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# Consumer protection under the Markets in Crypto-Assets Regulation (MiCAR)

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# List of Abbreviations

| | |
|---|---|
| **AML** | Anti-Money Laundering |
| **B2C** | Business-to-Consumer |
| **CASP** | Crypto-asset Service Provider |
| **CCD** | Consumer Credit Directive |
| **CFR** | Common Frame of Reference |
| **CJEU** | Court of Justice of the European Union |
| **CRD** | Consumer Rights Directive |
| **CRD IV** | Capital Requirements Directive IV |
| **CRR** | Capital Requirements Regulation |
| **CTF** | Counter-Terrorist Financing |
| **DeFi** | Decentralized Finance |
| **DLT** | Distributed Ledger Technology |
| **DMFSD** | Distance Marketing for Financial Services Directive |
| **DORA** | Digital Operational Resilience Act |
| **DSA** | Digital Services Act |
| **EBA** | European Banking Authority |
| **ECB** | European Central Bank |
| **EMD2** | E-Money Directive 2 |
| **ESMA** | European Securities and Markets Authority |
| **EU** | European Union |
| **GCC** | Greek Civil Code |
| **GFC** | Global Financial Crisis |
| **InsurTech** | Insurance Technology |
| **IoT** | Internet of Things |
| **MiCAR** | Markets in Crypto-Assets Regulation |
| **MS** | Member State |
| **PilotR** | Pilot Regime for DLT |
| **PSD2** | Payment Services Directive 2 |
| **RegTech** | Regulatory Technology |
| **RTS** | Regulatory Technical Standards |
| **SIFI** | Systemically Important Financial Institution |
| **SME** | Small and Medium-sized Enterprise |
| **TEC** | Treaty of the European Communities |
| **TEU** | Treaty of the European Union |
| **TFEU** | Treaty on the Functioning of the European Union |
| **TradiFi** | Traditional Finance |
| **UCPD** | Unfair Commercial Practices Directive |
| **UCTD** | Unfair Contract Terms Directive |
| **UN** | United Nations |

# Introductory Remarks

In recent years, blockchain technology and its application to various types of crypto-assets have significantly altered the financial landscape. Consumers and investors now, more than ever, have greater access to alternative instruments for fulfilling their economic interests. To support the operation of these crypto-assets and the growth of this emerging market, new players have entered the scene, assuming diverse roles to meet the increasing demand for these financial products. This new market, although created within an environment of distrust towards the traditional financial system, faces many of the same or similar challenges. This convergence, often referred to as the "financialization" of crypto, has captured the EU's attention and has led to the Union's intense attempt to take on the lead towards regulating this new market, by introducing relevant policies and legislative initiatives, with the Markets in Crypto-Assets Regulation (MiCAR), being the most prominent one. MiCAR comprises a wide range of provisions, which, in other contexts, are found scattered in multiple EU legislative frameworks. Although its overarching goal is to regulate the markets where crypto-assets are offered, it is argued here that specific provisions within MiCAR serve distinct sub-purposes.

The aim of this Thesis is to examine consumer protection as one of such sub-purposes within MiCAR. More precisely, it seeks to analyze MiCAR's provisions to uncover where and how consumer protection is embedded within the Regulation, with the goal of assessing the necessity and effectiveness of these provisions in safeguarding consumers.

The Thesis is structured in three chapters. **Chapter 1** briefly presents the blockchain, i.e., the underlying technology concerning crypto-assets, and proceeds to introduce the EU's adopted approach, including the Union's relevant policies and MiCAR as such. **Chapter 2** examines whether MiCAR pursues consumer protection objectives, and identifies potential indicators that support such conclusion, focusing on the regulation's legal basis, recitals, and the introduction of the notion of the "retail holder". **Chapter 3** focuses on specific MiCAR provisions which are identified as facilitating consumer protection. These provisions are analyzed in comparison to other similar ones found in other EU legislative acts and are assessed on their effectiveness in providing adequate levels of protection for consumers engaging in crypto-asset activities.

# Chapter 1: Blockchain and the EU

## *1.1 Blockchain*

The 21st century has marked unprecedented technological advancements that have revolutionized many industries. It has been asserted by many that we are experiencing the Fourth Industrial Revolution, characterized by an extensive use of technologies that are blurring the lines between the physical and digital world.[1] Finance is heavily affected by this trend, as it has become not only one of the most globalized segments of the world's economy but also among the most digitized and datafied ones.[2] At the heart of this transition lies, among others, the Blockchain technology. Back in 2008, this technological advancement was made widely known to the public by means of an innovative white paper titled "Bitcoin: A Peer-to-Peer Electronic Cash System" by Satoshi Nakamoto.[3]

The main idea that was proposed was that of a decentralized system facilitating peer-to-peer transactions by eliminating the need for a central authority/ intermediary to be in charge of verifying the executed transactions. This marked the genesis of a revolutionary idea – a tamper-resistant and transparent ledger that could inspire trust in a seemingly "trustless" environment.[4] Particularly in the financial sector, following the GFC of 2008-2009, the "perfect storm", as it has been characterized by many, revealed "macroprudential" risks, including those arising not just from the potential failure of individual institutions but also from interdependencies, along with extensive systemic failures.[5] This further encouraged the idea that maybe a system where transactions would not require to be "filtered" through an intermediary would be more efficient and capable of effectively promoting the economic interests of the actors directly involved in the transactions.[6]

The GFC exposed the vulnerabilities in TradiFi[7] and the financial sector, where public trust was eroded due to a variety of factors. A key issue was the widespread misunderstanding of complex financial instruments, such as mortgage-backed securities, by both investors and financial institutions. The widespread use of subprime mortgages, combined with the bundling and selling of these risky loans as

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[1] K. Schwab, *The Fourth Industrial Revolution: What It Means and How to Respond* (World Economic Forum, 14 January 2016) https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/ accessed 21/08/24.

[2] P. Gandhi, S. Khanna, S. Ramaswamy, *Which Industries Are the Most Digital (and why)?* (2016) Harvard Business Review https://hbr.org/2016/04/a-chart-that-shows-which-industries-are-the-most-digital-and-why accessed 28/08/24.

[3] "Satoshi Nakamoto" is a pseudonym describing a mysterious figure, probably consisting of a group of individuals. P. D. Filippi and A. Wright, *Blockchain and the Law: The Rule of Code* (2018) https://doi.org/10.2307/j.ctv2867sp, p. 198-99.

[4] K. Werbach, *Trust, but Verify: Why the Blockchain Needs the Law* (2018) 33 Berkeley Tech LJ, p. 498.

[5] R. P. Buckley, D. W. Arner, D. A. Zetzsche, and E. Selga, *The Dark Side of Digital Financial Transformation: The New Risks of FinTech and the Rise of TechRisk* (2019) UNSW Law Research Paper No 19-89, European Banking Institute Working Paper 2019/54, University of Luxembourg Law Working Paper 2019-009, University of Hong Kong Faculty of Law Research Paper No 2019/112, Singapore Journal of Legal Studies (Forthcoming) https://ssrn.com/abstract=3478640 accessed 18 September 2024.

[6] S. Aboura, *A Note on the Bitcoin and Fed Funds Rate* (April 1, 2021), Empirical Economics (2022) https://ssrn.com/abstract=4004428 accessed 17/06/24.

[7] D. A. Zetzsche, D. W. Arner and R. P. Buckley, *Decentralized Finance (DeFi)* (2020) 6 Journal of Financial Regulation 172 https://ssrn.com/abstract=3539194 accessed 18/09/24.

seemingly safe investments, created a "false reality". When the U.S. housing bubble burst, triggering widespread mortgage defaults, it exposed the financial sector's vulnerabilities, as many institutions had overleveraged themselves. With the collapse of Lehman Brothers and other SIFIs, along with their subsequent government bailouts, the public confidence in the stability of the financial system was profoundly undermined, leaving plenty of room for doubt regarding its effectiveness.[8] It was at that point that the lack of transparency and accountability in the financial sector further compounded the public's sense of betrayal. This constituted fertile ground for the development of ideas for a financial system, completely independent from the mechanisms of the present regime, including credit institutions, exchanges, investment firms and credit rating agencies.

Thus, Bitcoin was designed and structured with the intent of restoring public trust in the financial sector. In technical terms, Bitcoin was designed to operate with the use of blockchain technology, as an open and interoperable protocol without centralized control.[9] Its accounts are pseudonymous, utilizing public-private key cryptography to allow individuals to create accounts without seeking permission. Transactions in Bitcoin involve the execution and digital signing of a "transaction" using a private key, enabling users to send and receive Bitcoin globally almost instantly.[10] The Bitcoin network, akin to a distributed ledger,[11] verifies and updates account balances after each transaction, typically managed through a digital "wallet" stored on personal computers, online applications, or secure hardware.[12]

As we navigate through the era of digitalization, traditional legal systems, developed during a time preceding the emergence of blockchain and Bitcoin, are now facing the strain of adapting to the rapid pace of technological change and more precisely the explosion of interest for DLT and blockchain.[13] Blockchain technology has moved beyond cryptocurrencies, like Bitcoin[14], and its application is now

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[8] International Monetary Fund, External Relations Dept., *The Perfect Storm* (23 June 2009) https://doi.org/10.5089/9781451953718.022; P. Monokroussos and C. Gortsos, *Non-Performing Loans and Resolving Private Sector Insolvency: Experiences from the EU Periphery and the Case of Greece* (2017) https://doi.org/10.1007/978-3-319-50313-4 accessed 18/07/24.

[9] *ibid.*

[10] *ibid.*

[11] The terms "blockchain" and "distributed ledger technology (DLT)" are often used interchangeably due to the decentralized nature of data storage, despite the fact that the latter constitutes a wider notion entailing other technological applications as well. See also: T. J. Falokun, *Jurisdiction and Choice of Law in Disputes Relating to Cross-Border NFT Transactions: The Case for Uniform Private International Law Rules* (2023) 27(1) Virginia Journal of Law & Technology 49-99.

[12] P. D. Filippi and A. Wright, op. cit. 3.

[13] Focusing on legal and governance issues only: L. J. Trautman, *Is Disruptive Blockchain Technology the Future of Financial Services?* (2016) 69 The Consumer Financial Law Quarterly Report p. 232; T. I. Kiviat, *Beyond Bitcoin: Issues in Regulating Blockchain Transactions* (2015-16) 65 Duke Law Journal p. 569; L. R. Cohen and D. C. Tyler, *Blockchain's Three Capital Markets Innovations Explained* (2016) International Financial Law Review http://www.iflr.com/Article/3563116/Blockchains-three-capital-markets-innovations-explained.html accessed 21/08/24.

[14] See J. O. McGinnis and K. W. Roche, *Bitcoin: Order without Law in the Digital Age* (Nw. Pub. L. Res. Paper No 17-06, 7 March 2017) https://ssrn.com/abstract=2929133 accessed 21/08/24; P. D. Filippi, *Bitcoin: A Regulatory Nightmare to a Libertarian Dream* (2014) 3 *Internet Policy Review* 1, p. 10; R. Grinberg, *Bitcoin: An Innovative Alternative Digital Currency* (2012) 4 *Hastings Science and Technology Law Journal* 159, p. 171; E. V. Murphy, M. M. Murphy and M. V. Seitzinger, *Bitcoin: Questions, Answers, and Analysis of Legal Issues* (13 October 2015) https://fas.org/sgp/crs/misc/R43339.pdf accessed 21/08/24; N. Kuhlmann, *Bitcoins – Funktionsweise und rechtliche Einordnung der digitalen Währung* (2014) 691 Computer & Recht; F. and P. Pesch,

being considered for all parts of the financial system. Capital raising,[15] trading,[16] clearing and settlement,[17] global payments,[18] deposits and lending,[19] property and casualty claims processing (InsurTech),[20] digital identity management and authentication,[21] and RegTech solutions[22] (such as automated compliance, administration and risk management, and anti-money laundering and client suitability checks) have all been identified as significant potential DLT use cases, and as areas that will benefit from the advantages DLT offers. Thus, the exercise of attempting to regulate such complex technological advancements becomes even more demanding, since such structures are alien-like for the law and policy makers.

## *1.2 EU regulatory approach*

The EU has adopted an active stance in its attempt to keep pace with the emerging trend of blockchain and more precisely with its applications in the creation and functioning of a multitude of cryptocurrencies, similar to Bitcoin. The Union, with more persistence since 2018, has consistently made it a primary objective to take proactive measures in responding to emerging developments within the financial services sector. With the European Commission's Fintech Action Plan of 2018, the EU signaled its determination to make beneficial use of technological innovation.[23] Since then, the EU has also adopted the Digital Finance Strategy (DFS 2020), which marked another significant and ambitious step towards regulating technology applications in the financial sector. The DFS 2020 primarily addresses new proposals regarding the prudential regulatory treatment of crypto-assets, the financing of SMEs, and the integration of DLT and the IoT within the EU Sustainable Finance Taxonomy.[24] The Strategy aims to

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*Bitcoins: Rechtliche Herausforderungen einer virtuellen Währung – Eine erste juristische Einordnung (*2014) 75 MMR.

[15] World Economic Forum (with Deloitte), *The Future of Financial Infrastructure - An Ambitious Look at How Blockchain Can Reshape Financial Services* (2016) www.weforum.org/docs/WEF_The_future_of_financial_infrastructure.pdf accessed 21/08/24.

[16] See D. Shrier and others, *Blockchain & Transactions, Market and Marketplaces* (2016) https://cdn.www.getsmarter.com/career-advice/wp-content/uploads/2016/12/mit_blockchain_transactions_report.pdf accessed 21/08/24; G. W. Peters and G. R. Vishnia, *Blockchain Architectures for Electronic Exchange Reporting Requirements: EMIR, Dodd Frank, MiFID I/II, MiFIR, REMIT, Reg NMS and T2S* (2016) https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2832604 accessed 21/08/24.

[17] World Economic Forum (with Deloitte), op. cit. 15, p. 119-128.

[18] World Economic Forum (with Deloitte), op. cit. 15, p. 21, 39, 46-55.

[19] World Economic Forum (with Deloitte), op. cit. 15, p. 65-82, 119-119.

[20] World Economic Forum (with Deloitte), op. cit. 15, p. 40, 56-64.

[21] See World Economic Forum (with Deloitte), *A Blueprint for Digital Identity – The Role of Financial Institutions in Building Digital Identity* (August 2016) 60 http://www3.weforum.org/docs/WEF_A_Blueprint_for_Digital_Identity.pdf accessed 21/08/24] (stressing the need for a more secure digital identity system, relying on Bitcoin characteristics); World Economic Forum (with Deloitte), op. cit. 15, p. 22; St. Bond, *It Was Only a Matter of Time – Digital Identity on Blockchain* (24 March 2017) http://idcdocserv.com/lcUS42416017 accessed 21/08/24.

[22] See World Economic Forum (with Deloitte), op. cit. 15, p. 92-109 (exploring the potential of Bitcoin automated compliance and proxy voting). On RegTech, generally, see D. W. Arner, J. Barberis and R. P. Buckley, *FinTech, RegTech, and the Reconceptualization of Financial Regulation* (2017) 37 Northwestern Journal of International Law & Business 371 https://scholarlycommons.law.northwestern.edu/njilb/vol37/iss3/2 accessed 21/08/24.

[23] European Commission, Communication on a FinTech Action Plan: For a More Competitive and Innovative European Financial Sector (Communication) COM (2018) 109 final.

[24] D. A. Zetzsche, F. Annunziata, D. W. Arner and R. P. Buckley, *The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy* (5 November 2020) European Banking Institute Working Paper

further enable and support the potential of digital finance in terms of innovation and competition while simultaneously mitigating associated risks, following the principle of "same activity, same risk, same rules".[25] In order to realize the vision conceived in the DFS, on September 24, 2020, the Commission introduced the new Digital Finance Package to "*boost responsible innovation in the EU's financial sector, especially for highly innovative digital start-ups, while mitigating any potential risks related to investor protection, money laundering and cyber-crime*".[26] This package consists of a set of legislative proposals and initiatives that fall under the broader DFS. It includes initiatives such as the MiCAR, DORA and the PilotR. Overall, the overarching goal is to enhance Europe's competitiveness in the financial sector, paving the way for the EU to become a "global standard-setter".[27]

The "standard-setter" approach is a prevalent strategy employed by the EU in regulating various sectors. EU regulations across multiple domains—such as food safety, chemicals, competition, privacy protection and now DeFi—have significant implications for multinational corporations seeking to operate within the highly regulated EU internal market.[28] These companies have an incentive to standardize their production globally and voluntarily adhere to a single rule, usually the most stringent one, which is typically the one enforced within the EU Single Market. This dynamic effectively transforms EU rules into global standards, a phenomenon known as the "de facto Brussels effect".[29] Although some scholars[30] have argued that the EU's motivation to regulate the technology sector is imperialistic, suggesting that the EU is seeking in fact to exert political and economic domination over other countries assuming pioneer roles in technological innovation,[31] it can be argued that EU primary motives are mainly internal.[32] The

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Series No 2020/77, University of Luxembourg Law Working Paper Series No 2020-018, University of Hong Kong Faculty of Law Research Paper No 2020/059 https://ssrn.com/abstract=3725395 accessed 21/08/24, p. 3.

[25] D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, *Remaining Regulatory Challenges in Digital Finance and Crypto-Assets after MiCA* (May 2023) Committee on Economic and Monetary Affairs (ECON), Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, UNSW Law Research Paper No 23-27 https://ssrn.com/abstract=4487516 or http://dx.doi.org/10.2139/ssrn.4487516 accessed 21/08/24, p. 14; C. Gortsos, *The Commission's 2020 Proposal for a Markets in Crypto-Assets Regulation ('MiCAR'): A Brief Introductory Overview* (7 May 2021) https://ssrn.com/abstract=3842824 accessed 21/08/24, p. 11.

[26] European Commission, *Financial Stability, Financial Services and Capital Markets Union, Communication on Digital Finance Package* (24 September 2020) https://ec.europa.eu/info/publications/200924-digital-finance-proposals_en accessed 21/08/24; C. Gortsos, op. cit. 25.

[27] European Commission, Press Release on Digital Finance Package (24 September 2020) https://ec.europa.eu/commission/presscorner/detail/en/IP_20_1684. See also *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee of the Regions: A Single Market for Citizens, at 7, COM (2007) 60 final (Feb. 21, 2007)* on the approach of the EU to become a standard-setter in multiple regulated areas.

[28] A. Bradford, *The Brussels Effect* (2012) 107 Northwestern University Law Review 1, Columbia Law and Economics Working Paper No 533 https://ssrn.com/abstract=2770634 accessed 21/08/24 p. 3.

[29] *ibid,* p. 6.

[30] E.g., L. A. Kogan, 'Exporting Europe's Protectionism' (Fall 2004) National Interest p. 91, 99. *See also* Peter F Drucker, 'Trading Places' (Spring 2005) National Interest p. 101 (arguing that one of the purposes for economic blocs -like the EU- is to export their regulations for protectionist purposes).

[31] See e.g., J. Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press 2006) p. 9-22; see also Lawrence A Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Enterprise* (2005) 40-43 https://s3.us-east-2.amazonaws.com/washlegal-uploads/upload/110405MONOKogan.pdf accessed 21/08/24.

[32] A. Bradford, op. cit. 28, p. 39.

EU is simply seeking to create a level-playing field by exporting its costly regulations abroad in the view of remaining committed to the principles of the Rule of Law and the welfare state.[33]

By positioning itself as a global regulator,[34] the EU can defend its social preferences, without compromising the competitiveness of its industries.[35] The key here is realizing that the dilemma between regulation and innovation is a false one. It is rather simplistic to argue that innovation is hindered only because more stringent rules may apply within the EU.[36] Of course, regulatory burdens can challenge European companies, especially start-ups and SMEs in the digital sector, and constitute an extra factor to be taken into account. Mario Draghi himself, in the statement accompanying his recent report on the "*The future of European competitiveness*", highlighted that the goal is not deregulation: The EU needs to stop failing to translate innovation into commercialisation, in order to be able to close the technolgy gap between itslef and other pioneer countries.[37] Technological innovation is a product of fundamental forces such as long-term investments in education, carefully designed industrial policy, and incentives for investment and entrepreneurship.[38] Digital regulation as a hurdle is not immaterial, but it is one-dimensional to argue that digital regulation—or the absence thereof—determines the fortunes of a country's tech industry.[39] Rather than condemning regulatory initiatives from the outset, the EU should prioritize legislative proposals that strike a careful balance between caution and innovation.[40] Overall, the Union's policy efforts should be directed toward completing the Digital Single Market and a genuine Capital Markets Union, harmonizing regulatory regimes across Member States, to achieve technological advancement and economic growth.[41]

In light of the above, it remains to be seen whether the Digital Finance Package and more specifically, one of its main components, MiCAR, will be able to strike the right balance between achieving its objectives and allowing crypto-asset market participants to evolve and flourish within its regulatory framework.

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[33] *ibid.*

[34] The EU's ability to act as a global standard-setter is rooted in 3 factors: a) the EU's market power, b) the EU's regulatory capacity, and c) the EU's political will to adopt strict rules. See A. Bradford, op. cit. 28, p. 11 f.

[35] *ibid*, p. 36

[36] A. Bradford, *The False Choice Between Digital Regulation and Innovation* (March 7, 2024) Northwestern University Law Review, Vol. 118, Issue 2, October 6, 2024, https://ssrn.com/abstract=4753107 accessed 28/09/24, p. 54

[37] M. Draghi, *The Future of European Competitiveness: Part A | A Competitiveness Strategy for Europe* (European Commission) https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059 accessed 28/09/24, p. 2.

[38] A. Bradford, op. cit. 36, p. 54.

[39] *ibid.*

[40] M. Draghi, *Address at the Presentation of the Report on the Future of European Competitiveness in the European Parliament* (2024) https://commission.europa.eu/topics/strengthening-european-competitiveness/eu-competitiveness-looking-ahead_en#paragraph_47059 accessed 28/09/24.

[41] A. Bradford, op. cit. 36, p. 54.

## *1.3 Markets in Crypto-Assets Regulation (MiCAR)*

The Regulation of the European Parliament and of the Council "on Markets in Crypto-Assets" and amending Directive (EU) 2019/1937 (MiCAR) constitutes one of the DFS 2020 crucial components. The EU legislator deemed it appropriate to create a framework not regulating crypto-assets as such, but rather one attempting to govern certain aspects of the markets in which crypto-assets are traded.[42] In particular, MiCAR imposes obligations on crypto-asset issuers (Titles II-IV) and on CASPs (Title V) in relation to certain crypto-assets that fall within the material scope of the Regulation. According to Art. 3 para. 1 (5) MiCAR, a crypto-asset is defined as *"a digital representation of a value or right that can be transferred and stored electronically, using distributed ledger or similar technology"*.[43] This broad definition is further refined by other provisions of MiCAR, which delineate the exact scope of the Regulation by explicitly excluding certain instruments that might otherwise fall within its purview.[44]

Titles II-IV of the MiCAR framework establish specific obligations for issuers in relation to three (3) categories of crypto-assets. Those are:

(a) Asset-Referenced Tokens (ARTs) (Title III, Articles 15 - 42),
(b) E-Money Tokens (EMTs) (Title IV, Articles 43 - 52) and
(c) Crypto-assets other than ARTs and EMTs (Title II, Articles 5 - 14).

In Title II, MiCAR sets forth transparency and disclosure obligations for issuers of crypto-assets that are neither ARTs nor EMTs. These obligations include the preparation and publication of a white paper, as a condition for proceeding with an offer on crypto-asset markets. In contrast, more stringent provisions apply to ARTs and EMTs, where the requirement to publish a white paper is supplemented by a regime whereby: (i) the issuance of these types of tokens constitutes a reserved activity; (ii) access to the

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[42] F. Annunziata, *An Overview of the Markets in Crypto-Assets Regulation (MiCAR)* (11 December 2023) European Banking Institute Working Paper Series No 158 https://ssrn.com/abstract=4660379 accessed 21/08/24, p. 13.

[43] In light of the objective of Recital (9) MiCAR on the creation of a regulatory framework characterized by technological neutrality, the wording is notably very broad, as it evokes not only DLT, but also similar technologies. See F. Annunziata, op. cit. 42, p. 21.

[44] Specifically, MiCAR does not cover:

(a) crypto-assets which qualify as 'financial instruments' as defined in Art. 4(1), point (15) of Directive 2014/65/EU45 ('MiFID II') (Recital (3) MiCAR).

(b) crypto-assets which qualify as 'electronic money' as defined in Art. 2(2) EMD, except if they qualify as e-money tokens under the MiCAR (Recital (9) MiCAR).

(c) crypto-assets which qualify as 'deposits' as defined in Article 2(1), point (3) of Directive 2014/49/EU48 ('DGSD') (Recital (9) MiCAR).

(d) crypto-assets which qualify as 'structured deposits' as defined in Article 4(1), point (43) MiFID II (Recital (9) MiCAR).

(e) crypto-assets which qualify as 'securitisation' as defined in Article 2, point (1) of Regulation (EU) 2017/240249 (the 'STS Securitisation Regulation') (Recital (9) MiCAR).

(f) crypto-assets issued and to services related to such assets that are provided by the European Central Bank ('ECB') and the national central banks ('NCBs') of all Member States when acting in their capacity as monetary authority, as well as by other (than central banks) public authorities (Recital (13) MiCAR).

(g) any fully decentralized crypto-asset and therefore, Bitcoin (Recital (22) MiCAR).

(h) any Non-Fungible Tokens (NFTs) (Recital (10)-(11) MiCAR).

activity is reserved only to entities that are authorized by the competent authority, in the case of EMTs, as credit institutions or e-money institutions and, in the case of ARTs, as credit institutions or based on the provisions of MiCAR itself; and (iii) these entities are subject to a detailed prudential regime.[45] Lastly, MiCAR formulates a general regime for the activities of CASPs, incorporating in its text provisions on initial authorization, prudential rules and rules of conduct and transparency, regardless of the types of crypto-assets traded by the CASPs.[46] MiCAR was formally adopted by the European Parliament and the Council on May 31, 2023. It entered into force on June 29, 2024, with its full application set to commence on December 30, 2024.[47]

MiCAR constitutes the EU's response to the policy debate prompted by the Libra proposal in June 2019. Specifically, the EU legislator was particularly concerned about the risks associated with stablecoins, which claim to maintain a stable value by referencing another value, right, or a combination thereof, often tied to official currencies.[48] An example of such a stablecoin that sparked debate was Facebook's Libra project, later renamed Diem. In 2019, Facebook announced it was leading a consortium to establish Libra, a new cryptocurrency, in the form of a stablecoin, to operate through a new global electronic payment system, combined with a Facebook-led digital identification infrastructure.[49] Upon the emergence of such an initiative, Libra's ambitious aim to "enable a simple global currency and financial infrastructure that empowers billions of people" immediately attracted the attention of regulators worldwide.[50] Facebook's announcement was highly disruptive – not just because of the scale of Libra's vision – but from its perceived ability to actually deliver on that promise, given Facebook's global reach and the combined resources of organizations backing the project.[51] The EU legislator feared that, in the event that the Facebook proposal would be substantiated, Libra could:

[45] F. Annunziata, op. cit. 42, p. 40.

[46] *ibid.*

[47] In derogation thereof, Titles III and IV shall apply as of 30 June 2024.

[48] M. Lehmann, *MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry*? (12 January 2024) European Banking Institute Working Paper Series 160 https://ssrn.com/abstract=4692743 accessed 21/08/24, p. 3.

[49] See also D. A. Zetzsche, R. P. Buckley and D. W. Arner, *Regulating LIBRA: The Transformative Potential of Facebook's Cryptocurrency and Possible Regulatory Responses* (11 July 2019) European Banking Institute Working Paper Series 2019/44, University of New South Wales Law Research Series UNSWLRS 19-47, University of Hong Kong Faculty of Law Research Paper No 2019/042, University of Luxembourg Faculty of Law Research Paper, Oxford Journal of Legal Studies, Volume 41, Issue 1, Spring 2021, Pages 80–113, https://ssrn.com/abstract=3414401 accessed 21/08/24.

[50] Libra Association, *An Introduction to Libra* (White Paper, 2019) https://libra.org/en-US/wp-content/uploads/sites/23/2019/06/LibraWhitePaper_en_US.pdf accessed 21/08/24.

[51] At the moment of Libra's announcement in June 2019, the project was supported by a group of 28 major businesses (including companies like Ebay, Mastercard, PayPal, Visa and Uber), which became the founding members of the Libra Association – a not-for-profit membership organization headquartered in Geneva tasked with governing the Libra platform. Subsequently, following regulatory backlash, several members (including PayPal, Visa, Mastercard, eBay, Stripe, and Mercado Pago) left the Association. See A. N. Didenko, D. A. Zetzsche, D. W. Arner and R. P. Buckley, *After Libra, Digital Yuan and COVID-19: Central Bank Digital Currencies and the New World of Money and Payment Systems* (1 June 2020) European Banking Institute Working Paper Series 65/2020, University of Hong Kong Faculty of Law Research Paper No 2020/036, UNSW Law Research Paper No 20-59 https://ssrn.com/abstract=3622311 accessed 21/08/24, p. 22.

(i) Weaken the effect of monetary policy and subsequently undermine the monetary sovereignty of the EU and its MS.[52] Extensive use of such a stablecoin could result in the loss of control over the traditional mechanisms that states use to regulate the economy, namely any conventional or unconventional monetary measures.[53] As more economic transactions transition to blockchain-based currencies, states would find it increasingly difficult to regulate the amount of money in circulation, monitor transactions and capital markets, and enforce crucial regulations such as those related to AML, tax evasion, and anti-trust.[54]

(ii) Challenge the monopoly of the Euro as the bloc's official currency as means of payment,[55]

(iii) Threaten financial stability globally, as disruptions to Libra could simultaneously impact multiple economies, and

(iv) Hinder competition in the payment services market, especially if the platform lacks interoperability.[56]

Eventually the Libra project was abandoned.[57] However, the EU continued with its initiative to introduce a regulatory framework on stablecoins[58] and more broadly crypto-assets, finally adopting MiCAR. Because of its emphasis on the potential risks associated with stablecoins, MiCAR has occasionally been referred to as an "anti-Libra/Diem Act".[59] However, the objectives of the Regulation were broadened during the legislative process.

Subsequent to these developments, the Crypto Winter of 2022-2023 underscored the need for regulatory intervention and legal certainty on a broader level. In the latter half of 2021, several operational failures and asset diversions emerged among crypto-asset platforms, some of which appeared to be fully decentralized. The collapse of the Terra-Luna stablecoin algorithms in May 2022, resulting in losses exceeding USD 50 billion, triggered significant downturns and extreme volatility in crypto-asset prices, leading to the bankruptcies of major crypto projects and intermediaries like Three Arrows Capital and FTX. These insolvencies revealed not only the concentration within certain DeFi markets but also highlighted poor risk management, conflicts of interest, inadequate accounting, insufficient business continuity plans, and the presence of unqualified key personnel in major crypto entities. This was further corroborated in March 2023 when the U.S. Commodity Futures Trading Commission (CFTC) filed a

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[52] C. Gortsos, op. cit. 25, p. 13.

[53] C. Gortsos, *Legal Aspects of the Single Monetary Policy in the Euro Area: From the Establishment of the Eurosystem to the Pandemic Crisis and the Current Inflation Crisis* (26 August 2023) https://ssrn.com/abstract=3819726 accessed 21/08/24.

[54] S. N. Weinstein, *Blockchain Neutrality* (2021) 55 Ga L Rev 499, p. 502-503.

[55] M. Lehmann, op. cit. 48, p. 3; D. A. Zetzsche and others, *The Markets in Crypto-Assets Regulation (MiCA) and the EU Digital Finance Strategy* (2021) 16 Capital Markets Law Journal p. 203, 205.

[56] A. N. Didenko, D. A. Zetzsche, D. W. Arner and R. P. Buckley, op. cit. 51, p. 23; See G7 Working Group on *Stablecoins, Investigating the Impact of Global Stablecoins* (October 2019) https://www.bis.org/cpmi/publ/d187.pdf accessed 21/08/24, p. 11-16.

[57] M. Lehmann, op. cit. 48, p. 3.

[58] According to the categorization in MiCAR, stablecoins encompass ARTs and EMTs. See C. Gortsos, op. cit. 25, p. 16; Financial Stability Board, *Addressing the Regulatory, Supervisory and Oversight Challenges Raised by "Global Stablecoin" Arrangements* (14 April 2020) https://www.fsb.org/2020/04/addressing-the-regulatory-supervisory-and-oversight-challenges-raised-by-global-stablecoin-arrangements-consultative-document accessed 21/08/24.

[59] M. Lehmann, op. cit. 48, p. 3.

lawsuit against Binance, the largest crypto exchange, for alleged violations including illegal client solicitation, wrongful disclosures, insider dealing and market manipulation.[60]

It became clear from these events that many of the advantages claimed by crypto-asset proponents were overstated.[61] It has also been illustrated, especially when recalling the collapse of FTX, that there is an emergence of market failures and negative externalities similar to those seen in TradiFi.[62] This phenomenon, referred to as the "financialization" of crypto, denotes how DeFi has increasingly mirrored TradiFi in functionality, thus exhibiting comparable market failures and externalities that also call for regulatory oversight.[63] It became clear that DLT and cryptocurrencies cannot remain unregulated, free to operate in their own "Wild West".[64] Since the risks associated with crypto are, in many ways, similar to those in TradiFi, analogous regulatory interventions are required. The risks in the crypto space include:

(a) agency risks (such as incompetence, negligence, misappropriation of assets, fraud and theft),
(b) conflicts of interest arising from the combination of various intermediary roles (such as exchange, custody, proprietary trading, and brokerage),
(c) hidden leverage, particularly in crypto lending and staking, which parallels the use of complex derivatives in traditional finance,
(d) ineffective protection of consumers' rights,
(e) market abuse and threats to market integrity, including AML/CTF risks, and
(f) concentration risks, where a single entity holds systemic importance within one or multiple crypto ecosystems (i.e., a Systemically Important Crypto Institution, or SICI).[65]

These risks demand regulation under the principle of "same risks, same rules". They are essential considerations in financial regulation, which focuses on the following key objectives:

(a) financial stability, in both its negative and positive aspect (prevention of crises – proper functioning of the financial system),
(b) financial integrity, focusing on preventing the misuse of financial markets for criminal activities, such as money laundering, terrorist financing etc.,
(c) customer protection, aiming to establish systems that safeguard consumers from exploitation, and
(d) financial efficiency, development, and inclusion (collectively referred to as "financial market functions"), focusing on enhancing the effective functioning and positive impacts of the financial system.

The Preamble of the new Regulation outlines its purpose. MiCAR aims to address a gap in EU law, namely the lack of regulation around crypto-assets.[66] It is explicitly stated in Recital (3) that: "*The*

[60] D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, op. cit. 25, p. 17.

[61] F. Annunziata, op. cit. 42, p. 5-6.

[62] F. Annunziata, op. cit. 42, p. 5-6.

[63] D.W. Arner, D. A. Zetzsche, R. P. Buckley and J. Kirkwood, *The Financialization of Crypto* (UNSW Law Research Paper No 23-32) https://ssrn.com/abstract=4436852 accessed 21/08/24.

[64] D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, op. cit. 25, p. 17.

[65] D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, op. cit. 25, p. 17.

[66] According to Recital (2) MiCAR, "*crypto-assets are digital representation of value or of rights that have the potential to bring significant benefits to market participants. Representations of value include external, non-*

*absence of an overall Union framework for markets in crypto-assets can lead to a lack of user confidence in those assets, which could significantly hinder the development of a market in those assets and lead to missed opportunities in terms of innovative digital services, alternative payment instruments or new funding sources for Union companies*" Thus, according to the EU legislator, crypto-assets need to be regulated in order to:

(a) develop and promote the uptake of transformative technologies in the financial sector,[67]
(b) protect the rights and interests of holders of crypto-assets,[68] and
(c) avoid substantial risks to market integrity and financial stability that may result from such assets.[69]

The Preamble continues to illustrate that: "*A dedicated and harmonized framework for markets in crypto-assets is therefore necessary at Union level in order to provide specific rules for crypto-assets and related services and activities that are not yet covered by Union legislative acts on financial services. Such a framework should support innovation and fair competition, while ensuring a high level of protection of retail holders and the integrity of markets in crypto-assets*." It becomes apparent that MiCAR constitutes a framework addressing a multitude of issues pertaining to crypto-assets. Some scholars have cleverly portrayed Mi*CAR* as a mismatched car, comprised by multiple different parts, reflecting the diverse nature of its provisions, which often mirror those found in other legislative acts.[70] The efficiency of such a cross-sectoral initiative remains to be seen.[71] The Regulation's main provisions are:

(a) Provisions relating to issuers of crypto-assets,
(b) Provisions relating to CASPs,
(c) Provisions entailing the rights of retail holders and
(d) Provisions on market abuse.

The complex and multifaceted nature of MiCAR presented a challenge for the EU legislator in determining the most suitable type of binding legislative act. The options available included a Regulation, a Directive, and a Decision, with the final choice being the Regulation.[72]

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*intrinsic value attributed to a crypto-asset by the parties concerned or by market participants, meaning the value is subjective and based only on the interest of the purchaser of the crypto-asset*.".

[67] Recital (5) MiCAR.

[68] Recital (6) MiCAR.

[69] See Recitals (1), (4)-(6) MiCAR; M. Lehmann, op. cit. 48, p. 3.

[70] Concerning the issuance and market offering of crypto-assets, MiCAR adopts a model similar to public offers and the Prospectus Regulation, but with modifications and simplifications to align with existing market practices, notably the white paper approach. In contrast, the regulatory framework for crypto-asset service providers closely mirrors MiFID, incorporating its structures, concepts, and regulatory and supervisory methodologies. F. Annunziata, op. cit. 42, p. 15.

[71] M. Lehmann at the EBI Global Academic Conference 2024; F. Annunziata, op. cit. 42, p. 15.

[72] V. Christianos, R.E. Papadopoulou, and M. Perakis, Introduction to European Union Law (Nomiki Bibliothiki, 2nd edn, 2021), p. 77.

### *1.3.1 Regulation*

A Regulation constitutes an EU legislative act, which can be adopted by the Parliament and the Council based on the provisions of either the ordinary or special legislative procedure. According to Article 288 para. 2 TFEU, a Regulation has general application, meaning that it applies to an indeterminate number of persons or to an indeterminate number of events or situations, giving it a general and abstract character.[73] It is an act binding in its entirety. This element distinguishes a Regulation from a Directive, which is not binding in all its parts but only concerning the intended result. It is also directly applicable in each MS. Regulations are integrated into national legal systems automatically, without requiring transposition or ratification. Already existing relevant national provisions are rendered obsolete and cease to be effective. Lastly, a Regulation directly creates rights and obligations for both legal and natural persons. Citizens of the Union can invoke the Regulation not only against the MS (vertical applicability) but also against other citizens (horizontal applicability).[74]

### *1.3.2 Directive*

A Directive is a legally binding, legislative act issued by the Council of the EU, either independently or more commonly together with the European Parliament. Depending on the EU legislator's intentions, these acts may by binding for all MS or only for those to which they are expressly addressed. The Directive specifies the intended outcome, which binds MS, while allowing them the flexibility to choose the form and means for achieving that outcome. In order for a Directive to take effect, the reaching of the specific date included therein does not suffice. Rather, within the deadline set by the Directive itself, MS must enact national legislative, regulatory, or administrative measures of a binding nature to incorporate it in their domestic legal systems and ensure their national regime's alignment with the intended outcome . This discretion granted to MS to choose how to implement the Directive within a given timeframe does not diminish the Directive's legal authority.[75] In terms of hierarchy of rules, the CJEU has determined that the provisions of Directives are not of a lower hierarchical status compared to Regulations and are therefore no less binding on MS than other Union law rules, such as Regulations.[76]

### *1.3.3 Decision*

Lastly, a Decision is binding in all its aspects for its recipients, meaning the entities to which it is addressed, which may be either MS or individuals. The Decision is communicated to its recipients. This legislative act is typically preferred in EU law when a specific, individualized measure is needed to address particular circumstances or parties. An indicative example is the decision issued by the Commission towards a MS when declaring that a state aid granted to a company is, obliging that recipient state, which to recover the unlawfully granted state aid.

Therefore, when the EU legislator was tasked with creating a framework to govern the market in crypto-assets, any of the three types of legislative acts could have been selected. However, given the particular nature of the Decision and the EU practice to utilize it in specific and most commonly individual

[73] See Case T-107/94 *Kik v Council and Commission* [1995] ECR II-1717; Case 6/68 *Zuckerfabrik Watenstedt v Council* [1968] ECR 409.

[74] D. Papagiannis, *European Law* (5th edn, Nomiki Bibliothiki 2016) p. 290; V. Christianos, R.E. Papadopoulou, and M. Perakis, op. cit. 72, p. 78.

[75] V. Christianos, R.E. Papadopoulou, and M. Perakis, op. cit. 72, p. 81.

[76] Case 52/75 *Commission v Italy* [1976] ECR 277.

cases, this option was never really part of the equation. Both a Regulation and a Directive—especially one focused on maximum harmonization—were viable alternatives, since MiCAR introduces provisions resembling the Prospectus Regulation, MiFID II or CRD. In general, the final choice favoring the approach of a Regulation ultimately underscores the gravity of the regulatory intent. The predominant aim was to address a significant regulatory void and establish a harmonized approach to crypto-assets across the EU Single Market, without leaving any room to MS for maneuver.[77]

[77] M. Lehmann, op. cit. 48, p. 3.

# Chapter 2: *Consumer Protection enshrined through MiCAR*

## *2.1 Consumer Protection Principles*

MiCAR, as previously established, touches upon various issues with regards to the functioning of the crypto-assets market. It will be argued here that one of the most significant sub-purposes achieved through the enactment of this legislative framework is consumer protection. To analyze this, it is necessary to examine consumer protection principles within the broader context of existing international and EU consumer protection frameworks and trends.

The UN Guidelines for Consumer Protection[78] may serve as an initial roadmap in identifying core general principles of consumer protection. According to the relevant chapter of these Guidelines, each State, when designing its own consumer protection policy, shall take into account the specific economic, social and environmental circumstances and the needs of its own population. However, the common denominator in all these efforts to design effective consumer policies are the legitimate needs of consumers that should be met. Those are, inter alia:[79]

(a) Access by consumers to essential goods and services,
(b) Protection of vulnerable consumers,
(c) Promotion and protection of economic interests of consumers,
(d) Access by consumers to adequate information to enable them to make informed choices according to individual wishes and needs,
(e) Consumer education, including education on the environmental, social and economic consequences of consumer choice,
(f) Availability of effective consumer dispute resolution and redress,
(g) Promotion of sustainable consumption patterns,
(h) A level of protection of consumers using electronic commerce that is not less than that afforded in other forms of commerce, and
(i) Protection of consumer privacy.

These priorities align with those that the EU has set in light of the present consumer protection policy, as enshrined though the New Consumer Agenda.[80] Within the unique context of the Regulation of the Markets in Crypto-assets, central role play the protection of consumers' economic interests and their right of access to adequate information. Crypto-assets, operating on blockchain technology, pose risks to transparency, given the cryptographic mechanisms that are applied and the complexity of the DLT framework, which makes it hard for even issuers or service providers to have a clear view of the transactions occurring therein.

To add to those objectives, the EU in Regulation 2021/690 establishing the Single Market Programme enumerates the following indicative aims, with respect to the specific objective of ensuring a high level of consumer protection:[81]

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[78] UNCTAD, *Report on Consumer Protection Law and Policy* (UNCTAD/DITC/CPLP/MISC/2016/1, 2016).

[79] *ibid.*

[80] Communication from the Commission to the European Parliament and the Council, *New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery* COM(2020) 696 final.

[81] Art. 3 Regulation (EU) 2021/690 stablishing a programme for the internal market, competitiveness of enterprises, including small and medium-sized enterprises, the area of plants, animals, food and feed, and European statistics (Single Market Programme) [2021] OJ L153/1.

(a) empowering, assisting and educating consumers, businesses and representatives of civil society in particular concerning consumer's rights under Union law,
(b) ensuring that the interests of consumers in the digital world are duly taken into consideration,
(c) contributing to improving the quality and availability of standards across the Union,
(d) efficiently addressing unfair commercial practices,
(e) promoting sustainable consumption, in particular through raising awareness about specific characteristics and the environmental impact of goods and services,

The regulation continues to further present the EU's goals relating to the protection of consumers and other financial services end-users:

(a) promoting a better understanding of the financial sector and of the different categories of commercialized financial products, and
(b) ensuring that the interests of consumers in the area of retail financial services are protected.

These principles encompass the entirety of the consumer protection framework, applicable within the EU. The notion of "Consumer Acquis" has been established to refer to the legislative acts that serve the promotion of consumer protection. Back in 2008, when the Commission announced the review of the Consumer Acquis, it was referring to 8 directives.[82] For the purposes of this analysis, considering the particularities of the provisions of MiCAR, intending to protect consumers, only the following directives will be taken into account:

(a) Consumer Rights Directive (CRD)[83]- only as a point of reference, since its applicability scope does not cover financial services,
(b) Unfair Commercial Practices Directive (UNCPD),[84]
(c) Distance Marketing for Financial Services Directive (DMFSD),[85]
(d) Consumer Credit Directive (CCD).[86]

All this emphasis that has been put to ensuring the protection of consumers with appropriate legislative provisions clearly shows that consumer protection constitutes a priority for the Union. But what is the underlying rationale that necessitates consumer protection?

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[82] M. Loos, *Review of the European Consumer Acquis* (Centre for the Study of European Contract Law Working Paper Series No 2008/03, April 2008) https://ssrn.com/abstract=1123850 accessed 21/08/24: (a) Directive 85/577/EEC to protect the consumer in respect of contracts negotiated away from business premises, (b) Directive 90/314/EEC on package travel, package holidays and package tours, (c) Directive 93/13/EEC on unfair terms in consumer contracts, (d) Directive 94/47/EC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, (e) Directive 97/7/EC on the protection of consumers in respect of distance contracts, (f) Council Directive 98/6/EC on consumer protection in the indication of the prices of products offered to consumers, (g) Directive 98/27/EC on injunctions for the protection of consumers' interests [1998] OJ L166/51, (h) Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees.

[83] European Parliament and Council Directive 2011/83/EU of 25 October 2011 on consumer rights [2011] OJ L304/64.

[84] European Parliament and Council Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (Unfair Commercial Practices Directive) [2005] OJ L149/22.

[85] European Parliament and Council Directive 2002/65/EC of 23 September 2002 concerning the distance marketing of consumer financial services (Distance Marketing for Financial Services Directive) [2002] OJ L271/16.

[86] European Parliament and Council Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers (Consumer Credit Directive) [2008] OJ L133/66.

As presented above, consumer protection was not included in the objectives of the Community in its initial stage. It constituted merely a means of achieving the conditions for the smooth functioning of the Single Internal Market. The use of this instrument was subject to its necessity for the functioning of the market and the immediacy of its effects on it. The "raising of the standard of living" of citizens was pursued only by promoting the production and distribution of goods, i.e. it was geared to the needs of suppliers. As a result, the promotion of consumer interests was largely based on the smooth functioning of the institutions of the liberal economy, in particular free and fair competition and supply and demand rules, without being a specific focus of EU policy.[87]

As the Community evolved through the years, reaching today's form, consumer protection became one of the main pursuits. Either as a means to achieve a functioning Internal Market or as a goal on its own, "*Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities*". Article 12 TFEU, which contains the so-called horizontal clause ("Querschnittsklausel") plays a crucial role in putting consumer protection in the center of policy consideration when the EU legislates in various sectors. This exact principle was applied also in the case of MiCAR. Certainly, MiCAR pursues other aims as well, however, as the Court has stated in its case law, "*the fact that [the Directive] is intended to assure other objectives cannot preclude its provisions from also having the aim of protecting consumers*".[88] Thus, consumer protection has been upgraded now, following the Lisbon Treaty, into a goal of its one. The Internal Market is now the means to achieving a high level of protection for consumers and not the other way around.[89] Consumer protection is one of the areas where citizens of the Union can directly reap the benefits of their countries being part of the bloc, as they can enjoy the rights that the EU legislation provides them with in the field of consumer protection.

The "unhooking" of consumer protection from the narrative of the Internal Market was imperative also in light of the measures receiving their recognition as crucial safeguards for protecting consumers. From a social point of view, consumers constitute a group of individuals that engage in commercial activities as counterparties to traders and sellers, who provide their goods and services in the market. When negotiating with the traders, consumers usually are not in the same position as their counterparties, but rather in a de facto weaker one. They are forced to deal with limited negotiation power and one of the market failures: information asymmetry.[90] This phenomenon, as it has been captured by the Nobel laureate (2001) economist George Akerlof in his now classic study on the "lemon market" is a basic and now commonly accepted source of consumer vulnerability and is therefore considered to justify consumer protection through mandatory law provisions.[91] In plain terms, information asymmetry refers to a situation where one party in a transaction has more or better information than the other. This imbalance of information can lead to market inefficiencies, as the less informed party may make decisions that do not fully reflect the true value or risks associated with the transaction.[92]

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[87] G. Dellios, *Consumer Protection and the System of Private Law*, Vol 1 (Sakkoulas, 2001) p. 403-404.

[88] Case C-178/94 *Dillenkofer v Bundesrepublik Deutschland* [1996] ECR I-4845, para. 39.

[89] G. Dellios, op. cit. 87, p. 408.

[90] Commission Notice, *Guidance on the Interpretation and Application of Directive 2011/83/EU on Consumer Rights* (2021/C 525/01) at 1.1 "The notions of 'trader' and 'consumer'.

[91] A. Karampatzos, *Private Autonomy and Consumer Protection* (Sakkoulas, 2016), p. 180.

[92] Indicatively, Commission Notice, *Guidance on the Interpretation and Application of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts* (2019/C 323/04) at 1.2.1.1. The definitions of 'seller' and 'consumer'.

In the context of financial transactions involving the exchange of crypto-assets, the risks related to misinformation are even more pertinent, taking into account the decentralized nature of the ledgers and the issues regarding transparency. Specifically, crypto-asset retail holders are vulnerable to different risks, such as wallet hacks, ransomware frauds, celebrity and corporate impersonation, social media hijacking, goodwill airdrop fraud, romance scams, pig butchering, and giveaway/multiplier scams.[93] Unsophisticated investors are targeted by unfair crypto-exchanges which breach their contracts, use Ponzi schemes,[94] or trade fake cryptocurrencies. MiCAR, through its provisions and the measures included therein, aims at resolving this imbalance of power[95] and providing consumers of the relevant services with the required protection.

## *2.2 Evidence of Consumer Protection objectives within MiCAR*

In first sentence of MiCAR's preamble, it is stated: "*The EU Parliament and the Council of the EU, having regard to the Treaty of the Functioning of the European Union, and in particular Article 114 thereof* (…)". Article 114 TFEU primarily concerns the internal market of the EU, serving as the legal basis for adopting measures aimed at harmonizing national laws that directly affect the establishment and functioning of the internal market. This reference to Article 114 TFEU within the context of MiCAR underscores its role in revealing the Regulation's legal foundation, utilized by the EU legislator in accordance with the subsidiarity principle before proceeding with the adoption of the legislative text. The effective functioning of the internal market is closely interrelated with ensuring a high level of protection for consumers. Consumer protection rules can enhance market outcomes, promote fairness, and support social objectives. Thus, empowering consumers and safeguarding their interests are key EU policy goals.[96]

Consumer protection has been increasingly central to EU policy since its initial inclusion in the Treaties through Article 153 TEC. With the Amsterdam Treaty, this focus was expanded with the addition of a new chapter, comprising Articles 129A-153. The Lisbon Treaty further refined the Union's responsibilities by upgrading Article 153 para. 2 to Article 12 TFEU, which is now part of the Provisions of Title II, General Application. This slow but steady evolution indicates how consumer protection has become a main consideration in the EU's efforts in establishing and developing the bloc's internal market.

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[93] J. Scharfman, 'Introduction to Cryptocurrency and Digital Asset Fraud and Crime' in J. Scharfman, *The Cryptocurrency and Digital Asset Fraud Casebook* (Springer International Publishing, 2023) p. 1–16.

[94] A Ponzi scheme is a type of sophisticated financial pyramid in which a scammer generates returns and distributes payouts using funds from newer participants. The scheme continues to operate until it becomes unsustainable to attract new investors or when participants attempt to withdraw all their savings; A. P. Alekseenko, *Model Framework for Consumer Protection and Crypto-Exchanges Regulation* (2023) 16 Journal of Risk and Financial Management https://doi.org/10.3390/jrfm16070305 accessed 14/06/24, p. 9.

[95] Since "*knowledge is power*". Francis Bacon, *Meditationes Sacrae* (1597).

[96] European Parliament, *Consumer Policy: Principles and Instruments* https://www.europarl.europa.eu/factsheets/en/sheet/46/consumer-policy-principles-and-instruments accessed 21/08/24 at 2.2.1.

This is further reaffirmed by the recent adoption of Regulation (EU) 2021/690 establishing the Single Market Programme.[97] Recital (3) highlights that the functioning of the internal market is supported by a substantial body of Union law, which includes aspects such as competitiveness, standardization, and, among others, consumer protection.[98]

Following the Covid-19 pandemic and the rapidly changing environment of digital revolution and globalization, the EU deemed it appropriate to move forward with the adoption of a "New Consumer Agenda", that would present the EU vision on consumer policy from 2020 to 2025,[99] building on the 2012 Consumer Agenda (which expired in 2020)[100] and the 2018 New Deal for Consumers.[101] This initiative focuses on five key priority areas:

(a) Green transition,
(b) Digital transformation,
(c) Redress and enforcement of consumer rights,
(d) Specific needs of certain consumer groups, and
(e) International cooperation.

As far as digital transformation is concerned, the EU realizes that consumers are heavily affected by the radical changes that the new technologies confer to their lives. Those changes can simultaneously offer a wide range of opportunities and choices for both goods and services, while also creating obstacles in the enjoyment of their rights and the safeguarding of their economic interests. Therefore, especially in light of the more and more extensive use of new technologies in the financial sector, MiCAR, the Regulation now governing the markets in crypto-assets, includes provisions that serve the objective of protection consumers that engaged in economic activities relating to crypto-assets covered by this specific Regulation.

The absence of an explicit reference to Article 169 TFEU in the Preamble of the Regulation, which outlines the EU's objective to promote a high level of consumer protection through legislative measures including directives and regulations, to ensure consumer safety, adequate information, and protection across the internal market, while coordinating national policies, shall not be an indicator that consumer protection is excluded from the objectives of the Regulation. Such a reference would only be imperative should there be a need for an appropriate legal basis for the adoption of minimum harmonization Directives in the sector of consumer protection.[102] However, this practice has long been abandoned. Ever since the *Tobacco Advertising* case, it has been established that the adoption of minimum

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[97] Regulation (EU) 2021/690 stablishing a programme for the internal market, competitiveness of enterprises, including small and medium-sized enterprises, the area of plants, animals, food and feed, and European statistics (Single Market Programme) [2021] OJ L153/1.

[98] Recital (3) Regulation (EU) 2021/690 stablishing a programme for the internal market, competitiveness of enterprises, including small and medium-sized enterprises, the area of plants, animals, food and feed, and European statistics (Single Market Programme) [2021] OJ L153/1.

[99] Communication from the Commission to the European Parliament and the Council, *New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery* COM(2020) 696 final.

[100] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, *A European Consumer Agenda - Boosting Confidence and Growth* COM(2011) 100 final.

[101] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, A New Deal for Consumers COM(2018) 183 final.

[102] Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-08419, para 104; E. Alexandridou, 'EU consumer protection law' in E. Alexandridou and others, *The New Law of Consumer Protection* (4th edn, 2023, Nomiki Bibliothiki) p. 18.

harmonization Directives in the sphere of consumer law is contrary to the principle of the internal market, as it allowed MS to provide for stricter measures in favor of consumers. This could result, according to the Court, in the existence of different regulations from one MS to another, which would open the door wide to the introduction of new barriers to the intra-Community trade.[103]

There are other indicators signaling that one of the objectives pursued by MiCAR is consumer protection. Those indicators must be searched, firstly, in the Preamble of the Regulation. Firstly, in Recital (29) the Regulation provides that consumer protection rules remain applicable where crypto-asset transactions concern B2C relationships, even if the respective crypto-assets involved in those transactions do not fall within the applicability scope of MiCAR. However, there may be instances where existing consumer law provisions fall short in covering all aspects of crypto-asset transactions requiring attention. Thus, as highlighted in Recital (4), such complete absence of rules may leave holders of crypto-assets exposed to risks. Moreover, Recitals (79) et seq. emphasize the importance of regulating the conduct of CASPs with the explicit aim of ensuring consumer protection.[104] Furthermore, a significant indicator of the intersection between consumer protection and the MiCAR regulatory framework is the definition of "retail holder" in Article 3 (37): "*Retail holder means any natural person who is acting for purposes which are outside the person's trade, business, craft or profession*". This definition, on first reading seems to equate the widely recognized notion of a "consumer" as delineated in multiple EU legislative texts, with the concept of a "retail holder". However, a more detailed analysis is necessary to fully understand the implications and scope of the term "retail holder" within the context of MiCAR.

Considering all of the above, it can be concluded that consumer protection serves as one of the objectives of MiCAR. The need for the effective and competitive functioning of the Single Internal Market necessitates that the EU incorporates in its legislative initiatives, especially those concerning digitalization, the prioritizing of consumer protection. However, consumer protection as such is not pursued only for the benefit of the internal market, but it bears its own goals and objectives, relating to the protection of the rights and economic interests of consumers.

[103] Case C-376/98 *Germany v European Parliament and Council* [2000] ECR I-08419, para 104; E. Alexandridou and others, op. cit. 102, p. 18-19.

[104] Recital (79) MiCAR: ("*In order to ensure consumer protection, market integrity and financial stability, crypto-asset service providers should* (…)"; Recital (80) MiCAR: "*To ensure consumer protection, crypto-asset service providers authorized*…"; Recital (85) MiCAR: "*To ensure consumer protection, crypto-asset service providers that exchange crypto-assets for funds*…"; Recital (89) MiCAR: "*Crypto-asset service providers that place crypto-assets for potential holders should, before the conclusion of a contract, communicate to those persons information on how they intend to perform their service. To ensure the protection of their clients, crypto-asset service providers that are authorized*…".

## 2.1 *"Consumer" in MiCAR – more like retail holder*

Article 3 MiCAR defines a "retail holder" as "*any natural person who is acting for purposes which are outside that person's trade, business, craft or profession*".[105] This definition includes the two main characteristics that are present in the majority of EU legislative texts that include their own, each time, definition of consumer.[106] Those are:

(a) The protected subject needs to be a "*natural person*",

(b) "*Acting for purposes which are outside some kind of business, commercial or trade activity*".[107]

In particular, in CRD Article 2 (1), a consumer is defined as "any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession". The same definition is also adopted in Article 2 (a) UCPD, in Article 2 (b) UCTD, in Article 3 (1) CCD and Article 2 (d) DMFSD.

The notion of a "consumer" has been a focal point of academic scrutiny and debate. Within the multitude of Directives related to consumer protection, the EU legislator has established various definitions of "consumer," which exhibit varying degrees of differentiation. Since those provisions are included in Directives of minimum or maximum harmonization, there is a need for transposition into the national law of MS. During this process, MS retain a degree of discretion in "designing" their national provisions and "constructing" the national definition of "consumer". In this respect, to an extent, consumer definitions chosen in certain MS differ from EU law.

Indicatively, in Greece, the Consumer Protection Act 2251/1994, prior to its revision with law 4512/2018, defined a consumer as "*every natural or legal person, at whom products or services on a market are aimed, and who makes use of such products and services, so long as the person is the end recipient*".[108] This definition, adopting the "final addressee" approach,[109] affording protection to a wider scope of subjects than the EU one, which only covered natural person and those only to the extent that they were acting outside their professional capacity, allowed for differentiated interpretations, resulting in fragmentation and legal uncertainty. In Greek academia, it was acknowledged that in practice such a broad definition of "consumer" can lead to difficulties in applying the law.[110]

Therefore, in light of the EU's attempt to achieve harmonization and prevent legal fragmentation and conceptual ambiguities, the Greek legislator adopted the current definition of consumer, in full alignment with the EU legislative acts. Now Article 1a (1) reads: "*Consumer: any natural person who acts for reasons which do not fall within the scope of his or her commercial, business, craft or liberal professional activity*". The majority of other EU countries have conditioned by now their legislative texts to fully reflect the EU approach. In spite of any remaining slight differences in scattered national rules on

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[105] Article 3 MiCAR.

[106] The notion of consumer has been specified separately in each adopted instrument, on an ad hoc basis. Those instruments include both acts of substantial and procedural law.

[107] H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, *EC Consumer Law Compendium: The Consumer Acquis and its Transposition in the Member States* (Otto Schmidt/De Gruyter European Law Publishers, 2008) https://doi.org/10.1515/9783866537248 accessed 14/07/24, p. 455.

[108] Article 1 para 4(a) Greek Law 2251/1994 (as in force at the time).

[109] Also previously adopted in Spain. See Art. 1(2) and (3) of Spanish Law 26/1984 of July 19 on Consumer Protection.

[110] H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, op. cit. 107, p. 462.

consumer protection, the definitions by and large accord, exhibit a common core, including the two characteristics presented above.[111]

In light of MiCAR, although the EU legislator chose to include the two key characteristics in the definition of "retail holder" and thereby effectively align it with the concept of a "consumer", the term "consumer" itself was not explicitly adopted. This practice has been previously observed in the consumer law context, specifically in Directive 94/47[112] which employed the term "purchaser" rather than "consumer". However, the case of MiCAR presents a distinct scenario. Since MiCAR constitutes a regulation, with direct effect and no need for further transposition, an explicit reference to the notion of "consumer" in the text of the Regulation would simultaneously mean the introduction of a uniform approach on what constitutes a consumer. This would subsequently raise issues in the adoption process of the Regulation, as many MS might resist such a provision due to potential clashes with their current legislative framework on consumer protection. Furthermore, given that consumer protection falls under the EU's shared competences (Article 4 TFEU), where the EU can only act if the principle of subsidiarity is satisfied,[113] there is insufficient basis for mandating such a uniform legislative initiative within MiCAR.

The newly introduced notion of a "retail holder" constitutes a descriptive term to cover those acquiring crypto-assets falling under the protective scope of MiCAR. It can be used both in the context of the activities of crypto issuers and in the context of activities of CASPs. The adopted definition in Article 2 of the Regulation directs the content of the notion to that of a "consumer". The phrasing of this term indicates that, in addressing whether legal persons might receive the same level of protection as natural persons in comparable transactional scenarios, MiCAR adheres to the established EU legal principle that such protection is reserved exclusively for natural persons. Thus, legal entities are not afforded the same consumer protection under this Regulation as natural persons acting in a similar capacity.[114]

Within the consumer protection regime, an open discussion continues to exist on whether and under which conditions investors should receive the same level of protection as consumers. This issue is also pertinent to the definition of a "retail holder" under MiCAR, given the conceptual parallels between "retail holder" and "consumer". To resolve this issue, it is crucial first to determine whether an investor qualifies as a consumer under existing frameworks. Following this, it is necessary to evaluate whether such an investor, also falling under the notion of a "consumer" can simultaneously be classified as a "retail holder" under MiCAR to ascertain whether they are entitled to the protections provided by the Regulation.

As presented above, consumers have 2 main characteristics. They constitute natural persons, and they act for purposes that can be regarded as being outside their trade or profession. In determining whether an activity falls outside a person's professional capacity, certain factors are to be considered according to the jurisprudence of the CJEU.[115] In this assessment, the context of the specific contract and

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[111] H. Schulte-Nölke, C. Twigg-Flesner and M. Ebers, op. cit. 107, p. 460.

[112] Not currently into force, repealed by Directive 2008/122/EC. The concept of "purchaser" is now replaced by the term "consumer" in this context.

[113] V. Christianos, R.E. Papadopoulou, and M. Perakis, op. cit. 72, p. 60.

[114] Joined Cases C-541/99 and C-542/99 *Cape Snc v Idealservice Srl and Idealservice MN RE Sas v OMAI Srl* [2001] ECR I-9427, para. 17; Case C-361/89 *Criminal Proceedings against Patrice Di Pinto* [1991] ECR I-0671, para. 19-23; M. Kingisepp, *The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive—A Significant Change of Paradigm?* (2011) Juridica International https://www.juridicainternational.eu/public/pdf/ji_2011_1_44.pdf accessed 21/08/24, p. 48.

[115] For the purposes of the analysis, case law on the notion of "consumer" in the context of Regulation 1215/2012 (Brussels I Regulation) will be used. Although the concept of consumer is examined every time as an autonomous concept within the limits and objectives of the Regulations in which it appears, it is deemed appropriate to draw

the subjective position assumed by the contracting party claiming to be a consumer prove to be of significant importance. This has been reaffirmed by the CJEU in multiple occasions, ever since the emblematic case of *Benincasa*, where it was stated that the concept of "consumer" "*must be interpreted restrictively, by referring to the position of that person in a given contract, in relation to the nature and purpose of the contract, and not to the subjective situation of that person, a single person who can be regarded as a consumer in the context of some transactions and as an economic operator in the context of other transactions".*[116]

To assess whether an individual qualifies as a consumer within a contract, one may take into account the purpose of that specific contract. According to well-established case law, "*only contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption, are covered by the special rules laid down by the regulation* [Brussels I] *to protect the consumer as the party deemed to be the weaker party".*[117] Hence, for a contracting party to be considered a consumer, the contract must be for private consumption, satisfying private needs, and not linked to any commercial or professional objectives.[118] This can prove to be a challenge when complex financial activities are performed by individuals, such as the acquisition of crypto-assets. It is hard to differentiate between investor activities that pertain to the professional endeavors of individuals and those that relate solely to their personal needs. Such an assessment should be made on a case-by-case basis, taking into account the specific context of the relevant transactions, and especially the purpose served by the concluding contract in question.

In cases where the factual background is not helpful in drawing clear lines between professional and personal use, the CJEU's narrative for dual purpose contracts might be of use to the national courts, vested with the competence to rule on the facts of the cases pending before them. According to the CJEU's case law, ever since the *Gruber* case, it has been established that activities which are partly business and partly private must be regarded as having been concluded by a consumer under certain conditions. When a contract is aimed at both a private and a professional purpose, a distinction must be made between:

(a) professional use of the good or service of a "*slight, marginal or having a negligible nature in the context of the operation*",
(b) professional use of the good or service of a "*relevant*" nature, and
(c) professional use of the good or service of a "*predominant or not negligible*" nature.

According to the CJEU, only in the first scenario -where professional use is "slight, marginal or negligible", can the contract be classified as one "concluded by a consumer". If the professional use of the good or service is "predominant" or "non-negligible", the contract cannot be qualified as a "contract

analogies and compare and contrast the interpretations adopted by the Court in various circumstances, since, as T. Rauscher has pointed out, the concept of consumer contained in other rules of European law must coincide with that used by Brussels I Regulation to ensure coherence of EU law. See T. Rauscher, *Ehegüterrechtlicher Vertrag und Verbraucherausnahme? – Zum Anwendungsbereich der EuVTVO*, IP-Rax, 2011-V, p. 484-487.

[116] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited [*2018] ECR I-00000, para 29; Case C-464/01 Johann *Gruber* v Bay Wa AG [2005] ECR I-00000, para. 36; Case C-269/95 *Francesco Benincasa v Dentalkit Srl* [1997] ECR I-03641, para. 16-18.

[117] Case C-498/16 *Maximilian Schrems v Facebook Ireland Limited* [2018] ECR I-00000, para. 30; Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00000, para. 36.

[118] On the act of consumption, Case C-419/11 *Česká spořitelna, a.s. v Gerald Feichter* [2013] ECR I-00000, para. 34.

entered into by a consumer".[119] Hence, pursuant to this line of argumentation, the Court has lowered the threshold for what qualifies as a professional activity and subsequently what activities would automatically fall outside the protective scope of protective provisions for consumers, thus widening the scope of afforded consumer protection, even in cases concerning "grey zones".

Moreover, when examining the context of the conclusion of a contract, with the aim of assessing its purpose, certain factors have been identified as irrelevant by the CJEU in the case of *Petruchová*. According to the facts of this case, Ms Petruchová, a resident of the Czech Republic, remotely concluded a framework contract with FIBO, a brokerage company incorporated under Cypriot law, which enabled her to engage in transactions on the international FOREX (foreign exchange) market. Her objective was to conclude contracts for differences (CFDs) to profit from fluctuations in exchange rates between base and quote currencies. Ms Petruchová, instead of investing with her own funds, utilized a trading mechanism known as "lots", which allowed her to trade with more funds than she had at her disposal.

On October 3, 2014, Ms. Petruchová concluded a CfD with FIBO, under which she placed an order to purchase 35 lots at a fixed rate of exchange against Japanese yen (JPY). Due to the processing of a long series of orders in the FIBO trading system, the order placed by Ms. Petruchová was executed by that company with a delay of 16 seconds, during which a fluctuation in the USD/JPY exchange rate occurred on the FOREX market. This delay caused Ms. Petruchová to miss out on a potential tripling of her profit. For this reason, Ms Petruchová proceeded to file an action claiming the unjust enrichment of FIBO before a Czech Regional Court, arguing that her contract with FIBO should be considered a consumer contract. She claimed that under Article 17(1) of Regulation No 1215/2012 (Brussels I bis), the court of her residence should have jurisdiction, despite a jurisdiction clause in the contract that designated Cypriot courts as the exclusive forum.

Thus, the admissibility of Ms. Petruchová's action hinged on whether she could be characterized as a consumer and, consequently, whether the jurisdiction clause in her contract with FIBO could be nullified. The first instance court ruled that the jurisdiction clause, which assigned exclusive competence to Cypriot courts, was valid and, consequently, that it did not have international jurisdiction to rule on the dispute pending before it. "*In the view of that court, Ms Petruchová was not a 'consumer' within the meaning of Article 17(1) of Regulation No 1215/2012, since she had not concluded the CfD at issue in order to meet her private needs, had the knowledge and expertise essential for entering into CfDs, acted in the aim of obtaining profit and was warned of the relevant risks and the unsuitability of CfDs for 'retail clients', within the meaning of Article 4(1)(12) of Directive 2004/39*".[120]

Ms Petruchová appealed against the decision. The appellate court, before issuing its final ruling, referred a preliminary question to the CJEU to clarify the concept of "consumer" under EU law. The question focused on:

- whether Article 17(1) of Brussels I bis must be interpreted as meaning that a natural person who, under a contract, such as a CfD, concluded with a brokerage company, carries out transactions on the FOREX market through that intermediary, can be qualified as a 'consumer' within the meaning of that provision, and
- whether factors such as the value of transactions carried out under such contracts, the extent of the risks of financial loss associated with their conclusion, the person's possible knowledge or

[119] Case C-464/01 *Johann Gruber v Bay Wa AG* [2005] ECR I-00000, para 39, 42, 45, 46; Case C-630/17 *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen* [2019] ECR I-00000, para. 93.

[120] Case C-208/18 *Jana Petruchová v FIBO Group Holdings Limited* [2019] ECR I-00000, para 25.

expertise in the field of financial instruments or his or her active behavior in such transactions and the fact that financial instruments are not covered by Article 6 of the Rome I Regulation or that the person is a 'retail customer' within the meaning of Article 4(1)(12) of Directive 2004/39 are relevant for the purposes of that classification.

With respect to the first question addressed by the referring national court, the CJEU reaffirmed its well-established jurisprudence, highlighting the importance of the domestic courts' assessment of the case's specific facts. In determining whether Ms. Petruchová acted with the view of satisfying her personal needs or for the benefit of hew professional activity, the national courts' factual evaluation is crucial.

In addressing the second question, the Court gave some insightful guidance in which factors shall be deemed irrelevant in the context of assessing whether an individual shall be considered a consumer. Specifically, the Court adopts the opinion that "*for the purpose of that classification, on the one hand, factors such as the value of transaction carried out under contracts such as financial contracts for differences, the extent of the risks of financial loss associated with the conclusion of such contracts, any knowledge or expertise that person has in the field of financial instruments or his or her active conduct in the context of such transactions are, as such, in principle irrelevant".* Should the Court had accepted such factors to be of importance in classifying individuals as consumers, it would have gone against the ratio of the consumer protection acquis and the overarching objective of legal certainty. This goal aims to enhance legal protection for individuals in the European Union by allowing plaintiffs to easily identify the appropriate court for legal actions and enabling defendants to reasonably foresee the jurisdiction where they may be sued. The notion of a consumer shall not be further restricted by additional factors, when EU law only sets two requirements, those of a natural person acting outside his professional capacity.

The Court did acknowledge that the value of transactions, assumed risks, and expertise shall not be deemed conclusive factors, but merely indicators that an activity is part of an individual's professional endeavors. However, by analogy, should a person, well-educated in crypto-assets, engage in relevant activities, e.g. acquisition of tokens, to satisfy personal needs, the mere fact that that individual happens to have knowledge on that field, does not deprive them per se of consumer protection. This view aligns with the reasoning adopted by a UK court in *Ramona Ang v. Reliantco Investments Limited*, where the mere possession of knowledge in a particular field did not negate the individual's consumer status.[121]

This narrative should be applied in the context of the notion of a "retail holder" as well. A "retail holder shall be considered a "consumer" and the concept of consumer in the context of MiCAR shall include that of an investor. This broader interpretation aligns with the objectives of consumer law as established since the proposal for the CFR,[122] the language of Recital (17) of the CRD, which explicitly addresses the concept of "predominant use" in dual-purpose contracts,[123] and the goals outlined in the New Consumer Agenda, particularly concerning Digital Transformation.[124] Moreover, the choice of

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[121] *Ramona Ang v Reliantco Investments Limited* [2019] EWHC 879 (Comm).

[122] The CFR is a legal tool developed to harmonize and simplify contract law across the EU. It is a comprehensive set of principles, definitions, and model rules intended to serve as a reference point for the development of European contract law, including areas like consumer protection. The drafters of the Framework deviated from those of the Green Paper and chose to extend the scope of the concept of consumer, aiming at more effectively achieving EU law harmonization. Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Legal Affairs, *The Common Frame of Reference: An Optional Instrument?* (European Parliament, 2008); M. Loos, op. cit. 82.

[123] Commission Notice, *Guidance on the Interpretation and Application of Directive 2011/83/EU on Consumer Rights* (2021/C 525/01) at 1.1 "The notions of 'trader' and 'consumer'.

[124] Communication from the Commission to the European Parliament and the Council, *New Consumer Agenda: Strengthening Consumer Resilience for Sustainable Recovery* COM(2020) 696 final, p. 10-12.

MiCAR to use the term "retail holder" instead of "consumer" offers a degree of flexibility, allowing for the extension of protections to a broader group of individuals without directly conflicting with the existing consumer acquis. This way, the protection afforded to retail holders under MiCAR can be more inclusive and potentially more effective, in light of the dynamic nature of digital markets and the diverse roles that individuals may undertake within them.

# *Chapter 3: Consumer Protection Provisions within MiCAR*

MiCAR covers multiple issues revolving around crypto-assets and the challenges that their trading creates, aligning with its broader objectives of ensuring financial stability, the smooth functioning of payment systems, monetary sovereignty, consumer protection and market integrity.[125] Those issues are addressed by the Regulation's provisions which can be characterized either as serving solely administrative purposes, or directly realizing the purpose of protecting consumers.[126] Thus, in order to comprehensively assess the afforded level of consumer protection enshrined within the measures of MiCAR, an analysis of certain key articles will be conducted.

Titles II to IV of MiCAR, establish rules for crypto-asset issuers, depending on the type of crypto-asset, regarding licensing, transparency, disclosure, and retail holder rights, closely mirroring the obligations of the Prospectus Regulation.[127] Title V of MiCAR proposes rules on authorization, transparency and prudential requirements addressed to CASPs, which closely resemble the obligations under MiFID II.[128] It can be observed that, although different provisions are addressed to different entities, i.e., crypto-asset issuers and service providers, there is a common core of prescribed obligations when it comes to the protection of consumers. This core includes the provisions relating to:

(a) Authorization requirements,
(b) Drafting of white papers,
(c) Liability clauses,
(d) Right of withdrawal,
(e) Redemption rights & Reserves of assets,
(f) Obligation to act honestly, fairly, professionally and in the best interest of the retail holder.

## *3.1 Authorization requirements*

In the context of MiCAR, and in line with other EU financial regulations, authorization can be understood as the process of obtaining approval by competent authorities for performing certain services or engaging in certain activities. Authorization requirements, according to this Regulation, are directed at CASPs and crypto-asset issuers, except those whose activities concern crypto-assets under Title II, i.e., crypto-assets other than ARTs and EMTs.[129] The authorization obligation primarily applies to CASPs -generally- and issuers of ARTs and EMTs, which are collectively known as stablecoins.[130] Thus, with

[125] Recitals (4) – (5) MiCAR.

[126] The differentiation in provisions of financial regulation rules on the basis of their nature has been supported in Greek academia, in the context of the national legislation transposing MiFID. See also A. Kouloridas, "The Regulation of "Inducements - Kickbacks" in *Investment Services Law. Part A: The Regulatory Framework - Issues of Interpretation and Application* (2010) 25 ChriDik, p. 39; V. Tountopoulos, *The Stock Exchange Order Contract* (Sakkoulas Publications, 2005), p. 351.

[127] 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 L168/12; F. Annunziata, op. cit. 42, p. 15.

[128] *ibid*.

[129] Recital (18) MiCAR. This category contains a wide variety of crypto assets, including utility tokens (Article 3 para. 1(9) MICAR).

[130] C. Gortsos, op. cit. 25, p. 16.

reference to these types of crypto-assets, the Regulation has opted for more stringent requirements, including the need for authorization.[131]

In light of the potential risks stablecoins pose to market stability, particularly if they become widely accepted as credible mediums of exchange, the EU legislator has introduced an additional procedural hurdle for companies seeking to issue their own stablecoins: the requirement of authorization.[132] The authorization scheme is not a novel practice within the EU financial regulation saga. EU legislative instruments related to Capital Markets and Banking Regulation (e.g., CRR, EMD2, PSD2, MiFID II) have long incorporated similar authorization provisions. While legislative acts like EMD2, PSD2 and CRD IV only indirectly refer to the consumer protection as an overarching objective guiding their provisions including those relating to authorization prerequisites,[133] Recital (37) MiFID II explicitly cites authorization as a mechanism for enhancing investor protection. To a certain extent aspects of investor protection inherently encompass consumer protection. The boundaries between the two are becoming less rigid, as consumers are often seen as retail investors, especially in markets like those involving crypto-assets where individuals are engaging in activities that were once the domain of professional investors. In these circumstances, consumers (particularly retail holders of crypto-assets) face similar vulnerabilities to investors, such as market volatility, complex product structures, and information asymmetries. Therefore, investor protection mechanisms—such as authorization requirements—serve the dual purpose of safeguarding consumers who participate in these markets.

In this respect, in the case of MiCAR, by allowing only a limited number of entities to provide certain services, only following a rigorous authorization procedure, the EU legislator ensures effective protection of end users of those services. This process guarantees that only those entities which have been thoroughly assessed and approved by competent authorities are permitted to offer such services, thereby not only protecting investors but also providing an added layer of consumer protection by preventing unqualified or unscrupulous entities from offering financial products that could harm market participants.

Article 16 MiCAR provides that a person shall only make an offer to the public, or seek the admission to trading, of an ART, within the Union, if the following requirements are fulfilled:

(a) The person must be the actual issuer of the ART, and

(b) They must either:

i) Be a legal person or other undertaking that is established in the Union and has been authorized by the competent authority of its home Member State in accordance with Article 21 MiCAR[134]; or, alternatively,

ii) a credit institution that complies with Article 17 MiCAR.[135]

The application submitted by the interested entity for obtaining authorization shall include, inter alia, the following:[136]

(a) the applicant issuer's address,

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[131] For ARTs, this is expressly stated in Recital (40) MiCAR. For EMTs, this is derived from the enhanced obligation imposed to crypto-asset issuers, contrary to what applies for crypto-assets covers by Title II of MiCAR.

[132] European Commission, *Explanatory Memorandum to the 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, 24 September 2020) {SEC(2020) 306 final}.

[133] Recital (10) EMD2; Recital (4) – (5) PSD2.

[134] Article 21: Grant or refusal of the authorization.

[135] Article 17: Requirements for credit institutions.

[136] Article 18, 34 MiCAR; C. Gortsos, op. cit. 25, p. 32.

(b) its articles of association,
(c) a program of operations, setting out the business model,
(d) a legal opinion that the ARTs do not qualify as financial instruments, e-money, deposits or structured deposits,
(e) a detailed description of the applicant issuer's governance arrangements,
(f) the identity of the members of the management body of the applicant issuer,
(g) proof that the above persons are of good repute and possess appropriate knowledge and experience to manage the applicant issuer,
(h) a crypto-asset white paper as referred to in Article 17 MiCAR,
(i) the policies and procedures referred to in Article 34 para. 5 (a)-(k) MiCAR,
(j) a description of the contractual arrangements with the third parties referred to in Article 34 (5), the applicant issuer's business continuity policy, the internal control mechanisms and risk management procedures and the procedures and systems, as well as
(k) a description of the issuer's complaint handling procedures.

Respectively, Article 48 MiCAR specifies that EMTs shall be offered to the public or issuers shall seek admission to trading, within the Union, if the following criteria are met by the interested party:

(a) They must be the actual issuer of the EMT and
(b) They must either:
i) Be authorized as a credit institution, under Article 8 CRD IV, or
ii) Be authorized as an electronic money institution, under Article 3 EMD2[137], which further references Articles 5-10 PSD2.[138]

The principal distinction between these provisions is that the authorization of EMTs is contingent solely upon compliance with other EU legislative instruments, such as the CRR,[139] CRD IV[140] and EMD2. In contrast, the issuance of ARTs can be performed by seeking specific authorization under the provisions of MiCAR. This difference can be understood in light of Recital (19) MiCAR, wherein the EU legislator identifies the similarities between electronic money and EMTs, justifying the necessity for uniform approaches and a harmonized regulatory framework concerning specific factors, including authorization procedures.

As far as CASPS are concerned, Article 59 MiCAR stipulates that:

*"A person shall not provide crypto-asset services, within the Union, unless that person is:*

*(a) a legal person or other undertaking that has been authorised as crypto-asset service provider in accordance with Article 63; or*

[137] European Parliament and Council Directive 2009/110/EC of 16 September 2009 on the taking up, pursuit, and prudential supervision of the business of electronic money institutions (E-Money Directive 2) [2009] OJ L267/7.

[138] European Parliament and Council Directive (EU) 2015/2366 of 25 November 2015 on payment services in the internal market (PSD2) [2015] OJ L337/35.

[139] 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 (Capital Requirements Regulation) [2013] OJ L176/1.

[140] 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 [2013] OJ L176/338.

*(b) a credit institution,[141] central securities depository,[142] investment firm,[143] market operator,[144] electronic money institution,[145] UCITS management company,[146] or an alternative investment fund manager that is allowed to provide crypto-asset services pursuant to Article 60."*

The regime for CASPs constitutes a combination of the two approaches on issuers of ARTs and EMTs. Entities seeking to provide crypto-asset services may do so either by obtaining authorization under the provisions of the MiCAR or by already operating, under certain conditions, as the following institutions: credit institutions, central securities depositories, investment firms, market operators, e-money institutions, UCITS management companies, or alternative investment fund managers. Those conditions are presented in Article 60 MiCAR.[147] Article 62 MiCAR provides for all the information that needs to be contained in the application for authorization. Specifically, the application shall contain:[148]

(a) the name, including the legal name,

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[141] 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 [2013] OJ L176/1 (CRR); 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 [2013] OJ L176/338 (CRD IV).

[142] 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 L257/1 (CSDR).

[143] 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 L173/349 (MiFID II).

[144] *ibid*.

[145] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up and pursuit of the business of electronic money institutions and amending Directives 2005/60/EC and 2006/48/EC [2009] OJ L267/7 (EMD2).

[146] 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) and amending Directives 98/8/EC and 2001/107/EC [2009] OJ L302/32 (UCITS IV Directive).

[147] A credit institution may provide crypto-asset services if it notifies the information referred to in paragraph 7 to the competent authority of its home Member State at least 40 working days before providing those services for the first time.

A central securities depository authorised under Regulation (EU) No 909/2014 of the European Parliament and of the Council shall only provide custody and administration of crypto-assets on behalf of clients if it notifies the information referred to in paragraph 7 of this Article to the competent authority of the home Member State, at least 40 working days before providing that service for the first time.

An investment firm may provide crypto-asset services in the Union equivalent to the investment services and activities for which it is specifically authorised under MiFID if it notifies the competent authority of the home Member State of the information referred to in paragraph 7 of this Article at least 40 working days before providing those services for the first time.

An electronic money institution authorised under EMD2 shall only provide custody and administration of crypto-assets on behalf of clients and transfer services for crypto-assets on behalf of clients with regard to the e-money tokens it issues if it notifies the competent authority of the home Member State of the information referred to in paragraph 7 of this Article at least 40 working days before providing those services for the first time.

A UCITS management company or an alternative investment fund manager may provide crypto-asset services equivalent to the management of portfolios of investment and non-core services for which it is authorised under Directive 2009/65/EC or Directive 2011/61/EU if it notifies the competent authority of the home Member State of the information referred to in paragraph 7 of this Article at least 40 working days before providing those services for the first time.

A market operator authorised under MiFID may operate a trading platform for crypto-assets if it notifies the competent authority of the home Member State of the information referred to in paragraph 7 of this Article at least 40 working days before providing those services for the first time.

[148] C. Gortsos, op. cit. 25, p. 63.

(b) the legal entity identifier of the applicant CASP,
(c) the website operated by that provider, and its physical address,
(c) the legal status of the applicant CASP,
(d) its articles of association,
(e) a program of operations setting out the types of crypto-asset services that the applicant wishes to provide, including where and how these services are to be marketed,
(d) a description of the applicant's governance arrangements,
(e) proof of absence of a criminal record in respect of infringements of national rules in the fields of commercial, insolvency, financial services law, anti-money laundering and counter-terrorism law, and professional liability obligations, for natural persons involved in the applicant's management body and those holding, directly or indirectly, 20% or more of the share capital or voting rights,
(f) proof that the natural persons involved in the applicant's management body collectively possess sufficient knowledge, skills and experience to manage that provider,
(g) a description of the applicant's internal control mechanism, procedure for risk assessment and business continuity plan,
(h) descriptions both in technical and non-technical language of the applicant's IT systems and security arrangements
(i) proof that the applicant meets the prudential safeguards in accordance with Article 60 MiCAR,
(j) a description of the applicant's procedures to handle complaints from clients,
(k) a description of the procedure for the segregation of client's crypto-assets and funds,
(l) a description of the procedure and system to detect market abuse.

With regards to certain CASP services:

(m) if the applicant intends to ensure the custody and administration of crypto-assets on behalf of third parties, a description of the custody policy,
(n) if the applicant intends to operate a trading platform for crypto-assets, a description of the operating rules of the trading platform,
(o) if the applicant intends to exchange crypto-assets for fiat currency or crypto-assets for other crypto-assets, a description of the non-discriminatory commercial policy,
(p) if the applicant intends to execute orders for crypto-assets on behalf of third parties, a description of the execution policy, and
(q) if the applicant intends to receive and transmit orders for crypto-assets on behalf of third parties, proof that the natural persons giving advice on behalf of the applicant have the necessary knowledge and expertise to fulfil their obligations.

It is evident that the authorization framework for CASPs in MiCAR has been significantly influenced by the relevant provisions established in MiFID II. This influence stems from the similarities in the services offered by CASPs and those provided by entities regulated under MiFID II.[149] There are significant parallels between the information required for authorization under MiFID II and that required under MiCAR.[150] However, MiCAR requires additional information, e.g., IT systems and security arrangements related to DLT, to be provided to the competent authorities, prior to their assessment for

[149] Article 3 para. 1(16) MiCAR; Annex I, Section A MiFID II.

[150] For reference, see Article 7 MiFID II and Commission Delegated Regulation 2017/1943 regulatory technical standards on information and requirements for the authorisation of investment firms.

granting or refusing authorization,[151] to account for the distinct digital nature of the services offered by CASPs. Overall, the authorization obligation serves as a crucial initial safeguard ensuring that crypto-asset issuers and CASPs operate transparently, prevent unfair practices and provide retail holders with a clear understanding of how crypto-assets circulate in the market. This, in turn, helps protect the interests of consumers in the market.

## *3.2 Drafting of white papers*

Before making an offer to the public, next to the authorization requirements, lies the obligation of the issuers to publish white papers. This obligation covers all types of crypto-assets, i.e., also those under Title II MiCAR. As Recital (24) indicates, "*In order to ensure their protection, prospective retail holders of crypto-assets should be informed of the characteristics, functions and risks of the crypto-assets that they intend to purchase.*" This is achieved by means of a crypto-asset white-paper, an information document containing mandatory disclosures.[152] Crypto-asset issuers are obliged, under Articles 6 (referring to crypto-assets other than ARTs and EMTs), 19 (referring to ARTs) and 51 (referring to EMTs) to include certain information to be published on the white papers. The disclosure items are presented in Annex I of the Regulation. Those entail mainly the following:

(a) Information about the offeror or the person seeking admission to trading,
(b) Information about the operator of the trading platform in cases where it draws up the crypto-asset white paper,
(c) Information about the crypto-asset project,
(d) Information about the offer to the public of crypto-assets or their admission to trading,
(e) Information about the crypto-assets,
(f) Information on the rights and obligations attached to the crypto-assets,
(g) Information on the underlying technology,
(h) Information on the risks.[153]

Disclosure of information has been the principal traditional tool for the further efficiency of the market.[154] The more information is provided to market participants, the easier it is for them to develop trust in the system, assess situations being adequately informed and, therefore, be able to make the most appropriate decision in line with their economic goals and aspirations.[155] In creating an obligation for the publication of an information document, MiCAR has, to an extent, "mimicked" the Prospectus Regulation, which lays down requirements for the drawing up, approval and distribution of another information document, the so-called Prospectus.[156] Recital (7) of the Prospectus Regulation explicitly states that: "*The provision of information which […] is necessary to enable investors to make an informed investment decision ensures, […], the protection of investors. Moreover, such information provides an effective means of increasing confidence in securities and thus of contributing to the proper functioning and development of securities markets. The appropriate way to make that information available is to publish a prospectus.*" Although MiCAR does not concern securities, but rather crypto-assets, given the

[151] Article 63 MiCAR.
[152] Recital (24) MiCAR.
[153] Annex I MiCAR.
[154] D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, op. cit. 25, p. 44.
[155] A. Kontogianni 'Article 3 Greek Law 2251/1994' in E. Alexandridou and others, op. cit. 102, p. 241.
[156] Article 1 Prospectus Regulation.

difficulty in drawing the line between the two,[157] it can be argued that the MiCAR white paper and the Prospectus serve similar purposes and aim in achieving similar results, namely the protection of retail holders/ investors and, in a macroeconomic view, the ensuring of market efficiency.

In the case of the Prospectus Regulation, a prospectus ought to be published when securities are offered to the public or admitted to trading on a regulated market situated or operating within a Member State.[158] Article 6 of the Prospectus Regulation lays down rules on the content and the form that the Prospectus should follow. As to its content, it is clarified that the Prospectus must contain information on both the issuers and the securities, pertaining mainly to:

(a) the assets and liabilities, profits and losses, financial position, and prospects of the issuer and of any guarantor,
(b) the rights attaching to the securities, and
(c) the reasons for the issuance and its impact on the issuer.

As to the form of presentation for this information, paragraph 2 of the same Article specifies that a Prospectus may be composed of a combination of a registration document (issuer's information), a securities note (security's information) and a summary, with the content as presented in Article 8 Prospectus Regulation. Although the text of the Regulation lays down the main rules, these instructions were not sufficient to adequately guide the conduct of issuers, in their attempt to comply with their obligations. For this reason, the Commission moved forward with the adoption of Delegated Regulation 2019/980 on the format, content, scrutiny and approval of the prospectus, in order to further clarify disclosure requirements.[159] The articles and the annexes of this Regulation go into detail on what exactly needs to be reported in the prospectus, depending on the type of security concerned, i.e., equity securities, non-equity securities, depository receipts issued over shares etc.

In comparison to MiCAR, the Prospectus regulation, in accordance to the Lamfalussy process, provides more detailed guidance on the exact content and format of the information document necessary for the proper issuance of securities. These details are set out in Delegated Regulation 2019/980 instead of the main text of the Prospectus Regulation. MiCAR, however, takes a different approach. While the Lamfalussy process has been adopted for other issues, the EU legislator chose to include more content requirements for the white paper within the Annexes of the Regulation, avoiding the need for a separate legislative act. It can be argued that such a venture was only possible, since the EU legislator had already gained the necessary experience regarding disclosure requirements for securities. As a result, upon the adoption of MiCAR, the EU legislator was quick and prepared -to an extend- to formulate the disclosure rules for ARTs, EMTs and other crypto-assets. Moreover, while the Prospectus Regulation goes into more excruciating detail on the Prospectus "phrasing" required, MiCAR's disclosure requirements aim to provide a more comprehensive overview for retail holders of crypto-assets, covering a broader range of information. The following table highlights the key differences between the disclosure requirements of the Prospectus Regulation and those of MiCAR.

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[157] M. Lehmann and F. Schinerl, *The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR* (14 May 2024) European Banking Institute Working Paper Series no 171 https://ssrn.com/abstract=4827376; D. A. Zetzsche, R. P. Buckley, D. W. Arner and M. van Ek, op. cit. 25, p. 16.

[158] Article 3 Prospectus Regulation.

[159] Commission Delegated Regulation (EU) 2019/980 of 14 March 2019 supplementing Regulation (EU) 2017/1129 of the European Parliament and of the Council as regards the format, content, scrutiny and approval of the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Commission Regulation (EC) No 809/2004 [2019] OJ L166/1.

| | Prospectus Regulation | MiCAR | |
|---|---|---|---|
| | | Information about the offeror (*for Title II crypto-assets*) | Art. 6 para. 1 (a), |
| Art. 6 para. 1 (a) | The assets and liabilities, profits and losses, financial position, and prospects of the issuer | Information about the issuer (if different than the offeror) | Art. 6 para. 1 (b), Art. 19 para. 1 (a), Art. 51 para. 1 (a) |
| | | Information about the operator of the trading platform in cases where it draws up the crypto-asset white paper (*for Title II crypto-assets*) | Art. 6 para. 1 (c) |
| Art. 6 para. 1 (b) | the rights attaching to the securities | Information about the crypto-asset project/ the ART/ the EMT | Art. 6 para. 1 (d) & (f), Art. 19 para. 1 (b), Art. 51 para. 1 (b) |
| | | Information about the offer to the public of crypto-assets or their admission to trading | Art. 6 para. 1 (e), Art. 19 para. 1 (c), Art. 51 para. 1 (c) |
| Art. 6 para. 1 (b) | the rights attaching to the securities | Information on the rights and obligations attached to the crypto-assets | Art. 6 para. 1 (g), Art. 19 para. 1 (d), Art. 51 para. 1 (d) |
| | | Information on the underlying technology | Art. 6 para. 1 (h), Art. 19 para. 1 (e), Art. 51 para. 1 (e) |
| Art. 6 para. 1 (c) | the reasons for the issuance and its impact on the issuer | Information on the risks | Art. 6 para. 1 (i), Art. 19 para. 1 (f), Art. 51 para. 1 (f) |
| | | Information on the reserve of assets (*for ARTs*) | Art. 19 para. 1 (g) |
| | | Information on the principal adverse impacts on the climate and other environment-related adverse impacts of the consensus mechanism used to issue the asset-referenced token. | Art. 6 para. 1 (j), Art. 19 para. 1 (h), Art. 51 para. 1 (g) |

Table 1

This table allows us to observe that the EU legislator was left with much more room for maneuver when it came to deciding on the specificities of the Prospectus disclosure rules. The text of that Regulation merely touches upon the basic areas for which an investor would logically need information on, primarily the security itself and the offeror. The detailed explanation of what this information entailed was defined

by the Commission's Delegated Regulation, crafted by ESMA experts. These discretionary powers, i.e., the latitude given by the EU legislator to the ESAs to create legislation on a secondary level when dealing with details of the law, was narrowed in the case of MiCAR. The text of the Regulation itself lays down eleven (11) areas to be covered by the information included in the white paper. On the one hand, this approach enables the EU legislator to effectively control the content of the white papers, by precisely delineating the covered areas. This ensures that consumers receive the essential information needed to make informed decisions and helps minimize information asymmetry. On the other hand, however, a certain degree of flexibility can sometimes be beneficial, as it allows for adaptability and responsiveness to evolving market conditions and emerging needs. For instance, under the Prospectus Regulation, information on the principal adverse impacts on the climate would have been included as part of the disclosure requirements for the security itself, if determined by ESMA while preparing the RTS for the Delegated Regulation. This determination would consider various factors, such as the size and capabilities of the issuing entity. In contrast, under MiCAR, reporting on this aspect is mandated as a new requirement, with no scope for the ESAs to apply exemptions or conduct ex ante proportionality assessments based on market feedback during the RTS consultation phase.[160] Consequently, the EU legislator has taken a stricter approach, limiting the flexibility of secondary legislation in this context.

Additionally, the white paper, like the Prospectus, must include specific statements designed to inform consumers about the risks associated with financial crypto-asset activities. These statements act as disclaimers, alerting consumers and investors that:

(a) the crypto-assets may lose their value in part or in full,
(b) they may not always be transferable and may not be liquid, and
(c) if the offer to the public concerns utility tokens, these may not be exchangeable against the good or service promised in the crypto-asset white paper, especially in case of failure or discontinuation of the project,
(d) the management body of the issuer confirms that the crypto-asset white paper complies with the requirements set out in the MiCAR and that the information contained therein is, to the best of their knowledge, correct, with no significant omissions.

Moreover, the issuers must also pay attention to the content of marketing communications related to their crypto-asset projects. It is essential that these communications clearly reference the published white paper and ensure that the content of the advertising aligns with the statements made in the white paper, while remaining fair, clear, and not misleading, also in light of the new Digital Services Act (DSA).[161] Both the content of the white paper and the marketing communications shall be notified to the competent national authorities, though they do not require prior approval.[162] They must also be made publicly available to effectively inform consumers and investors.

By instituting these information requirements, MiCAR seeks to effectively prevent issuers of crypto-assets from engaging in practices that would be considered misleading actions or omissions under Articles 6 and 7 of the UCPD. Similar to MiFID, MiCAR acts as lex specialis relative to the UCPD,

[160] See also European Law Institute, *Response to the European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law* https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Response_of_the_ELI_to_the_European_Commission_s_Public_Consultation_on_Digital_Fairness_.pdf accessed 19/09/2024, p. 7-10.

[161] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L 277/1.

[162] In contrast to what applies for the securities in the Prospectus Regulation. C. Gortsos, op. cit. 25, p. 27.

aiming to establish stricter and more detailed rules tailored to specific business practices to enhance consumer protection.[163] The UCPD, as an older directive with only 16 articles, offers limited guidance on information obligations and leaves much room for interpretation by the MS. With regards to the provisions of pre-contractual information, the DMFSD seems to offer more specific rules, setting clear requirements for what must be disclosed to consumers before entering distance contracts.[164] However, since MiCAR has established its own comprehensive rules on information requirements and marketing practices, which overlap significantly with existing provisions of the UCPD and the DMFSD, compliance with MiCAR inherently ensures adherence to these other regulations. Thus, all three EU regulations work complementarily to safeguard consumers' and investors' economic interests in the complex and high-risk sector of digital financial services.[165]

## *3.3 Liability clauses*

As per Recital (39) MiCAR, to further protect holders of crypto-assets, civil liability rules should apply to offerors and persons seeking admission to trading and to the members of their management body for the information provided to the public in the crypto-asset white paper. This principle encompasses all types of crypto-assets, as specified in Articles 15, 26, and 52 MiCAR. The civil liability rules contained in MiCAR cover a very specific issue, that of the accuracy of information contained in the white paper. If an offeror, a person seeking admission to trading, or an operator of a trading platform fails to provide information that is complete, fair, clear, or not misleading in their white paper, they, along with the members of their administrative, management, or supervisory body, will be liable to holders of the crypto-assets who suffer losses due to such failures. Issuers, offerors, persons seeking admission to trading and operators of trading platforms cannot absolve themselves of this obligation, by any means, even if the consumers/ investors agree to such a term contractually. Such an exclusion or limitation would be deprived of any legal effect.[166]

The aim of these provisions is to ensure that issuers, offerors, persons seeking admission to trading, and operators of trading platforms, along with their management bodies, adhere to the rules governing white papers and marketing communications, and do not exploit consumers by providing incorrect information or manipulating their investment decisions. Establishing civil liability for compliance with consumer protection rules is a well-established practice. For instance, the Prospectus

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[163] Commission Notice, *Guidance on the Interpretation and Application of Directive 2005/29/EC of the European Parliament and of the Council concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market* [2016] OJ C 212/1.

[164] Art. 2 DMFSD: "Distance contract" means any contract concerning financial services concluded between a supplier and a consumer under an organised distance sales or service-provision scheme run by the supplier, who, for the purpose of that contract, makes exclusive use of one or more means of distance communication up to and including the time at which the contract is concluded; financial service' means any service of a banking, credit, insurance, personal pension, investment or payment nature." Under this definition, crypto-asset related contracts can fall within this notion.

And according to C. Gortsos, op. cit. 25: "Crypto-asset services should be considered 'financial services' as defined in Directive 2002/65/EC249".

[165] See also European Law Institute, *Response to the European Commission's Public Consultation on Digital Fairness – Fitness Check on EU Consumer Law* https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Response_of_the_ELI_to_the_European_Commission_s_Public_Consultation_on_Digital_Fairness_.pdf accessed 19/09/2024, p. 7-10.

[166] C. Gortsos, op. cit. 25, p. 30.

Regulation includes similar provisions, such as Article 11, which holds issuers accountable for the content of the Prospectus. These provisions act as a deterrent against misleading practices or omissions.

MiCAR, however, has taken a further step compared to the Prospectus Regulation, the UCPD, and the DMFSD. The EU legislator not only imposed an obligation on crypto-asset issuers to provide fair, clear, and non-misleading information but also established a direct civil liability claim in EU law for holders who suffer losses due to misinformation by the issuer. Although the legal nature of such a claim is not clear, i.e., it is not clear whether it covers both types of civil liability, contractual and tortious, this still constitutes a big step for the EU legislator, as the EU is slowly moving away from the trend of leaving it to national law to regulate issues on contract law and compensation.[167]

Throughout this analysis it has been argued that the MiCAR legislator has equated a "retail holder" with a "consumer", treating them in a similar manner and adopting similar provisions for the counterbalancing of similar risks which both groups face. However, it is surprising how MiCAR regulates the issue of the burden of proof concerning responsibility and loss due to incomplete or incorrect information in the white paper provided by issuers. Article 15 para. 4 MiCAR states that:
"*It shall be the responsibility of the holder of the crypto-asset to present evidence indicating that the offeror, person seeking admission to trading, or operator of the trading platform for crypto-assets other than asset-referenced tokens or e-money tokens has infringed Article 6 by providing information that is not complete, fair or clear, or that is misleading and that reliance on such information had an impact on the holder's decision to purchase, sell or exchange that crypto-asset.*".[168] This approach contrasts with the CRD, which places the burden of proof regarding compliance with information requirements on the trader, especially in the context of distance and off-premises contracts.[169] MiCAR's decision to place the burden of proof on retail holders disregards the inherent information asymmetry and imbalance of negotiating power. This lack of procedural advantage for retail holders seems inconsistent with the consumer-like protection that MiCAR aims to provide, particularly given the challenges in proving inaccurate information in white papers and the complexity and opacity of DLT networks.

As far as CASPs are concerned, MiCAR does not explicitly provide for a liability claim. However, such claims could potentially be inferred from national provisions, similar to how it was handled with provisions transposing MiFID. For example, in Greece, it has been argued that any breach of conduct obligations under MiFID can lead to liability for the covered entities, whether tortious or contractual. Thus, national legal frameworks might provide avenues for holding CASPs accountable under similar principles.

With respect to tort liability, it is argued that the breach by investment firms of the rules of the Greek MiFID transposing law can in principle be considered an unlawful act, within the meaning of both Article 914 of the GCC on general tort liability and Article 8 of Law 2251/1994 on the liability of the service provider against consumers.[170] In a similar manner, the obligation of CASPs to act honestly, fairly,

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[167] See discussions on EU common contract law. A Despotidou, 'Article 4i Greek Law 2251/1994' in E. Alexandridou and others, op. cit. 102, p. 454.

[168] Articles 26 and 52 MiCAR follow the same structure.

[169] "*As regards compliance with the information requirements laid down in this Chapter, the burden of proof shall be on the trader*." Article 6 para. 9 CRD.

[170] D. Avgitidis, 'Protestion of investors as a consumers' in E. Alexandridou and others, op. cit. 102, p. 1083. As regards tort liability, it has also been pointed out in theory that it can be accepted only for those rules which establish, in a literal sense, standards of ethical conduct and not for those provisions which merely introduce organisational obligations, although it is not excluded that they may also aim to protect private interests.

professionally and in the best interest of the retail holder may, if not upheld, bear -reflectively- the same consequences in terms of liability within each national legal regime. At the same time, as far as national MiFID conduct rules go, it has been argued that they must necessarily pass through the principle of good faith in Article 288 of the GCC in order to form part of the contractual relationship between the investment firm and the client and thus the basis for the contractual basis for the liability of the investment firm in the event of any breach.[171] Similarly, since MiCAR contains comparable provisions to the MiFID conduct rules mainly for CASPs but also for all crypto-asset issuers,[172] it could be argued, mutatis mutandis, that national law provisions, such as Article 914 GCC or Article 288 GCC, shall be complementarily applied, so that retail holders will be able to enjoy full protection of their rights. Therefore, the same way that the rules of professional conduct of the Greek law transposing MiFID can indirectly generate compensation obligations for the entities falling under their scope, both contractual and tortious ones, the same can happen in the context of the application of MiCAR, even though there is no explicit reference in the Regulation's text.

The legal nature of this claim is not necessarily clear. The respective articles read "[…] *shall be liable to a holder of the crypto-asset for any loss incurred due to that infringement*". On a first read, this appears to indicate a tort liability claim, as it aligns with the three prerequisites of tort liability: breach of duty, loss or damage suffered by the holder, and causation linking the breach to the loss.[173] This interpretation is supported by Greek academic academia for similar provisions under MiFID, where breaches of conduct obligations were seen as grounds for tort liability. However, it is also plausible to view these provisions as establishing contractual liability. For instance, if an issuer fails to meet obligations under MiFID, it could be deemed a breach of the duty of good faith as prescribed by the Greek Civil Code, [174] representing a defective performance of a contract. In the context of MiCAR, both interpretations could be valid. The term "civil liability" in the provisions potentially encompasses both tort and contractual responsibility arising from the misconduct of crypto-asset issuers.

## *3.4 Right of withdrawal*

Despite denying the shift of the burden of proof with respect to suffered losses, the EU legislator obliged issuers of Title II crypto-assets to provide a right to consumers to withdraw from their agreement to purchase crypto-assets without incurring any cost and without the need to give reasons.[175] The right of withdrawal gives consumers the right to unilaterally go back on their decision to conclude a contract.[176] That right can be exercised within 14 calendar days from the day of the consumers' agreement to purchase those crypto-assets. Information on the right of withdrawal is to be provided in the crypto-asset white paper.[177]

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[171] D. Liapis, *Compensation of Investors & Capital Markets Law: A Contribution to the Protection from Major Risks in Capital Markets* (Nomiki Bibliothiki 2012), p. 199.

[172] See analysis below 2.4.6 Obligation to act honestly, fairly, professionally and in the best interest of the retail holder.

[173] D. Liapis, op. cit. 171, p. 199.

[174] Article 288 GCC.

[175] Art. 13 MiCAR.

[176] M. Loos, *Rights of Withdrawal* (Centre for the Study of European Contract Law Working Paper Series No 2009/04, 27 February 2009) https://ssrn.com/abstract=1350224 accessed 29/09/24, p. 5.

[177] Article 13 MiCAR.

Since the introduction of the Doorstep Selling Directive, the right of withdrawal has played a central role in the context of consumer protection sparking considerable debate within the academic community.[178] The essence of the right was disputed considering that, since the right of withdrawal gives the consumer the right to unilaterally go back on his decision to conclude a contract, such freedom enhances the uncertainty of contractual transaction, being at odds with the law principle "pacta sunt servanda".[179] However, this principle does have its limitations. There are other well-known doctrines, such as mistake, deceit, and fraud, which introduce limitations and devoid contracts of their effect, should certain conditions be met. By analogy, it can be argued that the right of withdrawal is also not necessarily incompatible with the principle of *pacta sunt servanda*. A consumer's decision to withdraw from a contract signifies that there has been – for some reason– a change in his initial assessment of the situation prior to the provision of his consent to enter into the particular contractual relationship. Since his initial "agreement" to be bound by the contract does not reflect his genuine intentions anymore, the legislator has deemed it appropriate to allow him to go back on his decision within a specific timeframe, adopting an analogous narrative as the one for mistake, deceit, and fraud. Given the significant implications of the right of withdrawal, its application requires strong justification.[180] In this case, the focus turns back to information asymmetry and imbalance of power which consumers face when negotiating with traders/ service providers.

The restricted timeframe within which consumers may exercise their right of withdrawal, commonly referred to as the "cooling-off period", represents a critical factor in defining the boundaries of this right and has been a subject of considerable debate. The European Commission, following the approach proposed in the CFR opted for a uniform duration of fourteen (14) calendar days. In deciding on this approach the EU legislator considered that the cooling-off period should, on the one hand, be sufficiently long for the consumer to be able to actually make use of the right of withdrawal and, on the other hand, they should not unreasonably burden the trader with uncertainty as to the finality of the contract concluded.[181] In light of these, it was deemed correct that 14 days is a sufficient amount of time, that allows consumers to rethink their decision to enter into a contract by even seeking independent advise, should they have been pressured by any aggressive or misleading commercial practices, or in the case that they decided to utilize distance trading or should they have decided to enter into complex contracts. [182]

MiCAR does not deviate from the 14-day cooling off period, being MiCAR itself a regulation concerning both distance concluded and complex agreements.[183] However, with respect to the starting point for the commencement of the 14-day period, Article 13, merely states that: "*The period of withdrawal shall begin from the date of the agreement of the retail holder to purchase those crypto-assets.*". This means that the 14-day cooling off period starts to run immediately upon the conclusion of the contract, regardless of any other factor. However, this is not the only feasible approach found within

[178] M. Loos, op. cit.176, p. 2.

[179] M. Loos, op. cit. 82, p. 8.

[180] C.-W. Canaris, *Wandlungen des Schuldvertragsrechts, Tendenzen zu seiner 'Materialisierung'*, Archiv für die civilistische Praxis 200 (2000), p. 344; J. Büßer, *Das Widerrufsrechts des Verbrauchers. Das verbraucherschützende Vertragslösungsrecht im europäischen Vertragsrecht*, Peter Lang: Frankfurt am Main/Berlin/Bern/Bruxelles/New York/Oxford/Wien, 2001, p. 133-134; Th. M. J. Möllers, *Europäische Richtlinien zum Bürgerlichen Recht*, Juristenzeitung 2002, p. 130.

[181] M. Loos, op. cit.176, p. 5.

[182] M. Loos, op. cit.176, p. 9.

[183] Article 13 MiCAR.

the Consumer Acquis for consumer contracts concerning non-tangible products/ services. There are two possible moments in which the cooling-off period may start:

(a) when the contract (or a binding pre-contract) is concluded,[184]

(b) when the trader has performed all his information obligation[185] or specifically the one pertaining to the existence of a right of withdrawal.[186]

Evidently, the provisions of MiCAR favor the first solution. Option 1 surely constitutes an approach which provides a high degree of legal certainty, as the start of the period does not depend on any other factor, e.g., whether or not the consumer has been informed of their right of withdrawal. However, the downside of this approach is that it creates a disincentive for the trader/ service provider to fulfill their information obligations, as doing so could make the consumer aware of their right of withdrawal, potentially leading to their going back on their contracts. Option 2 reverses this issue by sanctioning the failure to meet the information obligations through delaying the start of the cooling-off period.[187] This could have been expressly provided for in the text of MiCAR. Although this approach introduces a certain degree of legal uncertainty, provided that it allows the parties to withdraw from a contract even long after its conclusion as is indicated by the *Heininger* case, this level of discretion can be beneficial in cases where consumers are deliberately misled.[188]

There could be instances where consumers are not informed about their rights in general or specifically about their withdrawal rights but are obviously aware of their existence and the legal consequence of the omission of the service provider. This knowledge allows them to leverage their -only typical- weaker position to alleviate themselves from obligations stemming from contracts that have been concluded even long ago, taking advantage of the fact that the trader/ service provider omitted to inform him about his withdrawal right. This positions service providers in a rather disadvantageous position.

In this case, the application of the principle of abuse of rights can serve as a counter-balance measure. Considering that the consumer's right to withdraw is not subject to the provision of any justification for such an action, a court should be able to assess each particular situation in concreto and, if necessary, to apply the doctrine of abuse of right in order to prevent the consumer from successfully invoking the right of withdrawal at will, when long periods of time have passed from the conclusion of the contract and misinformation on the part of the trader/ service provider has hindered the 14-day cooling off period from running.[189] In accordance with settled CJEU case-law, there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends, including the case of private transactions.[190] It thus follows that a MS must refuse to grant the benefit of the provisions of EU law where they are relied upon by a person not with a view to achieving the objectives of those provisions, but with the aim of benefiting from an advantage granted to that person by EU law when the objective conditions required for obtaining the advantage sought, prescribed by EU law, are met only formally.[191]

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[184] Article 9 para. 2 (a) CRD.

[185] Article 6 para. 1 DMFSD; art. 14 para. 1 CCD.

[186] Article 10 CRD.

[187] M. Loos, op. cit.176, p. 12.

[188] Case C-481/99 *Heininger* [2001] ECR I-9945.

[189] G. Reiner, *Der verbraucherschützende Widerruf im Recht der Willenserklärungen*, Archiv für die civilistische Praxis 203 (2003), p. 27.

[190] Case C-116/16 and C-117/*16 T Danmark and Y Denmark* EU:C:2019:135, para. 70-71 and the case-law cited

[191] Case C-251/16 *Cussens and Others,* EU:C:2017:881, para. 32 and 33; Case C-116/16 and C-117/*16 T Danmark and Y Denmark* EU:C:2019:135, para. 72 and 91.

The CJEU recent case of BMW reiterates this approach by accepting that: *where information provided by the creditor* [by analogy, an issuer of crypto-assets] *to the consumer under Article 10(2) of that directive proves to be incomplete or incorrect, the withdrawal period starts to run only if the incomplete or incorrect nature of that information is not capable of affecting the consumer's ability to assess the extent of his or her rights and obligations under that directive or his or her decision to conclude the contract and, where relevant, is not capable of depriving him or her of the possibility of exercising his or her rights, in essence, under the same conditions as would have prevailed if that information had been provided in a complete and correct manner*.[192] This means that, even in the case where information is omitted, it shall be examined whether consumers concluding a contract were so immensely affected by that omission in the decision to undertake contractual obligations, to the extent that they would have not chosen to be contractually bound.

Therefore, MiCAR provides for withdrawals rights only to retail holders of specific crypto-assets, namely the less risky ones, crypto-assets other than ARTs and EMTs. Those rights constitute traditional consumer protection rights. An issue that arises concerns the starting point of the 14-day cooling off period, which is stipulated in the Regulation as the conclusion date of the agreement. It is argued, however, that it would be preferable, according to the jurisprudence of the CJEU as well, that it would be stipulated in the Regulation as such that the cooling off period would run from the date that the traders have performed all their information obligations or, at least, specifically the one pertaining to the existence of a right of withdrawal. This would enhance legal certainty while simultaneously effectively ensuring that the cooling off period does not run in the expense of consumers' rights and that is made clear from the text of the regulation.

## *3.5 Redemption rights & Reserves of assets*

In order to further facilitate consumer protection, the Regulation establishes a statutory asset right, a redemption right, for retail holders of all ARTs and EMTs either against the issuers themselves or against the reserve of assets backing the issued stablecoins.[193] Specifically, MiCAR stipulates that any holder of ART and EMT shall have a redemption right, free of charge, at all times, including in stress scenarios, towards the issuers and -when the issuers are no longer able to meet their obligations- against the reserve of assets.[194] Thus, the basic conditions for affording redemption rights are prescribed by law. Any further details or conditions -where applicable- shall be disclosed in the whitepaper. In principle, in case of ARTs, the issuer shall redeem them either by providing a cash amount equivalent to the market value of the referenced assets or by delivering the underlying assets themselves. In case of EMTs, the issuer shall redeem the EMT at par value by paying out an amount in funds that corresponds to the full monetary value of the token.

MiCAR, in order to ensure that issuers would be able to satisfy the redemption requests of retail holders, establishes an obligation for issuers to maintain at all times a reserve of assets, backing the issued

[192] Joined Cases C-38/21, C-47/21 and C-232/21 *BMW Bank and others*, para. 277 ff.

[193] D. A. Zetzsche and J. Sinnig, *The EU Approach to Regulating Digital Currencies* (2024) 87 Law and Contemporary Problems 2 https://ssrn.com/abstract=4707830 accessed 19/09/24, p. 11; F. Annunziata, op. cit. 42, p. 51.

[194] Article 39 para. 1 MiCAR; Article 49 MiCAR.

stablecoins. This obligation concerns only issuers of all ARTs and the issuers of significant EMTs.[195] However, Article 58 para. 2 MiCAR envisages the possibility that competent authorities may impose that requirement also to e-money institutions issuing EMTs that are not significant, should they deem it appropriate.

According to Article 3 para. 1 (32) MiCAR, the reserve of assets is defined as "*the basket of reserve assets securing the claim against the issuer*". It plays a crucial role as a stabilization mechanism and guarantee for the token holders. The reserve of assets has to be segregated from the other assets of the issuer, to avoid contamination risks,[196] has to be held in custody by custodians and composed and invested in low-risk assets. It is critical that the reserved assets have a resilient liquidity profile so that issuers can operate normally, even during liquidity stress. Thus, issuers are obliged to establish, maintain and implement liquidity management policies and procedures, to specify which highly liquid financial instruments with minimal market, credit and concentration risk can be include in the reserve, pursuant to the RTS issued by EBA.[197] The composition and management of the reserved assets is of outmost importance. Issuers should ensure that the value of the reserve is at least equal to the corresponding redemption value of tokens in circulation and that changes in the reserve are adequately managed to avoid adverse impacts on the market of the reserve assets.[198] Any loss of value of the reserve of assets, or the mere expectation of it, could impair holders' confidence in the resilience of the token and trigger multiple redemption requests, that could be parallelized to the traditional bank runs or sell-offs occurring in the stock market. This would negatively impact TradiFi institutions and financial markets in which such assets were traded and might trigger spillover effects to the wider financial system, essentially negating any of the proclaimed advantages for decentralized finance and crypto-assets.

Redemption rights towards the reserve of assets backing the stablecoins in circulation can be exercised, should issuers be unable or likely unable to fulfil their obligations against their clients. In such cases, Article 47 MiCAR grants the respective competent authority the power to trigger the implementation of the redemption plan that each issuer has to develop, to ensure the orderly redemption of the tokens.

According to the relevant Consultation Paper,[199] a redemption plan shall have a specific structure and content depending on (a) the significance of the outstanding stablecoins, and (b) the size, volatility, composition, concentration and nature of the reserve of assets.[200] Specifically, the redemption plan should mainly describe the processes (a) for identification of token holders and their entitlement to the redemption of the tokens, while simultaneously addressing money laundering and terrorism financing risks as applied by the issuer, (b) collection and permanent removal of redeemed tokens from circulation and (c) the subsequent payout or delivery of assets to the token holders.[201] In creating the content of the redemption plan, it is crucial that issuers ensure the following general principles:

(a) Equitable treatment and no economic harm to token holders.

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[195] Article 36 para. 1 MiCAR; Article 58 para. 1.

[196] F. Annunziata, op. cit. 42, p. 52.

[197] European Banking Authority, *Final Report: Draft Regulatory Technical Standards to Further Specify the Liquidity Requirements of the Reserve of Assets under Article 36(4) of Regulation (EU) 2023/1114* (2024).

[198] *ibid,* p. 5 para. 6.

[199] European Banking Authority, *Consultation Paper: Draft Guidelines on Redemption Plans under Articles 47 and 55 of Regulation (EU) 2023/1114* (2024).

[200] *ibid*, p. 17

[201] *ibid*, p. 24.

The issuers, unless otherwise disclosed in the respective white paper, need to ensure that all token holders with the same redeemable token are treated equally and rank pari passu. The issuer should also include in the redemption plan how the individual redemption of claims will be suspended upon the adoption of the competent authority's decision triggering the implementation of the redemption plan for the orderly and collective redemption of the tokens.[202]

(b) Allocation of the reserve of assets to meet the token holders' redemption claims.
Issuers of ARTs and of EMTs subject to the requirement to hold a reserve of assets should develop the redemption plan on the assumption that if the issuer is deemed by the competent authority as unable or likely to be unable to meet its obligations, the remaining reserve of assets will be used exclusively for the redemption of all token holders' claims. This ensures that the reserve assets are fully directed towards fulfilling the token holders' redemption rights, safeguarding their interests in case of issuer insolvency or financial distress. Additionally, the redemption plan should indicate how the costs for the implementation of the redemption plan – such as for the appointment of consultants or intermediaries, or in connection with the liquidation of the reserve of assets – will be covered.[203]

(c) Liquidation of the reserve of assets.
In order to meet the token holders' claims in an equitable manner and to avoid undue economic harm, issuers of ARTs or of EMTs subject to the requirement to hold a reserve of assets should develop the redemption plan with the aim of ensuring the maximization of the proceeds from the liquidation of the remaining reserve of assets within a reasonable timeframe. For this purpose, the issuer should develop redemption scenarios under ordinary and stressed market conditions and lay down liquidation strategies taking into account the composition of the reserve of assets.[204]

(d) Implementation of the plan in a timely manner.
Issuers should ensure that the redemption plan lays down in a pragmatic and operational manner the actions to be taken immediately and, in any case, without undue delay by the issuer upon the competent authority's adoption of the decision triggering the implementation of the redemption plan. The redemption plan should also include a comprehensive and organized planning of the phases and related actions necessary to its full implementation. The phases for the orderly implementation of the plan should include:
   (a) immediate follow-up actions to the decision of the competent authority to trigger the redemption plan, including the activation of the internal processes or of the contractual arrangements for the maintenance in operation of the critical activities,
   (b) publication of the communication notice informing the token holders about the process and the timeline to submit the redemption claim and the related content,
   (c) to the extent it is not included in point (a) above, implementation of the liquidation strategies of the reserve of assets,
   (d) assessment of the redemption claims,
   (e) development of a distribution plan, namely the plan to meet all the submitted and positively assessed redemption claims, with the total amount of the proceeds from the liquidation of reserve of the assets for the issuers subject to the requirement to hold a reserve of assets or,

[202] *ibid*, p. 18 para. 17-20.
[203] *ibid*, p. 19.
[204] *ibid*, p. 19 para. 26-31.

for issuer not subject to the requirement to hold reserve of assets, with the funds available to meet the redemption claims,

(f) arrangements and timeline for the settlement of the positively assessed redemption claims.[205]

Situations that trigger the implementation of an issuer's pre-designed redemption plan are:

(a) Insolvency,
(b) Resolution (where applicable) or
(c) Withdrawal of authorization,

since in these cases it is self-evident that the issuer is in a state of inability to fulfil any obligations against its token holders.[206] Competent authorities may, even if the above-mentioned situations are not encountered as such, take into account the following factors, as specified by the draft guidelines on redemption plans:[207]

(a) Capital position of the issuer
    (a) Infringement of the own funds' requirements (Article 35 MiCAR) and additional obligations for issuers of significant ARTs,
    (b) Having lower assets than liabilities, indicating negative equity and financial risk.
(b) Liquidity position of the issuer
    (a) infringement of the liquidity requirements, or of the requirements relating to the level and composition of reserve of assets set out in Chapters 3 and 5 of Title III MiCAR, in a way that would justify the withdrawal of the issuer's authorization by the competent authority,
    (b) be unable to pay debts and liabilities as they fall due.
(c) Other requirements for continuing authorization
    (a) in relation to governance arrangements: accumulation of material weaknesses or deficiencies in key areas of the governance arrangements, internal control functions, including risk management and ICT risk management, which alone or together have material negative prudential impact on the issuer and/or its operational resilience; or any other elements considered relevant by the competent authority,
    (b) material deficiencies, which in combination can have a material negative prudential impact on the issuer, such as major reputational depreciation arising from a lack of transparency in the conduct of business and operations or incomplete/inaccurate disclosure of information.

Other factors that should be taken into account when assessing the likelihood of future inability of issuers to fulfil their obligations:

(a) significant adverse developments in the macroeconomic environment which could potentially jeopardize the issuer's financial standing, including factors like own funds, liquidity requirement and/or the assets backing token holders' redemption rights. Such developments could adversely affect the issuer's business model, the outlook for its profitability, liquidity position, viability and reserve of assets,
(b) significant deterioration of market perception for an issuer, e.g., due to obstacles to a prompt access to the assets backing the redemption rights of token holders. This could occur, for example, iff the credit institution holding the issuer's deposits shows a decline in solvency or if there's

[205] *ibid*, p. 21 para. 31.

[206] *ibid*, p. 30 para. 78 et seq.

[207] *ibid*, p. 30 para. 82 et seq.

increased volatility in the highly liquid financial instruments that make up the asset reserve or the high-quality liquid assets required for the liquidity coverage ratio (LCR),

(c) significant deterioration of the market conditions, likely leading to a run on the ART or EMT by the token holders, due to, among other things, any large and/or persistent negative divergence between the market value of the token and the market value of the assets referenced, idiosyncratic shock relating to specific assets referred to by ART or EMT, increasing and high instability of the crypto market, interconnectedness between the financial system and the crypto activities in issuers able to act as contagion channel of the crisis (idiosyncratic or market wide), loss of confidence of the token holders.

In light of the above analysis on the adopted measures aiming at enforcing an effective redemption framework for ARTs and EMTs, it is evident that MiCAR prioritizes the protection of retail holders' economic interests. The Regulation emphasizes the holders' right to redeem the value of their crypto-assets, ensuring that retail holders can claim, at any given time, the value of their tokens, even amid adverse conditions faced by issuers that could jeopardize those interests. This is achieved mainly through the obligation imposed on issuers to maintain a comprehensive and robust reserve of assets, with specific requirements for liquidity management and risk mitigation. This regulatory approach aligns with MiCAR's objective of enhancing consumer protection in the evolving crypto-asset market, revealing the EU's commitment to creating a secure environment for retail investors. By enforcing such standards, MiCAR not only mitigates risks associated with crypto-assets but also instills confidence among consumers for crypto-asset services and products, thus promoting greater participation in the market.

## *3.6 Obligation to act honestly, fairly, professionally and in the best interest of the retail holder*

MiCAR also establishes governance arrangements for the ensuring of the appropriate functioning of the actors in the crypto-asset market. Among those obligations, MiCAR establishes particular conduct and best execution rules, following the structure of MiFID, with the aim of ensuring protection of retail holders. Specifically, the Regulation goes on to impose conduct obligations not only addressed to CASPs, who can be considered equivalent to investment firms regulated under MiFID II,[208] but also to crypto-asset issuers. Those obligations entail the duty of the covered persons to act honestly, fairly, professionally and in the best interest of their clients, i.e. retail holders. According to Article 14 relating to obligations of Title II crypto-asset issuers, and Article 27 pertaining to ART issuers, it is expressly established that MiCAR makes it one of its objectives to regulate the conduct of those issuers, in its attempt to minimize the power asymmetry that consumers/ retail holders face. Since EMT issuers are also bound by similar obligations, it can be argued that, although not expressly stated, the obligation to act honestly, fairly and professionally against retail holders also applies to issuers of EMTs mutatis mutandis.

MiCAR does not go into detail on the content of conduct rules. Recitals (38), (49) and (79) are enlightening in the sense that they indicate the actions that issuers and CASPs should engage in, which are closely interrelated with their obligation to abide by the best interests of the retail holders. Specifically, Recital (38) stipulates that: "*Offerors and persons seeking admission to trading of crypto-assets other than ARTs or EMTs should act honestly, fairly and professionally, should communicate with holders and*

[208] Article 4 para. 1 (1) MiFID II.

*prospective holders of crypto-assets in a manner that is fair, clear and not misleading, should identify, prevent, manage and disclose conflicts of interest, and should have effective administrative arrangements to ensure that their systems and security protocols meet Union standards*", Recital (49) reads: "*To ensure protection of retail holders, issuers of asset-referenced tokens should always act honestly, fairly and professionally and in the best interests of the holders of asset-referenced tokens. Issuers of ARTs should also put in place a clear procedure for handling complaints received from holders of ARTs*." and Recital (79) "*In order to ensure consumer protection, market integrity and financial stability, CASPs should always act honestly, fairly and professionally and in the best interests of their clients. […] Crypto-asset service providers should provide their clients with information that is complete, fair, clear and not misleading and warn them about the risks associated with crypto-assets. Crypto-asset service providers should make their pricing policies public, should establish complaints-handling procedures and should have a robust policy for the identification, prevention, management and disclosure of conflicts of interest*".

It can be concluded from the text of the Recitals that conduct obligations for issuers focus more on governance and internal arrangements, i.e., management of conflicts of interests, effective administrative arrangements relating to security systems, complaint handling procedures etc. As far as CASPs are particularly concerned, their obligation to act honestly, fairly and professionally and in the best interest of the retail holders is expressly tied with their information, risk assessment and pricing policies obligations.[209] Prospective and existing clients should be provided with all required comprehensive information on crypto-assets, e.g., hyperlinks to the respective published white papers, clear marketing communications, warnings for risks associated with transactions in crypto-assets and principal adverse impacts on the climate of the consensus mechanism used to issue different crypto-asset.[210]

Although the regime applicable to CASPs has as its most obvious reference model the MiFID II one, incorporating structures, notions, regulatory approaches and a set of conduct rules, MiCAR unexpectedly does not seem to follow the approach adopted in MiFID II with regards to the obligation of manufacturing investment firms to establish a Target Market, in which they may provide their products, targeted to a specific category of investors.[211] In the context of MiFID, ESMA has concluded that there are instances where the application of conduct or business rules in the context of the provision of investment services to individual clients may be insufficient to ensure that firms fulfil their duty of acting in the best interests of their clients.[212] For that reason, it was deemed appropriate that manufacturer investment firms undertook the obligation to define the Target Market of each individual financial instrument. In defining the Target Market, investment firms ought to understand the financial instruments they offer or recommend to such an extent that they are able to assess the compatibility of the financial instruments with the needs of the clients to whom they provide investment services and ensure that financial instruments are offered or recommended only when the risk associated with a crypto-asset

[209] Article 66 MiCAR

[210] Article 66 MiCAR. See also European Securities and Markets Authority (ESMA), *Guidelines specifying certain requirements of the Markets in Crypto Assets Regulation (MiCA) on investor protection – third package* (December 2024) ESMA35-1872330276-1936, available at https://www.esma.europa.eu/sites/default/files/2024-12/ESMA35-1872330276-1936_MiCA_Final_Report_to_CP3_-_investor_protection_mandates.pdf.

[211] Article 24 et seq MiFID II.

[212] European Securities and Markets Authority (ESMA), *Guidelines on Product Governance Requirements* (August 2023) ESMA35-43-3448, available at https://www.esma.europa.eu/sites/default/files/2023-08/ESMA35-43-3448_Guidelines_on_product_governance.pdf.

matches the risk appetite of the prospective retail holder.[213] For this reason, investment firms under MiFID II are required to identify at a sufficiently granular level the potential Target Market for each financial instrument and specify the type(s) of client for whose needs, characteristics and objectives the financial instrument is compatible, as well as identify any group(s) of clients for whose needs, characteristics and objectives the financial instrument is not compatible. To proceed with such an assessment, obligated entities are required to take into consideration:

(a) The type of client ("retail client", "professional client" and/or "eligible counterparty"),
(b) Knowledge and experience,
(c) Financial situation with a focus on the ability to bear loss,
(d) Risk tolerance and compatibility of the risk/reward profile of the product with the target market,
(e) Clients' objectives and needs.[214]

None of these are provided for in MiCAR. The Regulation does not even classify retail holders depending on their activities, which constitutes one of the reasons why it was important to investigate whether the notion of a retail holder can also capture investors. CASPs' obligation to act in the best interest of their clients strictly refers to administrative and organizational obligations. In depth analysis of the products offered, i.e., the crypto-assets in circulation, is not required.

On the other hand, with regards to the obligation for the conduct of suitability and appropriateness assessments, those are expressly provided for in Article 81 MiCAR. The Regulation mirrors the structure of Article 25 MiFID II.[215] Article 24 MiFID II incorporates other obligations including, the provision of information in a good time, on an independent basis, periodic assessment of suitability, adequate competence obligation as regards to the CASPs employees. When it comes to warnings, MiCAR specifies the risk areas that need to be communicated to the CASPs clients. Those include the possibility of the value of crypto-assets to fluctuate, the possibility of suffering full or partial losses, the liquidity risk and, lastly, the non-coverage of crypto-assets by the investor compensation schemes under Directive 97/9/EC and by the deposit guarantee schemes under Directive 2014/49/EU.

Overall, MiCAR, by incorporating conduct and best execution rules akin to those under MiFID II, extending obligations not only to CASPs but also to issuers of crypto-assets realizes its aim to safeguard the economic interests of retail holders, enhance their market understanding and significantly improve their position, by providing them with the appropriate information to effectively overcome information asymmetry. Thus, consumer protection is effectively promoted. Both crypto-asset issuers and CASPs are mandated to act with integrity, fairness, and professionally, prioritizing the interests of their clients. MiCAR strongly focuses on addressing governance issues, while ensuring comprehensive and transparent communication about crypto-assets, referring to risks and environmental impacts. Although, the non-provision in MiCAR of the establishment of a Target Market is surprising, it is partially counterbalanced by the adoption of the MiFID II structure relating to the execution of suitability and appropriateness assessments for retail holders. Thus, MiCAR, once again, prioritizes consumer protection by focusing on the provision of clear and transparent information to retail holders.

[213] *ibid*, p. 55 et seq.

[214] *ibid*.

[215] See V. Tountopoulos, *Capital Markets Law* (2nd edn, Sakkoulas 2021), p. 253 et seq.

# Concluding Remarks

Crypto-assets have undeniably become part of the financial landscape, playing a transformative role in the reshaping of traditional financial systems. Consumers are becoming more and more engaged in activities involving crypto-assets, seeking to capitalize on the benefits that DeFi has to offer. However, in doing so, they often find themselves at a disadvantage compared to issuers and CASPs. Recognizing the risks inherent in this evolving market, the EU has acted to close this regulatory gap, with the introduction of MiCAR.

MiCAR moves in between the lines of multiple legal regimes, trying to simultaneously achieve multiple different aims, with consumer protection standing out as a key focus. The central position of consumer protection in this EU initiative can be concluded from the text of the Regulation itself, with reference to its recitals and the introduction of the notion of a "retail holder", which is adopted to describe natural persons that transact with crypto-assets and adopts a definition which heavily resembles the EU one concerning the notion of "consumer". It has been argued here that the term "retail holder" should be interpreted broadly, in an analogous way the notion of "consumer" is understood in the EU Consumer Acquis and by the jurisprudence of the CJEU, affording protection also to investors. Thus, consumer protection enters the MiCAR regulation in an indirect manner, making its way to the Recitals and the definitions of its text, ensuring that its principles are directly applied and remain relevant in the field of crypto-assets.

MiCAR also imposes certain obligation to entities involved in the crypto-asset market, i.e., crypto-asset issuers and CASPs. Depending on the nature of their activities and the risks applicable in each respective case, the Regulation has designed provisions in a way that directly or indirectly aim to ensure and preserve a high level of protection for consumers/ retail holders of crypto-assets and crypto-asset services. The obligations enshrined in those articles are inspired by many other legal regimes pertaining to either consumer protection as such or to frameworks for the protection of investors. It has been argued here that certain regulations that are traditionally found in investor protection frameworks shall also be understood as serving, in specific cases, consumer protection objectives. Thus, their introduction into MiCAR, along with other provisions that are inherently consumer-protection oriented, further corroborates MiCAR's emphasis on incorporating consumer principles into its scope.

The effectiveness of MiCAR as a newly introduced regulatory regime remains to be fully evaluated in practice. However, at first glance, it seems that the EU legislator has utilized the knowledge and experience accumulated from designing other legislative acts in order to create a framework that effectively addresses consumer protection in the crypto-asset market. While some deficiencies have been identified in the provisions discussed in this Thesis, MiCAR, as a regulatory regime, without excessively limiting the room for technological innovation, provides for significant safeguards that will allow for consumers to reap the benefits of these new financial products. These protections not only empower consumers to participate more actively in the crypto-asset market but also enhance their economic rights and contribute to broader financial inclusion.

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