

EBC Global Annual Conference

Dreaming about MiCAR

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MiCAR

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**REGULATION (EU) 2023/1114 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
of 31 May 2023
on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010
and Directives 2013/36/EU and (EU) 2019/1937
(Text with EEA relevance)**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

My CAR



Similarities Between MiCAR and My CAR

1. Its design is not clear.
2. One cannot rely on it to work properly.
3. The moment it was created, it was already technologically outdated.

A. Its design is not clear.

Too Many Goals



promote
innovative
technologies



protect investors



promote market
integrity



smooth payment
systems



secure financial
stability



save monetary
sovereignty

Cobbled Together from Mismatched Spare Parts



Financial Law

- whitepaper
- service providers
- exchange law
- market abuse



Banking Law

- capital requirements
- qualified holdings
- recovery plans



Payment Services Law

- e-money
- prohibition of interest
- cap on usage



Investment Fund Law

- investment rules
- redemption right



Consumer Law

- right of withdrawal

Title I	Title II	Title III	Title IV	Title V
Subject Matter, Scope and Definitions	Crypto-Assets Other Than Asset-Referenced Tokens or E-Money-Tokens	Asset Referenced Tokens	E-Money Tokens	Authorisation and Operating Conditions of Crypto-Asset Service Providers
Art 1–3	Art 4–15	Art 16–47	Art 48–58	Art 59–85
Title VI	Title VII	Title VIII	Title IX	
Prevention and Prohibition of Market Abuse Involving Crypto-Assets	Competent Authorities, EBA and ESMA	Delegated Acts	Transitional and Final Provisions	
Art 86–92	Art 93–138	Art 139	Art 140–149	

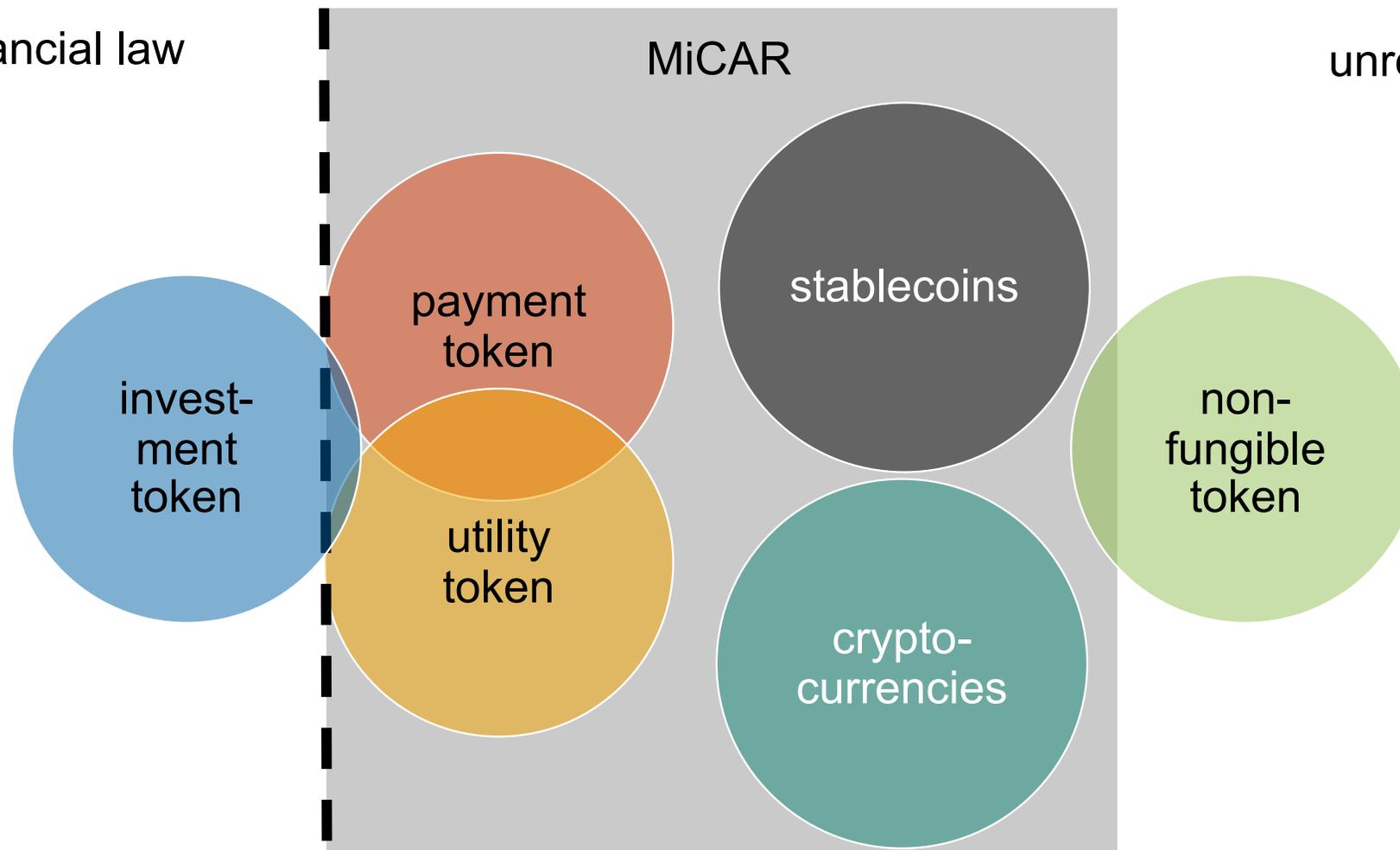
B. One cannot rely on it to work properly.

Border to Financial Law is Blurry

traditional financial law

MiCAR

unregulated



A Plethora of Interpretative Problems

- while being composed of LEGO blocks from different EU acts, MiCAR frequently diverges from them
- question:
 1. is the divergence intentional (*interpretation e contrario*), or
 2. is a parallel interpretation (*interpretation per analogiam*) appropriate?
- issue besets nearly every provision of MiCAR
- e.g.: appropriateness test from MiFID II missing in Art 78 and 81 MiCAR – What does this mean?

Contradictory Rules

- e.g. stablecoins
- **investor protection** through
 1. reserve of assets (Art 36–38)
 2. redemption right (Art 39)
 3. recovery and redemption plan (Art 46–47)
- but: prohibition to grant interest because **means of payment** (Art 40, 50)
- but: **hard cap** for use as means of payment where (Art 23, 58(3))
 1. number of transactions > 1 mn and
 2. value of transactions > EUR 200 mn per day
- Do we want stablecoins as a means of payment, or not?

MiCAR is not Fool-Proof

- scenario: Amazon issues the 'Amazon coin'. The coin does not refer to any other asset or currency, but can be used on all platforms and apps of Amazon for goods and services. Imagine the use of the Amazon coin would exceed the threshold of Art 23.
- **Would the hard cap apply?**
 - **Answer: No, because the Amazon coin is not a stablecoin (ART or EMT).**
 - **Is this sensible?**

Isolationist Tendencies

- only persons based in the EU can:
 1. issue stablecoins (ART or EMT)
 2. provide crypto-asset services
- no equivalence mechanism
- cooperation with foreign authorities only in EU interest (Art 107, 126) and under EU leadership (Art 119)
- **MiCAR erects a "Fortress Europe"**
- **gamble to create European champions may not work out**
- **EU may instead fall further behind other parts of the world**

**C. The moment it was created, it was already
technologically outdated.**

MiCAR is Not Technologically Neutral

- crypto-assets defined as using 'DLT or a similar technology' (Art 3(1) No 5)
- DLT is specifically defined (Art 3(1) No 1 and 2)
- EU Commission can 'further specify [...] technical elements of definition' and 'adjust those definitions to market developments and technological developments' (Art 3(2))
- legislation will have to catch up with technological innovation
- a continuous race between the hare and the hedgehog

Some Technologies are Incompatible with MiCAR

- MiCAR effectively outlaws certain innovations, e.g.
 1. algorithmic stablecoins
 - maintain stability by adapting supply to demand
 - no reserve of assets
 - not compatible with MiCAR
 2. stablecoins referring to illiquid assets
 - e.g. real estate
 - funds can be invested only in highly liquid financial instruments (Art 38)
 - reference to illiquid assets economically impossible under MiCAR

Some Innovations Outpace MiCAR

1. Decentralised Finance (DeFi)

- excluded by Recital 22 phrase 2:

'Where crypto-asset services are provided in a fully decentralised manner without any intermediary, they should not fall within the scope of this Regulation.'

- already calls for reform in the literature

2. staking

- highly important and raises many issues (see Switzerland)

3. crypto-lending

- equally not addressed

Takeaways

How to Drive MiCAR

1. Be careful and do not exceed its limits (Level 2 Legislation)!
2. Do not use it for terrain it is not made for (DeFi)!
3. Keep a reliable back-up option (traditional financial regulation)!

How to Regulate Technology

1. Try to cover as much as possible by existing law!
2. Devise new law only to respond to specific new needs!
3. Do not rely on politicians, but on tech experts!
4. Coordinate and cooperate with foreign counterparts!
5. Do not believe you could replace innovation with regulation!

For Going Further

- Annunziata 'An Overview of the Markets in Crypto-Assets Regulation (MiCAR)', EBI WP No 158 (2023)
- Lehmann 'MiCAR – Gold Standard or Regulatory Poison for the Crypto Industry?', EBI WP No 160 (2024)
- Zetsche, Buckley, Arner & van Eck, 'Remaining Regulatory Challenges in Digital Finance and Crypto-assets after MiCA', Study for the EU Parliament's Econ Committee (2023)

Thank you for your CARtention!