for crypto-assets on behalf of third parties, i.e., concluding agreements to buy, to sell or to subscribe for one or more crypto-assets on behalf of third parties;[477]

- the placing of crypto-assets, i.e., marketing crypto-assets that are not admitted to trading on a trading platform for crypto-assets to specified purchasers, not including an offer to the public or an offer to existing holders of the issuers' crypto-assets;[478]

- the reception or transmission of orders for crypto-assets on behalf of third parties, i.e., the reception of an order to buy, sell or to subscribe for crypto-assets and the transmission of that order to a third party execution;[479]

- the provision of advice concerning the acquisition or the sale of one or more crypto-assets or the use of crypto-asset services, i.e., offering, giving or agreeing to give personalized or specific recommendations to a third party concerning the acquisition or the sale of crypto-assets or the use of crypto-asset services;[480]

However, it is unclear what purpose this categorization serves as in the proposals' text no differentiation between these two categories is taken as no common denominator can be found between the services in the two categories and the MiCA does not provide any differentiation between the two 'categories'.[481]

The list of crypto-asset services is closely based on the list of investment services and activities provided by Annex I Section A of the MiFID II. Only the activity of a 'custodian wallet-provider' does not correspond to an investment service or activity but rather has factual similarities to the ancillary services of 'safekeeping and administration of financial instruments for the account of clients, including custodianship and related services' as provided by Annex I Section B (1) of the MiFID II. As ESMA notes,[482] there is in fact no harmonized definition on safekeeping and record-keeping of ownership of securities at EU-level. However, there is no activity in the MiFID II to be deemed equivalent to the custody

[477] Art 3 (1) (14).
[478] Art 3 (1) (15).
[479] Art 3 (1) (16).
[480] Art 3 (1) (17).
[481] The text of the proposal rather differentiates in its Annex IV between three 'classes' with regards to the different minimum capital requirements applicable to each of those classes, as pointed out by *Rennig*, see Rennig (n 362) 395; see also Section 5.5.3.
[482] ESMA, Advice (n 6) 34.

and administration of crypto-assets or the access to such crypto-assets on behalf of third parties as defined the MiCA.[483]

The list provided by the MiCA is comprehensive and covers most activities in the crypto-economy next to the issuance, though, as *Zetzsche and others* point out, interestingly, the exchange of crypto-assets for financial instruments as well as portfolio management[484] where such a portfolio includes crypto-assets are missing in the services of MiCA.[485] In large parts, the list of services provided by the MiCA corresponds to the list to be found in the FATF Recommendations for 'virtual asset service providers',[486] in order for MiCA to further contribute to the objective of combatting money laundering and the financing of terrorism as such services are likely to raise money-laundering concerns.[487]

According to the recitals of the MiCA, crypto-asset services shall be considered as 'financial services' as defined in the DMFSD, meaning that – where marketed at distance – the contracts between the CASP and consumers should be subject to that directive and therefore subject the CASP to information requirements towards the consumer as well as a right of withdrawal for 14 days after conclusion of the contracts.[488] However, the right of withdrawal will not apply if the price of the crypto-asset depends on fluctuations, e.g. if the crypto-asset is traded on a trading platform for crypto-assets.[489]

The Commissions' proposal lays down general rules and requirements, all CASPs shall be obliged to follow. These rules are irrespective of the crypto-asset under the scope of MiCA in question that the service is related to. Further, depending on the specific service provided, in order to mitigate the specific risks each type of service raises, the Commissions' proposal stipulates additional specific requirements related to each service.[490]

5.5.2. Authorization of CASPs

As pointed out above, according to the Commissions' proposal, crypto-asset services shall only be provided by legal persons. But not only that, MiCA stipulates two further requirements for those legal persons that seek to provide crypto-asset services: Firstly, said

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483 To the equivalence of investment services to crypto-asset services see below Section 5.5.2.
484 See Annex I Section A (5) of the MiFID II.
485 Zetzsche and others (n 192) 217.
486 See FATF (n 173) 130.
487 Recital 8.
488 Art 3 et seq DMFSD; Art 6 DMSFD
489 Art 6 (2) DMFSD.
490 Recital 59.

legal person needs to have a registered office in a Member State of the Union. Secondly, it shall have been authorized as a CASP by the NCA of the Member State where its office is registered.[491]

Thus, only legal entities with a registered office in a Member State are eligible to apply for authorization. MiCA provides a comprehensive list of information that shall be included in the **application** to the NCA where the applicant needs to demonstrate that it meets the organizational requirements set out by the MiCA. The application shall *inter alia* contain information on the applicant legal entity, such as its name, physical address, website, legal status and its articles of association.[492] Further, it shall contain details on its governance arrangements and business plan, describing which crypto-asset services the applicant wishes to provide and where and how these services are to be marketed.[493] Like for issuers of ART, the applicant shall provide the NCA with information on all natural persons involved in its management body as well as for all natural persons who directly or indirectly hold 20 % or more of the share capital or voting rights, proofing the absence of any criminal records regarding commercial, insolvency, financial services and anti-money laundering law as well as counter-terrorism legislation and professional liability obligations, i.e. to be fit and proper.[494] Additionally, all natural persons involved in the management body shall collectively possess sufficient knowledge, skills and experience to perform their duties and comply with their regulatory obligations.[495] Further, the application shall contain information on the applicants policies and procedures regarding internal control mechanisms, risk assessment and a business continuity plan[496] as well as with regards to handling complaints from its clients and its systems to ensure the integrity and confidentiality of information received.[497] The applicant CASP also shall have to proof to the NCA the existence of the prudential safeguards it is subject to (see Section 5.3.3.).[498] Last but not least, applicants shall provide the NCA with information on its procedure for the segregation of clients' crypto-assets and funds as well as its procedure and system to detect market abuse committed by clients.[499] If an applicant CASP has already provided the NCA with information pursuant to

[491] Art 53 (1); Recital 50.
[492] Art 54 (2) (a) – (c).
[493] Art 54 (2) (d) – (e).
[494] Art 54 (2) (f); Recital 57.
[495] Art 54 (2) (g); Recital 57.
[496] Art 54 (2) (h).
[497] Art 54 (2) (k) and (i); Recital 57.
[498] In contrast to issuers of ART, see Section 5.4.3.4.
[499] Art 54 (2) (l) and (m).

the EMD2, MiFID II, PSD2 or national law applicable to crypto-asset services[500] prior to the entry into force of the MiCA, the NCA shall not require the applicant to resubmit that information as long as it is still up-to-date and accessible to the NCA.[501]

For certain specific services, the applicant shall provide additional information to the NCA specific to the service that the issuer intends to provide. These requirements will be mentioned at the appropriate place in this thesis (see Section 5.5.4.).

Upon receipt of the application, the NCA shall communicate within 25 working days to the applicant if the application is complete.[502] If it is not complete, it shall set a deadline to submit the outstanding information after which, if it remains incomplete, the authorization shall be refused.[503] In any case, the NCA shall inform the applicant immediately if the application is in fact complete.[504] As opposed to the additional consultation of the ESMA and EBA in the authorization procedure for issuers of ART,[505] concerning the authorization of CASPs the Commissions' proposal only provides a consultation mechanism on NCA-level: In the cases where an applicant CASP is either a subsidiary of a CASP that is already authorized in another Member State, a subsidiary of the parent undertaking of a CASP authorized in another Member State or is controlled by the same natural or legal persons who control a CASP in another Member State, the NCA of the applicants home Member State shall consult the NCA of the other Member State.[506] This NCA-level consultation is reasoned by the relatively small scale of CASPs to date.[507] ESMA shall rather supervise the NCAs, as it shall have the power to request information in order to ensure that the NCAs grant authorizations in a consistent manner.[508]

In any case, the NCA shall within three months of receipt of the complete application adopt a fully reasoned decision granting or refusing an authorization, taking into account the nature, scale and complexity of the services the applicant intends to provide.[509] Within three working

[500] E.g., the German 'Kryptoverwahrgeschäft' according to § 1 (1a) S 2 N 6 KWG or the authorization as a service provider for services in relation virtual financial assets according to the Maltese 'Virtual Financial Assets Act'; for more details on the Maltese 'Virtual Financial Assets Act' see also Christopher P. Buttigieg, Christos Efthymiopoulos 'The regulation of crypto assets in Malta: The Virtual Financial Assets Act and beyond' (2019) 13 Law Financial Mark Rev 30.
[501] Art 54 (3).
[502] As opposed to 20 working days for the authorization of issuers of ART, see Section 5.4.3.4.
[503] Art 55 (1) and (2).
[504] Art 55 (3).
[505] Art 18, see also Section 5.4.3.4.
[506] Art 55 (4).
[507] Recital 52.
[508] Art 55 (6).
[509] Art 55 (5).

days of the date of the decision, the applicant is to be informed by the NCA.[510] The authorization granted by the NCA shall ensure that it specifies the services the CASP is authorized to provide.[511]

Although MiCA stipulates that an authorization as a CASP shall be valid for the entire Union and shall allow a CASP to provide its services throughout the Union without being required to have a physical presence in the territory of a host Member State,[512] MiCA provides a passporting-regime with a notification requirement similar to the one for investment firms as defined in the MiFID II:[513] The CASP shall be obliged to submit a list of the Member States in which it intends to provide its services, including the starting date of the intended provision as well as a list of all other activities it provides but which are not covered by the MiCA.[514] The NCA then shall within 10 working days communicate that information to the host Member States, ESMA and to the EBA and inform the notifying CASP of that communication without delay. Only after receipt of that information from the NCA – respectively at the latest 15 days after having submitted the notification to the NCA – the CASP shall be allowed to provide its services.[515] Therefore, unlike the EU-passport for a white paper of a crypto-asset other than ART or EMT which does not prevent the issuer to offer its crypto-assets in a different Member State than its home Member State in the case where it has not notified its home NCA that it intends to do so, CASPs that intend to provide their services cross-border have the obligation to notify the NCA and wait for its communication or the latest 15 days after the submission of the notification before providing services in a different Member State.

The authorization through the NCA as a CASP for any crypto-asset services does however not include an authorization for the entity to provide payment services related to the crypto-assets services it offers. In order to be legally able to provide payment services, a CASP shall still need to obtain an additional authorization as payment institution in accordance with the PSD2.[516]

[510] Art 55 (7).
[511] Art 53 (2).
[512] Art 53 (3).
[513] See Art 34 MiFID II.
[514] Art 58 (1).
[515] Art 58 (4).
[516] Art 63 (4); Recital 58.

Similar to the corresponding provision in the ECSP for crowdfunding service providers,[517] ESMA is mandated to maintain a public register of all CASPs authorized in the Union, including the name, legal status, physical address, website as well as a list of the crypto-asset services that the CASP is authorized to provide and the Member States in which the CASP wishes to provide its services in. Therefore, the NCA that granted the authorization to the CASP shall inform ESMA of all authorizations granted.[518]

No person that is not authorized as a CASP shall use a name, marketing strategy or any other process suggesting to be authorized as a CASP or that is likely to confuse the public in that respect.[519]

As already indicated in Section 5.1., credit institutions and investments firms shall be partially exempted from the scope of the MiCA. This concerns mainly the authorization requirement for certain – already otherwise authorized – entities, that shall not be subject to further authorization requirements under the MiCA to be allowed to provide crypto-asset services.[520] On the one hand, credit institutions authorized under the CRD-IV[521] that provide crypto-asset services shall be exempted from the authorization requirements. However, such credit institutions are still subject to the register of crypto-asset service providers maintained by ESMA[522] as well as MiCAs EU-passport regime for CASPs.[523] On the other hand, investment firms authorized for certain investment services and activities under the MiFID II shall also not be subject to the authorization requirements of the MiCA for crypto-asset services that are deemed to be equivalent to the investment services and activities they are already authorized to provide, again except for the provision to be included in ESMAs public register of CASPs and the EU-passporting regime.[524]

[517] Art 14 ECSP.
[518] Art 55 (6).
[519] Art 53 (1) subpara 3.
[520] Recital 54.
[521] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338.
[522] Though, it remains unclear how and by whom ESMA shall be informed to include a credit institution providing crypto-asset services in its public register, as the current draft is worded, a credit institution could simply start to provide crypto-asset services without notifying its NCA.
[523] Art 2 (5); Recital 54.
[524] Art 2 (6); The current draft of the MiCA exempts investment firms from the provisions of 'chapter I of Title V, except Articles 57, 58, 60 and 61'. Articles 57 and 58 concern the public register for CASPs and the EU-passport for cross-border provision of crypto-asset services. Articles 60 (prudential requirements) and 61 (organizational requirements) are in fact contents of chapter II of Title V, thus an investment firm would not be exempted from these provisions in the first place. It is therefore unclear why the current draft limits its exemption for those two articles and most likely presents an editorial mistake.

The following figure juxtaposes the crypto-asset services and the investment services and activities MiCA deems to be equivalent to each other:[525]

Crypto-asset services[526]		Investment services and activities[527]
operation of a trading platform for crypto-assets	*is deemed to be equivalent to*	operation of an MTF *and* operation of an OTF
exchange of crypto-assets for official currency or for other crypto-assets	*is deemed to be equivalent to*	dealing on own account
execution of orders for crypto-assets on behalf of third parties	*is deemed to be equivalent to*	execution of orders on behalf of clients
placing of crypto-assets	*is deemed to be equivalent to*	underwriting of financial instruments and/or placing of financial instruments on a firm commitment basis; *and* placing of financial instruments without a firm commitment basis;
reception and transmission of orders for crypto-assets on behalf of third parties	*is deemed to be equivalent to*	reception and transmission of orders in relation to one or more financial instruments
providing advice on crypto-assets	*is deemed to be equivalent to*	investment advice

Figure 3 - Crypto-asset services and equivalent investment services and activities

As already outlined above, there is no investment service deemed to be equivalent to the custody and administration of crypto-assets on behalf of third parties. Further, the investment service of 'portfolio management'[528] is missing an equivalent crypto-asset service.

5.5.3. General obligations for all CASP

In order to ensure consumer protection, market integrity and financial stability,[529] all CASP shall have to follow general **rules of conduct**, i.e., the obligation to act honestly, fairly and professionally in the best interest of clients and prospective clients and to inform clients in a clear and not misleading way. Further, all CASP shall inform their clients of risks associated with purchasing crypto-assets and make their pricing policies publicly available on a

[525] Art 3 (6) (a) – (f).
[526] As defined in Art 3 (1) (9).
[527] As defined in Annex I Section A of the MiFID II.
[528] Annex I Section A (5) of the MiFID II.
[529] Recital 55.

prominent place on their website.[530] For the same reasons, all CASP shall establish a complaint handling procedure[531] and have a robust policy to identify, prevent, manage and disclose conflicts of interest.[532]

Concerning **prudential requirements**, all CASP shall maintain sufficient capital in the form of either own funds, an adequate insurance policy for operational risks or a comparable guarantee.[533] They shall at all times have funds equal to or higher than either of the following:[534]

- The minimum capital requirements provided by Annex IV of the MiCA differentiating the services into three classes according to the nature of the specific crypto-asset services provided, i.e.
    - Class 1: minimum of EUR 50.000,00 for CASPs authorized for the reception and transmission of orders on behalf of third parties and/or providing advice on crypto-assets and/or execution of orders on behalf of third parties and/or placing of crypto-assets;
    - Class 2: minimum of EUR 125.000,00 for CASPs authorized for any class 1 crypto-asset services and custody and administration of crypto- assets on behalf of third parties;
    - Class 3: minimum of EUR 150.000,00 for CASPs authorized for any class 2 crypto-asset services and the exchange of crypto-assets for official currency or other crypto-assets and/or the operation of a trading platform for crypto-assets;
- One quarter of the fixed overheads of the previous year, to be reviewed annually; in the case the CASP has not been in business the year preceding the starting date of the provision of its services, the projected fixed overheads that have been submitted with the business plan with the application for the authorization shall be used for the calculation.[535]

[530] Art 59.
[531] Art 64.
[532] Art 65.
[533] Art 60 (2), (4) and (5).
[534] Art 60 (1).
[535] Art 60 (3).

Further, MiCA stipulates comprehensive organizational requirements for all CASPs. The members of the management body as well as natural persons with decisive influence on the CASP shall have to be fit and proper, i.e., have the necessary good repute and competence to perform their duties and shall be free of convictions of offences relating to money laundering or terrorist financing or other financial crimes.[536] Any changes to the management body shall be notified to the NCA.[537]

CASPs shall at all times employ personnel with the skills, knowledge and expertise necessary to discharge their responsibilities,[538] asses and periodically review the effectiveness of the policies, arrangements and procedures to comply with its obligations,[539] ensure continuity and regularity in the delivery of services to clients as well as establish an effective business continuity policy and disaster recovery plans, most notably through the employment of resilient and secure ICT systems.[540] Further, internal control mechanisms and effective procedures for risk assessment and systems and procedures to safeguard the security, integrity and confidentiality of information shall be implemented.[541] In order to enable NCAs to fulfil their supervisory tasks, in particular to ascertain whether the CASP has complied with all obligations with respect to clients and market integrity, and to perform the enforcement of actions, all CASPs shall keep records of all crypto-assets services, orders and transactions undertaken by them.[542] Additionally, systems, procedures and arrangements to detect potential market abuse committed by clients shall be implemented and the CASP shall have the obligation to report their NCA immediately in case of any suspicion of potential market abuse.[543]

If the CASP holds clients' crypto-assets or other funds or the means of access to crypto-assets, e.g. custodian wallet-providers, it shall make adequate arrangements to safeguard the ownership rights of the clients, especially in the event of the CASP insolvency.[544] Unless the CASP is authorized as an electronic money institution under the EMD2 or a payment

[536] Art 61 (1), (2) and (3).
[537] Art 62.
[538] Art 61 (3).
[539] Art 61 (4).
[540] Art 61 (5); for the purposes of the adequacy of such ICT systems see also European Commissions, 'Proposal for a Regulation of the European Parliament and the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014' COM(2020) 595 final, which is also part of the Digital Finance Package and will be of significant importance with regard to ICT systems of CASPs.
[541] Art 61 (7).
[542] Art 61 (8).
[543] Art 61 (9).
[544] Art 63 (1), Recital 58.

institution authorized under the PSD2,[545] in the case where the business model requires the CASP to hold clients' funds as defined in the PSD2,[546] these funds should be held with a credit institution or a central bank segregated from the CASPs' own funds.[547]

Naturally, CASPs shall be allowed to outsource the performance of operational functions to third parties. But if they do so, they shall take all reasonable steps to avoid additional operational risk through that outsourcing and remain fully responsible for discharging their obligations to third parties.[548] Further, the CASPs' written agreements with any third party involved in the outsourcing[549] shall ensure that the following conditions are complied with: They shall ensure that the third party cooperates with the NCA of the CASP and that the CASP has direct access to the relevant information of the outsourced services.[550] If the third party involved in the outsourcing is not established in the Union, the written agreement shall also ensure that it nevertheless meets the EU data protection standards laid down by the General Data Protection Regulation[551] (GDPR).[552] Additionally, the CASP shall ensure that the outsourcing does neither result in the delegation of the responsibility of the CASP, nor change the relationship between the CASP and its clients, its obligations towards its clients nor the conditions for the authorization.[553] It further shall retain the expertise and resources necessary to evaluate the quality of the services provided, supervising the outsourced services and managing the risks associated with the outsourcing on an ongoing basis.[554]

Finally, to ensure of the Commissions' goal that ART and EMT are mainly used as means of exchange rather than a store of value, and to ensure that through structuring a crypto-asset as ART or EMT the provisions regarding EU securities cannot be circumvented,[555] also CASPs – like issuers – are prohibited to grant interests or any other benefit related to the duration of time a holder of ART or EMT holds such crypto-assets.[556]

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[545] Art 63 (5).
[546] See Art 4 (25) PSD2, i.e., banknotes and coins, scriptural money or electronic money.
[547] Art 63 (2) and (3); Recital 58.
[548] Art 66.
[549] Art 66 (3).
[550] Art 66 (1) (d) and (f)
[551] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1.
[552] Art 66 (1) (g)
[553] Art 66 (1) (a) – (c).
[554] Art 66 (1) (e).
[555] Zetzsche and others (n 192) 216.
[556] Art 36 and 45; Recital 41 and 46.

5.5.4. Special obligations for the provision of specific crypto-asset services

5.5.4.1. Custody and administration of crypto-assets on behalf of third parties

The special obligations for the provision of the service of custody and administration of crypto-assets on behalf of third parties are – as all special obligations in this section – to be seen specifically to reduce the typical risk posed by the provided service. In this case, the special obligations are designed to minimize the risk of loss of the crypto-assets that are held and administered for the CASPs clients.[557]

First and foremost, MiCA stipulates that the CASP shall enter into a contractual relation with their clients and provides mandatory provisions specifying the duties and responsibilities of the CASP.[558] These mandatory provisions include, *inter alia*, the identity of the parties, the nature and a description of the service provided, a description of the security system used as well as the fees applied by the CASP.

The crypto-assets in custody on behalf of the clients shall be kept segregated from the own holdings of the CASP, i.e., on a separate address on the DLT,[559] and the CASP shall ensure that – presumably upon the clients request[560] – the crypto-assets or the means of access – e.g., the private key, see Section 2.2. – are returned as soon as possible to its clients. Further, such CASP shall have a custody policy with internal rules and procedures to ensure the safekeeping or the control of the clients' crypto-assets or the means of access to the clients crypto-assets.[561] An applicant CASP shall demonstrate in its application to the NCA that it has an adequate custody policy in place.[562] MiCA stipulates in this context the duty[563] to ensure that it will not lose clients' crypto-assets or the rights related to them due to frauds, cyber threats or negligence. This provision is supported by a strict liability rule, i.e. that the CASP shall be liable to their clients for loss the of crypto-assets as a result from an ICT-related incident, including cyber-attacks, theft or any malfunction, up to the market value of the

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557 XReg.Consulting, 'MiCA explained: the EU crypto-asset law' (XReg.Consulting Ltd, 2020) <https://uploads-ssl.webflow.com/5df7642ffbd9264804671001/5f7b3b3116ebd4add01abd32_XReg%20EU%20MiCA%20explained%20-issue%201-1.1a%20-FINAL.pdf> accessed 4 September 2021, 25.
558 Art 67 (1); Recital 59.
559 Art 67 (7).
560 see Art 67 (6), where the current draft simply states that it shall be 'returned as soon as possible' without any limitation to that effect, however a strict reading of this provision would not make much sense, thus it has to be teleologically interpreted with the addition of 'upon the clients' request'.
561 Art 67 (3).
562 Art 54 (2) (n).
563 See the wording of Art 67 (3) subpara 2: '[...] **shall ensure** that the crypto-asset service provider **cannot** lose clients' crypto-assets [...]' (emphasis added).

crypto-asset lost.[564] This liability rule is extremely strict, as it would hold CASPs liable even in cases where the loss has arisen as a result of an external event beyond the CASPs' reasonable control (*force majeure*) and is in contrast to the liability rule for custodians safeguarding reserve assets of an issuer of ART,[565] the liability provision for depositaries as defined in the AIFMD[566] as well as depositaries as defined in the UCITS.[567]

MiCA is drafted in a way that the administration and the custody of the crypto-assets on behalf of the clients are imperatively interconnected. The CASP shall keep a register of all the clients' positions, recording any movements and ensuring that any movement is matched by a transaction.[568] If certain rights are attached to a crypto-asset, the CASP shall facilitate the exercise of its clients' rights attached to that crypto-asset and record any event likely to create or modify that rights in the clients' position register.[569] Additionally, the CASP shall be obliged to inform its client on a regular basis, at least once every three months and always on the clients' request with a statement of position of the clients' crypto-assets, mentioning the crypto-assets concerned, their balance, their value and the transfers made during the period concerned.[570] This statement of position shall be made on a durable medium.[571] In the case where operations on crypto-assets occur that require a response from the client, the CASP shall provide its client with any information thereof as soon as possible.[572]

5.5.4.2. Operation of a trading platform for crypto-assets

Applicant CASPs that seek to operate a trading platform for crypto-assets shall describe their operating rules in their application for authorization.[573] Besides minimum requirements for the establishment of such operating rules, the special obligations for CASPs operating a trading platform for crypto-assets further include additional information and transparency obligations, operational obligations and requirements to the systems, procedures and

[564] Art 67 (8).
[565] Art 33 (8); see also Section 5.4.3.2.; this provision was heavily criticized in the consultation process, see e.g., AFME (n 164) 4 et seq.
[566] See Art 21 (12) AIFMD.
[567] See Art 24 UCITS Directive.
[568] Art 67 (2).
[569] Art 67 (4).
[570] Art 67 (5).
[571] For the ECJs interpretation of the term 'durable medium' see C-375/15 *BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation* [2017] ECLI:EU:C:2017:38.
[572] Art 67 (5) subpara 2.
[573] Art 54 (2) (o).

arrangements all designed to mitigate the specific risks the operation of a trading platform for crypto-assets might pose.[574]

The minimum requirements for the operating rules stipulated by MiCA are manifold. The CASP shall be obliged to set out the requirements, due diligence and approval process that will be applied before admitting a crypto-asset to the trading platform, including a definition of exclusion categories of types of crypto-assets that will not be admitted to trading on the trading platform.[575] In this context, MiCA further stipulates that the operating rules shall clearly state that a crypto-asset shall not be admitted to trading, where a white paper compliant with MiCA has not been published, unless the issuer is exempted from this obligation.[576] This will also include the exemption for issuers provided by the grandfathering-clause for issuers of crypto-assets other than ART or EMT for such crypto-assets issued before the entry into force of the MiCA (see Section 5.4.2.7.). Furthermore, in order to mitigate money-laundering and financing of terrorism risks, the operating rules shall prevent the admission to trading of crypto-assets with an inbuilt anonymization function,[577] so-called 'privacy coins', unless the holders and their transaction history can be identified by the CASP or by competent authorities.[578] With this, MiCA sets out quite a thorough pre-admission due diligence obligation for the CASP, that also includes a quality-check to the crypto-assets that are sought to be admitted to trading on the CASPs' trading platform, including those crypto-assets whose issuer is exempted to draw up and publish a white paper.[579] In this quality check as part of the due diligence to be carried out by the CASP, it shall ensure that the crypto-asset concerned complies with the operation rules and further assess the experience, track record and reputation of the issuer and its development team.[580] Concerning the time after the initial admission to trading on the trading platform, the CASP shall set out conditions in its

[574] Recital 59 and 60.
[575] Art 68 (1) (a) and (b).
[576] The current draft contains a clear editorial mistake, stating that a crypto-asset shall not be admitted, 'where a crypto-asset white paper has been published' – rather the opposite was intended, see Art 68 (1) subpara 2; concerning the exemptions to the obligation to publish a white paper see Section 5.4.2.1.
[577] It is however unclear what 'anonymization function' in this context is supposed to mean, as complete anonymization is deemed to be technically and practically impossible to achieve but certain privacy preserving functions are inherent to many crypto-assets; for further elaboration on this topic see e.g. Monero Policy Working Group, 'Response to the consultation request from the European Commission regarding REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1379971_en> accessed 4 September 2021.
[578] Art 68 (1) subpara 4.
[579] Art 68 (1) subpara 3 last sentence.
[580] Art 68 (1) subpara 3.

operating rules for crypto-assets to remain accessible for trading, such as liquidity thresholds and periodic disclosure requirements to the issuer.[581]

The operating rules shall further establish general policies and procedures and the level of fees, if any, for the admission to trading on the trading platform as well as conditions under which trading of certain crypto-assets can be suspended.[582] In order to ensure fair and open access to the trading platform for clients willing to trade, objective and proportionate criteria for the participation in trading activities shall be provided in the operating rules.[583] Additionally, the operating rules shall set requirements to ensure fair and orderly trading and procedures to ensure efficient settlement of both crypto-assets and official currency transactions.[584]

Concerning transparency and information requirements, first and foremost, the CASP shall be obliged to draft the beforementioned operating rules in an official language of its home Member State, or in another language customary in the sphere of finance, and make them public on its website.[585] Further, CASPs authorized for the operation of a trading platform for crypto-assets shall make public information on a non-discriminatory basis on any bid and ask prices and the depth of the trading interests at those prices during the trading hours[586] as well as the price, volume and time of the transactions executed regarding the crypto-assets traded on their trading platforms as close to real-time as technically possible.[587] These information shall be available free of charge 15 minutes after publication in a machine readable format and remain published for at least 2 years.[588] With regards to fee structures, the CASP shall be obliged to ensure that they are transparent, fair and non-discriminatory and do not incentivize disorderly trading conditions or market abuse.[589]

In terms of requirements for the systems, procedures and arrangements, CASPs authorized to operate a trading platform for crypto-assets shall additionally ensure that their trading systems are resilient and have sufficient capacity to operate under severe market stress. These systems should further be able to reject orders that certain volumes and price thresholds or are clearly

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[581] Art 68 (1) (f).
[582] Art 68 (1) (c) and (g).
[583] Art 68 (1) (d).
[584] Art 68 (1) (e) and (h).
[585] Art 68 (2).
[586] Art 68 (5).
[587] Art 68 (6).
[588] Art 68 (7).
[589] Art 68 (8).

erroneous, and should be subject to effective business continuity arrangements providing for cases of failure of the trading system.[590]

MiCA further prohibits CASPs to deal on own account on their own trading platform for crypto-assets, even if the CASP is at the same time authorized for the exchange of crypto-assets for official currency or other crypto-assets.[591] The CASP shall at all time maintain resources and have back-up facilities in order to be capable of reporting to their NCA.[592] The Commissions' proposal stipulates as a further operational obligation that the CASP shall finally settle crypto-asset transactions on the DLT on the same date as the transaction has been executed on the platform.[593] This provision might pose a problem to established market participants mainly due to the fact that many crypto-asset transactions on the DLT can be very slow, hence a same-date-settlement would sometimes not even be factually feasible, or – even more importantly – exceedingly expensive, especially in the case where a very fast transaction shall take place. Thus, many existing platforms are centrally organized, providing solely off-chain settlement in form of a book entry in their internal database, as this form of settlement enables them to operate on significantly lower costs.[594]

In contrast to the provisions on the custodians for the reserve assets of an issuer of ART[595] and the even stricter provisions on the CASP that hold custody of crypto-assets on behalf of third parties,[596] for CASPs operating a trading platform for crypto-assets MiCA provides no provision regarding the responsibility for losses of crypto-assets due to a system malfunction.[597]

5.5.4.3. Exchange of crypto-assets against official currency or against other crypto-assets

The Commissions' proposal stipulates that CASPs that are authorized for exchanging crypto-assets against official currency or against other crypto-assets by using their own capital shall establish a non-discriminatory commercial policy, indicating the type of clients they accept as

[590] Art 68 (4).
[591] Art 68 (3).
[592] Art 68 (10).
[593] Art 68 (8).
[594] For further reading on this topic see the remarks of the DAAA in the consultation process, see DAAA (n 148), 6 et seq.
[595] See Section 5.4.3.2.
[596] See Section 5.5.4.1.
[597] AFME (n 164) 4.

well as the conditions that are to be met by these clients.[598] Already in the application for authorization the applicant CASP shall describe said policy.[599]

Regarding the pricing policy, CASPs shall be given two options by the MiCA: They shall either publish a firm price of the crypto-assets or a method for determining the price of the crypto-assets.[600] In any cases, the transaction shall be executed at the prices displayed at the time of the clients' orders' receipt.[601] Further, CASPs exchanging crypto-assets against official currencies or other crypto-assets shall be subject to post-trade transparency requirements, i.e. the obligation to publish the details of orders and transactions concluded by the CASP, including the volumes and prices.[602]

5.5.4.4. Execution of orders for crypto-assets on behalf of third parties

CASPs that execute orders for crypto-assets on behalf of third parties shall already in their application set out their execution policy.[603] This execution policy shall ensure the best possible result for their clients, taking into account best execution factors such as price, costs, or speed or any other considerations relevant to the execution of the order, unless the CASP is following its clients' specific instructions.[604] For this, the CASP shall implement effective execution arrangements that provide prompt, fair and efficient execution as well as take all necessary steps to prevent possible misuse of the CASPs' employees of any information relating to the clients' order.[605]

To ensure transparency for clients, the CASP shall provide appropriate and clear information on the execution policy in place and any significant change to it to its clients.[606]

5.5.4.5. Placing of crypto-assets

The service of placing of crypto-assets can only be provided concerning crypto-assets that are either newly issued or already issued but not admitted to any trading platform for crypto-assets.[607] Most notably, MiCA stipulates that the CASP providing that service is subject to pre-contractual transparency obligations. It shall communicate to the issuer or to a third party

[598] Art 69 (1), Recital 61.
[599] Art 54 (2) (p).
[600] Art 69 (2).
[601] Art 69 (3).
[602] Art 69 (4); Recital 61.
[603] Art 54 (2) (q)
[604] Art 70 (1).
[605] Art 70 (2).
[606] Art 70 (3).
[607] Art 3 (1) (15).

acting on the issuers' behalf before the conclusion of a contract on how they intend to perform their service, i.e., the type of placement considered, whether a minimum amount or purchase is guaranteed or not, the amount of transaction fees associated with the service, the timing, process and price for the operation and information about the targeted purchasers.[608]

The Commissions' proposal further sets out that the CASP shall obtain a specific agreement of its potential customers as to the type of placement, applicable guarantees by the CASP to a minimum purchase amount and if no guarantee is granted, an agreement to that fact, as well as to the targeted purchasers.[609]

To further minimize the risk of potential conflicts of interests, additionally to the general obligation for all CASPs to maintain and operate an effective policy on conflicts of interests,[610] CASPs that place crypto-assets shall have special procedures in place to prevent, monitor, manage and potentially disclose any conflicts of interests that could typically arise from that service, i.e. from placing the crypto-assets with the CASPs' own clients and from the situation where the proposed price for placing the crypto-assets has been overestimated or underestimated.[611]

5.5.4.6. Reception and transmission of orders on behalf of third parties

The service provided by a CASP that is authorized to receive and submit orders for crypto-assets on behalf of third parties is essentially that a client approaches it, gives it an order to buy or sell crypto-assets and the CASP in turn transmits that order to another CASP that is authorized for the operation of a trading platform for crypto-assets and/or the execution of orders for crypto-assets on behalf of third parties and/or the exchange of crypto-assets against official currencies or other crypto-assets, for execution of that order.[612]

MiCA stipulates that in order to fulfil that service promptly and properly, the CASP shall implement adequate procedures and arrangements.[613] Further, the CASP shall not be allowed to receive any benefits or discounts for routing their clients' orders to a particular other CASP.[614] This prohibition serves to avoid kick-back arrangements and hidden fee structures between different CASPs and further promote the general obligation of all CASPs to act in the

[608] Art 71 (1).
[609] Art 71 (1) subpara 2.
[610] Art 65; see Section 5.5.3.
[611] Art 71 (2); Recital 62.
[612] See Art 3 (1) (16).
[613] Art 72 (1); Recital 61.
[614] Art 72 (2).

best interest of their clients[615] and the goal to prevent conflicts of interests.[616] In addition to that, to avoid unorderly behaviour as well as market abuse, CASPs shall take all reasonable steps to prevent the misuse of information relating to pending clients' orders by any of their employees.[617]

5.5.4.7. Advice on crypto-assets

Concerning advice on crypto-assets, the Commission naturally seeks to ensure that this advice is given on the basis of sufficient knowledge and expertise on the topic the advice is given to. For this reason, applicant CASPs that apply for authorization to provide advice on crypto-assets shall demonstrate in the application[618] that the natural persons giving advice on behalf of the applicant possess the necessary knowledge and experience to fulfil their obligations.[619]

Additionally, CASPs providing advice on crypto-assets shall assess the compatibility of crypto-assets with the needs of its clients and recommend them only when this is in the interest of the clients.[620] Similar to investment advisors as defined in the MiFID II,[621] CASPs providing advice on crypto-assets shall need to have policies and procedures in place, enabling them to gather all the information necessary from the client to assess its knowledge and experience with crypto-assets, objectives, financial situation and a basic understanding of the risks involved in purchasing crypto-assets.[622] Reasonable steps shall be taken to ensure this information is reliable.[623] Additionally, this assessment shall take place on an ongoing basis, at least every two years for each client after the initial assessment.[624] MiCA further

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[615] Art 59 (1).
[616] Art 65 (1) (c).
[617] Art 72 (3); E.g., information on a pending order of a highly significant volume can evidently have, if made public, significant impact on the price of the crypto-asset concerned; see also Section 5.6.
[618] Art 54 (2) (r), again, in this provision, the draft contains a clear editorial mistake as the provision starts with the phrase 'where the applicant intends to receive and transmit orders for crypto-assets on behalf of third parties […]' (emphasis added) but subsequently goes on stipulating that 'proof that the natural persons giving advice on behalf of the applicant crypto-asset service provider have the necessary knowledge and expertise to fulfil their obligations[…]' shall be contained in the application. From the content of the provision, it is clearly applicable to the service of providing advice on crypto-assets rather than the service of the reception and transmission of orders; also see Recital 63 and Art 73 (2) which have a similar wording and in fact are applicable to the service of advice on crypto-assets.
[619] Art 73 (2); Recital 63.
[620] Art 73 (1).
[621] Art 4 (4) MiFID II.
[622] Art 73 (3).
[623] Art 73 (4).
[624] Art 73 (6).

stipulates that the CASP shall provide its clients with a report on that assessment summarizing as a minimum the clients' needs and demands as well as the advice given.[625]

If, on the basis of the information received, the CASP comes to the conclusion that its client has insufficient knowledge, or in the case where the client refuses to provide the requested information and the CASP factually cannot assess the clients' knowledge, it shall be obliged to inform these clients that crypto-assets may not be appropriate for them and warn them on the risks associated with crypto-assets, including a statement of the risk of losing the entirety of the money invested or converted into crypto-assets. This warning shall be expressly acknowledged as received and understood by the client.[626] In any case, CASPs offering advice on crypto-asset shall always warn their clients that, due to their tradability, the value of crypto-assets may fluctuate.

Interestingly, as opposed to the corresponding provision in the MiFID II on investment advice, CASPs that provide advice on crypto-assets are not – because of that specific service provided – obliged to disclose the cost of the advice.[627] A transparency obligation on the applicable pricing policy follows the general rules of conduct, however, does not oblige the CASP to individually inform its (potential) clients about the costs of the advice. [628]

5.5.5. Acquisition of CASPs

In case of an intended acquisition of a qualified holding of a CASP, or respectively the divestiture of such, the same notification requirements as well as assessment procedures through the NCA shall take place as in the case of the acquisition of issuers of ART.[629] To avoid repetition, reference is made to the explanations given in Section 5.4.3.7. that are applicable *mutatis mutandis* to the acquisition of CASP.

5.5.6. Summary to CASPs

The crypto-asset services of MiCA are mainly inspired by the investment services and activities as defined by the MiFID II, apart from the service of the custody and administration of crypto-assets on behalf of third parties. This exception might be mainly due to the specific challenges the DLT poses to users, being most notably the technical background of crypto-

[625] Art 73 (7); Recital 63.
[626] Art 74 (5).
[627] Art 24 (4) (c) MiFID II; Recital 72 MiFID II
[628] See in particular Art 59 (4).
[629] See Arts 74 and 75, whose wording replicates the corresponding provisions for issuers of ART, interchanging the term 'issuers of asset-referenced token' with 'crypto-asset service provider', Arts 37 and 38.

assets and the need of safekeeping the private key in order to not lose all the assets related to that private key. Portfolio management shall be no crypto-asset service according to the draft of the MiCA.

Every person seeking to provide crypto-asset services shall first apply for authorization as such. Only legal entities with a registered office in a Member State of the Union shall be eligible to become authorized as a CASP. The authorization shall only be granted for specific services that the applicant CASP has applied to be authorized to. In the application the applicant CASP shall need to demonstrate that it complies with the provisions set out by the MiCA, being the general obligations for all CASPs on the one hand and the special additional obligations for the specific crypto-asset service(s) it has applied to be authorized for.

5.6. Prevention of market abuse involving crypto-assets

5.6.1. Scope

In order to ensure end users' confidence in crypto-asset markets and to ensure market integrity,[630] MiCA also contains rules on the prevention of market abuse involving crypto-assets, similar to the rules on the prevention of market abuse involving financial instruments provided by the Market Abuse Regulation (MAR). However, considering that issuers of crypto-assets and crypto-asset service providers are often SMEs, the drafters of MiCA did not deem it proportionate to apply all the provisions of the MAR, hence MiCA itself stipulates specific rules prohibiting certain behaviours where crypto-assets are admitted to trading on a trading platform for crypto-assets or for which a request for admission to trading on such a platform has been made.[631]

5.6.2. Insider information

Inspired by the definitions contained in Art 7 (1) MAR, MiCA defines 'insider information' as 'any information of a precise nature that has not been made public, relating, directly or indirectly, to one or more issuers of crypto-assets or to one or more crypto-assets, and which, if it was made public, would be likely to have a significant effect on the prices of those crypto-assets'.[632] MiCA provides the obligation for issuers of crypto-assets to inform the public as soon as possible of such inside information and ensure that this information reaches

[630] Recital 64.
[631] Art 76; Recital 64.
[632] Art 3 (1) (27).

as many people as possible in an easy manner. Further the information provided shall be complete, correct and timely in order to allow an adequate assessment of the information by the public.[633] In certain circumstances, on its own responsibility, the issuer shall be allowed the disclosure to the public of inside information. These circumstances are almost word for word the circumstances provided by Art 17 (4) MAR, i.e., the cumulative presence of the following conditions: (a) the immediate disclosure is likely to prejudice the legitimate interests of the issuers and (b) a delay of disclosure is not likely to mislead the public and (c) the issuers are able to ensure the confidentiality of that information.[634]

The disclosure of inside information however shall only be permitted if it is carried out in the normal exercise of an employment, profession or duties – as provided by the MAR for financial instruments,[635] unlawful disclosure of inside information with regards to crypto-assets shall be prohibited.[636]

Additionally, MiCA stipulates a prohibition of insider dealing. Insider dealing takes place if a person uses inside information to either directly or indirectly and either for his or her own account or the account of a third party acquire or dispose crypto-assets.[637] Recommending or inducing another person to engage in insider dealing is prohibited in the same way.[638, 639]

5.6.3. Market manipulation

Alongside provisions surrounding inside information, MiCA stipulates a prohibition of market manipulation.[640] Market manipulation therefore comprises

i. entering into a transaction, placing an order to trade, or any other behaviour which

    a. gives or is likely to give false or misleading signals as to the price, supply or demand or a crypto-asset

    b. sets or is likely to set the price of one or several crypto-assets at an abnormal or artificial level;

[633] Art 77 (1); see also XReg (n 557) 27.
[634] Art 77 (2).
[635] Art 14 (c) MAR in connection with Art 10 MAR.
[636] Art 79.
[637] Art 78 (1).
[638] Art 78 (2), see also XReg (n 557) 27.
[639] Again, this provision is inspired by its corresponding provision in the MAR, see Art 8 MAR.
[640] Art 12 MAR in connection with Art 15 MAR.

unless such activity is carried out for legitimate reasons.

ii. entering into a transaction, placing an order to trade or any other activity or behaviour which affects or is likely to affect the price of one or several crypto-assets, employing a fictitious device or any other form of deception or contrivance;

iii. disseminating information through the media, including the internet, or by any other means, which gives, or is likely to give, false or misleading signals as to the supply of, demand for, or price of a crypto-asset, or is likely to secure, the price of one or several crypto-assets, at an abnormal or artificial level, including the dissemination of rumours, where the person who made the dissemination knew, or ought to have known, that the information was false or misleading.[641]

MiCA further provides an exemplary list of behaviours that shall be considered as market abuse, *inter alia* mentioning the case where a person with influence in the market voices an opinion about a crypto-asset and profits subsequently from the impact of the opinion voiced on the price of that crypto-asset without disclosing that conflict of interest to the public.[642]

5.6.4. Summary to MiCAs provisions to prevent market abuse involving crypto-assets

As indicated above, MiCAs provisions on the prevention of market abuse involving crypto-assets are generally inspired by the corresponding provisions of the MAR concerning market abuse involving financial instruments. Though, the Commissions' proposals provisions are deliberately not as detailed as in the MAR by design in order to not be disproportionate with regards to smaller and mid-sized enterprises typically present in the markets of crypto-asset.[643] By way of example in the absence of a corresponding provision to Art 17 (1) subpara 2 MAR, i.e. the prohibition to disclose inside information to the public with marketing communications, one could hold the opinion that involving crypto-assets, inside information can indeed be made public by marketing communications as well. Further, the

[641] Art 80 (1) (a)-(c).

[642] Art 80 (2) (c); Prominently, Elon Musk was frequently accused by the crypto-community of such practices as his tweets on crypto-assets typically had great influence on the price of that crypto-assets (in particular Bitcoin and Doge), see e.g., David Z. Morris, 'Musk Has Doge on a Leash. Is He a Manipulator?' (Coindesk, 14 May 2021) <https://www.coindesk.com/elon-musk-tesla-doge-bitcoin-manipulation> accessed 4 September 2021.

[643] Recital 64.

provisions of the MiCA do not contain obligations for issuers to provide a list of insiders to the NCA.[644] Likewise, no provisions on managers' transactions can be found in the MiCA.

MiCA rather concentrates its provisions on the classics of market abuse, i.e. insider information and market manipulation, likely due to the occurrence of such practices in recent years in the markets of crypto-assets and due to the nature of the crypto-assets, most importantly the legal classification in delimitation to financial instruments as defined in the MiFID II.[645] The scope of the rules provides, similar to the scope of MAR, that the provisions on the prevention of market abuse involving crypto-assets shall only be applicable if the crypto-asset is admitted to trading on a trading platform for crypto-assets or a request to that effect has been made.

6. Putting it together: The status quo and the proposal of the European Commission

6.1. The harmonized regulatory framework for crypto-assets

As highlighted in Chapter 4, the current regulatory framework for crypto-assets is quite narrow. Beyond AML/CFT legislation, it can generally be said, that if a crypto-asset does not qualify as a financial instrument as defined in the MiFID II or as electronic money as defined in the EMD2, the crypto-asset and with it all persons engaged in the issuance or the provision of services in relation to that crypto-asset in the Union fall in a regulatory gap on EU level. This gap MiCA seeks to fill. Fragmentation in the Union through national laws leave the unsatisfactory risk of circumvention of existing legal framework as well as regulatory arbitrage and a lack of users' confidence in crypto-assets, therefore a need to harmonize the framework is given.

With the current draft of MiCA, the future of crypto-assets in the European Union shall bring all crypto-assets currently not covered by EU legislation under a harmonized framework. The proposed definition of the term 'crypto-asset' on the one hand provides a universal definition for crypto-assets and, on the other hand, a catch-all-category, meaning that every crypto-asset not falling under a more specific definition, such as the definition of financial instruments,

[644] See Art 18 MAR.
[645] However, as mentioned in Section 4.2., certain crypto-assets can be qualified financial instruments, leading to the consequence of falling outside the scope of MiCA and consequently – when traded on a regulated market, MTF, OTF or classified as derivative on financial instruments traded the beforementioned – be under the scope of the MAR.

electronic money, ART or EMT, will be captured by it and lead to the application of Title II of the MiCA in relation to its issuers as well as Title V of the MiCA with regards to the provision of services in connection with those crypto-assets.

Always, the legal qualification will have to start with the question if the instrument in question falls under the definition of 'crypto-asset' as provided by the MiCA. If this is to be answered positively, one must examine the substance of the crypto-asset, i.e., its specific features, structure and the rights it grants its holders. If it qualifies as a financial instrument, it is and will be to be treated as such, with all the consequences a qualification as a financial instrument – and which financial instrument respectively – brings to its issuer or other entities engaged in activities in connection with that crypto-asset. Issuances can *inter alia* be subject to the Prospectus Regulation, the provision of services related to these crypto-assets can be under the scope of MiFID II and the crypto-asset could fall under the scope of the MAR. If the crypto-asset does not qualify as a financial instrument but fits the definition of electronic money as provided by the EMD2, it could qualify as such. With such classification the issuer and entities engaged in activities in connection with that crypto-asset would fall under the scope of the EMD2, which would also lead the crypto-asset falling under the definition of 'funds' provided by the PSD2, therefore bringing it also under the scope of the PSD2.

If none of the above apply, and if not exempted otherwise from its scope, MiCA is applicable. Under the scope of MiCA, further legal qualifications must take place: Firstly, practically speaking it makes sense to first examine if the crypto-asset falls under the definition of EMT, i.e., if the crypto-assets' main purpose is to be used as means of exchange and it purports seeks to maintain a stable value by referring to the value of one official currency. If this is the case, Title IV of the MiCA is applicable to issuances of this crypto-asset. Secondly, if the crypto-asset does not fulfil the narrow scope of EMT, one has to consider if the crypto-asset in question falls under the definition of ART, i.e., in particular if the crypto-asset in question seeks to maintain a stable value by referring to the value of several official currencies, one or several commodities, one or several crypto-assets or a combination of such assets. With the qualification of the crypto-asset as ART, Title III is to be applied to its issuances. Thirdly, the catch-all-aspect of the definition of crypto-assets becomes visible: If the crypto-asset does neither qualify as financial instrument, electronic money, EMT nor ART, Title II of the MiCA is applicable to issuances of this crypto-asset. Under this category, one further differentiation has to be made in the legal qualification, i.e., if the crypto-asset is to be qualified as utility tokens as defined by the MiCA, meaning that it is intended to provide digital access to a good or service that is available on DLT and the crypto-asset is only accepted by its issuer. With this last differentiation just minor additional special provisions apply within Title II, mainly addressed at the risks posed by utility tokens for not yet established or young projects by the issuer.

Crypto-assets within the scope of MiCA further trigger the application of Title V to crypto-asset services and their providers. Additionally, if the crypto-asset under the scope of MiCA is admitted to trading on a trading platform for crypto-assets or a request to that effect has been made, it is subject to the provisions on the prevention of market abuse provided by Title VI of the MiCA.

The following figure shall illustrate a practical approach to the assessment scheme on the qualification of crypto-assets according to the proposed framework for crypto-assets:

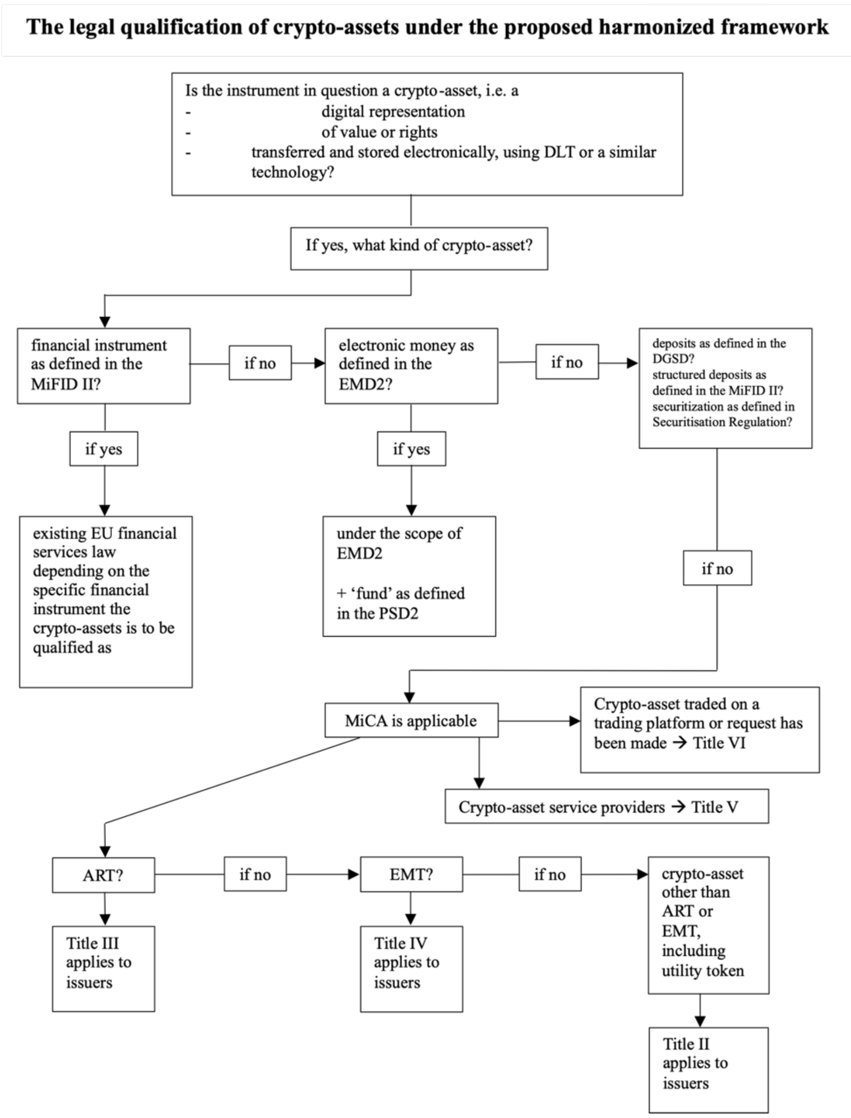

Figure 4 - The legal qualification of crypto-assets under the proposed harmonized framework

6.2. Will there be unregulated crypto-assets?

Considering the foregoing, one could pose the question if – even with the catch-all-definition of crypto-assets in the MiCA – certain crypto-assets remain unregulated. The answer is no.

MiCA provides a grandfathering clause for crypto-assets other than ART or EMT that were offered to the public or admitted to a trading platform for crypto-assets before the entry into application from MiCA.[646] These crypto-assets are exempted from Title II of the MiCA, therefore their issuers shall not be subject to the requirements laid down by that Title, being *inter alia* the requirement to be a legal entity, to draw up a white paper and to comply with the rules of conduct provided by the MiCA. However, these crypto-assets remain crypto-assets under the scope of MiCA, therefore in particular the provisions targeted at CASPs (Title V) and on the prevention of market abuse (Title VI) will be applicable.

Many doubts have been articulated as to how 'issuerless' crypto-assets, i.e., crypto-assets where no issuer can be identified, such as Bitcoin or crypto-assets of decentralized finance projects (DeFi),[647] can be targeted on a regulatory level. MiCA takes a very straightforward approach to the challenge to also include such (allegedly) issuerless crypto-assets in its regulatory framework: Firstly, the proposed definition of a 'crypto-asset' is broad enough to catch any crypto-asset under MiCAs material scope of application. This is to be understood irrespective of a known person attributable to the creation of that crypto-asset. With the broad definition of the 'issuer', a person under the scope of that definition does not necessarily have to be involved in the creation of the crypto-asset at all. It is also not limited to the legal entity being the first to initiate an issuance. Hence, these crypto-assets will be regulated in the Union. Secondly, the personal scope of application of MiCA catches *all persons engaged in the issuance of crypto-assets*.[648] An issuer of crypto-assets can, by definition, only be a legal entity,[649] but this does not mean that MiCA would not be applicable if the issuer is a natural person. On the contrary, a natural person issuing crypto-assets, i.e. offering to third parties to acquire a crypto-asset[650] or searching for admission to trading of that crypto-asset on a trading

[646] Art 123 (1).
[647] DeFi projects use smart contracts to provide open access to financial services, such as saving, loans, etc. Its rules are written in code and therefore often do not rely on the management through institutions. Thus, many DeFi projects operate without any central authority and without information as to who is responsible for the application; see e.g., Sid Coelho-Prabhu, 'A Beginner's Guide to Decentralized Finance (DeFi)' (The Coinbase blog, 6 January 2020) <https://blog.coinbase.com/a-beginners-guide-to-decentralized-finance-defi-574c68ff43c4> accessed 4 September 2021.
[648] See Art 2 (1).
[649] Art 3 (1) (6).
[650] Art 3 (1) (7)

platform for crypto-assets[651], would be in infringement of the MiCA, thus NCAs would be mandated to exercise their supervisory powers in order to impede this activity, ranging from the prohibition of the offer or the prohibition of trading of that crypto-asset to administrative sanctions.[652] According to the Commissions' proposal only legal persons shall be eligible to be issuers of crypto-assets.

In other words, as soon as a person offers crypto-assets to the public or seeks admission to trading of crypto-assets to a trading platform, this person will have to comply with the MiCAs rules addressed at the 'issuer of crypto-assets'.

7. Conclusion and answers to the research questions

The Commissions' proposal provides a harmonized framework for crypto-assets currently not falling within the scope of existing EU financial services legislation. Comprehensive new rules transpose the currently mostly unregulated market of crypto-assets in a highly regulated market along the lines of existing EU financial services legislation. According to the Commissions' proposal, new issuances of crypto-assets shall no longer be possible without a legal person attributable to that crypto-asset. This legal person will be subject to certain requirements and obligations. No crypto-asset shall be issued unless certain requirements are met by the issuer. These will differ with regards to the individual crypto-asset that is issued and may range from the requirement to comply with rules of conduct towards holders of crypto-assets and the obligation to draw up, notify and publish a white paper to the need to endure a long-lasting authorization process as issuer including the approval of a white paper through the NCA and strict own fund and operational requirements. With a very broad scope of what is considered an 'issuance', according to the current draft, one crypto-asset could in fact have several issuers subject to the obligations set out by MiCA. Many demarcation problems already known from the existing EU financial services legislation are not solved by the current proposal.

MiCA provides two new legal definitions for specific crypto-assets, namely ART and EMT. These crypto-assets have in common that they purport to maintain a stable value by referring to either the value of only one official currency (EMT) or by referring to the value of a basket of currencies, commodities or crypto-assets (ART). Both, ART and EMT, are – because of their stable value – expected to be used as means of exchange/payment by its holders. Both

[651] Art 3 (1) (6).
[652] Art 82; Art 92.

can be referred to as ‘stablecoins’, however the definitions of ART and EMT are narrow and do not cover all stablecoins on the market, most notably ‘algorithmic stablecoins’, i.e., crypto-assets that aim at maintaining a stable value merely through a protocol and without the reference to one or several other assets. If an ART or EMT is or grows significantly large in scale, it might be deemed as ‘significant’ by the EBA, with the consequence that higher prudential requirements for its issuers shall be applicable and that EBA will have supervisory powers in order to avoid supervisory arbitrage in the case of the anticipated high frequency use in cross-border transactions. These rules are to be seen in close connection to the fear that such a significant stablecoin might pose great systemic risks. Remarkably though, MiCA does not provide such a mechanism for algorithmic stablecoins, irrespective of their scale.

Concerning services in connection with crypto-assets, MiCA provides a list of what is to be deemed as crypto-asset services in the future, closely based on the list of investment services and activities according to the MiFID II. For providers of such crypto-asset services, a comprehensive legal framework is proposed by the MiCA, including general obligations for all providers and additional special obligations applicable to the provision of the different services targeted at the specific risks the individual service might pose.

As the recent years showed, also markets in crypto-assets are not free from certain practices that abuse the market. Therefore, MiCA provides provisions on the prevention of market abuse on the lines of the existing EU legal framework, most notably the MAR, however, not as detailed in order to not be disproportionate to the size of the companies being currently in the market.

The proposal holds in its current draft some minor editorial mistakes and a few ambiguities that are hopefully addressed in the further legislative procedure and cured in the final version of the Regulation. Besides that, MiCA is a welcome approach to the regulation of crypto-assets, remarkable in the depth of its provisions and certainly has the potential to provide an adequate regulatory framework for the future of crypto-assets in the Union. Globally, it is – so far – a unique piece of legislation in this field of law. It provides a harmonized framework for innovative digital services in the Union that has the potential to further support users' confidence in crypto-assets. As the analysed Commissions' proposal is a merely draft, it is open to changes during the ongoing legislative process and its final text might present different approaches and/or a more differentiated framework in some respects.

This thesis aimed to provide an overview to the regulatory future of crypto-assets in the Union by an analysis of the newly proposed Regulation on Markets in Crypto-assets in its published version of the 24th of September 2020. The reader should note that the presented provisions are, at the time of writing this thesis, not yet in force and still subject of discussions of the Council and its preparatory bodies, therefore changes to the presented provisions during the ongoing legislative process are possible. For this reason, this thesis shall not be regarded as a commentary on a legislative act in force but merely serve as a presentation of the current stage of the debate on how the regulatory future of crypto-assets in the Union could present itself.

To conclude, the author will now turn to the proposed research questions for this thesis and briefly sum up the main findings of this thesis by providing the answers to that questions.

(1) What kind of crypto-assets are covered by the MiCA?

MiCA provides a catch-all-definition for crypto-assets under which all crypto-assets can be subsumed. However, Art 2 of the MiCA exempts certain crypto-assets from the scope of the MiCA, most notably crypto-assets that qualify as financial instruments as defined in the MiFID II and crypto-assets that qualify as electronic money as defined by the EMD. With this definition, also crypto-assets without an identifiable issuer are within its material scope of application. As soon as crypto-assets are offered to the public or their admission to trading on a trading platform for crypto-assets is sought, the person doing so will have to comply with the provisions of the MiCA addressed at the issuer, regardless of the fact if the production of the underlying code or the business plan of the project is attributable to it. Irrespective of the fact if there is an issuer identifiable or not, all crypto-assets under the scope of MiCA are subject to the scope of the provisions applicable to crypto-asset service providers as well as – if applicable – to its provision on the prevention of market abuse.

(2) How is the Commission planning to regulate markets in crypto-assets in the European Union and how do these plans fit into the existing legal framework?

The Commission proposed a new regulatory regime applicable to persons engaged in the issuance as well as in the provision of services in connection with crypto-assets that currently do not fall under existing EU legislation. Depending on the type of crypto-asset, different legal frameworks will be applicable to activities in connection with that crypto-asset. However, the newly proposed regime for crypto-assets under the scope of MiCA is clearly inspired by existing EU financial services law, most notably the MiFID II for crypto-asset services, the Prospectus Regulation for the issuance of crypto-assets and the obligatory transparency and information requirements issuers are subject to and the EMD2 for the regulatory requirements for issuers of EMT and ART.

(3) How is the Commission seeking to mitigate anticipated threats to financial stability posed by 'global stablecoins'?

The draft does not use the word 'global stablecoin', it adds the attribute 'significant'. MiCA only defines two specific kinds of stablecoins, the ART and the EMT. In order to monitor the development of ART and EMT, NCAs are mandated to inform the EBA about such crypto-assets whose issuers are under their supervision on an annual basis on certain aspects that are deemed to be indicators for a particularly wide adoption and systemic relevance of the ART or EMT. If the ART or EMT is, on the basis of this information provided by the NCAs, to be deemed 'significant', supervisory powers will transition to EBA and additional obligations, such as higher prudential requirements, will apply on the issuers. However, these rules and mechanisms shall only apply to crypto-assets that fall under the narrow scope of the definitions of ART and EMT. Issuers of other stablecoins, such as algorithmic stablecoins, fall under the category of 'issuers of crypto-assets other than ART or EMT' and the regulatory provisions applicable to them are more lenient than for ART or EMT. Further, no mechanism is provided for the case that such algorithmic stablecoin meets indicators that would deem ART or EMT as 'significant', hence no additional supervisory measures are provided for in the current draft.

8. Bibliography

8.1. Cases of the European Court of Justice

Joined Cases C-355/18 to C-357/18 and C-479/18 *Barbara Rust-Hackner and Others v Nürnberger Versicherung Aktiengesellschaft Österreich and Others* [2019] ECLI:EU:C:2019:1123

C-375/15 BAWAG PSK Bank für Arbeit und Wirtschaft und Österreichische Postsparkasse AG v Verein für Konsumenteninformation [2017] ECLI:EU:C:2017:38

8.2. Legislation

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 [2011] OJ L 174/1 ['AIFMD']

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC [2015] OJ L 141/73 ['AMLD4']

Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU [2018] OJ L 156/43 ['AMLD5']

Directive 2013/65/EU of the European Parliament and the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013] OJ L 176/338 ['CRD-IV']

Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012 [2014] OJ L 257/1 ['CSDR']

Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC [2002] OJ L 271/16 [‘DMFSD’]

Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937 [2020] OJ L 347/1 [‘ECSP’]

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 [2009] OJ L 267/7 [‘EMD2’]

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1 [GDPR]

Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC [2014] OJ L 173/1 [‘MAR’]

Directive 2014/65/EU of the European Parliament and of the Council of 14 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJ L 173/349 [‘MiFID II’]

Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs) [2014] OJ L 352/1 [‘PRIIPs Regulation’]

Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [‘Prospectus Directive’, no longer in force]

Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC [2017] OJ L 168/12 [‘PR’]

Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L 337/35 [‘PSD2’]

Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L 335/1 [‘Solvency II Directive’]

Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63. [‘SSMR’]

Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJ L 294/13 [‘Transparency Directive’]

Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32 [‘UCITS Directive’]

8.3. Official Documents of EU Institutions

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region on a FinTech Action plan' COM(2018) 109 final

European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a on a Digital Finance Strategy for the EU' COM (2020) 591 final

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937' COM(2020) 593 final

European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology' COM(2020) 594 final

European Commission, 'Proposal for a Regulation of the European Parliament and the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014' COM(2020) 595 final

European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341' COM(2020) 596 final

European Commission, 'Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on An SME Strategy for a sustainable and digital Europe' COM(2020) 203 final

European Securities and Markets Authority, 'Advice on Initial Coin Offerings and Crypto-Assets' (ESMA50-157-1391, 9 January 2019) <www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf> accessed 4 September 2021

European Securities and Markets Authority, 'Annex 1 – Legal qualification of crypto-assets – survey to NCAs' (ESMA50-157-1384, January 2019) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-1384_annex.pdf> accessed 4 September 2021

European Securities and Markets Authority, 'ESMA alerts investors to the high risks of Initial Coin Offerings (ICOs)' (ESMA50-157-829, 13 November 2017) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-829_ico_statement_investors.pdf> accessed 4 September 2021

European Securities and Markets Authority, 'ESMA alerts firms involved in Initial Coin Offerings (ICOs) to the need to meet relevant regulatory requirements' (ESMA50-157-828, 13 November 2017) <https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf> accessed 4 September 2021

European Banking Authority, 'Report with advice for the European Commission on crypto-assets' (EBA Report, 9 January 2019) <https://www.eba.europa.eu/eba-reports-on-crypto-assets>, accessed 4 September 2021

European Parliament, 'Entwurf eines Berichts über den Vorschlag für eine Verordnung des Europäischen Parlaments und des Rates über Märkte für Kryptowerte und zur Änderung der Richtlinie (EU) 2019/1937' 2020/0265(COD) <https://www.europarl.europa.eu/doceo/document/ECON-PR-663215_DE.pdf> accessed 4 September 2021

European Central Bank, 'Opinion of the European Central Bank of 19 February 2021 on a proposal for a regulation on Markets in Crypto-assets, and amending Directive (EU) 2019/1937 (CON/2021/4) 2021/C 152/01' (2021) OJ C 152/1

8.4. Books

BINDER GRÖSSWANG (ed), *Digital Law* (2nd edition, Lexis Nexis 2020)

Drescher D, *Blockchain Basics: A Non-Technical Introduction in 25 Steps* (Appress 2017)

Kirchmayr-Schliesselberger S (ed), Klas W (ed), Miernicki M (ed), Rinderle-Ma S (ed), Weilinger A (ed), *Kryptowährungen Krypto-Assets, ICOs und Blockchain Recht - Technik – Wirtschaft* (Nomos 2019)

Steiner C, *Krypto-Assets und das Aufsichtsrecht* (Finanzverlag 2019)

8.5. Commentary

Zib C, Russ A, Lorenz H, *Kapitalmarktgesetz: Kommentar* (LexisNexis ARD ORAC, 1. Edition 2008)

8.6. Public consultation feedback to the Commissions' proposal of an EU regulatory framework for crypto-assets

Association for Financial Markets in Europe (AFME), 'Position Paper - European Commission Legislative Proposals on Crypto-Assets' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1437912_en> accessed 4 September 2021

Digital Asset Association Austria (DAAA), 'Feedback on the Proposal a regulation on markets in crypto-assets and on the Proposal for a pilot regime for market infrastructures based on distributed ledger technology' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1439672_en> accessed 4 September 2021

Börse Stuttgart, 'Statement Börse Stuttgart on the MiCAR' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1437907_en> accessed 4 September 2021

EU Crypto Initiative, 'Markets in Crypto-Assets and Pilot Regime Regulation Feedback' (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Finanzdienstleistungen-EU-Rechtsrahmen-fur-Kryptoanlagen/F1439517_de> accessed 4 September 2021

Facebook Ireland Ltd, 'Facebook's response to a regulatory framework for crypto-assets' (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1433058_en> accessed 4 September 2021

Diem Association, ‘Comment letter to the markets and crypto-asset framework on behalf of the Diem Association’ (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1438178_en> accessed 4 September 2021

German Banking Industry Committee, ‘Additional comments on the “proposal for a regulation on markets in crypto assets” as part of the European Commission’s Digital Finance Package’ (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1408664_en> accessed 4 September 2021

Office for Financial Market Innovation / Principality of Liechtenstein, ‘Review of the EU-Digital Finance Package (MiCA, Pilot Regime of DLT-MTF) and Recommendations’ (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1364662_en> accessed 4 September 2021

Monerium ehf, ‘EU regulatory framework for crypto-assets Feedback in response to the proposed EU regulatory framework for markets in crypto-assets’ (2021) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1439671_en> accessed 4 September 2021

Monero Policy Working Group, ‘Response to the consultation request from the European Commission regarding REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937’ (2020) <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12089-Financial-services-EU-regulatory-framework-for-crypto-assets/F1379971_en> accessed 4 September 2021

8.7. Articles

Blocher W, ‘The next big thing: Blockchain – Bitcoin – Smart Contracts: Wie das disruptive Potential der Distributed Ledger Technology (nicht nur) das Recht fordern wird’ [2016] AnwBk 612.

Boreiko D, Farrarini G, Giudici P, ‘Blockchain Startups and Prospectus Regulation’ (2019) 20 EBOR 655.

Buchleitner C, Rabl T, ‘Blockchain und Smart Contracts – Revolution oder alter Wein im digitalen Schlauch?’ [2017] ecolex 4.

Buttigieg CP, Efthymiopoulos C, ‘The regulation of crypto assets in Malta: The Virtual Financial Assets Act and beyond’ (2019) 13 Law Financial Mark Rev 30.

Chen Y, Bellavits C, ‘Blockchain disruption and decentralized finance: The rise of decentralized business models’ (2020) 13 JBV Insights e00151.

Dobrowolski M, ‘Überblick über die unterschiedlichen aufsichtsrechtlichen Rahmenbedingungen für Initial Coin Offerings’ (2018) 3 GesRZ 147.

Ebner F, Kalss S, ‘Die digitale Sammelurkunde – ein erster Schritt zur vollständigen Digitalisierung des österreichischen Wertpapierrechts’ (2020) 6 GesRZ 369.

Fenwick M, Vermeulen EPM, ‘Decentralisation is Coming: The Future of Blockchain’ (2019) 2 JBBA 1.

Ferrari V, ‘The regulation of crypto-assets in the EU – investment and payment token under the radar’ (2020) 27 MJECL 325.

Follak KP, ‘Crypto Assets under Private Law and Supervisory Regulation: European Perspectives’ (2020) 10 ÖBA 712.

– –, ‘EU Commission Proposal: Regulatory Package on Crypto-Assets’ (2021) 2 ÖBA 102.

Gikay AA, ‘How the New Generation Cryptocurrencies Decoded the Investment Contract Code: Analysis of US and EU Laws’ (2018) 10 Bocconi Legal Papers 313

– –, ‘Regulating decentralized Cryptocurrencies under Payment Services Law: Lessons from the European Union Law’ (2018) 9 JOLTI 1

– –, ‘European Consumer Law and Blockchain based Financial Services: A Functional Approach against the Rhetoric of Regulatory Uncertainty’ (2019) 24 TLR 27.

– –, Stanescu CG, 'Technological Populism and Its Archetypes: Blockchain and Cryptocurrencies' (2019) 2019 NJCL 64.

Hacker P, Thomale C, ‘Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law’ (2018) 4 ECFR 645

Liebau D, Schueffel P, ‘Crypto-Currencies and ICOs: Are They Scams? An Empirical Study’ (2019) 2 JBBA 1

Rennig C, ‘FinTech-Aufsicht im künftigen EU-Recht’ (2020) 6 ZBB, 385.

Rirsch R, Dämon R, Tomanek S, ‘PRIIP-VO Der vergessene Anwendungsbereich - Veranlagungen nach KMG und Crypto-Asset inkl Checkliste für die Anwendbarkeit der PRIIP-VO’ (2020) 1 ÖBA 37.

Rohr J, Wright A, ‘Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets’ (2019) 70 HLJ 463.

Siadat A, ‘Markets in Crypto Assets Regulation – erster Einblick mit Schwerpunktsetzung auf Finanzinstrumente’ [2021] RdF, 12.

Paulmayer S, ‘Initial Coin Offerings (ICOs) und Initial Token Offerings (ITOs) als prospektpflichtiges Angebot nach KMG?’ (2017) 259 ZFR 530.

Zetzsche DA, Annunziata F, Arner DW, Buckley RP, ‘The Markets in Crypto-Assets Regulation (MICA) and the EU Digital Finance Strategy’ (2021) 16 Cap Mark Law J 203.

8.8. Online Sources and others

Auffenberg L, ‘DeFi on the Rise – Final Destination for Financial Market Regulation?’ (Fin Law Blog, 8 February 2021) <www.fin-law.net/2021/02/08/defi-on-the-rise-final-destination-for-financial-market-regulation/> accessed 4 September 2021

Bank for International Settlements (BIS), ‘International banking and financial market developments’ (BIS Quarterly Review, September 2017) <https://www.bis.org/publ/qtrpdf/r_qt1709.htm> accessed 4 September 2021

BitcoinSuisse, ‘Was ist DeFi?’ (BitcoinSuisse Blog, 27 October 2020) <www.bitcoinsuisse.com/de/fundamentals/was-ist-defi> accessed 4 September 2021

Coelho-Prabhu S, ‘A Beginner’s Guide to Decentralized Finance (DeFi)’ (The Coinbase blog, 6 January 2020) <https://blog.coinbase.com/a-beginners-guide-to-decentralized-finance-defi-574c68ff43c4> accessed 4 September 2021

Dai W, ‘B-money’ (1998) <www.weidai.com/bmoney.txt> accessed 4 September 2021

Diem Association, Whitepaper v2.0 (April 2020) <www.diem.com/en-us/white-paper/> accessed 4 September 2021

Financial Action Task Force (FATF), ‘International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation’ (2012-2020) as updated in October 2020 <www.fatf-gafi.org/recommendations.html> accessed 4 September 2021

Frankenfield J, ‘Cryptocurrency Airdrop’ (Investopedia, 19 August 2021) <www.investopedia.com/terms/a/airdrop-cryptocurrency.asp> accessed 4 September 2021

Global Financial Markets Association (GFMA), ‘Consultation response Basel Committee on Banking Supervision - Designing a Prudential Treatment for Crypto-Assets’ (March 2020), available at <www.gfma.org/wp-content/uploads/2020/04/gfma-bcbs-prudential-crypto-assets-final-consolidated-version-20200427.pdf> accessed 4 September 2021

International Association for Trusted Blockchain Applications, ‘INATBA’s Initial Response to European Commission’s MiCA Regulation’ (INATBA, 2020) <https://inatba.org/wp-content/uploads/2020/09/INATBA-Initial-Response-to-MiCA-September-2020.pdf> accessed 4 September 2021

Kagan J, ‘Financial Technology – Fintech’ (Investopedia, 28 August 2020) <https://www.investopedia.com/terms/f/fintech.asp> accessed 4 September 2021

König B, Marek L, ‘Der Kommissionsvorschlag einer Verordnung über Märkte für Kryptowerte - ein erster Überblick’ (2021) 33 RdW digital exklusiv <https://lesen.lexisnexis.at/_/der-kommissionsvorschlag-einer-verordnung-ueber-maerkte-fuer-kry/artikel/rdw_digitalonly/2021/15/RdW_digitalOnly_2021_15_033.html> accessed 4 September 2021

Krause SK, Natarajan H, Gradstein HL, ‘Distributed Ledger Technology (DLT) and blockchain (English)’ (FinTech note;no. 1, World Bank Group 2017) <http://documents.worldbank.org/curated/en/177911513714062215/Distributed-Ledger-Technology-DLT-and-blockchain> accessed 4 September 2021

Morris DZ, ‘Musk Has Doge on a Leash. Is He a Manipulator?’ (Coindesk, 14 May 2021) <https://www.coindesk.com/elon-musk-tesla-doge-bitcoin-manipulation> accessed 4 September 2021

National Institute of Standard and Technology, US Department of Commerce (NISTIR 8202) ‘Blockchain Technology Overview’ (2018) available at <https://nvlpubs.nist.gov/nistpubs/ir/2018/NIST.IR.8202.pdf> accessed 4 September 2021

Nakamoto S, Bitcoin: A Peer-to-Peer Electronic Cash System <https://bitcoin.org/bitcoin.pdf> accessed 4 September 2021

Noether S, Mackenzie A, Monero Core Team, ‘Ring Confidential Transactions’ (Monero Research Lab, 2016) <www.getmonero.org/resources/research-lab/pubs/MRL-0005.pdf> accessed 4 September 2021

Renteria N, Wilson T, Strohecker K, ‘In a world first, El Salvador makes bitcoin legal tender’ (Reuters, 10 June 2021) <www.reuters.com/world/americas/el-salvador-approves-first-law-bitcoin-legal-tender-2021-06-09/> accessed 4 September 2021

Sandner P, ‘Crypto-Europe: Comprehensive European Regulation For Crypto Assets Has Been Presented’ (Forbes, 2020) <www.forbes.com/sites/philippsandner/2020/09/21/crypto-europe-comprehensive-european-regulation-for-crypto-assets-has-been-presented/?sh=5bfc4d9e3862> accessed 4 September 2021

Schock S, ‘Virtuelle Währungen – 5. GeldwäscheRL, FM-GwG, WiEReG’ (Lexis Briefings in lexis360.at, state 5 November 2020) <https://360.lexisnexis.at/d/lexisbriefings/virtuelle_wahrungen_5_geldwascherl_fm_gwg_wiereg/h_80004_4982011684304865824_92b72c7326?origin=gs&searchId=20210806065146> accessed 4 September 2021

Vermaak W, ‘MiCA: A Guide to the EU’s Proposed Markets in Crypto-Assets Regulation’ (Sygna Bridge Blog, undated) <www.sygna.io/blog/what-is-mica-markets-in-crypto-assets-eu-regulation-guide/> accessed 4 September 2021

XReg.Consulting, ‘MiCA explained: the EU crypto-asset law’ (XReg.Consulting Ltd, 2020) <https://uploads-ssl.webflow.com/5df7642ffbd9264804671001/5f7b3b3116ebd4add01abd32_XReg%20EU%20MiCA%20explained%20-issue%201-1.1a%20-FINAL.pdf> accessed 4 September 2021

9. Annex

9.1. Abstract (English)

While some crypto-assets fall under the scope of existing EU financial services legislation, presently a majority of crypto-assets remains outside its scope. This thesis aims to provide an overview to the European Commissions' proposal on filling this legislative gap: The European Commissions' proposal for a Regulation on Markets in Crypto-assets (MiCA) published on the 24th of September 2020 as part of the Digital Finance Package. According to the proposal, comprehensive new rules shall transpose the currently mostly unregulated market of crypto-assets in a highly regulated market. After an initial presentation of some key aspects of the distributed ledger technology as well as some terminology used in the crypto-community, this thesis provides a brief overview to the Digital Finance Package and to the status quo of regulatory aspects of crypto-assets in the Union in order to illustrate the legislative gap the European Commission seeks to fill with its proposed Regulation. In its main part, the specific new provisions proposed by the European Commission with the MiCA are presented and analysed in detail.

The analysis of this thesis suggests that according to the current draft of the MiCA, it is highly unlikely that any crypto-assets will remain unregulated within the Union. With a catch-all-definition of crypto-assets, every crypto-asset currently not covered by EU legislation will be under MiCAs material scope of application. Further, with a very broad definition of what is considered to be an 'issuer of crypto-assets', also crypto-assets without a known attributable responsible person or group of persons may nevertheless have an 'issuer' according to the MiCA: As soon as crypto-assets are offered to the public or admission of such crypto-assets to a trading platform for crypto-assets is sought, the person acting will have to comply with the provisions of the MiCA addressed at the 'issuer'.

The newly proposed framework for crypto-assets is drafted along the lines of existing EU financial services legislation. However, it presents some notable deviations, be it for reasons of editorial mistakes that might be cured in the final version of the Regulation or due to the specific features of crypto-assets and the distributed ledger technology in contrast to established instruments in EU financial services. Further, the analysis of this thesis suggests that the risks of 'global stablecoins' are not adequately approached by the proposal. MiCA proposes two new legal definitions of specific crypto-assets, namely 'asset-referenced tokens' (ART) and 'electronic money tokens' (EMT). These are two subtypes of crypto-assets

commonly referred to as ‘stablecoins’, as they aim to maintain a stable value by referring to either one single official currency (EMT) or several official currencies, commodities, crypto-assets or a combination of such assets (ART). Issuers of such crypto-assets shall be more stringently regulated than issuers of crypto-assets other than ART or EMT under the scope of MiCA. In light of the anticipated systemic risks global stablecoins with a particularly wide adoption and a high frequency of cross-border transactions might pose, where an ART or EMT becomes very large in scale, EBA will deem it as ‘significant’ and thereby transpose supervisory powers to itself and subject the issuer of that crypto-asset to more stringent requirements. However, the definitions of ART and EMT are narrow and do not cover all possible constructions of stablecoins, most notably ‘algorithmic stablecoins’. Hence even if an algorithmic stablecoin grows very large in scale, according to the current draft it cannot be deemed ‘significant’ and no (additional) supervisory measures to mitigate a systemic risk could be taken.

9.2. Abstract (Deutsch)

Während einige Kryptowerte in den Anwendungsbereich der bestehenden EU-Finanzdienstleistungsgesetzgebung fallen, bleibt die Mehrheit der Kryptowerte derzeit außerhalb ihres Anwendungsbereichs. Diese Arbeit soll einen Überblick über den Vorschlag der Europäischen Kommission zur Schließung dieser Gesetzeslücke geben: Den Vorschlag der Europäischen Kommission für eine Verordnung über Märkte für Kryptowerte (MiCA), der am 24. September 2020 als Teil des Digital Finance Package veröffentlicht wurde. Dem Vorschlag zufolge sollen umfassende neue Vorschriften den derzeit weitgehend unregulierten Markt für Kryptowerte in einen stark regulierten Markt nach dem Vorbild der bestehenden EU-Rechtsvorschriften für Finanzdienstleistungen überführen. Nach einer einleitenden Darstellung einiger Schlüsselaspekte der Distributed-Ledger-Technologie sowie einiger in der Krypto-Community verwendeter Begriffe, gibt die Arbeit einen kurzen Überblick über das Digital Finance Package und den Status quo der regulatorischen Aspekte von Kryptowerten in der Union, um die Gesetzeslücke zu verdeutlichen, die die Europäische Kommission mit ihrem Verordnungsvorschlag zu schließen versucht. Im Hauptteil werden die spezifischen neuen Bestimmungen, die die Europäische Kommission mit der MiCA vorschlägt, vorgestellt und im Detail analysiert.

Die Analyse dieser Arbeit legt nahe, dass es nach dem aktuellen Entwurf der MiCA höchst unwahrscheinlich ist, dass einige Kryptowerte in der Union unreguliert bleiben werden. Mit einer Catch-All-Definition der „Kryptowerte" werden alle Kryptowerte, die derzeit nicht durch EU-Rechtsvorschriften abgedeckt sind, in den materiellen Anwendungsbereich der MiCA fallen. Mit einer sehr weit gefassten Definition dessen, was als „Emittent von Kryptowerten" gilt, können auch Kryptowerte, für die kein Verantwortlicher bekannt ist, dennoch einen „Emittenten" im Sinne der MiCA haben: Sobald Kryptowerte öffentlich angeboten werden oder die Zulassung solcher Kryptowerte zu einer Handelsplattform für Kryptowerte angestrebt wird, wird die handelnde Person die an den Emittenten adressierten Vorschriften der MiCA erfüllen müssen.

Der neu vorgeschlagene Rechtsrahmen für Kryptowerte ist in Anlehnung an die bestehenden EU-Rechtsvorschriften für Finanzdienstleistungen formuliert. Er weist jedoch einige bemerkenswerte Abweichungen auf, sei es aufgrund von redaktionellen Fehlern, die in der endgültigen Fassung der Verordnung korrigiert werden könnten, oder aufgrund der besonderen Merkmale von Kryptowerten und der Distributed-Ledger-Technologie im

Gegensatz zu den etablierten Instrumenten im EU-Finanzdienstleistungsbereich. Darüber hinaus legt die Analyse dieser Arbeit nahe, dass die Risiken von „globalen Stablecoins“ nicht angemessen behandelt werden. Die MiCA schlägt zwei neue rechtliche Definitionen spezifischer Kryptowerte vor, nämlich „wertreferenzierte Token“ (ART) und „E-Geld-Token“ (EMT). Dabei handelt es sich um zwei Unterarten von Kryptowerten, die gemeinhin als „Stablecoins“ bezeichnet werden, da sie darauf ausgelegt sind, einen stabilen Wert beizubehalten, indem sie sich entweder auf eine einzige offizielle Währung (EMT) oder auf mehrere offizielle Währungen, Waren, Kryptowerte oder eine Kombination solcher Vermögenswerte (ART) beziehen. Emittenten solcher Kryptowerte werden strenger reguliert als Emittenten von Kryptowerten, die keine ART oder EMT sind. In Anbetracht der zu erwartenden Systemrisiken, die von globalen Stablecoins mit einer besonders weiten Verbreitung und einer hohen Frequenz grenzüberschreitender Transaktionen ausgehen könnten, wird die EBA, wenn ein ART oder EMT einen solch großen Umfang annimmt, diesen als „signifikant“ einstufen, damit die Aufsichtsbefugnisse auf sich selbst übertragen und den Emittenten dieses Kryptowertes (noch) strengeren Anforderungen unterwerfen. Die Definitionen von ART und EMT sind jedoch eng gefasst und decken nicht alle möglichen Konstruktionen von Stablecoins ab, insbesondere nicht „algorithmische Stablecoins“. Selbst wenn also ein algorithmischer Stablecoin sehr breit genutzt wird, könnte er daher nach dem aktuellen Entwurf der MiCA nicht als „signifikant“ eingestuft werden und es könnten keine (zusätzlichen) Aufsichtsmaßnahmen zur Minderung eines Systemrisikos ergriffen werden.