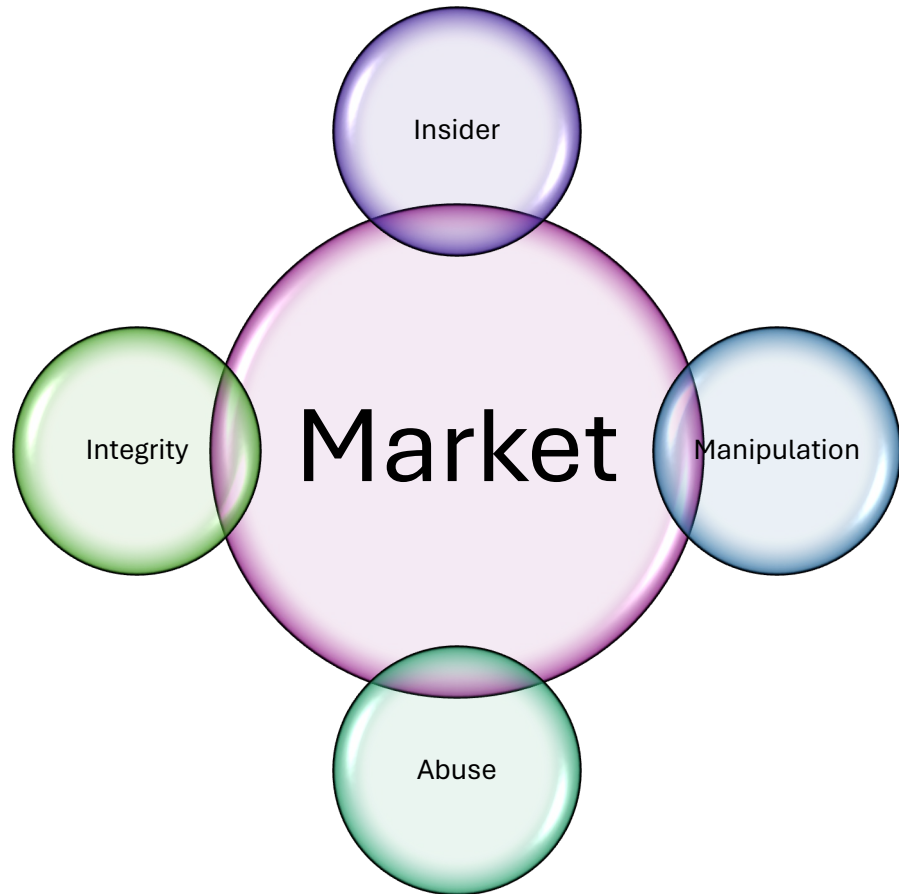


Market Abuse under MiCAR

Iris M. Barsan

15 & 16 February 2024





Specificity of crypto-markets

- Open 24/7
- Very volatile
- Specific tech knowledge (insiders might be different)
- Perpetual futures
- Involvement of automated processes
 - Smart contracts
 - DAOs



From MAR to MiCAR



MiCAR is directly inspired by MAR



All the main provisions have been transposed to MiCAR with minor modifications



recital 95 MiCAR „However, as issuers of crypto-assets and crypto-asset service providers are very often SME’s, it would be **disproportionate** to apply all of the provisions“ of MAR to them. „It is therefore necessary to lay down **specific rules** prohibiting certain behaviours that are likely to undermine user confidence in markets in crypto-assets and the integrity of those markets (...)”



What has not been transposed are the exemptions.....

MiCAR may have a **harsher effect** than MAR

MiCAR will very likely be interpreted in the light of MAR

Agenda



SCOPE



MARKET
MANIPULATION



INSIDER DEALING



WHAT IS
MISSING?



Scope



NFT

- NFTs are out of MiCAR's scope
 - Two cases of insider dealings on NFTs
 - Sorare vs Ajax Amsterdam 2022
 - Open Sea insider dealing 2023
- What is non-fungibility?
 - Fractional parts = fungible
 - Large series or collection → likely fungible
 - Unique identifier of NFT → not an indication of non-fungibility
 - Assets and rights of NFT should also be non-fungible



Scope



- MAR & MiCAR only apply to crypto-assets/financial instruments admitted to **trading**
 - Post- admission to trading, all transactions, inside or outside the market, are covered
- Problems
 - Non-EU trading platforms
 - Derivatives

Non-EU trading platforms

MiCAR does not provide for a territorial scope

- Unclear when a trading platform needs to register in the EU
- Criteria of focalization? Targeting of EU markets or EU investors?

Risk that crypto-markets remain outside of the EU

- EU investors heavily trade on non-EU markets
- May commit market abuse
- May be victims of market abuse

Crypto-asset admitted to trading in the EU & outside the EU → market abuse outside the EU

- Effects of market abuse felt in the EU?
- Enforcement problem

Derivatives (1/2)



Recital(97) Derivatives that qualify as **financial instruments** as defined in Directive 2014/65/EU, and whose **underlying asset is a crypto-asset**, are subject to **Regulation (EU) No 596/2014** when traded on a regulated market, multilateral trading facility or organised trading facility. Crypto-assets falling within the scope of this Regulation, **which are underlying assets of those derivatives**, should be subject to the market abuse provisions of this Regulation



No generic definition of derivatives under MiFID II → Annexe I C list



Art. 4 § 1 (44) MiFID II *any other securities giving the right to acquire or sell any such transferable securities or giving rise to a **cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures***

ART may be derivatives → they derive their value from the underlying asset pool

BUT MiCAR does provide for a mandatory and permanent redemption right that can be settled in cash

Asset pool used for **stabilization** as opposed to a derivative referring to a basket of assets where the value of the derivative may vary

Derivatives (2/2)



**Derivative subject to
MAR/MiFID II**



**Crypto Underlying subject to
MiCAR**



**Within the reserve of assets
of an ART there may be
financial instruments**



**Cumulative application
MAR/MiCAR**

Cumulative sanctions?

Market Manipulation



MiCAR ~ MAR



Most abuses on crypto-markets
are market manipulation

Mango DAO (ongoing case before the SEC)
Hack of SEC account before Bitcoin Spot ETF approval (10/01/2024)



Strategies are the same

Pump & dump
Whale techniques
Spoofing
Wash trading
Etc.



MiCAR mirrors MAR

Some points are missing (definition of legitimate reasons; extension to natural persons acting for a legal person etc.)



Insider dealing

Few cases

- Nathaniel Chastain (Open Sea insider dealing) condemned to 3 months of prison 22 August 2023

Former OpenSea Executive Sentence to 3 Months in Prison Over NFT Insider Trading Charges: Report

Nathaniel Chastain, former head of product at OpenSea, was also fined \$50,000.

Written by [Radhika Parashar](#), Edited by [Manas Mitul](#) | Updated: 23 August 2023 15:26 IST

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"I'm sorry for putting my colleagues and friends at OpenSea through this ordeal," Chastain said

Photo Credit: Bloomberg

Inside information

- MiCAR targets issuers, offerors, persons asking admission to trading
 - Offeror
 - Issuer
 - Third party
 - Person asking admission to trading
 - Trading platform operator
 - Offeror
 - Issuer
 - Third party



Inside information

Obligation to provide information not only on the crypto-asset but also on the **offeror**, issuer, **person seeking admission to trading** this is broader than MAR (art. 87 § 1 a))

Is the information on an **offeror** who is not the issuer or on the **person seeking admission** to trading really relevant for market abuse purposes?

What influence does the information relating to them have on the price of the crypto-asset? → significant effect

Is there the same correlation between an **issuer** and a crypto-asset as there is between an issuer and a financial instrument?

Financial instruments

Value of shares depends on issuer (less so of bonds)

EMT

Value of token depends on underlying fiat currency

ART

Value depends on asset reserve

Utility token : dual nature

Exchange for goods & services

Existing utility → issuer irrelevant → public blockchain

Future utility → issuer relevant as the service may never exist

Object of speculation

Value does not depend so much on the issuer or much as on the market

Categories of insiders (art. 89 § 5)

Board members of issuer, offeror, person seeking admission to trading

- If the **issuer/offeror** has little influence on the price of the crypto-asset why should board members have more influence?
- **Person seeking admission to trading**
 - Inside information because the crypto-asset will be listed
 - Inside information if that person is the trading platform operator (ex.: Open Sea insider dealing)

Shareholders

- Not likely to have inside information
- Operations on the issuer/offeror/person seeking admission to trading will very likely have little effect on the price

Employees, professionals, people with duties *or in relation to its role in the distributed ledger technology or similar technology*

- No reference to issuer/offeror/person seeking admission to trading
- The specific reference to DLT is interesting
 - Recital (96): “(...) *market abuse in the context of markets in crypto-assets and their functioning, taking into account, for instance, the use of social media, the use of smart contracts for order executions and the concentration of mining pools.*”

Involvement in criminal activities

- Hackers are always natural insiders

Anyone

- where that person knows or ought to know that it is inside information

Crypto insiders

Hackers

- Most of the time that is in itself an illicit behaviour
- Is there room for insider dealing?
- US: pending bill to include hacking practices into the scope of insider dealing

Smart contracts

- If their mechanisms are publicly accessible, is there still room for inside information?
- Automated trading through smart contracts
 - Equivalent to algorithmic trading?
 - Could increase market tendencies
 - Can they be stopped?
 - Rather market manipulation than insider dealing?

Miners

- Miner concentration → PoW
- PoS → possible collusion?
- Miners proposing/adopting a fork?
- Chats on messaging platforms → inside information?



What is missing under MiCAR?



MAR provisions absent under MiCAR



Obligations

Art 4 Notifications and list of financial instruments

Article 18 Insider lists

Article 19 Managers' transactions

Article 20 Investment recommendations and statistics

Article 21 Disclosure or dissemination of information in the media



Exemptions

Article 5 Exemption for buy-back programmes and stabilisation

Article 6 Exemption for monetary and public debt management activities and climate policy activities

Article 9 Legitimate behaviour (for insider dealing)

Article 11 Market soundings

Article 13 Accepted market practices (market manipulation)



Thank you for
your attention

