ARTICLES

THE EUROPEAN MICA REGULATION: A NEW ERA FOR INITIAL COIN OFFERINGS

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ABSTRACT

Initial Coin Offerings (ICOs) have emerged as the most disruptive fundraising strategy of the twenty-first century, attracting global attention in both the business and legal communities. Their innovative approach to raising capital in the digital asset space has marked a significant shift in traditional fundraising methods. In recent years, however, the excitement surrounding ICOs has waned, largely due to regulatory challenges. The lack of a definitive legal framework, coupled with stringent enforcement actions, has led to a cautious approach to ICOs by industry participants and legal practitioners advising them.

This Article aims to explore the potential resurgence of ICOs in light of new developments in the European regulatory landscape, focusing on the European Union's (EU's) Markets in Crypto-Assets (MiCA) regulation. The MiCA regulation represents a pivotal development in the legal governance of crypto-assets within the EU. It seeks to establish a comprehensive set of rules for crypto-asset markets to enhance consumer protection, foster innovation, and provide market stability.

Through an in-depth analysis of the MiCA framework, the Article assesses its impact on ICOs. It discusses how the Regulation addresses previous concerns regarding investor protection, market transparency, and legal certainty. It also considers MiCA's potential to set a precedent to influence global regulatory approaches to ICOs. In addition, the Article delves into comparative analysis with other jurisdictions, especially with the United States, to assess if and how Europe's regulatory stance could shape global standards in ICO governance.

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Europe's role as a regulatory trendsetter in other areas of law provides a basis for predicting similar outcomes in the context of ICOs and crypto-assets.

In conclusion, this Article contends that the introduction of a clear, comprehensive, and balanced regulatory framework, as exemplified by MiCA, may not only revive, but significantly enhance the role of ICOs in global finance, marking the beginning of a new era in the evolution of digital asset fundraising.

I. INTRODUCTION

The recent advent of exchange-traded funds (ETFs) for Bitcoin[1]—the first and most well-known crypto-asset in the world[2]—represents a

1. *See* Gary Gensler, *Statement on the Approval of Spot Bitcoin Exchange-Traded Products*, SEC (Feb. 10, 2024), https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023.

2. *See* Satoshi Nakamoto, *Bitcoin: A Peer-to-Peer Electronic Cash System*, https://bitcoin.org/bitcoin.pdf (Bitcoin's white paper); *See generally* SAIFEDEAN AMMOUS, THE BITCOIN STANDARD: THE DECENTRALIZED ALTERNATIVE TO CENTRAL BANKING (2018) (claiming that Bitcoin with its

significant milestone in the financial world, merging the realms of traditional finance with the burgeoning sector of crypto-assets.[3] This integration marks a pivotal moment not only for Bitcoin, but for the entire spectrum of crypto-assets, signaling mainstream acceptance of and institutional support for the growth of the crypto-assets industry.[4] The introduction of Bitcoin ETFs serves as a critical bridge between conventional investment mechanisms and the innovative, often uncharted waters of crypto-assets. In fact, traditional investment funds traded on stock exchanges have the right to hold Bitcoin and provide market exposure to investors who may lack expertise in the crypto-assets sector or do not trust crypto-asset service providers.

While the recent introduction of ETFs is a milestone, it is important to recognize that the crypto-assets sector has long been home to groundbreaking financial innovations. Among these, Initial Coin Offerings (ICOs) stand out as a transformative fundraising tool that epitomizes the novel and disruptive nature of the crypto economy.[5] ICOs have enabled a direct and democratized approach to investment, allowing startups and other projects to raise capital directly from a global pool of investors without the intermediaries typical of traditional finance.[6]

In the last years, legal uncertainty and alternative fundraising strategies for blockchain projects have diminished the interest of founders and investors in ICOs. This Article explores the potential resurgence of ICOs in light of the European Union's (EU's) new Markets in Crypto-Assets (MiCA) regulation, which recognizes a special category of crypto-assets that are not securities and establishes a comprehensive legal regime for

decentralized, digital scarcity, could serve as a global monetary standard, akin to the role gold played in the past).

3. *See* Andrew Ross Sorkin et al., *Bitcoin Heads to Wall Street. Now What?*, N.Y. TIMES (Jan. 11, 2024), https://www.nytimes.com/2024/01/11/business/dealbook/bitcoin-etf-wall-street-crypto-investing.html ("Bitcoin bulls join forces with Wall Street").

4. Jesse Pound, *Bitcoin ETFs See Record-High Trading Volumes as Retail Investors Jump on Crypto Rally,* CNBC (Feb. 28, 2024), https://www.cnbc.com/2024/02/28/bitcoin-etfs-see-record-high-trading-volumes-as-retail-investors-jump-on-crypto-rally.html.

5. Dirk A. Zetzsche et al., *The ICO Gold Rush: It's a Scam, It's a Bubble, It's a Super Challenge for Regulators*, 60 HARV. INT'L L.J. 267, 267 (2019) ("ICOs have the potential to provide a new, innovative, and potentially important vehicle for raising funds to support innovative ideas and ventures.").

6. *See* Shaanan Cohney et al., *Coin-Operated Capitalism*, 119 COLUM. L. REV. 591, 601 (2019); Jonathan Rohr & Aaron Wright, *Blockchain-Based Token Sales, Initial Coin Offerings, and the Democratization of Public Capital Markets* (Cardozo Legal Studies Research Paper No. 527, 2017), https://perma.cc/4565-9RRT.

token public offerings.[7] The MiCA regulation seeks to establish comprehensive rules for crypto-asset markets to enhance consumer protection, foster innovation, and maintain market stability.[8]

The Article begins in Part II with a description of the development of ICOs, their legal challenges, and the objectives and contents of the MiCA regulation. Part III then lays out the categories of crypto-assets regulated by MiCA and provides a comparison with U.S. law, identifying the characterizing features of the crypto-assets regulated under Title II of MiCA. Part IV then analyzes the rules relating to white papers and marketing communications, the relevant liability regime, the additional transparency and custody obligations of the offerors, and the right of withdrawal. Part V concludes with a final assessment of whether MiCA regulations on ICOs may serve as a global benchmark for digital asset regulation.

II. Initial Coin Offerings and the Quest for Legal Certainty

ICOs have shown great potential to catalyze fundraising for innovative companies, but scandals and lawsuits have affected their credibility. The lack of legal certainty has often created an intolerable legal risk for founders, who are increasingly inclined to choose alternative ways to raise capital, especially through the intervention of venture capital funds (VCs). By providing a new and comprehensive regulation capable of mitigating legal uncertainty, MiCA may lead to a resurgence of interest and adoption of ICOs among crypto-asset industry participants.

A. *Strengths and Weaknesses of Initial Coin Offerings*

In recent years, distributed ledger technology (DLT) has presented unique challenges to the legal world. The MiCA regulation simply defines DLT as "a technology that enables the operation and use of distributed ledgers."[9] The commonly used term "blockchain" is a form of

7. Regulation (EU) 2023/1114 of the European Parliament and of the Council of May 31, 2023 on cryptocurrency markets and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, 2023 O.J. (L 150) 40. The Regulation was preceded by a Commission proposal COM (2020) 0593. On the proposal, see Dirk A. Zetzsche, et al., *The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy*, 16 Cap. Mkts. L.J. 203, 204–06 (2021); Matthieu Lucchesi, *Crypto-Assets: The Draft "MICA" Regulation Aims for a New EU Regulation*, Int'l Bus. L.J. 179 (2021).

8. Regulation (EU) 2023/114 of the European Parliament and of the Council 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, recital (1), O.J. (L 150) 40, 40 [hereinafter MiCA].

9. MiCA, *supra* note 8, art. 3(1) (1) at 63.

DLT that—for the purposes of the present Article—can be defined as a "database where people can store data in a transparent and non-repudiable manner and engage in a variety of economic transactions pseudonymously."[10] In its decentralized and permissionless version, DLT has enabled the development of a financial system in which, in the absence of intermediaries, people located anywhere in the world can connect and take advantage of smart contract technology.[11] Several activities can be carried out on DLTs, including the transmission of crypto-assets almost in real time and the creation of trading protocols in so-called "decentralized finance" or "DeFi."[12] The development of DLT technology is proceeding at a relentless pace, with innovative applications or upgrades being created every week.[13] These innovations require constant funding, and in the early years of the expansion of blockchain technology, the main tool for capital formation was the public sale of tokens.[14] This strategic process is now more commonly recognized through ICOs, which have emerged in the last decade as an alternative mechanism for raising capital.[15]

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10. PRIMAVERA DE FILIPPI & AARON WRIGHT, BLOCKCHAIN AND THE LAW. THE RULE OF CODE 2 (2018). On the origins of the blockchain, see also WILLIAM MAGNUSON, BLOCKCHAIN DEMOCRACY: TECHNOLOGY, LAW AND THE RULE OF THE CROWD 9–40 (2020).

11. Georgios Dimitropoulos, *The Law of Blockchain*, 95 WASH. L. REV. 1117, 1157 (2020) (arguing that blockchain operates based on its own rules and principles that have a law-like quality). *See also* Usha Rodrigues, *Law and the Blockchain*, 104 IOWA L. REV. 679, 708–13 (2019).

12. *See* Aaron Wright, *The Growth & Regulatory Challenges of Decentralized Finance*, 17 N.Y.U. J. L. & BUS. 686, 687 (2021) (pointing out that instead of having some centralized intermediary that facilitates a financial service or product, DeFi protocols rely on automated smart contract-based systems); Eric W. Hess, *Bridging Policy and Practice: A Pragmatic Approach to Decentralized Finance, Risk, and Regulation*, 128 PENN ST. L. REV. 347, 380–402 (2024) (calling for a paradigm shift in SEC's approach to DeFi, in promoting public private collaborations as a reasoned alternative to a blunt application of the "same risk, same rules"). On the self-executing character of smart contracts and its legal implications, see Pietro Sirena & Francesco Paolo Patti, *Smart Contracts and Automation of Private Relationships*, (Bocconi Legal Studies Research Paper No. 3662402, 2020), https://ssrn.com/abstract=3662402.

13. *See* Lawrence Wintermeyer, *DeFi Innovates at a Blistering Pace as Regulators Take Action*, FORBES (Sept. 9, 2021), https://www.forbes.com/sites/lawrencewintermeyer/2021/09/09/defi-innovates-at-a-blistering-pace-as-regulators-take-action/?sh=7ec524031687.

14. *See* Saman Adhami, *Why Do Businesses Go Crypto? An Empirical Analysis of Initial Coin Offerings*, 100 J. ECON. & BUS. 64, 64–67 (2018) (arguing that probability of an ICO's success is higher if the code source is available, when a token presale is organized, and when tokens allow contributors to access a specific service).

15. Aurelio Gurrea-Martínez & Nydia R. León, *The Law and Finance of Initial Coin Offerings*, *in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 118, 125–29 (Chris Brummer ed. 2019) (framing the differences between ICOs and other methods to raise capital).

According to the data, between 2013 and 2018, over USD 28 billion was raised through 1,601 ICO campaigns, underscoring the significance of ICOs in the growth of entrepreneurial finance.[16] This success should come as no great surprise, given the strengths of crypto fundraisings. The most immediate reason for the success is that ICOs allow investors to be part of new and exciting developments, potentially leading to significant returns in an area of cutting-edge technology.[17] There are also other reasons for the success. For one, ICOs can be accessed by a global audience, unlike traditional fundraising methods which are often limited by geography and stringent financial regulations. This inclusivity allows startups and other projects to tap into a wider pool of investors and raise funds more efficiently.[18] Traditional fundraising methods also often have high barriers to entry, including the need for connections to venture capitalists or the ability to meet strict listing requirements for public offerings.[19] ICOs and crypto fundraising lower these barriers, making it easier for startups and small projects to access capital.[20] Finally, due to the frequent absence of barriers to entry, ICOs allow almost anyone to invest in a project, not just accredited or qualified investors. This "democratization" means that more people can participate in potentially lucrative investment opportunities, which were previously accessible only to a select group of investors.[21]

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16. Christian Masiak et al., *Initial Coin Offerings (ICOs): Market Cycles and Relationship with Bitcoin and Ether*, 55 SMALL BUS. ECON. 1113, 1114 (2020). *See also* JACK PARKIN, MONEY CODE SPACE: HIDDEN POWER IN BITCOIN, BLOCKCHAIN AND DECENTRALIZATION 25–30 (2020) (describing the growing startup economy surrounding Bitcoin).

17. *Cf.* Max Raskin, *Meet the Bitcoin Millionaires. Early Adopters of the Virtual Currency are Suddenly Rich,* BLOOMBERG (Apr. 12, 2023), https://www.bloomberg.com/news/articles/2013-04-10/meet-the-bitcoin-millionaires.

18. Marten Risius et al., *On the Performance of Blockchain-based Token Offerings*, 33 ELEC. MKTS. 32, 33–34 (2023) (focusing on how and why the volume and sentiment of social media signals may serve as predictors of fundraising performance). *See also* MARCO DELL'ERBA, TECHNOLOGY IN FINANCIAL MARKETS: COMPLEX CHANGE AND DISRUPTION 130–31 (2024) (arguing that ICOs limit the need to cede control to third parties, as is happens with traditional venture capital funds).

19. Gurrea-Martínez & León, *supra* note 15, at 126–27 (presenting a comparison between ICOs and other sources of financing).

20. Moran Ofir & Ido Sadeh, *ICO vs. IPO: Empirical Findings, Information Asymmetry, and the Appropriate Regulatory Framework*, 53 VAND. J. TRANSNAT'L L. 525, 544–51 (2020) (identifying the ICOs key success factors based on an empirical study).

21. Christian Fisch et al., *Does Blockchain Technology Democratize Entrepreneurial Finance? An Empirical Comparison of ICOs, Venture Capital, and REITs*, 31 ECON. OF INNOVATION & NEW TECH. 70, 70 (2022) (defining the "democratization" in terms of "the creation of more equality regarding the access to financial resources by categories known to be underrepresented among potential entrepreneurs").

Early on, the unique expansiveness of ICOs brought to light the huge risks for investors and consumers.[22] Startup projects often did not meet investors' expectations, and the unregulated environment facilitated fraud.[23] In addition, although certain features of the technology depended on a decentralized network and smart contract automation, the new market fostered the emergence of innovative centralized services aimed at enabling easier access to modern technologies[24]: in particular, so-called *exchanges* that—in the simplest forms—allowed the exchange of legal tender currency against crypto-assets.[25] Coupled with wild marketing practices on social networks, ICOs often became a trap for inexperienced investors.[26]

In the initial phase, regulatory authorities remained passive, as ICOs appeared to be a very young and small niche of the financial landscape.[27] Authorities worldwide were concerned that too much regulation might impede technological innovation and that young and talented founders could establish their businesses in a different country to escape regulation.[28] The first interventions of global regulatory authorities pointed out the risks for investors and consumers through announcements and consultations.[29] In 2017, during the so-called "ICO boom,"[30] the U.S. Securities and Exchange Commission (SEC) finally

22. A comprehensive framing of the phenomenon is offered by Gurrea-Martínez & León, *supra* note 15, at 118.

23. *See* Zetzsche et al., *supra* note 5, at 292–97 (presenting a study based on a database of 1,000 whitepapers published for ICOs).

24. *Cf.* Vanessa Villanueva Collao & Verity Winship, *The New ICO Intermediaries*, 5 ITALIAN L.J. 731, 748–52 (2019).

25. However, the activities of exchanges are multiple and in traditional finance are generally offered by different parties: for a comprehensive reconstruction Marco Dell'Erba, see *Crypto-Trading Platforms as Exchanges,* MICH. ST. L. REV. (forthcoming 2024). On the regulatory challenges of exchanges, see also Yesha Yadav, *The Centralization Paradox in Cryptocurrency Markets*, 100 WASH. U. L. REV. 1725, 1727 (2023) (noting that the seemingly decentralized world of cryptocurrencies has come to depend heavily on trading firms that institutionalize a highly centralized organizational model).

26. Chris Brummer et al., *What Should Be Disclosed in an Initial Coin Offering?, in* CRYPTOASSETS: LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 157, 159 (2019) (arguing that, due to information asymmetry, ICOs investments can give rise to a "shot in the dark investment decision").

27. *Cf.* Marco Dell'Erba, *Initial Coin Offerings: The Response of Regulatory Authorities*, 14 N.Y.U. J.L. & BUS. 1107, 1127–30 (2018).

28. *See* Zetzsche et al., *supra* note 5, at 270–72 (presenting a worldwide survey of the main regulatory interventions).

29. *Id.* at 270–71.

30. The explosion of ICOs is mainly linked to Ethereum and the adoption of the ERC-20 protocol, which allowed (and still allows) users of the smart contract platform to generate new tokens very cheaply and without having to set up a new technological infrastructure. *See* DANIEL T.

intervened with enforcement actions and fines.[31] The magnitude of these measures caused serious concern and the multiplication of enforcement actions led to uncertainty and fear among industry participants.[32] Often founders of promising blockchain projects preferred not to raise funds with an ICO due to the risk of regulatory enforcement.[33] In this situation, VCs took the lead and started to provide capital to founders in exchange for future tokens, purchased at a discounted rate.[34] Today, this type of funding appears to be sub-optimal, largely due to the dominance of VCs over crypto projects.[35] VCs are interested in making fast profits from the resale of tokens that are usually purchased at a lower price than that set by retail investors.[36] The significant amount of purchased tokens gives VCs power within the decision-making process of the blockchain project in which they invest. Because of this, VC funding presents similar problems in both traditional tech fundraising and blockchain project

STABILE, KIMBERLY A. PRIOR & ANDREW M. HINKES, DIGITAL ASSETS AND BLOCKCHAIN TECHNOLOGY: U.S. LAW AND REGULATION 127–29 (2020). In the European context, see also Peter Zickgraf, *Initial Coin Offerings*, *in* THE LAW OF CRYPTO ASSETS 174, 179–82 (Philipp Maume et al. eds., 2022) and CLAUDIA SANDEI, L'OFFERTA INIZIALE DI CRIPTO-ATTIVITÀ 1–15 (2022). For some examples of ICOs in 2017, see CAMILA RUSSO, THE INFINITE MACHINE 235–38 (2020).

31. Notably, on September 25, 2017, the U.S. Securities and Exchange Commission announced the creation of a Cyber Unit to focus on cyber-related misconduct involving token sales that violate Federal securities laws. *See* Press Release, SEC Announces Enforcement Initiatives to Combat Cyber-Based Threats and Protect Retail Investors, SEC (Sept. 25, 2017), https://www.sec.gov/newsroom/press-releases/2017-176; HOUMAN B. SHADAB, REGULATING BLOCKCHAIN: TECHNO-SOCIAL AND LEGAL CHALLENGES 251 (Philipp Hacker et al. eds., 2019). Among the most discussed cases where SEC intervened, see in particular Munchee Inc., Securities Act Release No. 10445 (Dec. 11, 2017).

32. In the U.S. this has brought to the establishment of the Blockchain Association to "guarantee that American entrepreneurs have the freedom to innovate." *See* THE BLOCK CHAIN ASSOCIATION, https://theblockchainassociation.org/crypto-here-for-good/.

33. STABILE, PRIOR & HINKES, *supra* note 30, at 157.

34. Often VCs adopted the "simple agreement for future tokens" (SAFTs) instrument, launched at the end of 2017 by Protocol Labs and Cooley. *See* Juan Batiz-Benet et al., *The SAFT Project: Toward a Compliant Sale Framework*, COOLEY (Oct. 2, 2017), https://www.cooley.com/news/insight/2017/2017-10-24-saft-project-whitepaper. *See also* HOUMAN B. SHADAB, *supra* note 31, at 251–52; STABILE, PRIOR & HINKES, *supra* note 30, at 157–66. Despite some critics, *see* Ryan Strassman, *Anything but Simple: A Critique of the Proposed Simple Agreement for Future Tokens*, 38 REV. BANKING & FIN. L. 833 (2019), SAFTs are frequently used even today in fundraisers organized by blockchain projects. Another frequently used instrument is the SAFE + token warrant scheme, whereby investors acquire equity of a company and the right to get a portion of the issued tokens. On the regulation of crypto VC funds, see Lin Lin & Dominika Nestarcova, *Venture Capital in the Rise of Crypto Economy: Problems and Prospects*, 16 BERKELEY BUS. L.J. 533 (2019).

35. Max Parasol, *The Risks and Benefits of VCs for Crypto Communities*, COINTELEGRAPH (July 8, 2022), https://cointelegraph.com/magazine/risks-benefits-venture-capital-funds-crypto-communities/.

36. *Id.*

fundraising.[37] This dynamic has placed the decentralized ethos of blockchain projects and founders' creativity at risk.[38]

B. *The European MiCA Regulation*

European legislators have introduced a new model for regulating blockchain projects and crypto-assets through MiCA, with the explicit aim of fostering technological innovation:

> The Union has a policy interest in developing and promoting the uptake of transformative technologies in the financial sector, including the uptake of distributed ledger technology (DLT). It is expected that many applications of distributed ledger technology, including blockchain technology, that have not yet been fully studied will continue to result in new types of business activity and business models that, together with the crypto-asset sector itself, will lead to economic growth and new employment opportunities for Union citizens.[39]

Though functioning in an unregulated industry, MiCA aims to establish itself as a global benchmark. Its scope of application is very broad, as MiCA applies to natural and legal persons and certain other undertakings engaged in the issuance, public offering, and admission to trading of crypto-assets, or that provide services related to crypto-assets in the EU.[40] The new rules will impact the majority of market participants willing to operate globally in the field of crypto-assets.

MiCA deals with several areas. The Regulation provides for transparency and disclosure requirements in the issuance, public offering, and admission of crypto-assets to trading on a trading platform.[41] It establishes requirements for the authorization and supervision of crypto-asset service providers (CASPs)[42] and issuers of different types of stablecoins—

37. *Id.*

38. *See generally* JACK PARKIN, MONEY CODE SPACE: HIDDEN POWER IN BITCOIN, BLOCKCHAIN AND DECENTRALISATION 162–73 (2020).

39. MiCA, *supra* note 8, recital (1) at 40.

40. *See* MiCA, *supra* note 8, art. 2 at 62 (on the scope of the Regulation).

41. MiCA, *supra* note 8, tit. II at 67–76.

42. MiCA, *supra* note 8, tit. V at 114–40. On MiCA rules dedicated to CASPs, see Nicoletta Ciocca, *Servizi di custodia, negoziazione e regolamento di cripto-attività*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 79, 80–88 (2022); MARIA T. PARACAMPO, CRYPTO-ASSET SERVICE PROVIDERS, TRA MIFIDIZZAZIONE DELLA MICA E TOKENIZZAZIONE DELLA MIFID 27–30 (2023); for further comparative law references, see Andrea Minto, *The Legal Characterization of Crypto Exchange Platforms*, 22 GLOBAL JURIST 137, 152–54 (2022).

also known as "asset-referenced tokens" and "e-money tokens"—as well as for their operation, organization, and governance.[43] Importantly, MiCA also sets up measures to prevent insider dealing, unlawful disclosure of inside information, and market manipulation related to crypto-assets to ensure the integrity of markets in crypto-assets.[44]

One of the most interesting parts of MiCA[45] deals with public offerings of "crypto-assets other than asset-referenced tokens or e-money tokens," which includes so-called utility tokens defined as "a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer."[46] This category of tokens is of great interest to private law scholars, as it constitutes an innovative title of legitimacy that grants token holders the right to access goods and services, without being subject to financial law.[47] Indeed, the MiCA rules dedicated to utility tokens include elements partly taken from consumer protection law, such as mandatory disclosures and the right of withdrawal.[48]

From a systematic point of view, MiCA does not comprehensively clarify the relationship between the new rules on crypto-assets and existing consumer law regulations. To identify those who are protected, MiCA does not refer to a "consumer," but rather a "retail holder."[49] Furthermore, one of the recitals states that "[U]nion legislative acts that ensure consumer protection, such as Directive 2005/29/EC of the European Parliament[50] and of the Council or Council Directive 93/13/

43. MiCA, *supra* note 8, tit. III and tit. IV at 76–114. For the definitions of asset-referenced tokens and e-money tokens, *see infra* Part III.B.

44. MiCA, *supra* note 8, tit. VI at 140–44.

45. MiCA, *supra* note 8, tit. II at 67–76.

46. MiCA, *supra* note 8, art. 3(1)(9) at 63.

47. *See* Sebastian Omlor, *Blockchain-Token im Zivilrecht*, JURISTISCHE AUSBILDUNG 661, 662 (2023) (stressing the absence of private law concepts in MiCA). *Cf.* Matthias Lehmann, *Who Owns Bitcoin: Private Law Facing the Blockchain*, 21 MINN. J.L. SCI. & TECH. 93, 95–98 (2020) (focusing on the concept of ownership applied to crypto-assets). For a collection of principles on private law matters related to crypto-assets, see UNIDROIT, *Principles on Digital Assets and Private Law* (2023), https://www.unidroit.org/.

48. On consumer protection under MiCA, see generally Maria Rosaria Maugeri, *Proposta di Regolamento MiCA (Markets in Crypto-Assets) e tutela del consumatore nella commercializzazione a distanza*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 229, 231 (2022).

49. According to MiCA, *supra* note 8, art. 3(1)(37) at 66, "retail holder" is defined as "any natural person who is acting for purposes which are outside that person's trade, business, craft or profession." On the definition, see Philipp Maume, *The Regulation on Markets in Crypto-Assets (MiCAR): Landmark Codification, or First Step of Many, or Both?*, 20 EURO. CO. & FIN. L. REV. 242, 265 (2023) (according to which the choice of the expression "retail holder" is due to reasons of linguistic consistency with the contents of MiCA).

50. Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and

EEC,[51] including any information obligations contained therein, remain applicable to offers to the public of crypto-assets where they concern business-to-consumer relationships."[52] On specific matters, MiCA clearly stands as an alternative to consumer protection regulations. In other cases, however, to protect the weaker party, there is a need to integrate prevailing "horizontal" rules of these European directives.

C. *Time for a Renaissance of Initial Coin Offerings?*

In the last few years, more structured projects that are risk-averse have usually decided not to fund themselves through public token offerings.[53] This has led to a decline in token fundraising done through ICOs.[54] Due to a proliferation of fraud, investors have become skeptical about ICOs, as they might also reveal the incapacity of the founders to be compliant with the law and attract capital from VCs.[55] It is questionable whether clear rules on token public sales might change the described trend and put ICOs again at the forefront of fundraising strategies.

With the declared aim of protecting investors in the issuance, public offering, and admission to trading of crypto-assets,[56] MiCA presents a comprehensive set of rules for public token sales to retail investors. The rules mainly focus on disclosure duties and publishing a white paper; they constitute an alternative to financial markets law. The primary aim of the rules is to bring order to a sector characterized by confusion and uncertainty, where it is easy for ill-intentioned actors to take advantage of inexperienced investors. What needs to be carefully assessed is whether MiCA can mitigate the risks associated with token public sales in a way that does not prevent technological innovation. Excessively burdensome requirements could represent a cost that founders are not willing to pay. At the same time, the new measures should grant adequate protection and reduce information asymmetry.

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amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, 2005 O.J. (L 149) 22.

51. Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993 O.J. (L 95) 29.

52. MiCA, *supra* note 8, art. 3(1)(9) at 63.

53. *See generally* Guillaume Andrieu & Aurélie Sannajust, *ICOs after the Decline: A Literature Review and Recommendations for a Sustainable Development*, VENTURE CAPITAL 1 (2023) https://doi.org/10.1080/13691066.2023.2240024.

54. *Id.*

55. *See also* Daniel Liebau & Patrick Schueffel, *Cryptocurrencies & Initial Coin Offerings: Are they Scams? An Empirical Study*, 2 J. BRITISH BLOCKCHAIN ASS'N 1, 2 (2019) (discussing the principal-agent theory in the field of ICOs).

56. MiCA, *supra* note 8, art. 1(2)(c) at 62.

Compared to U.S. capital markets and commodities law, an immediate advantage of the MiCA is that its provisions are included in a special wider legal act that applies to crypto-assets, which are not considered financial instruments.[57] MiCA implements a new taxonomy of crypto-assets that crucially allows founders to assess how they can take advantage of the new rules. It outlines different categories of crypto-assets and specific requirements for access to market venues. Moreover, compliance with MiCA should avoid the legal risks associated with excessive scrutiny and fines from financial authorities, because in many cases no prior authorization will be required to offer crypto-assets to the public.[58]

The Regulation applies to natural and legal persons and certain other undertakings that are engaged in the issuance, public offering, and trading of crypto-assets in the EU.[59] In essence, the targeting of European investors and token listings on exchanges that operate within the EU requires compliance with MiCA. As in other areas of the law, notably data protection, the EU sets legal standards that have a global impact.[60] It remains to be seen if this will lead to a renaissance of ICOs as a fundraising strategy that takes advantage of DLT technology.

III. The Taxonomy of Crypto-Assets

To understand the novelty of the European approach, it is important to start with a comparison with U.S. law and explain its general regulatory stance on the distinction between securities and commodities in crypto-assets. In the EU, similar regulatory uncertainties affect the distinction between crypto-assets that are subject to MiCA rules and crypto-assets that are financial instruments. The main problem is understanding the scope of Title II and the rules on utility tokens, defined as types of crypto-assets that are only intended to provide access to a good or service provided by their issuer.[61] The latter category represents one of the main innovations within the MiCA framework and could revolutionize ICO fundraising.

57. MiCA, *supra* note 8, art. 2 at 62 (on the scope of the Regulation).

58. *See infra* Part IV.B.

59. MiCA, *supra* note 8, art. 2(1) at 62.

60. *See, e.g.*, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) O.J. (L 119) 1.

61. MiCA, *supra* note 8, art. 3(1)(9) at 63. *See infra* Part III.C.1.

A. *Comparison with the United States of America*

The legal classification of tokens is one of the fundamental challenges of regulating DLT.[62] The technology offers the possibility of shaping tokens with different structures and functionalities and defining ever-changing economic logic, depending on the mode of issuance, distributions over time, etc.—so-called *Tokenomics*.[63] Given this versatility, the legal treatment of tokens has always been pervaded by a basic legal question: given that crypto-assets are traded on secondary markets that are, in principle, unregulated and are frequently purchased with speculative intent, to what extent should the rules designed to protect investors in traditional financial instruments be applicable in the crypto-asset context?[64]

The solution to the problem poses a dilemma, however: the rules for traditional financial instruments establish requirements for their issuance that are difficult for crypto-asset market participants to meet. The cryptographic technology that secures communication and data through encryption and the other features of the tokens do not line up with the securities laws applied in different countries. In addition, legal costs are often prohibitive for startups formed by young developers. Ultimately, the plain application of traditional financial law could result in a decisive obstacle to developing new technologies.

In the United States, the most problematic issues arise with the application of the Securities Exchange Act of 1934[65] to tokens—through the so-called *Howey* test.[66] According to the approach most recently embraced by the SEC, albeit conducted on a case-by-case basis, not many contracts

62. *See* Filippo Annunziata, *Speak, If You Can: What Are You? An Alternative Approach to the Qualification of Tokens and Initial Coin Offerings* 1, 3–4 (Bocconi Legal Stud. Research Paper No. 2636561, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3332485.

63. *See generally* Pierluigi Freni et al., *Tokenomics and Blockchain Tokens: A Design-Oriented Morphological Framework*, 3 BLOCKCHAIN: RSCH. & APPL. 1 (2022) (explaining the central role played by tokens within blockchain-based ecosystems).

64. *See generally* DE FILIPPI & WRIGHT, *supra* note 10, at 89–91; SYREN JOHNSTONE, RETHINKING THE REGULATION OF CRYPTOASSETS: CRYPTOGRAPHIC CONSENSUS TECHNOLOGY AND THE NEW PROSPECT 83–84 (2021) (highlighting that regulatory approaches tend to apply to crypto-assets categories already known in financial law, such as currency, securities and commodities).

65. Securities Exchange Act of 1934, 15 U.S.C. §§ 77a-78rr (2022). The definition of security is provided in Section 2(a)(1).

66. *See* Report of Investigation pursuant to Section 21(a) of the Securities Exchange Act: The DAO, Exchange Act Release No. 81027 at 17–18 ("Whether or not a particular transaction involves the offer and sale of a security—regardless of the terminology used—will depend on the facts and circumstances, including the economic realities of the transaction. Those who offer and sell securities in the United States must comply with the federal securities laws, including the requirement to register with the Commission or to qualify for an exemption from the registration

involving tokens seem capable of escaping securities law.[67] The test in *Howey* leads the U.S. financial authority to believe that the transfer of tokens constitutes an investment contract, as persons buying crypto-assets often invest money in a common enterprise and expect profits solely from the efforts of the promoter or a third party.[68] However, the SEC's approach has not gone without criticism and seems to have been—at least partially—defeated by the recent decision in *SEC v. Ripple Labs.*[69] In the absence of specific rules, the demarcation between tokens to be classified as securities and other tokens is very complex. The uncertainty has generated regulatory pressure on the market, and the SEC's aggressive approach following the collapse of the "FTX" exchange, due to a USD 8 billion fraud committed by its founder Sam Bankman-Fried—who invested money belonging to clients and who has cast FTX as the poster child for cryptocurrency reliability—has led to widespread concern among industry participants.[70]

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requirements of the federal securities laws[.]"); *See also* Justin Henning, *The Howey Test: Are Crypto-Assets Investment Contracts?*, 27 U. MIAMI BUS. L. REV. 51, 61–70 (2018); M. Todd Henderson & Max Raskin, *A Regulatory Classification of Digital Assets: Toward an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets Survey: Privacy, Data, and Business*, COLUM. BUS. L. REV. 443, 457 (2019); STABILE, PRIOR & HINKES, *supra* note 30, at 127–32; Marco Dell'Erba, *United States of America*, *in* THE LAW OF CRYPTO ASSETS 528–32 (Philipp Maume et al. eds., 2022) (describing in detail the four prongs elaborated in the decision of the U.S. Supreme Court, 5/27/1946—*SEC v. W.J. Howey Co*, 328 U.S. 293, 299—to determine whether a relationship configures a security in the specific meaning of an investment contract: "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party."). For a comparison with the European legal framework under MiFD II prior to MiCA, see Philipp Maume & Mathias Fromberger, *Regulation of Initial Coin Offerings: Reconciling U.S. and E.U. Securities Laws*, 19 CHI. J. INT'L L. 548, 572–84 (2019).

67. *See, e.g.*, David Pan, *SEC's Gensler Reiterates 'Proof-of-Stake' Crypto Tokens May Be Securities*, BLOOMBERG (Mar. 15, 2023), https://www.bloomberg.com/news/articles/2023-03-15/sec-s-gary-gensler-signals-tokens-like-ether-are-securities.

68. *Cf. Framework for "Investment Contract" Analysis of Digital Assets*, SEC (last updated July 5, 2024), https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets. *See also* Henning, *supra* note 66, at 52–53, 61–70; STABILE, PRIOR & HINKES, *supra* note 30, at 166–74.

69. SEC v. Ripple Labs, Inc., 682 F. Supp. 3d 308, 328–30 (S.D.N.Y. 2023) (explaining why *programmatic sales* in the secondary market of ripple tokens do not constitute an *investment contract*). On the Ripple "saga," see generally Jacqueline Hennelly, *The Cryptic Nature of Crypto Digital Assets Regulations: The Ripple Lawsuit and Why the Industry Needs Regulatory Clarity*, 27 FORDHAM J. CORP. & FIN. L. 259 (2022).

70. Joshua Oliver, Nikou Asgari & Kadhim Shubber, *FTX: Inside the Crypto Exchange That 'Accidentally' Lost $8bn*, FIN. TIMES (Nov. 18, 2022), https://www.ft.com/content/913ff750-d1f4-486a-9801-e05be20041c1[https://perma.cc/D36Y-MQ9B]; Candice Choi, *Crypto Crisis: A Timeline of Key Events*, WALL ST. J. (June 6, 2023), https://www.wsj.com/articles/crypto-crisis-a-timelineof-key-events-11675519887 [https://perna.cc/JUC8-HYBE]; Menesh S. Patel, *Fraud on the Crypto*

Additionally, in the United States, the competence of the Commodity Futures Trading Commission (CFTC), which regulates futures and derivatives markets, is relevant to the crypto-assets context. In the crypto realm, the CFTC treats the most prominent crypto-assets—like Bitcoin[71] and Ethereum[72]—as commodities. While the CFTC does not regulate the "actual" crypto-assets, it has jurisdiction over derivatives—like futures and options—based on these crypto-assets.[73] Through regulatory enforcement, the CFTC tries to ensure that the trading of these crypto-based financial products occurs in a fair and orderly manner, and it supervises the exchanges where they are traded.[74] The regulatory landscape does not always clearly fix the delimitation between securities and commodities.[75] Some crypto-assets straddle the line between securities and commodities, leading to overlapping jurisdictions of the SEC and CFTC.[76]

For the purposes of this Article, it is important to note that in the United States, crypto-assets can be considered securities or commodities, and no specific rules have been enacted to legally qualify crypto-assets or to provide particular guidance.[77] Compared to U.S. law, the new European regulatory environment is radically different, because MiCA establishes a new asset class for crypto-assets that are not securities. This new asset class is subject to innovative rules on token offerings capable of considering the disruptive nature of blockchain technology.

Market, 36 HARV. J. L. & TECH. 171, 180–83 (2022) (discussing the implications of the FTX case on the fall of the prices of specific crypto-assets in 2022).

71. *Cf.* Mitchell Prentis, *Digital Metal: Regulating Bitcoin as a Commodity*, 66 CASE W. RSRV. L. REV. 609, 626 (2015).

72. Jesse Hamilton, *U.S. CFTC Chief Behnam Reinforces View of Ether as Commodity*, COINDESK (Mar. 28, 2023), https://www.coindesk.com/policy/2023/03/28/us-cftc-chief-behnam-reinforces-view-of-ether-as-commodity/.

73. *See* STABILE, PRIOR & HINKES, *supra* note 30, at 78–79 (on the interpretation of "commodity" in the field of digital assets).

74. *Id.* at 68–69.

75. Taylor Anne Moffett, *CFTC & SEC: The Wild West of Cryptocurrency Regulation*, 57 U. RICH. L. REV. 713, 715 (2023) (proposing a regulatory framework where the two agencies regulate jointly and where the firms can self-designate and register with either the CFTC or SEC); Yuliya Guseva & Irena Hutton, *Regulatory Fragmentation: Investor Reaction to SEC and CFTC Enforcement in Crypto Markets*, 64 B.C. L. REV. 1555, 1560 (2023) (arguing that policy reforms aiming to create a more comprehensive system for financial innovations, such as crypto, need empirical research comparing the actions of relevant regulators).

76. *See* STABILE, PRIOR & HINKES, *supra* note 30, at 83.

77. *See* Arjun Kharpal, *'Can't Get Their Act Together': Crypto Firms Slam SEC, Washington for Lack of Clarity on Rules*, CNBC (Mar. 24, 2023), https://www.cnbc.com/2023/03/24/cant-get-their-act-together-crypto-firms-slam-sec-washington-for-lack-of-clarity-on-rules.html.

However, one of the main challenges is understanding MiCA's scope of application.

B. *The Delimitation Between MiCA and MiFID II: Security Tokens vs. Other Tokens*

MiCA provides a regime for crypto-assets that are not financial instruments, but difficulties may arise in drawing a line between MiCA and the Markets in Financial Instruments Directive (MiFID II's) scope of application.[78] Since its enactment in 2014, MiFID II is the main point of reference in the EU for the regulation of securities law. To apply standardized financial market rules on disclosures and transparency, the Directive introduces the pivotal notion of "transferable security," expressly defined by the Directive, in referring to particular instruments as shares in companies and bonds, and not left to the discretion of courts.[79] Moreover—and this constitutes the key regulatory difference between the EU and the United States—MiCA now provides express rules to deal with tokens not attracted by financial markets law. More specifically, MiCA provides new and partly different rules from those contained either in MiFID II or in the so-called "prospectus regulation," which is published when securities are offered to the public or admitted to trading on a regulated market.[80] However, MiCA does not precisely determine the boundaries of its scope of application. In other words, the new European Regulation does not completely solve the problem in identifying the correct legal classification of tokens. Uncertainties remain concerning this legal classification.

MiCA defines a crypto-asset as "a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology."[81] As for the scope of application, MiCA does not apply to crypto-assets that fall under the

78. Council Directive 2014/65/EU of the European Parliament and of the Council on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, O.J. (L 173) 349 [hereinafter MiFID II].

79. MiFID, *supra* note 78, art. 4(1)(44) at 385. Transferable securities constitute the most significant subtype of financial instruments covered by MiFID, *supra* note 78, art. 4(1)(44) at 385. On the weight to be given to the rule in the context of ICOs, see Maume & Fromberger, *supra* note 66, at 573–75.

80. Council Directive 2017/1129, 2017 O.J. (L 168) 12. On the rational of the prospectus regulation, see FEDERICO DELLA NEGRA, FINANCIAL SERVICES CONTRACTS IN EU LAW 185–90 (1st ed. 2023). This regulation applies in the case of public offerings of investment tokens. On the difficulties in applying the regulation to ICOs, see Philipp Maume, *Initial Coin Offerings and EU Prospectus Disclosure*, 31 EU. BUS. L. REV. 185, 194 (2020).

81. MiCA, *supra* note 8, art. 3(1)(5) at 63.

definition of financial instruments or other positions or products regulated by financial market rules.[82] Therefore, MiCA applies only to crypto-assets that do not qualify as financial instruments. In contrast, crypto-assets that qualify as financial instruments—so-called security tokens—are subject to other rules: in particular, MiFID II, the prospectus regulation, and the new "pilot" regime for DLT-based market infrastructures that has introduced rules to create DLT-based market venues to exchange securities.[83]

A second level of classification concerns only those tokens that do not qualify as financial instruments and are subject to MiCA. In addition to the aforementioned general umbrella definition of crypto-asset, MiCA provides for three different categories of crypto-assets: the already mentioned utility tokens, asset-referenced tokens,[84] and e-money tokens.[85] Finally, MiCA also applies on a residual basis to fungible crypto-assets that, while not financial instruments, do not integrate any of the three categories of tokens defined by MiCA. In fact, the analytical rules of Title II of MiCA expressly refer to "crypto-assets other than asset-referenced tokens or e-money tokens."[86] Therefore, Title II addresses utility tokens and other tokens that are not financial instruments,[87] while

82. MiCA, *supra* note 8, art. 2(4) at 62–63.

83. Council Directive 2022/858, 2022 O.J. (L 151) 1 (EU). *Cf.* Dirk A. Zetzsche & Jannik Woxholth, *The DLT Sandbox under the Pilot-Regulation*, (Eur. Banking Inst., Working Paper No. 92, 2021); Jonathan McCarthy, *A Distributed Ledger Technology and Financial Market Infrastructures: An EU Pilot Regulatory Regime*, 17 CAP. MKTS. L.J. 288 (2022); Andrea Tina, *Mercati centralizzati, decentralizzati Prospettive di inquadramento della DeFi nell'attuale orizzonte MiFID*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 41 (2022) (It.); Philipp Maume & Finn Kesper, *The EU DLT Pilot Regime for Digital Assets*, 20 EUR. CO. L. 1 (2023). For a comparison between MiCA and the Pilot regime, see Francesca Mattasoglio, *Le proposte europee in tema di crypto-assets e DLT. Prime prove di regolazione del mondo crypto o tentativo di tokenizzazione del mercato finanziario (ignorando bitcoin)?*, 2021 RIVISTA DI DIRITTO BANCARIO 413 (It.).

84. MiCA, *supra* note 8, art. 3(1)(6) at 63 ("a type of crypto-asset that is not an electronic money token and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies.").

85. MiCA, *supra* note 8, art. 3(1)(7) at 63 ("a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency.").

86. MiCA, *supra* note 8, tit. II at 67–76.

87. In the same vein, see MiCA, *supra* note 8, recital (18) at 40 which says "the third type consists of crypto-assets other than asset-referenced tokens and e-money tokens, and covers a wide variety of crypto-assets, including utility tokens". In fact, MiCA Title II provides for specific rules that apply only to utility tokens. *See, e.g.*, MiCA, *supra* note 8, arts. 3(c), 4(6), 6(5)(d), 12(8) at 67–68, 70, 74. *See* Matthias Lehmann & Fabian Schinerl, *The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR* 2 (EBI Working Paper Series No. 17, 2024). This distinction is not discussed by Maume, *supra* note 49, at 254. *See also* Tomasz Tomczak, *Crypto-assets and Crypto-assets' Subcategories under MiCA Regulation*, 17 CAPITAL MKT. L.J. 365, 381–82 (2022)

crypto-assets that are unique and non-fungible compared to other crypto-assets—so-called non-fungible tokens (NFTs)—are outside MiCA's scope of application.[88]

In the outlined legal framework, there is a crucial distinction between utility tokens and security tokens, often discussed in legal literature[89] and recognized among specific legal systems.[90] In fact, MiCA's scope of application depends on the latter distinction. Under a critical view, the fact that MiCA regulates only crypto-assets that do not qualify as financial instruments reveals the potential fragility of the conceptual architecture on which MiCA rests, as it does not clearly distinguish between what is a security and what is not. The express recognition of the "fluidity" of these boundaries separates MiCA's scope of application from that of traditional financial markets law.[91] Indeed, as will be seen,

(arguing that MiCA refers not only to the utility tokens, but also other tokens which may be qualified as crypto-assets in accordance with the general definition of MiCA art. 3(1)(5)).

88. MiCA, *supra* note 8, art. 2(3) at 62. However, an important clarification is found in MiCA, *supra* note 8, recital 11 at 42: "fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible." Furthermore, it states that

> The issuance of crypto-assets as non-fungible tokens in a large series or collection should be considered an indicator of their fungibility. The mere attribution of a unique identifier to a crypto-asset is not, in and of itself, sufficient to classify it as unique and non-fungible. The assets or rights represented should also be unique and non-fungible in order for the crypto-asset to be considered unique and non-fungible. The exclusion of crypto-assets that are unique and non-fungible from the scope of this Regulation is without prejudice to the qualification of such crypto-assets as financial instruments. This Regulation should also apply to crypto-assets that appear to be unique and non-fungible, but whose de facto features or whose features that are linked to their de facto uses, would make them either fungible or not unique. In that regard, when assessing and classifying crypto-assets, competent authorities should adopt a substance over form approach whereby the features of the crypto-asset in question determine the classification and not its designation by the issuer.

Ultimately, the token's technical characteristics do not exclude the qualification in accordance with one of MiCA's categories, given that substance prevails over form.

89. *See* WULF A. KAAL, SECURITIES VERSUS UTILITY TOKENS (2022).

90. See SWISS FIN. MKT. SUPERVISORY AUTH., GUIDELINES FOR ENQUIRIES REGARDING THE REGULATORY FRAMEWORK FOR INITIAL COIN OFFERINGS (ICOS) 5 (Feb. 16, 2018) (Switz.) [hereinafter FINMA Guidelines], that distinguish between "utility tokens" and "asset tokens" and specify that only the latter are treated as securities. On the Swiss legal framework concerning token classifications, see Biba Homsy, *Aspects of Swiss Financial Regulation*, *in* BLOCKCHAINS, SMART CONTRACTS, DECENTRALIZED AUTONOMOUS ORGANIZATIONS AND THE LAW 144, 163–65 (Daniel Kraus et al. eds., 2019); Michel J. Reymond, *Swiss Law on Financial Market Infrastructures as applied to Crypto Token Exchanges*, 2021 INT'L BUS. L.J. 215, 217–219 (2021) (focusing on the different service providers involved in token sales).

91. *See* Marco Cian, *La nozione di criptoattività nella prospettiva del MiCAR. Dallo strumento finanziario al* token, *e ritorno*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 59, 60 (2022) (It.). For negative remarks on the political choice, see also PARACAMPO, *supra* note 42, at 7; Maume, *supra* note 49, at 251 (stating that MiCA is conceived as a special set of rules with respect

the boundary between tokens subject to MiCA and security tokens can be difficult to identify.[92] One of MiCA's introductory statements—called "recitals"—stipulates the principles of "same activities, same risks, same rules" and "technology neutrality," whereby "crypto-assets that fall under existing Union legislative acts on financial services should remain regulated under the existing regulatory framework, regardless of the technology used for their issuance or their transfer."[93] It is thus clear that substance should prevail over form. However, the recital offers little or no guidance as to the decisive elements that may distinguish between the different categories of tokens.

In any case, the aforementioned "fluidity of boundaries" seems inevitable. Once the principle of technology neutrality is accepted, it does not seem possible to regulate the matter differently. The flexibility of cryptographic technology makes it impossible to determine exactly when a given token should be subject to MiCA. Competent authorities will issue guidelines[94] and the legal classification will ultimately depend on a case-by-case investigation. It is important to identify the characterizing features of utility tokens and, more generally, of tokens subject to MiCA's Title II on crypto-assets other than asset-referenced tokens or e-money tokens.

C. *The "Other Tokens" Under Title II: Utility Tokens and Beyond*

The categories conceived of in MiCA pose problems for the legal classification of crypto-assets and the distinction between them and financial instruments. In this context, it has been argued that utility tokens undoubtedly generate more difficulties in determining the applicability of traditional financial law.[95] According to MiCA's definition, the utility token is "a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer."[96] Merely denominating

to MiFID II, but in the individual regulatory solutions it substantially resumes the European rules on financial instruments).

92. *See infra* Part II.C.

93. MiCA, *supra* note 8, recital 9 at 42.

94. This is expressly provided for in MiCA, *supra* note 8, art. 2(5) at 63, according to which ESMA has to develop guidelines for identifying when crypto-assets should be qualified as financial instruments. In addition, under MiCA, *supra* note 8, art. 3(2) at 66, the Commission could adopt delegated acts to clarify the meaning of certain definitions in the regulation, including those related to tokens.

95. *See* Cian, *supra* note 91, at 68. *See also* Zickgraf, *supra* note 30, at 201 ("the qualification and handling of utility tokens under capital markets has proven to be the most controversial and complex issue in connection with ICOs").

96. MiCA, *supra* note 8, art. 3(1)(9) at 63.

utility tokens as crypto-assets used by issuers or CASPs does not preclude them from being classified in different terms and likewise being considered financial instruments.

1. The Legal Classification

In describing a method for classifying tokens and determining their legal regime, it is necessary to consider that utility tokens are not the only crypto-assets that are not financial instruments. Unlike asset-referenced and e-money tokens, utility tokens are a subcategory of crypto-assets to which MiFID II does not apply. Therefore, to determine whether a token is subject to MiCA, the definition of financial instrument must be assessed. In other words, to be excluded from MiCA, the token must constitute a financial instrument under MiFID II.[97]

As this demonstrates, the European rules do not eliminate all uncertainties regarding the legal classification of crypto-assets. However, within the broad category of crypto-assets subject to MiCA, utility tokens integrate a strong set of distinguishing parameters compared to the U.S. legal system, as the relevant rules expressly identify elements that are likely to preclude a crypto-asset from being considered a financial instrument. It is therefore of fundamental importance to determine when crypto-assets should qualify as utility tokens.

Utility tokens "only" confer the right to access a good or service.[98] Even before the publication of MiCA, scholars pointed out that the utility token category created ambiguities, as the good or service element lends itself to viewing the classification through the lens of consumer protection, while the emphasis on raising capital through an ICO invokes the more appropriate application of capital markets law.[99] It is no coincidence that before the entry into force of MiCA, it was common to consider that where the good or service was not yet accessible at the time of the token launch, the governing framework should be that of financial instruments.[100] In fact, in the absence of a usable good or service, the common solution to information asymmetry focused on the position of the issuer and its ability to develop the project under the promised terms.

In contrast, if the good or service were already available on the market, the situation would be similar to that in consumer contracts, where

97. *See* Cian, *supra* note 91, at 59–60 (departing from the definition of "financial instrument" in identifying the basic features of crypto-assets through *a contrario* arguments).

98. See again the definition in MiCA, *supra* note 8, art. 3(1)(9) at 63.

99. *See* SANDEI, *supra* note 30, at 36–41.

100. Zickgraf, *supra* note 30, at 202–03.

legal protection is concentrated on the qualities and attributes of the good or service.[101] This distinction is underscored in the Swiss FINMA Guidelines, which clarify that the utility token is not a security only if the good or service is accessible during the ICO.[102]

MiCA follows this logic but provides a different regime: where the offering involves "a utility token providing access to a good or service that exists or is in operation."[103] The rules contained in Title II on public offerings of crypto-assets other than asset-referenced tokens and e-money tokens do not apply.[104] Consequently, there is no requirement to publish a white paper. The exemption is justified by the absence of information asymmetry given the close connection between the token and an existing good or service.[105] The buyer has knowledge of the good or service that can be accessed through the tokens. In such cases, the purchase of crypto-assets is considered less suitable for an investment purpose.[106] The immediate availability of the good or service brings the utility tokens under the ordinary rules of consumer contracts. Moreover, the exception does not operate where the offeror makes known in any communication its intention to seek admission to trading.[107]

Along the same lines, before MiCA, the ability to access the good or service at the time of the ICO was considered an important element to exclude the nature of the security.[108] Instead, in the context of the new European Regulation, the circumstance that the utility attached to the token—namely the access to goods or a service—is not available at the time of the offering. This does not determine the qualification of the token as a financial instrument, but it does invoke the application of the

101. *See* Philipp Hacker & Chris Thomale, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, 15 ECFR 645, 675 (2018) ("It is undeniable that even in this constellation, information asymmetries will often arise between issuers and buyers. However, these asymmetries typically do not relate to financial, but rather to functionality and consumption risks"); Zickgraf, *supra* note 30, at 202–03.

102. *See* FINMA Guidelines, *supra* note 90, at 5 ("These tokens do not qualify as securities only if their sole purpose is to confer digital access rights to an application or service and if the utility token can already be used in this way at the point of issue.").

103. MiCA, *supra* note 8, art. 4(3)(c) at 67.

104. *Id.*

105. *Id.*

106. *See* Claudio Frigeni, *Il mercato primario delle cripto-attività. Offerta al pubblico e regime di trasparenza nella proposta di Regolamento MiCA*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 23, 34 (2022) (It.).

107. MiCA, *supra* note 8, art. 4(4) at 68.

108. Zickgraf, *supra* note 30, at 202–03.

rules encompassed in Title II of MiCA, in particular the obligation to notify and publish a white paper.[109]

Regarding the relevant features of the crypto-asset, the tradability of the token on the secondary market and the potential volatility of its price are not relevant to the legal classification. MiCA establishes rules aimed at allowing Title II crypto-assets to be admitted to trading.[110] It would therefore not make sense, as has been the case in the past,[111] to consider tradability in the secondary market a determining factor for the legal classification of the crypto-asset as a financial instrument. MiCA entails the legal recognition of a market for crypto-assets parallel to the MiFID II framework. Title II crypto-assets undergo the rules of MiCA whereas MiFID II remains applicable to financial instruments. For the qualification in terms of the utility token, the access to a good or service provided by the issuer should form the "utility" of the crypto-asset. Without specification by the relevant rules, the good or service does not need to be digital.[112] The token could give access to a good or service in the analog world. Moreover, it is not clear under MiCA whether the use of the token—and thus the enjoyment of the utility—should result in the exhaustion, transmission, or cancellation of the crypto-asset. However, among the mandatory disclosures, the white paper must contain information on how utility tokens "can be redeemed for goods or services to which they relate."[113] It is therefore controversial whether access to the good or service can be granted to holders that "keep" the crypto-assets in their digital wallet.

2. Problems of Classification: Hybrid Tokens

MiCA does not indicate what regime is applicable in cases where a so-called "hybrid" function is attributable to the token.[114] The use of the word "only" within the definition of utility token[115] might indicate that if such a crypto-asset has additional functions, classification as a utility token is not possible. This interpretation, however, is incorrect. First, MiCA itself ascribes to tokens an additional function beyond mere access to the good or service: namely, tradability in the secondary

109. *See infra* Part III.B.

110. MiCA, *supra* note 8, art. 5 at 68–69.

111. See in relation to the qualification of "financial product," in accordance with Italian law, SANDEI, *supra* note 30, at 50. *See also* Enzo Maria Incutti, "Initial Coin Offering" ed il mercato delle cripto-attività: l'ambiguità degli "utility token", 2022 RIVISTA DI DIRITTO PRIVATO 71, 86 (2022) (It.).

112. *See* Cian, *supra* note 91, at 68.

113. MiCA, *supra* note 8, Annex I Part G(5) at 187.

114. *See* Cian, *supra* note 91, at 69.

115. MiCA, *supra* note 8, art. 3(1)(9) at 63.

market. In addition, it would make little sense to adopt a strict interpretation of the functional characteristics of the token. Crypto-assets with additional functions beyond access to goods or services still fall under the broader category of crypto-assets other than asset-referenced tokens and e-money tokens, which are regulated under Title II anyway.[116] In this sense, the only mixed function that might be excluded from the scope of MiCA bears elements suitable to bring the token into the category of financial instruments.[117] In other words, only hybrid tokens, which can be considered halfway between utility tokens and security tokens, should be considered outside the scope of MiCA: as an example, a token that allows access to a service and confers a right to receive a dividend based on the economic results of the issuing company. Under these circumstances, advanced jurisdictions in the field of crypto-asset regulation, such as Switzerland, classify these tokens almost exclusively as securities ("asset token" according to the terminology of Swiss law).[118] In the European context, with MiCA, the alternative to choosing between classifications like tokenized financial instruments and crypto-assets is much less dramatic than in other jurisdictions around the world. The alternative is not "all or nothing" in terms of investor protection, but rather a choice between two similar regimes based on a disclosure document—a prospectus or a white paper—with liability falling on the issuer or offeror.[119] The white paper has clear similarities to the prospectus and seems to adequately support the offering of tokens with financial characteristics.[120] Given that utility tokens can also be admitted to a trading platform, it appears that Title II of MiCA could also apply to crypto-assets that have a partial investment function.[121] Indeed, the plurality of token functionalities that can be achieved through technology seems to strongly support a broad understanding of the scope of MiCA's Title II. In principle, only tokens that give holders

116. Title II does not apply if the token should be classified as a financial instrument. *See* MiCA, *supra* note 8, art. 2(4) at 62.

117. *See* Maume, *supra* note 49, at 257 ("Hybrid tokens that are financial instruments under Art. 4(1)(15) MiFID2 but also grant access to services are not subject to MiCAR").

118. FINMA Guidelines, *supra* note 90, at 5 ("If a utility token additionally or only has an investment purpose at the point of issue, FINMA will treat such tokens as securities (i.e. in the same way as asset tokens).").

119. Regarding the rules on the white paper, *see infra* Part 3.B.

120. *See infra* Part IV.B.

121. This is the position of the German financial authority BaFin. *See Merkblatt Zweites Hinweisschreiben zu Prospekt- und Erlaubnispflichten im Zusammenhang mit der Ausgabe sogenannter Krypto-Token GZ*: WA 51-Wp 7100-2019/0011 and IF 1-AZB 1505-2019/0003, 1, 6 (Aug. 16, 2019) (Ger.).

rights similar to those of holders of financial instruments expressly excluded from the MiCA should be considered outside of its scope,[122] in particular the securities mentioned in Article 4(1)(44) of MiFID II in subparagraphs (a), (b), and (c)—for example, shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares, bonds, and debt securities.[123]

Under this framework, it does not seem that the "governance" function—the possibility for token holders to vote on issues related to the development of the blockchain project or the distribution of crypto-assets belonging to a decentralized organization—affects the qualification of the token as a financial instrument.[124] As correctly noted, the purpose of governance is usually not to generate rights to "cash flows," but rather to participate in choices regarding the use of the blockchain project.[125] Therefore, the user does not purchase an instrument equivalent to a company share, given that there is generally no direct participation in the profits of the underlying project, which, in many cases, are entirely absent.[126] In addition, excluding so-called governance tokens from the scope of MiCA would result in an excessive restriction to its scope. In fact, most tokens allow holders to express choices and preferences in the context of decentralized organizations (DAOs), built on DLT infrastructures with smart contracts.[127] The "payment" function

122. MiCA, *supra* note 8, art. 2(4) at 62–63.

123. *See* Zickgraf, *supra* note 30, at 198–99 (defining the characteristics of investment tokens).

124. *See* Hacker & Thomale, *supra* note 101, 673–74.

125. *Id.* ("Again, they do not confer property stakes in the underlying company. While they do grant "membership" in the blockchain vehicle (e.g., the Filecoin platform), the aim of the membership is not to generate future cash flow, but to make functional use of the blockchain product. This vastly differs from the model of shares.").

126. In many cases, blockchain projects do not create any form of revenue. This is the case for the so-called memecoins, crypto-assets that originate from internet memes or have a humorous or lighthearted premise, often gaining popularity and value rapidly due to social media and viral trends. *See* Adam James, *Solana's Memecoin Mania Pushes On-chain Volumes and Fees to New Highs*, THE BLOCK (Mar. 17, 2024), https://www.theblock.co/post/282993/solana-memecoin-volume-fees-highs.

127. *See* DE FILIPPI & WRIGHT, *supra* note 5, at 146; Aaron Wright, *The Rise of Decentralized Autonomous Organizations: Opportunities and Challenges*, STAN. J. BLOCKCHAIN L. & POL'Y 1, 7 (2021) (describing the function of governance tokens in the following terms: "These governance tokens likely will help keep the smart contract developers in check by preventing them from taking actions that would go against the smart contract's users. At the same time, holders of the governance tokens can take ready action to account for regulatory requirements, should they arise, or complex technical or organizational issues that may emerge over time.") On governance tokens as a sub-category of utility tokens, see BIYAN MIENERT, DEZENTRALE AUTONOME

can also play a role in token classifications.[128] According to an early classification, not entirely complying with MiCA, currency tokens, utility tokens, and investment tokens were all distinguished from one another.[129] The currency tokens were characterized by a payment function, a function that was generally considered to be unrelated to utility tokens.[130] In the *Hedqvist* case, which concerned the potential application of VAT, the European Court of Justice stated that Bitcoin is not a financial instrument, but it "has no other purpose than to be a means of payment and . . . it is accepted for that purpose by certain operators."[131] Similar considerations can be extended to the native crypto-asset of the Ethereum blockchain: the payment function has been in the past recognized for Ether, the native crypto-asset of the blockchain Ethereum, along with the utility function.[132] However, the described features that

ORGANISATIONEN (DAOs) UND GESELLSCHAFTSRECHT 182–83 (2022). For an overview see also E. Macchiavello, *Digital Platforms, Capital Raising and EU Capital Markets Law: Different Shades of Decentralization*, 33 EUR. BUS. L. REV. 1057 (2022). On DAOs and corporate structures, see Nathan Tse, *Decentralised Autonomous Organisations and the Corporate Form*, 51 VICTORIA U. WELLINGTON L. REV. 313 (2020); CHRISTOPHER J. BRUMMER & RODRIGO SEIRA, LEGAL WRAPPERS AND DAOs (2022) (illustrating how wrappers might be employed to protect DAO participants from unlimited liability, optimize tax treatment, engage in contractual off-chain transactions, and enable compliance with key regulatory expectations).

128. The definition of utility tokens in ESMA's report, specifies that utility tokens must have a different function than means of payment. EUR. SEC. & MKT. AUTH., ADVICE INITIAL COIN OFFERINGS AND CRYPTO-ASSETS 43 (2019) [hereinafter ESMA Advice] ("Utility-type crypto-asset: a type of crypto-asset that provides some 'utility' function other than as a means of payment or exchange for external goods or services").

129. *See* Valeria Ferrari, *The Regulation of Crypto-assets in the EU – Investment and Payment Tokens Under the Radar*, 27 MAASTRICHT J. EUR. & COMP. L. 325, 329–31 (2020).

130. *See* DÖRTE POELZIG, KAPITALMARKTRECHT 583 (C.H. Beck, 3d ed., 2023) (Ger.) (pointing out that utility tokens do not constitute an "alternative" means of payment).

131. Case C-264/14, Skatteverket v. David Hedqvist, EUCLI:EU:C:2015:718, ¶¶ 42, 55 (Oct. 22, 2015) ("The 'bitcoin' virtual currency, being a contractual means of payment, cannot be regarded as a current account or a deposit account, a payment or a transfer. Moreover, unlike a debt, cheques and other negotiable instruments referred to in VAT Directive 2006/112, art. 135 (1)(d), 2006 O.J. (L 347) 1, 28 (EU), the 'bitcoin' virtual currency is a direct means of payment between the operators that accept it."). From a comparative law perspective, see Georgios Dimitropoulos, *Global Currencies and Domestic Regulation*, *in* REGULATING BLOCKCHAIN. TECHNO-SOCIAL AND LEGAL CHALLENGES 112, 122–23 (Philipp Hacker et al. eds., 2019) (arguing that the above decision of the European Court of Justice "both implicitly and explicitly recognizes its nature as some sort of money."). From a civilian perspective, see Marco Cian, *La criptovaluta - Alle radici dell'idea giuridica di denaro attraverso la tecnologia*, BANCA, BORSA E TITOLI CREDITO 315 (2019) (It.).

132. EUR. BANKING AUTH., REPORT WITH ADVICE FOR THE EUROPEAN COMMISSION 7 (2019) ("Ether has the features of an asset token but is also accepted by some persons as a means of exchange for goods external to the Ethereum blockchain, and as a utility in granting holders access to the computation power of the Ethereum Virtual Machine.").

tokens can assume now seem to have lost relevance, given the wide adoption of stablecoins—"asset-referenced tokens" and "e-money tokens in MiCA"[133]—crypto-assets having primarily the function of means of payment.[134] Crypto-assets such as Bitcoin and Ether should now be brought under the regulations of Title II of MiCA, as the concurrent function as a means of payment for these crypto-assets does not impact their legal classification. A variety of problems may affect the claims of the issuer or the offeror when it comes to the crypto-assets' price. In the past, it has often been argued that public statements on the price action of the crypto-assets, coupled with promises regarding improved functionalities of the blockchain project, should lean towards classifying crypto-assets in terms of financial instruments, as they generate an expectation of profits for holders.[135] The new MiCA rules address the offeror's disclosure requirements in the white paper, as well as marketing activities.[136] The offeror is required to state in the white paper that "the crypto-asset may lose its value in part or in full."[137] In addition, marketing communications must be consistent with the content of the white paper.[138] Therefore, where the issuer or the offeror complies with MiCA, any reliance on an increase in the price of tokens should not be protected, while the offeror could be held liable for the incorrectness or incompleteness of the information in the white paper or within marketing communications.[139] Misbehavior and misleading statements of offerors or of persons who provide marketing services should be addressed through a specific regime. In this respect, MiCA does not

133. *See* Gabriella Gimigliano, *Payment Tokens and the Path towards MiCA*, 8 ITALIAN L.J. 353 (2022) (focusing asset-referenced and electronic money tokens in the framework of European payment law).

134. For an extensive and detailed review of the different types of stablecoins, see Alexander Lipton, *Toward a Stable Tokenized Medium of Exchange*, *in* CRYPTOASSETS. LEGAL, REGULATORY, AND MONETARY PERSPECTIVES 89, 90–95 (Chris Brummer ed., 2019). *See also* Craig Calcaterra, Wulf A. Kaal & Vadhindran Rao, *Stable Cryptocurrencies*, 61 WASH. U. J. L. & POL'Y 193 (2020); Kara Bruce, Christopher K. Odinet & Andrea Tosato, *The Private Law of Stablecoins*, 54 ARIZ. ST. L.J. 1073 (2022). Specifically, on policy considerations, see Gary B. Gorton & Jeffery Y. Zhang, *Taming Wildcat Stablecoins*, 90 U. CHI. L. REV. 909, 910–17 (2023). *See also* Eric S. Mulvey, *How Stable Are Stablecoins?: State Regulation of Stablecoins*, 23 J. HIGH TECH. L. 321, 322 (2023); Mary Elizabeth Burke, *From Tether to Terra: The Current Stablecoin Ecosystem and the Failure of Regulators*, 28 FORDHAM J. CORP. & FIN. L. 99 (2023).

135. *See* Zickgraf, *supra* note 30, at 207 (arguing that the highlighting of profit opportunities related to the token in the issuer's promotional materials constitutes a factor that suggests the qualification of the token as a financial instrument).

136. MiCA, *supra* note 8, art. 6 at 69–71.

137. MiCA, *supra* note 8, art. 6(5) (a) at 70.

138. MiCA, *supra* note 8, art. 7(1) (c) at 71.

139. *See infra* Part III.C.

provide precise rules, while other jurisdictions have rules aimed at regulating online promotions of crypto-assets.[140]

In light of the above, it seems that the EU has designed the MiCA regulation in such a way as to encompass most of the crypto-assets available in the market, providing a "full harmonization"[141] regulation with a special status compared to traditional financial instruments, which in the EU are predominantly regulated by MiFID II. MiCA's broad scope of application is evidenced by a particular recital of the "pilot" regime, under which "[m]ost crypto-assets fall outside the scope of [EU] financial services legislation" and such crypto-assets "therefore require a dedicated regulatory framework at Union level,"[142] namely the MiCA regulation.[143] In a similar vein, the European Securities and Markets Authority (ESMA) had already indicated that only between 10% and 30% of tokens could be considered financial instruments.[144] Additionally, at the national level, the French Financial Markets Authority (AMF), argued that tokens launched through ICOs could not be qualified according to the categories of financial instruments.[145] Thus, practitioners must firmly reject the idea that after the adoption of MiCA, crypto-assets should be presumed to be securities subject to the MiFID II regime, unless a competent national authority states that they are not.[146] The Title II regime aims to regulate a significant number of crypto-assets through specific legislation that considers the technical features of the crypto-assets. In addition,

140. *See infra* Part III.B.

141. On the different levels of harmonization, see Marcus Klamert, *What We Talk about When We Talk about Harmonisation*, 17 CAMB. YEARBOOK EUR. LEGAL STUD. 360, 362 (2015) (arguing that "Harmonisation is 'full' in scope when there is comprehensive or exhaustive legislative harmonization in a specific area"). *See also* Vanessa Mak, *Full Harmonization in European Private Law: A Two-Track Concept*, 20 EUR. REV. PRIV. L. 213, 214–16 (2012).

142. Council Regulation L151/1, 2022 O.J. 1.

143. *See*, with reference to the goals of MiCA, Christos V. Gortsos, *Challenges Ahead for the EU Banking System*, 33 EUR. BUS. L. REV. 353, 369 (2022) ("Since most cryptoassets . . . fall outside the scope of EU financial and consumer protection law, their holders may be exposed to risks.").

144. *See* ESMA Advice, *supra* note 128, at 19–20.

145. *Discussion Paper on Initial Coin Offerings (ICOs)*, AUTORITÉ DES MARCHÉS FINANCIERS (AMF) 8 (Oct. 26, 2017) ("the tokens issued in France of which the AMF is aware should not fall under French regulations governing the public offering of financial securities") [hereinafter AMF *Discussion Paper on Initial Coin Offerings (ICOs)*].

146. *Cf.* Dirk A. Zetzsche et al., *Remaining Regulatory Challenges in Digital Finance and Cryptoassets after MiCA*, study requested by ECON Comm. Eur. Par., 110 (May 2023) ("Crypto-assets are deemed transferable securities subject to Annex I Section C(1) Directive 2014/65/EU, unless the National Competent Authority determines that the crypto-asset is subject to regulation as a financial derivative, a payment service under the Payment Services Directive, E-money under the E-money Directive, or an EMT, an ART or other crypto-asset under MiCA, another regulated service or activity, or is exempted from financial regulation altogether.").

as will be examined later in this Article,[147] MiCA excludes Title II crypto-assets from the need for prior authorization by the national competent authority, as the offeror is only required to supply the white paper.[148]

In the outlined framework, problems with MiCA's application could arise from the nature of MiFID II, which has not resulted in maximum harmonization at a European level.[149] Some European Member States, such as Italy, embrace a broader notion of "financial product" than the "financial instrument" regulated by MiFID II.[150] MiCA's maximum harmonization approach requires that new rules have to be applied to all crypto-assets that do not fall within the list of those expressly excluded by Article 2(4) of MiCA. It follows that, despite national implementations of MiFID II with a wider scope of application than what the Directive requires to European Member states, crypto-assets that are not included in the list of Article 2(4) of MiCA must be subject to the rules of the new European Regulation.[151] There should not be an obligation to publish a prospectus in the case of sale to the public.[152] A different interpretation would jeopardize the goal of maximum harmonization, creating inequalities between different Member States and negatively impacting those who intend to operate in jurisdictions that interpret the scope of financial law more widely than that of MiFID II.

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147. *See infra* Part III.B.

148. On the qualification of tokens, see MiCA, *supra* note 8, art. 97(1) at 149 ("[B]y December 30, 2024, the European Supervisory Authorities ("ESAs") shall jointly issue guidelines in accordance with Article 16 of Regulation (EU) No 1093/2010, Article 16 of Regulation (EU) No 1094/2010 and Article 16 of Regulation (EU) No 1095/2010 to specify the content and form of the explanation accompanying the crypto-asset white paper referred to in Article 8(4). The guidelines shall include a template for the explanation and the opinion and a standardized test for the classification of crypto-assets.").

149. *Cf.* Vladislav Burilov, *Regulation of Crypto Tokens and Initial Coin Offerings in the EU*, 6 EUR. J. COMP. L. & GOV. 146, 147–150 (2019) (addressing the problem from a supranational perspective). *See also* Tomczak, *supra* note 87, at 370.

150. In the Italian legal system, "financial instrument" constitutes a *species* of the *genus* "financial product." *See* TUF art. 1(1)(u) (defining "financial products" as "financial instruments and any other form of investment of a financial nature.")

151. See, with reference to the Italian legal system, Frigeni, *supra* note 106, at 33 (pointing out that, following the approval of MiCA, on the one hand, the issuance or offering of crypto-assets that do not qualify as securities but fall under the notion of financial products will no longer be subject to the obligation to publish a prospectus pursuant to art. 94-*bis* Testo unico finanziario ("TUF"), but will have to be preceded by the publication of a white paper, pursuant to MiCA art. 4; on the other hand, the issuance or offering of crypto-assets that do not qualify as either securities or financial products, which until now have been exempt from the obligation to prepare a prospectus, will in turn be attracted to the transparency rules provided by MiCA). *See also* FILIPPO ANNUNZIATA, LA DISCIPLINA DEL MERCATO DEI CAPITALI 520–21 (Giappichelli, 12th ed., 2023).

152. *See* Frigeni, *supra* note 106.

D. *Examples of Tokens That Would Fall Under Title II*

Writings that have addressed the issue of the legal classification of ICOs often mention examples of tokens that are not subject to financial market law.[153] MiCA is intended to regulate any fungible crypto-asset not subject to the rules of financial instruments on a residual basis.[154] The scope of Title II thus extends itself over a wide and varied array of tokens. This section will discuss some examples of existing tokens to understand which type of tokens will be regulated under Title II of MiCA.

It is worth starting with utility tokens, which are the only category of Title II crypto-assets explicitly defined by MiCA.[155] In recent times, fan tokens[156] linked to soccer teams that are supposed to serve as a means of fan engagement and access to exclusive discounts and experiences are often referenced in this context.[157] Such tokens are traded on the secondary market and, as other crypto-assets, are subject to price fluctuations and speculative transactions.[158] It seems fair to argue that fan tokens fall under the scope of MiCA.

Scholars have pointed out that crypto-assets issued by the Filecoin project, aiming to establish a peer-to-peer data storage system hinged

153. *See* Hacker & Thomale, *supra* note 101, at 673–74.

154. *See* MiCA, *supra* note 8, art. 2 at 62.

155. *See supra* Part II.C.

156. *See* Cian, *supra* note 91, at 68. From an economic and financial perspective, MATTHIAS SCHARNOWSKI ET AL., FAN TOKENS: SPORTS AND SPECULATION ON THE BLOCKCHAIN 8 (2022) (Fan tokens are utility tokens that give holders a tokenized share of influence on club or team decisions).

157. *See, e.g.*, the information about the "Lazio Fan Token." *Lazio Fan Token: Brings Fans Closer Together!*, LAZIO, https://www.sslazio.it/en/fan-zone/fan-token (last visited Aug. 16, 2024) ("it is a utility token (Cryptocurrency with different functionalities), powered by blockchain technology, that aims to revolutionize fan engagement through innovative and exclusive experiences that were once out of the reach of S.S. Lazio and its fans." According to the website description, the token "gives the privilege to all Lazio fans to be part of an exclusive and growing digital community that can enjoy special benefits such as exclusive merchandise, digital art, limited edition NFTs, discounts, as well as special access to world-class events. In essence, Lazio Fan Token is your pass to become a super fan." (translations provided by the Author)).

158. *See* SCHARNOWSKI ET AL., *supra* 156, at 1–5, (arguing, on the basis of statistical research, that fan tokens pose higher risks for investors than more established crypto-assets; that the price performance of tokens on the secondary market does not appear correlated with that of the shares of soccer teams that are organized as a public company; and that the buying and selling of tokens depends in part on the the soccer team's results). *See, e.g.*, Ender Demir et al., *Are Fan Tokens Fan Tokens?*, 47 FIN. RSCH. LETTERS (2022), doi:10.1016/j.frl.2022.102736 (pointing to an increase in token sales in case of defeat of teams engaged in the UEFA Champions League tournament).

on the blockchain,[159] also fall under the umbrella of utility tokens. Users of the data storage system pay service providers connected to the network with the native "FIL" token at the time of data transmission and at the time of data return to incentivize the service provider for retention over time.[160] Availability and cost are not controlled by a central entity but are freely determined based on supply and demand.[161] Storage service providers must lock up the project token as collateral—which is lost if the provider proves to be unreliable—and get remuneration in "FIL" for generating new blocks.[162] Finally, the token enables holders to exercise governance powers over the Filecoin project development.[163] The multiple functionalities of these tokens seem to confirm their legal classification as utility tokens.

The comparison with the United States is significant in this regard. In the SEC's complaints against Binance and Coinbase, it claimed that the exchanges listed assets, including FIL, that had been offered and sold as investment contracts in the absence of proper registration.[164] The U.S. authority's analysis mainly focused on the type of fundraising and project development planning that allegedly fostered expectations of future profit from token purchases.[165] In the context of MiCA, the SEC's arguments would probably be irrelevant to the legal classification of the token. The European framework's primary purpose is to allow companies to sell crypto-assets to raise capital for the development of new technology.

Among the examples of tokens that would hypothetically fall under Title II,[166] the case of Ether is also of interest. The function or utility of the token could lie in the ability to perform transactions on the blockchain and, thus, use "block space." Through transactions, users also enjoy the functionality of smart contracts developed on Ethereum for a wide variety of purposes—crypto-asset purchases, staking, trading,

159. *See* Hacker & Thomale, *supra* note 101, at 673–74. *See also* Ferrari, *supra* note 129, at 329.

160. Information on the Filecoin project is available on GitBook at *The Filecoin project*, FILECOIN (last updated Aug. 2023), https://docs.filecoin.io/basics/project-and-community/the-filecoin-project.

161. *See generally The FIL token,* FILECOIN (last updated June 28, 2024), https://docs.filecoin.io/basics/assets/the-fil-token.

162. *Id.*

163. *Id.*

164. *See* SEC v. Coinbase, Inc., 2024 U.S. Dist. LEXIS 56994, at *62 (S.D.N.Y. Mar. 27, 2024); SEC v. Binance Holdings Ltd., 2024 U.S. Dist. LEXIS 114924 at *1 (D.D.C. June 28, 2024).

165. *Id.*

166. In fact, according to MiCA, *supra* note 8, art. 143(1) at 180, MiCA will start applying on December 30, 2024.

gaming, on-chain voting, etc.[167] Following the transition to the consensus mechanism called "proof-of-stake,"[168] the Ethereum token also secures the DLT network, since, to validate blocks and earn fees, it is necessary to access the network by "staking" Ether.[169] Some users stake their Ether through smart contract pools set up by third-party validators[170] and get a synthetic token in return, which is representative of the user's position in the pool and allows the holder to get staking rewards.[171] This latter functionality and the potential usefulness of validators do not seem to affect the classification of the token, since the gain should refer to self-executing technological solutions and decentralized activities unrelated to a coordinated entrepreneurial effort. The staking rewards ultimately depend on the volume of transactions on the blockchain.[172] Ether could be considered a form of investment, but this would not impact the legal classification of the token, which would theoretically be encompassed under Title II of MiCA.

The same analysis seems to be correct in the case of Layer-1 tokens, native to a blockchain's base layer, whose main purpose is to secure the network and enable transactions on the DLT—e.g. "NEAR," "Matic/POL," "Sol," "ADA," "Algo," "BNB coin," "Dot," or "Lumen." Although on a case-by-case basis, ICOs involving tokens of this type should be subject to the MiCA regulation in the future. Again, it is important to note the differences with the SEC's approach. The sale of some of these

167. *See Ethereum Whitepaper*, ETHEREUM (Last updated March 14, 2024), https://ethereum.org/en/whitepaper.

168. @corwintines, *Proof-of-Stake*, ETHEREUM (July 9, 2024), https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/.

169. Proof-of-Stake is a method used by some blockchains to secure their network and verify transactions, where the chance to validate transaction blocks is given to holders that stake/block in a smart contract a certain amount of the native crypto-asset. *See id.* (describing Ethereum's Proof-of-Stake consensus mechanism: "Proof-of-stake is a way to prove that validators have put something of value into the network that can be destroyed if they act dishonestly. In Ethereum's proof-of-stake, validators explicitly stake capital in the form of ETH into a smart contract on Ethereum"). *See* VITALIK BUTERIN, PROOF OF STAKE: THE MAKING OF ETHEREUM AND THE PHILOSOPHY OF BLOCKCHAINS 25–40 (2022).

170. *See, e.g.*, LIDO DAO, https://lido.fi/; ROCKETPOOL, https://rocketpool.net/. Also see crypto-asset service providers such as "Coinbase" and "Binance" for examples of liquid staking services offered by decentralized organizations.

171. Limiting our examination to the operators on Ethereum mentioned in the previous note, the synthetic versions of Ether take on the following names: "stETH," "rETH," "cbETH," and "bETH."

172. For Ethereum's Proof-of-Stake rewards and penalties, see @corwintines, *Proof-of-Stake Rewards and Penalties*, ETHEREUM (June 28, 2024), https://ethereum.org/en/developers/docs/consensus-mechanisms/pos/rewards-and-penalties/.

Layer-1 tokens was considered to fall under the Securities Act of 1933.[173] The SEC claimed that Coinbase and Binance were offering and selling these tokens as investment contracts without prior registration.[174]

Tokens that have the predominant governance function of managing decentralized protocols or organizations, such as OP, ARB, UNI, Aave, and Yearn, also appear to fall under Title II of MiCA. These are tokens that do not confer any specific rights to the holders other than the ability to make proposals and vote in the context of decentralized organizations.[175] Despite the control function that governance is supposed to exercise over the protocols, there are significant differences compared to typical corporate shareholdings, which confer specific rights and obligations, as well as the potential distribution of dividends based on capital allocation.[176] Like the other crypto-assets mentioned above, governance tokens are subject to secondary market volatility.[177]

IV. The Legal Regime

It is now time to dive into MiCA's provisions for token offerings, which represent a real step forward in the global context due to the precise balance between founders' needs and investor protection. First, it is necessary to clarify who is subject to the rules by explaining the distinction between issuer and offeror. Then, the Article will focus on the offeror's main obligations, the white paper's publication, and the marketing communications. Departing in part from the strictness of the prospectus framework provided for financial instruments, the standardization implemented by MiCA will enable interested parties to compare different projects through a series of disclosures that take into account the technological features of the purchased crypto-asset. These obligations are accompanied by a novel liability regime designed to act as a deterrent against abusive behaviors. Finally, the Article analyzes the remaining obligations regarding the safekeeping of the funds raised and the granting of a right of withdrawal to retail investors.

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173. *See* Coinbase, Inc., 2024 U.S. Dist. LEXIS 56994, at *42; Binance Holdings Ltd., 2024 U.S. Dist. LEXIS 114924 at *4–5.

174. *Id.*

175. *See* Gabriel Shapiro, *Why YFI Are Not Investment Contracts: A Recreational Legal Memo,* Substack (Oct. 18, 2020), https://metalex.substack.com/p/why-yfi-are-not-investment-contracts (providing a legal analysis of the governance token of Yearn).

176. *See* Hacker & Thomale, *supra* note 101, at 673–74.

177. *See, e.g.*, CoinMarketCap, https://coinmarketcap.com/ (listing past market performances of governance tokens).

A. *The Distinction Between Issuer and Offeror and the Exemptions*

MiCA makes a distinction between the "public offer" of crypto-assets and the "admission to trading" of crypto-assets.[178] The offers to the public cover cases in which a natural person, a legal person, or a different undertaking offers tokens in the EU.[179] Whereas, in the case of "admission to trading," the crypto-asset is listed on a trading platform made available by a CASP authorized to operate under the MiCA framework.[180] In both cases, the core of the regime concerns the requirement to prepare, notify, and publish a white paper and how marketing communications are to be disseminated.[181] Before examining these in detail, it is necessary to emphasize that MiCA offers solutions that are partly derived from financial market law and partly from consumer law.[182] The white paper is mainly aimed at identifying the entities responsible for the DLT project and the characteristics of the crypto activity, with some mandatory disclosures and warnings.[183] The rules on marketing communications, on the other hand, aim to prevent the use of unfair business practices that are likely to mislead potential purchasers.[184] Finally, a characteristic element of consumer law found in MiCA is the right of withdrawal.[185]

A further important aspect concerns the distinction between the definition of "issuer"[186]—a "natural or legal person, or other undertakings, who issues crypto-assets" —and that of "offeror" —a "natural or legal person, or other undertakings, or the issuer, who offers crypto-assets to the public."[187] As will be seen, the issuer is not necessarily the one required to comply with the obligations under the public offering and the access to trading rules. The distinction between issuer and offeror is particularly relevant for startups and blockchain projects that can create a good product with a token, but are not interested in taking

178. MiCA, *supra* note 8, arts. 4–5 at 67–69.

179. MiCA, *supra* note 8, art. 4 at 67–68.

180. MiCA, *supra* note 8, arts. 5, 59(1)(a), 63, 76 at 68, 114, 120–22, 131–33.

181. MiCA, *supra* note 8, arts. 6–9 at 69–73. *See infra* IV.B.

182. For instance, information about the issuer and the offeror are typical of Prospectus duties, whereas marketing and the right of withdrawal took inspiration from consumer law.

183. *See* Zickgraf, *supra* note 30, at 219.

184. *See* MiCA, *supra* note 8, art. 6 at 69.

185. MiCA, *supra* note 8, art. 13 at 74–75. On the right of withdrawal, *see infra* Part III.E.

186. MiCA, *supra* note 8, art. 3(1)(10) at 63.

187. MiCA, *supra* note 8, art. 3(1)(13) at 63.

the necessary steps to fulfill the obligations under Title II of MiCA.[188] In any case, where the issuer is different from the offeror, the white paper must give precise information about both the offeror and the issuer.[189] The purpose of the rule is to provide token purchasers with an opportunity to assess the credibility of the individuals who participated in the development of the project.[190] However, where the issuer and the offeror are not the same person, liability for the information in the white paper rests solely with the offeror.[191]

The connotations of blockchains and DeFi also make it possible for the issuer to be an entirely unknown entity or for the token to have been issued by a decentralized organization, making it impossible to identify a "legal person," a "natural person," or "other undertaking." In this regard, one of MiCA's recitals states that "[w]here crypto-assets have no identifiable issuer, they should not fall within the scope of Title II, III, or IV of this Regulation. Crypto-asset service providers providing services in respect of such crypto-assets should, however, be covered by this Regulation."[192] The main example of a crypto-asset without an issuer is Bitcoin.[193] However, the same exemption could apply to public offerings in the context of DeFi, made through a protocol[194] that operates "in a fully decentralized manner without any intermediary."[195] This can be the case of a public offering made without an identifiable issuer within the meaning of the aforementioned recital. The resulting framework, which has been criticized by scholars,[196] is consistent with the political intent not to deal with DeFi in MiCA. It was felt that financial transactions carried out in an automated way by smart contracts, without intermediaries, were still too "young" a phenomenon and that,

188. The public offering could also be promoted by an *ad hoc* non-profit legal entity. For example, a foundation that aims to manage and develop the technology to which the use of the token is linked.

189. MiCA, *supra* note 8, Annex I Part B at 184.

190. *See also* Zickgraf, *supra* note 30, at 201.

191. MiCA, *supra* note 8, art. 15(1) at 75. On the liability rules for information in the white paper see Part III.C.

192. MiCA, *supra* note 8, recital (22) at 45.

193. *See* MAGNUSON, *supra* note 10, at 9–11 (describing the genesis of Bitcoin in 2008).

194. For example, it considers the case of a so-called *liquidity pool* implemented on a decentralized exchange. *See, e.g.,* UNISWAP, http://uniswap.org; CURVE, http://curve.fi; SUSHISWAP, http://sushi.com. The liquidity pool typically consists of a pair of tokens: the newly issued token and a token that has greater liquidity (e.g., a stablecoin or Ether).

195. MiCA, *supra* note 8, recital (22) at 45.

196. *See* Martina Granatiero, *Cripto-attività diverse dai token collegati ad attività o dai token di moneta elettronica*, *in* CRYPTO-ASSET: REGOLAMENTO MICA E DLT PILOT REGIME. ANALISI RAGIONATA SU TOKEN, STABLECOIN, CASP 67, 97 (Stefano Capaccioli & Marco T. Giordano eds., 2023).

in any case, they deserved a different treatment from MiCA, so as not to hinder the development and experimentation that could be useful for traditional finance in the future.[197]

MiCA provides cases of exemptions from the duty to publish a white paper and to comply with marketing communications requirements.[198] These include: an offer to fewer than 150 natural or legal persons per Member State where such persons are acting on their account;[199] a public offering of a crypto-asset in the EU whose total consideration, over twelve months from the start of the offer, does not exceed EUR 1 million or the equivalent amount in another official currency or crypto-assets;[200] or an offer of a crypto-asset aimed exclusively at qualified investors where the crypto-asset can be held only by such qualified investors.[201]

More interesting are the actual exemptions from Title II provided for crypto-assets offered for free[202] and crypto-assets automatically created as a reward for maintaining the distributed ledger or validating transactions.[203] In addition, Title II rules do not apply where the offer involves a utility token that provides access to an existing or operating good or service.[204] Finally, Title II rules do not apply where the crypto-asset holder has the right to use it only in exchange for goods and services in a limited network of merchants with contractual arrangements with the offeror.[205]

Concerning the first exemption, we consider so-called "airdrops," i.e., tokens that are distributed free of charge by the issuer, usually to parties that have shown an interest in the platform, e.g., by using its features before the token's launch.[206] The exemption is explained by the fact

197. In any case, see MiCA, *supra* note 8, art. 142(1) at 180 ("By 30 December 2024 and after consulting EBA and ESMA, the Commission shall present a report to the European Parliament and the Council on the latest developments with respect to crypto-assets, in particular on matters that are not addressed in this Regulation, accompanied, where appropriate, by a legislative proposal"). The said report should contain "an assessment of the development of decentralised-finance in markets in crypto-assets and of the appropriate regulatory treatment of decentralised crypto-asset systems without an issuer or crypto-asset service provider, including an assessment of the necessity and feasibility of regulating decentralised finance." *Id.*

198. MiCA, *supra* note 8, arts. 4(2)–(3) at 67.

199. MiCA, *supra* note 8, art. 4(2) (a) at 67.

200. MiCA, *supra* note 8, art. 4(2) (b) at 67.

201. MiCA, *supra* note 8, art. 4(2) (c) at 67.

202. MiCA, *supra* note 8, art. 4(3) (a) at 67.

203. MiCA, *supra* note 8, art. 4(3) (b) at 67.

204. MiCA, *supra* note 8, art. 4(3) (c) at 67.

205. MiCA, *supra* note 8, art. 4(3) (d) at 67.

206. *See* Sandei, *supra* note 30, at 128–30 (criticizing the exemption provided in MiCA and calling for the introduction of a comprehensive disclosure regime in light of the risks to the users

that the issuer or provider does not receive any revenue, while the parties receiving a token cannot be economically harmed, and therefore there is no need to impose disclosure requirements.[207] The MiCA specifies that a crypto-asset is not considered to be offered for free if purchasers are required to provide or agree to provide personal data to the provider in exchange for the crypto-asset, or if the provider of a crypto-asset receives fees, commissions, or monetary or non-monetary benefits from the potential holders of those crypto-assets in exchange for the crypto-asset.[208] Concerning personal data, the exemption is related to the phenomenon of benefits received in exchange for personal data that has already emerged in the context of digital marketplaces.[209] To perform an airdrop, at least one piece of the recipient's personal data is required, namely the public key of the digital wallet.[210] However, this last piece of information does not seem to be enough to make the exception inapplicable. In fact, the personal data exception seems to apply only to cases in which the provider can—and intends to—benefit from processing the data of the person receiving the tokens. In the case of airdrops aimed at rewarding the first users of the platform to which the token is linked, the activity of potential token recipients might instead become relevant if the protocol earns fees—e.g., related to trading activity. Nonetheless, even in this case, there is no real

receiving the tokens); Bridgett S. Bauer, *Airdrops: "Free" Tokens Are Not Free from Regulatory Compliance*, 28 U. MIAMI BUS. L. REV. 311 (2020) for a North American Context. On the economic rationale behind "airdrops," see also Darcy W.E. Allen et al., *Why airdrop cryptocurrency tokens?*, 163 J. BUS. RSCH. 113945 (2023) (basing off a study of ten airdrops, stating that the goal of the projects is to do marketing, create a network effect among users, and decentralize governance, as the tokens generally allow for voting).

207. *See also* Zickgraf, *supra* note 30, at 218 (claiming that airdrops lack the "the central feature of an ICO", namely "a consideration paid by investors").

208. MiCA, *supra* note 8, art. 4(3) at 67.

209. *See* Mateja Durovic & Franciszek Lech, *A Consumer Law Perspective on the Commercialization of Data*, 29 EUR. REV. PRIV. L. 702, 703–710 (2021). A direct reference can be found in Article 3(1) of Directive (EU) 2019/770 of the European Parliament and of the Council of May 20, 2019 on certain aspects of contracts for the provision of digital content and digital services, O.J. (L 136) 1, where it is clarified that the directive "shall also apply where the trader supplies or undertakes to supply digital content or a digital service to the consumer, and the consumer provides or undertakes to provide personal data to the trader."

210. The public key of the digital wallet is usually considered "pseudoanonymized" personal data and would fall under the scope of the General Data Protection Regulation ("GDPR"). *See* Michèle Finck, *Blockchains and Data Protection in the EU*, 4 EUR. DATA PROT. L. REV. 17, 22–23 (2018); Briseida Sofia Jimenez-Gomez, *Risks of Blockchain for Data Protection: A European Approach*, 36 SANTA CLARA HIGH TECH. L. J. 281, 307 (2020) ("public keys are personal data under the GDPR"); Enza Cirone, *Blockchain and the General Data Protection Regulation: An Irreconcilable Regulatory Approach?*, 2021 QUEEN MARY L. J. 15, 25–26 (2021).

consideration, as the use of the platform does not give rise to a right to get the tokens, and the users do not have a legal expectation of receiving the tokens themselves.[211]

MiCA also clarifies that crypto-assets automatically created as rewards for maintaining the distributed ledger or validating transactions are not regulated by Title II.[212] The exemption can be traced back to the blockchain's consensus mechanism—e.g., "proof-of-work" and "proof-of-stake"—and the compensation of validators. Therefore, the development and launch of a distributed ledger do not constitute a public offering of crypto-assets. In any case, if the "automatically created" crypto-asset by the DLT protocol were to be offered to the public or traded on a trading platform, Title II regulations would apply.[213] Ultimately, the nature of the token is not relevant in the case at hand; what is relevant is how the token is distributed. In the case of tokens automatically created as a reward for the maintenance of the distributed ledger or the validation of transactions, there cannot even be a discussion of a counterparty, since the crypto-asset is generally acquired based on an automated protocol operation and there is no counterparty.

The last exemption, inspired by the Payment Service Directive (PSD2),[214] affects cases in which the crypto-asset holder has the right to use it only in exchange for goods and services in a limited network of merchants with contractual arrangements with the offeror.[215] These are scenarios in which the token is issued and offered in the context of a network of merchants whose services are contractually identified and connected to the token. For example, a token issued for enjoying discounts and promotions in a shopping mall might be considered.

The case of tokens distributed to team members and advisors merits a separate discussion, given that frequently some of these issued tokens are intended to remunerate the activity of the founders and individuals

211. On the other hand, it seems that the exemption should not apply in cases where the project makes the sending of the token—which is now certain—conditional on certain activities performed by the user, such as: investing a certain amount of money or performing certain dissemination activities on social networks.

212. MiCA, *supra* note 8, art. 4(3) (b) at 67.

213. MiCA, *supra* note 8, arts. 4–5 at 67–69.

214. *See* Directive (EU) 2015/2366 of the European Parliament and of the Council of November 25, 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, art. 3(k), O.J. (L 337) 35, 56.

215. MiCA, *supra* note 8, art. 4(3) (d) at 67.

in various capacities involved in the development of the blockchain project.[216] Such distributions made by the issuer do not integrate the elements of a public offering and access to trading and therefore do not fall within the scope of MiCA. In any case, the above exemptions do not apply if the offeror, or another person acting on its behalf, discloses in any communication its intention to seek admission to trading of a crypto-asset.[217]

B. *White Paper and Marketing Communications*

The most significant obligations related to the offering of crypto-assets concern the drafting, notification, and publication of the so-called white paper, the document that encompasses the main mandatory disclosures concerning the DLT related project. The denomination "white paper" is not new for cryptocurrency enthusiasts.[218] In fact, already during the ICO season in the years 2017 and 2018, the launch of blockchain projects was usually accompanied by the presence of a white paper.[219] The drafting and publication of the paper only complemented a widespread practice; it was not supported by specific regulations or disclosure requirements.[220] Such documents, sometimes called "lite papers," offered varied information about the technology employed, the function of the tokens, and the characteristics of the founding team.[221] In the absence of rules, the information was often insufficient, if not false or misleading, and did not allow investors—especially the less experienced—to have real knowledge of the purchased tokens.[222]

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216. It is customary to reserve a part of the crypto-asset supply of a project, normally 8-15% of the total number of crypto assets, to team members and advisors. Usually, this token component is subject to lock-up and vesting provisions.

217. MiCA, *supra* note 8, art. 4(4) at 68.

218. *See* Zetzsche et al., *supra* note 5, at 267–80; Gurrea-Martínez & León, *supra* note 15, at 124–25.

219. *See* Zetzsche et al., *supra* note 5, at 289.

220. *See* Gurrea-Martínez & León, *supra* note 15, at 124–25.

221. *Id.*

222. Several communications published by national authorities are noteworthy in this regard: see, for example, BaFin's statement that white papers are not regulated, and the issuer has absolute freedom to determine their form and content. It can, however, be noted that the information contained in white papers is often not comprehensive and accurate, and that the contents of white papers are also changed during the life of the ICO. *S*ee Zetzsche et al., *supra* note 5, at 267. According to BaFin, white papers do not provide adequate protection for investors. *Zweites Hinweisschreiben zu Prospekt- und Erlaubnispflichten im Zusammenhang mit der Ausgabe sogenannter Krypto-Token, GZ: WA 51-Wp 7100-2019/0011 und IF 1-AZB 1505-2019/0003*, BAFIN (Aug. 16, 2019), https://www.bafin.de/SharedDocs/Downloads/DE/Merkblatt/WA/dl_wa_merkblatt_ICOs.html). In the same vein, see FINANCIAL CONDUCT AUTHORITY, GUIDANCE ON CRYPTOASSETS 12 (2019) ("These documents are not prospectuses, are not approved by a regulatory authority and do not, generally, provide the level of

To solve the problem, MiCA resumes the practice of white paper publication, imposing precise content requirements.[223]

The MiCA rules now attempt to ensure that potential holders of crypto-assets are informed about the characteristics, functions, and risks of the crypto-assets they intend to purchase. In addition, the white paper is mandated to include general information about the issuer, the offeror, or the person seeking admission to trading; the project to be undertaken with the capital raised, the public offering of the crypto-asset, or its admission to trading; the rights and obligations associated with the crypto-asset, the underlying technology used for the crypto-asset, and the risks associated with it; and information about the significant adverse climate and other environmental impacts of the consensus mechanism used to issue the crypto-asset.[224] Finally, the white paper should include some warnings to the potential buyer about the value of the tokens and the lack of protection in case of total loss.[225]

For the reader's convenience, the white paper should also contain a summary specifically stating that the public offering of the crypto-asset does not relate to a solicitation to purchase financial instruments, as such an offer or solicitation can only be made using a prospectus or other offering documents under applicable national law.[226] Moreover, offerors have to indicate that the white paper on crypto-assets does not

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detail contained in a prospectus in relation to the company, the business and the product."). AMF *Discussion Paper on Initial Coin Offerings (ICOs)*, *supra* note 145, at 5, where on white papers it is stated that

> It may contain major omissions or inaccuracies and present certain realities or forecasts only partially or in an excessively optimistic manner. For example, it may not give the names of the people who are legally responsible for the offering or the competent jurisdiction in the event of a dispute. Under no circumstances should this documentation be compared to an information document that requires prior approval from the AMF.

223. MiCA, *supra* note 8, art. 6 at 69–71.

224. *Id.*; *See* Fabian Aubrunner & Susanne Reder, *MiCAR: Das Whitepaper bei sonstigen Kryptowerten*, DER GESELLSCHAFTER 4 (2023) (Austria) (regarding content of the obligations).

225. Specifically, according to MiCA, *supra* note 8, art. 6(5) at 70, the white paper on crypto-assets must contain a clear and unambiguous statement that

> The crypto-asset white paper shall contain a clear and unambiguous statement that: (a) the crypto-asset may lose its value in part or in full; (b) the crypto-asset may not always be transferable; (c) the crypto-asset may not be liquid; (d) where the public offering concerns a utility token, that utility token may not be exchangeable against the good or service promised in the crypto-asset white paper, especially in the case of a failure or discontinuation of the crypto-asset project; (e) the crypto-asset is not covered by the investor compensation schemes under Directive 97/9/EC of the European Parliament and of the Council; (f) the crypto-asset is not covered by the deposit guarantee schemes under Directive 2014/49/EU.

226. MiCA, *supra* note 8, art. 6(7) (c) at 70.

constitute a prospectus within the meaning of the prospectus regulation.[227] This last profile deserves further consideration, as it is clear that the regulation echoes a basic concept designed for financial instruments. The objectives are very similar if not identical, but the white paper under Title II tokens is simpler than the prospectus and its preparation should generate lower costs for those obligated to notify and publish it. In this regard, the focus does not appear to be primarily on the intrinsic content of the document, in terms of detailed descriptions of the tokens, but rather on providing a reference point to exclude the application of different regimes—financial instruments, asset-referenced tokens, and e-money tokens.[228]

The duty to publish a white paper affects not only the offer of Title II tokens, but also the offer of asset-referenced tokens[229] and e-money tokens.[230] However, there is a significant difference in regulation, as a prior approval of the white paper by a national competent authority is not required for Title II tokens.[231] Offerors have only to notify the white paper to the competent national authority.[232] Since the publication of the MiCA proposal, the choice of Title II tokens has been criticized, as the lack of prior authority control could lead to a reduction in the level of investor protection.[233] However, the choice of the European legislator, based on an assessment of the risk deemed to be lower in the case of utility tokens and other Title II tokens appears correct.[234] The official intent is not to overburden national authorities,[235] but the ultimate

227. MiCA, *supra* note 8, art. 6(7)(d) at 70.

228. Andrea Vicari, *Il white paper nella proposta di regolamento sulle cripto-attività (MiCAR)*, at 255 (2022) (It.); Aubrunner & Reder, *supra* note 224, at 2.

229. MiCA, *supra* note 8, art. 19 at 80.

230. MiCA, *supra* note 8, art. 51 at 108.

231. MiCA, *supra* note 8, art. 8 at 72.

232. *Id.*

233. *Cf.* Zetzsche et al., *supra* note 7, at 212 ("mere ex post enforcement and accountability through liability does not really seem sufficient to ensure adequate levels of integrity and confidence in the market.").

234. *See* Vicari, *supra* note 228, at 252.

235. *See* Filippo Annunziata, *Verso una disciplina europea delle cripto-attività. Riflessioni a margine della recente proposta della Commissione UE*, DB (Oct. 15, 2020), https://www.dirittobancario.it/art/verso-una-disciplina-europea-delle-cripto-attivita-riflessioni-margine-recente-proposta-commissione (arguing that the above justification is weak, since the mere ex-post supervision does not really seem sufficient to guarantee adequate levels of integrity and trust in the market). A different opinion is expressed by Frigeni, *supra* note 106, at 28 (arguing that the new rules are inspired, above all, by the need to prevent a formal authorization by a public authority from generating among the retail investors an improper reliance on the features of the offered crypto-asset). The white paper must mandatorily provide the following information: "This crypto-asset white paper has not been approved by any competent authority in any Member State of the EU. The

effect is also to make access to capital for blockchain projects cheaper, faster, and more efficient.[236] Requiring prior authorization would have been a significant barrier to technological innovation. Moreover, the criticism seems to ignore the fact that, before the European Regulation, authorities proposed an opt-in system to be used at the discretion of blockchain projects willing to offer tokens to the public, which was certainly less stringent than the current MiCA framework.[237] Finally, in the presence of an overly stringent European regime, the structural characteristics of blockchain would induce project development teams to issue tokens in unregulated jurisdictions. On the other hand, platforms operating in Europe would be at a disadvantage compared to those outside the EU when it comes to admitting tokens to trading if the issuer or offeror has not taken responsibility for preparing the white paper, as they would be subject to an authorization procedure that could cause delays and additional costs. In contrast, asset-referenced tokens[238] and e-money tokens[239] entail greater administrative complexities and risks that justify prior scrutiny by national competent authorities.[240] The choice of the European legislator appears consistent with the intent to distinguish between stablecoin projects that could affect the stability of the European financial system.[241]

In traditional finance, it is often claimed that the requirement to publish a prospectus containing a detailed set of information and to be submitted to a public authority is aimed to discourage unscrupulous or

offeror of the crypto-asset is solely responsible for the content of this crypto-asset white paper." MiCA, *supra* note 8, art. 6(3) at 70.

236. *See* Aubrunner & Reder, *supra* note 224, at 5–6.

237. *See, e.g.*, CONSOB, LE OFFERTE INIZIALI E GLI SCAMBI DI CRIPTO-ATTIVITÀ - DOCUMENTO PER LA DISCUSSIONE 1, 9–10 (Mar. 19, 2019) (It.) (presenting a regime for offerings conducted on platforms operated by entities authorized by Consob.) *See also* CONSOB, LE OFFERTE INIZIALI E GLI SCAMBI DI CRIPTO-ATTIVITÀ - RAPPORTO FINALE 1–16 (Jan. 2, 2020) (It.) (following the comments provided by stakeholders). *See* Gregorio Gitti & Maria Rosaria Maugeri, *Blockchain-Based Financial Services and Virtual Currencies in Italy*, 9 EUR. CONSUMER & MKT. L. 43, 44 (2020).

238. MiCA, *supra* note 8, art. 16 at 76.

239. MiCA, *supra* note 8, art. 48 at 107.

240. *See* Matthias Terlau, *MICAR-Stablecoins. Erlaubnispflichten des Emittenten bei öffentlichem Angebot, Zulassung zum Handel und (nur) Ausgabe*, 23 ZEITSCHRIFT FÜR BANK- UND KAPITALMARKTRECHT 809, 809–10 (2023) (Ger.).

241. The main reference is Facebook's (now sunset) project to launch its own crypto-assets (initially named Libra and then Diem), *see* Zetzsche et al., *supra* note 7, at 203–04. More specifically, see Dirk A. Zetzsche et al., *Regulating Libra*, 41 OXFORD J. LEGAL STUD. 80, 94 (2021); Ivan Pupolizio, *From Libra to Diem. The Pursuit of a Global Private Currency*, 22 GLOBAL JURIST 281, 288 (2022). For a first overview of MiCA's rules on stablecoins, see Gimigliano, *supra* note 134, 353–60; Edoardo D. Martino, *Regulating Stablecoins as Private Money between Liquidity and Safety* 33–50 (Amsterdam Ctr. for L., Working Paper No. 2022-07, 2022).

otherwise insufficiently structured initiatives ex ante.[242] It is expected that the white paper will also have a deterrent effect, as obliged offerors will have to adapt to a precise content regime with a high level of disclosure. To complement the framework, to "facilitate transparency,"[243] MiCA also stipulates that ESMA shall establish a registry of white papers on crypto-assets other than asset-referenced tokens and e-money tokens.[244]

Due to the characteristics of the new DLT technologies, some authors are in favor of a more pronounced departure from the prospectus framework. For instance, Ferrari and Giudici stated that:

> "An easy forecast is that these crypto asset prospectuses will become lengthy and not particularly useful for retail investors who will no longer read them, since they will be packed with legalese and will be written simply to appease the authority that will receive the notification and will register the white paper - rather than the geek audience to whom white papers were originally addressed in the blockchain space - and to defensively escape liability and litigation."[245]

In fact, MiCA's regulatory guidance makes the white paper a kind of simplified prospectus, while the name of the document still has value in developer circles as an illustration of the technology used by a particular blockchain project, in the manner of the well-known Bitcoin white paper.[246] However, among the information elements to be included in the white paper it is also necessary to indicate the characteristics of the technology used and give an account of protocols, distributed ledgers, consensus mechanisms, etc.[247] MiCA's white paper is proposed as a synthesis between the typical document originally conceived by developers working with blockchain technology and the prospectus, intended as an indispensable information medium in traditional finance. The rules on marketing communications are also interesting, as they take into account how retail investors usually learn about the public offering or the issuance of a new token, not through the canonical disclosure

242. *See* Frigeni, *supra* note 106, at 37.

243. MiCA, *supra* note 8, recital (101) at 58.

244. MiCA, *supra* note 8, art. 109(1)(a) at 155.

245. *See* Guido Ferrarini & Paolo Giudici, *Digital Offerings and Mandatory Disclosure* 21–22 (Eur. Corp. Governance Inst. Working Paper No. 605/2021, 2021).

246. *See* SATOSHI NAKAMOTO, BITCOIN: A PEER-TO-PEER ELECTRONIC CASH SYSTEM 1–9 (2009), https://bitcoin.org/bitcoin.pdf.

247. MiCA, *supra* note 8, Annex I Part H at 187.

documents, but—primarily—through websites or by reading "posts" on social networks.[248]

Under MiCA, marketing communications must be clearly identifiable as such and be fair, clear, and not misleading.[249] The link between marketing communications and white papers is also becoming more relevant.[250] In addition to stating that a white paper on a crypto-asset has been published,[251] the communications must clearly state the website of the offeror, the person seeking admission to trading, or the operator of the trading platform of the specific crypto-asset, as well as the telephone number and e-mail address for contacting that person.[252] Finally, each marketing communication contains an invitation to inquire about and evaluate the characteristics of the token.[253] As we will see, the link between white papers and marketing communications forms a bridge between financial and consumer law: any violation of MiCA rules could also have consequences under consumer law.

Unlike similar laws or regulations in other legal systems,[254] MiCA does not specifically consider the activity of influencers and celebrities, which has been particularly relevant over the years for the promotion of various blockchain projects on social networks.[255] Through their accounts, such individuals can influence the financial decisions of millions of users, particularly those of a young age.[256] It is important to note that where influencers are acting on behalf of a project, MiCA's rules on marketing communications should apply.[257] In any case, the peculiarities of the phenomenon make it foreseeable that in the

248. RUSSO, *supra* note 30, at 6 (describing the use of social networks by celebrities during ICOs).

249. MiCA, *supra* note 8, art. 7(1)(a)-(b) at 71.

250. *See* MiCA, *supra* note 8, art. 7(2) at 71 ("Where a crypto-asset white paper is required pursuant to Article 4 or 5, no marketing communications shall be disseminated prior to the publication of the crypto-asset white paper. The ability of the offeror, the person seeking admission to trading or the operator of a trading platform, to conduct market soundings shall not be affected.").

251. MiCA, *supra* note 8, art. 7(1)(d) at 71.

252. *Id.*

253. *See* Lara Modica, *La proposta di regolamento MiCA e la disciplina delle pratiche commerciali scorrette*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 295, 305 (2022) (It.).

254. See the guidance on financial promotion rules for cryptoassets, 2023, PS23/6, art. 1, ¶ 1 (Eng.), applicable to any entity conducting crypto-assets promotional activities to consumers residing in the United Kingdom.

255. *See* Modica, *supra* note 253, at 307 (stressing the peculiar risks encountered by the "typical" retail investor in the field of crypto-assets).

256. SANDEI, *supra* note 30, at 5–8.

257. As the offeror would be liable for the marketing activities, in accordance with MiCA art. 7.

coming years it will be necessary to assess the need to establish a specific regime capable of regulating in detail the marketing activities carried out on social networks. Member States have started to consider the implementation of such a regime.[258]

MiCA also contains detailed rules for changes to the white paper and marketing communications, which must also be notified to the competent authority if they occur over the course of the public offering or, in any event, as long as the crypto-asset is admitted to trading.[259] Offerors are required to amend the white paper in case of a "significant new factor, material mistake or material inaccuracy that is capable of affecting the assessment of the crypto-assets."[260] The framework is intended to ensure that potential buyers can refer to correct and up-to-date information in an ever-changing technological environment where initial plans are not infrequently disrupted or quickly become obsolete.[261] As a best practice,[262] the amended white paper and amended marketing communications must be time-stamped and the most recent amended version of the white paper must be identified as the applicable version.[263] In addition, all amended crypto-asset white papers and, where applicable, amended marketing communications must remain available for as long as the crypto-assets are held by the public.[264]

C. *The Liability of the Offerors*

In the absence of prior authorization, following the publication of the white paper, providers may offer crypto-assets throughout the EU and gain access to a crypto-asset trading platform in the Union.[265]

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258. In French law, there is a joint initiative of the AMF and the Autorité de Régulation Professionnelle de la Publicité ("ARPP") aimed at providing professional skills to influencers working in the financial sector. *See* Press Release, AMF, The AMF and the ARPP launch the Responsible Influence Certificate in Finance (Sept. 7, 2023), https://www.amf-france.org/en/news-publications/news-releases/amf-news-releases/amf-and-arpp-launch-responsible-influence-certificate-finance#:~:text=%22As%20part%20of%20its%20statutory,content%20creators%20in%20the%20context. From a general perspective, see Christine Riefa & Laura Clausen, *Towards fairness in digital influencers' marketing practices*, 8 EUR. CONSUMER & MKT. L. 64, 64 (2019).

259. MiCA, *supra* note 8, art. 12 at 73–74.

260. MiCA, *supra* note 8, art. 12(1) at 73.

261. *See* Ferrarini & Giudici, *supra* note 245, at 20 (observing that the regulation on white paper amendments would also have the effect of creating a nexus between information for primary market investors and information for secondary market investors).

262. *See* Gurrea-Martínez & León, *supra* note 15, at 124.

263. MiCA, *supra* note 8, art. 12(7) at 74. *See* Zetzsche et al., *supra* note 7, at 212 (fearing that crypto-asset holders might be confused by the presence of different versions of the white paper).

264. MiCA, *supra* note 8, art. 12(7) at 74.

265. MiCA, *supra* note 8, art. 11(1) at 73.

MiCA also specifies that offerors are not subject to additional disclosure requirements when offering such crypto-assets to the public or being admitted to a trading platform.[266] The lack of prior review is balanced by specific liability provisions that should induce obligated parties to comply diligently with the rules.[267] In fact, the information disclosed in the white paper, in correspondence with the public offer, could take on a specific ex-post value, as, if the information disclosed turns out to be incomplete or incorrect, the offeror may be held liable for any damage caused to holders.[268] MiCA provides a special liability regime for the offeror, the person seeking admission to trading, or the operator of a trading platform and members of its administrative, management, or supervisory body for any loss suffered by crypto-asset holders due to incomplete, incorrect, or misleading information contained in the white paper.[269] In contrast to the prospectus liability regime, which is based entirely on different national laws,[270] MiCA provides for a regime that harmonizes—albeit incompletely—the law at the European level.[271]

In light of the liability regime, it has been said that the obligation of prior disclosure would not really be aimed at informing buyers, but would have the main purpose of preestablishing a ground for liability in favor of investors.[272] On the other hand, the effectiveness of the legislation is dubious due to the difficulty of satisfying the burden of proof placed on the injured party.[273] The latter is called upon to prove the

266. MiCA, *supra* note 8, art. 11(2) at 73.

267. *See* Frigeni, *supra* note 106, at 37.

268. *Id.*

269. MiCA, *supra* note 8, art. 15 at 75–76.

270. According to Directive 2003/71/EC, art. 6, ¶ 2, 2003 O.J. (L 345) 64, 73 (EC), "[m]ember States shall ensure that their laws, regulations and administrative provisions on civil liability apply to those persons responsible for the information given in a prospectus." See the recent analysis of Paola Lucantoni, *Prospectus Liability in Europe: The Relevant Breach of Duties*, 14 J. EUR. TORT L. 156, 159–64 (2023) (presenting a comparative overview of the national implementations of the European Directive No. 71/2003/EC).

271. In this regard, see Danny Busch & Matthias Lehmann, *Uniform Prospectus Liability Rules for Europe*, 14 J. EUR. TORT L. 113, 113 (2023) (on the basis of the liability rules of MiCA, calling for harmonization at the European level of prospectus liability rules). Similar problems of regulatory "incompleteness" have been addressed in the field of private law remedies in the area of European financial law covered by MiFID II. *See* Olha O. Cherednychenko, *European Securities Regulation, Private Law and the Investment Firm-Client Relationship*, 5 EUR. REV. PRIV. L. 925, 935–36 (2009); DELLA NEGRA, *supra* note 80, at 186.

272. *See* Frigeni, *supra* note 106, at 38.

273. *See* MiCA, *supra* note 8, art. 15(4) at 75 ("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

causal link between the incomplete, incorrect, or ambiguous information and the choice to purchase the crypto-asset.[274] A lighter burden of proof would have been desirable, but it cannot be ruled out that case law will develop presumptions of causation along the lines of what has happened in other areas of civil liability. The presumptions could be based on the findings of the supervisory authorities on the white paper. This would be useful in establishing claims for damages by injured parties.

Finally, regarding the assets on which the injured party could claim damages, "institutional entities," i.e., trading platforms, could be held liable.[275] Nonetheless, in most cases, these players will probably take advantage of their bargaining power to require the issuers to publish the white paper and take responsibility for its content.[276] This could result in a reduction in the level of protection for the aggrieved party, as the trading platform operator would—as a rule—have a stronger asset and financial base than the project launching the token, which is not required to be based in the EU.[277] In extreme cases where the white paper is found to be completely inadequate and incomplete, the crypto-asset service provider (even if it does not hold the position of an offeror) may be held liable for admitting the token to trading, in the presence of very serious breaches of the disclosure requirements associated with the white paper.[278]

misleading and that reliance on such information had an impact on the holder's decision to purchase, sell or exchange that crypto-asset").

274. *Cf.* Ferrarini & Giudici, *supra* note 245, at 23; Modica, *supra* note 253, at 301–02. MiCA's burden of proof regime would deviate from the presumptions developed in some member states' prospectus liability case law, which favor the injured party in proving reliance on false information and causation. See for an assessment of the Italian case law: PAOLO GIUDICI, PROSPECTUS REGULATION AND PROSPECTUS LIABILITY 513–14 (Busch et al. eds., 2020).

275. *See* MiCA, *supra* note 8, art. 15(1) at 75(referring also to the operators of trading platforms).

276. Moreover, it seems unlikely that exchanges and trading platforms will take on risks related to factors they cannot control, such as the characteristics and operation of the technology on which the crypto-asset placed on the market is based.

277. Nonetheless, see the additional obligations concerning custody and safekeeping *infra* Part III.C.

278. A legal basis for the assertion of liability against a CASP (specifically against a trading platform operator) could be found in MiCA, *supra* note 8, art. 66 at 124, which establishes an obligation to act honestly, fairly and professionally in the best interests of clients. In particular, cryptocurrency service providers must provide their clients with accurate, clear and non-misleading information, including in marketing communications, and must not intentionally or negligently mislead a client regarding the actual or perceived benefits of a cryptocurrency. Based on the above provision, it seems that publishing a white paper that clearly violates the law could trigger the liability of the service provider.

As for the violation of marketing communications, on the other hand, there are no specific rules determining the consequences of the violation. Generally, consumer protection rules such as the Unfair Commercial Practices Directive[279] and the Unfair Terms Directive[280] are applicable in cases where offers to the public of crypto-assets concern business-to-consumer relations.[281] These rules are not fully harmonized at an EU level and thus legal consequences within the individual national legal systems that have implemented the European directives will be diversified. In this field, interventions of public authorities in the context of public enforcement are possible.[282] The effectiveness of such measures can be seen through exemplar interventions in gambling concerning advertisements on social networks.[283]

D. *Additional Obligations of the Offerors: Transparency and Safeguarding of Funds*

To protect buyers, MiCA also provides specific transparency and safeguarding requirements for funds and crypto-assets.[284] Crypto-asset offerors who set a deadline for their public offering are required to publish the result of the public offering on their website within twenty business days after the end of the subscription period.[285] Where no deadline has been set for the public offering, offerors must publish on their website, on an ongoing basis and at least monthly, "the number of units of the crypto-assets in circulation."[286] The transparency requirement regarding the results of the capital raising seems to be intended to allow an assessment of the success of the initiative of the blockchain project, also in light of the stated objectives of the offerors. In addition, based on the way the offering is designed, failure to achieve a minimum

279. The European Parliament and the Council of the European Union, *supra* note 28.

280. On the "unfairness" control of contractual clauses in accordance with European law, see Stefano Pagliantini, *La proposta MiCAR e le clausole abusive: una prima lettura, speciale*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 333, 345 (2022) (It.).

281. It should be recalled that MiCA adopts a definition of "retail investor." MiCA, *supra* note 8, art. 3(1)(37) at 66. This is identical to the one usually adopted for "consumer" within European legislation. See *supra* note 49.

282. See Modica, *supra* note 253, at 313–14.

283. *See* AUTHORITY FOR COMMUNICATIONS GUARANTEES (AGCOM), Resolution No. 422/22/CONS, against the company Meta Platforms Ireland Limited, concerning the violation of Article 9(1) d.l. 87/2018 converted into l. 96/2018.

284. MiCA, *supra* note 8, art. 10 at 73.

285. MiCA, *supra* note 8, art. 10(1) at 73.

286. MiCA, *supra* note 8, art. 10(2) at 73.

capital raise result will in many cases give rise to a restitution obligation for the offerors.[287]

Special safeguards apply to offerors that set a deadline for their public offering. They must take effective measures to monitor and safeguard the funds or other crypto-assets raised during a public offering.[288] To this end, such offerors shall ensure that the funds or crypto-assets[289] collected during the public offering are held in custody by one or both of the following: (i) a credit institution, if the funds are collected during the public offering; or (ii) an authorized CASP that provides custody and administration of crypto-assets on behalf of clients.[290] In addition, in cases where a time limit has not been set for the public offering, the offeror is subject to the described custody obligations until the expiration of the retail holder's right of withdrawal under Article 13 of MiCA.[291]

The reasons behind the safeguard regime can be found in MiCA's Annex I on the disclosure elements to be included in the white paper.[292] The document must contain a specific notice that

> [P]articipating in the offer to the public of crypto-assets will be able to be reimbursed if the minimum target subscription goal is not reached at the end of the offer to the public, if they exercise the right to withdrawal foreseen in Article 13 or if the offer is cancelled and detailed description of the refund mechanism, including the expected timeline of when such refunds will be completed.[293]

287. Gurrea-Martínez & León, *supra* note 15, at 123; SANDEI, *supra* note 30, at 4.

288. MiCA, *supra* note 8, art. 10(3) at 73.

289. Public offerings of crypto-assets may aim to raise a currency that is legal tender in a state ("fiat") or other crypto-assets. In this respect, Bitcoin and Ether were mainly used in the past, as they are the most significant crypto-assets in terms of capitalization and liquidity. Since their value is subject to market fluctuations, ICO promoters had to manage the associated financial risk. *See* Gurrea-Martínez & León, *supra* note 15, at 149–51. Currently, mainly stablecoins such as USDC, USDT, and DAI, that are not subject to market fluctuations, are used for ICOs in which projects raise crypto-assets.

290. MiCA, *supra* note 8, art. 10(3) at 73. In this regard, the white paper should include information about the arrangements to safeguard funds or other crypto-assets during the time-limited public offering or during the withdrawal period. *See* MiCA, *supra* note 8, Annex I, Part E (10)) at 186.

291. *See infra* Part III.E.

292. MiCA, *supra* note 8, Annex I at 184.

293. MiCA, *supra* note 8, Annex I Part E(7) at 186.

MiCA also requires mentioning the maximum duration of twelve months for the public offering of a utility token that provides access to goods or services that do not yet exist or are not yet operational.[294]

Thus, the obligation of intermediaries to provide custody for crypto-assets, subject to authorization and supervision, is intended to ensure the return of funds or crypto-assets in cases where the investment is terminated for the reasons stated above. The lack of an EU domicile could jeopardize any restitution enforcement, as offerors of crypto-assets other than asset-referenced tokens or e-money tokens are not required to be based in the EU. Moreover, for crypto-asset fundraising done through stablecoins, such as USDT or USDC, or "large caps," such as Ether, authorized CASPs that offer custody services should ensure more guarantees as to the security of IT solutions and should be able to intervene—if requested by competent authorities—to avoid the misbehaviors of offerors.[295] From the perspective of blockchain projects conducting crypto-asset fundraising, the downside of the rule is the requirement to use an intermediary without being able to take advantage of direct on-chain custody mechanisms.[296] Using an intermediary is a significantly more expensive option than direct custody of crypto-assets.[297] MiCA assumes that the new authorization regime for custody services will grant holders strong protection, due to the oversight of competent national authorities.[298]

E. *The Right of Withdrawal*

Those who purchase crypto-assets other than asset-referenced tokens and e-money tokens directly from an offeror or a CASP that places crypto-assets on behalf of that offeror[299] have a right of withdrawal.[300]

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294. MiCA, *supra* note 8, art. 4(6) at 68.

295. See the specific obligations of CASPs concerning "safekeeping of clients' crypto-assets and funds" in MiCA, *supra* note 8, arts. 70 at 127 and "custody and administration of crypto-assets on behalf of clients" in MiCA, *supra* note 8, arts. 75 at 129.

296. For instance, founders often use a multisig (multi-signature) wallet that requires two or more private keys to authorize a transaction. This setup enhances security by distributing the power to approve transactions among multiple parties. The most used multisig is Gnosis Safe. *See* GNOSIS SAFE, https://safe.global/.

297. CASPs charge fees for the custody of crypto-assets.

298. See MiCA, *supra* note 8, art. 94 at 144 on the supervisory and investigative powers of the competent authorities over CASPs.

299. See MiCA, *supra* note 8, art. 3(1)(22) at 64 (defining "placing of crypto-assets" as "the marketing, on behalf of or for the account of the offeror or a party related to the offeror, of crypto-assets to purchasers.").

300. MiCA, *supra* note 8, art. 13(1) at 74.

In line with other European rules, retail holders have a period within which to withdraw from their agreement to purchase crypto-assets other than asset-referenced tokens and e-money tokens, without incurring any fees or costs and without having to give reasons.[301] The withdrawal period begins from the date of the agreement of the retail holder to purchase those crypto-assets.[302] In the context of an industry marked by strong impulsiveness in purchase choices and fear of missing the occasion to make a gain—the so-called "fear of missing out"—the right of withdrawal should ensure an additional period of reflection to weigh in on the purchase.[303]

According to one MiCA recital,[304] if the retail holder has a right of withdrawal under MiCA, the right of withdrawal under Directive 2002/65/EC concerning the distance marketing of financial services should not apply.[305] However, the relationship with other consumer withdrawal rules provided at the European level must be clarified. MiCA stipulates that offerors provide information on the right of withdrawal in their crypto-assets white paper.[306] Thus, it appears that this is the only required way to communicate the information on the right of withdrawal,[307] although part of the scholarship supports the simultaneous application of the rules encompassed in the Consumer Rights

301. *Id.*

302. *Id.*

303. *See* Gurrea-Martínez & León, *supra* note 15, at 142.

304. MiCA, *supra* note 8, recital 37 at 47.

305. Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. Such legislation, on the other hand, applies to services for crypto-assets, as specified by MiCA recital 79. See Council Regulation 2023/1114, recital 79, 2023 O.J. (L 150) 40, 54 (EU). For a different view, see Pietro Sirena, *La tutela del consumatore nella commercializzazione a distanza di cripto-attività*, 2022 OSSERVATORIO DEL DIRITTO CIVILE E COMMERCIALE 315, 330 (2022) (referring to the proposal for a directive of the European Parliament and of the Council of May 11, 2022, amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC) (It.).

306. MiCA, *supra* note 8, art. 13(3) and Annex I Part E(7) at 74, 186.

307. Maugeri, *supra* note 48, at 240–41 (highlighting that, unlike an earlier version of the proposal, MiCA's final version no longer refers to the Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (*see* MiCA recital 29)).

Directive,[308] noting the greater and more detailed scope of the information requirements on the right of withdrawal provided in favor of the consumer.[309]

In general terms, in the event of a conflict between the provisions of the Consumer Rights Directive and a provision of another EU act governing specific areas, "the provision of that other Union act shall prevail and shall apply to those specific sectors."[310] Nonetheless, the relationship between MiCA's right of withdrawal and "horizontal" consumer protection rules shows that sometimes there are not only contrasts, but also possible integrations of the specific regime by applying more general rules. Finding the right balance is not easy. On the one hand, there is a need to protect the weaker contractor; on the other hand, it is important not to overburden the supplier in the context of a market where operators are subject to systematic control by competent national authorities. Therefore, it seems necessary to assess the European rules on consumer withdrawal that might apply in the context of crypto-assets on a case-by-case basis.

In the case of failure to provide information on the right of withdrawal, in the absence of an express reference, the rules on the twelve-month extension of the period for exercising the right of withdrawal do not seem to apply.[311] It should be noted that the failure to disclose the existence of the right of withdrawal in the white paper would constitute a serious violation of mandatory rules that could give rise to liability, under Article 15 of MiCA.[312] Concerning crypto-assets, the exception to the right of withdrawal that is provided for the provision of digital content "which is not supplied on a tangible medium if the performance has begun with the consumer's prior express consent and his acknowledgment that he thereby loses his right of withdrawal" does not seem to apply either.[313] The rule's goal is to allow consumers to immediately enjoy digital content, which is "data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through down

308. *See* Directive 2011/83/EU, 2011 O.J. (L 304) 64 (EU). For a general overview concerning the European rules on withdrawal, see Francesco Paolo Patti, *Il recesso del consumatore: l'evoluzione della normativa*, EUROPA E DIRITTO PRIVATO 1007 (2012) (It.).

309. *See* Sirena, *supra* note 305, at 330; Maume, *supra* note 49, at 265–66.

310. *See* Directive 2011/83/EU, art. 3(2), 2011 O.J. (L 304) 64, 73 (EU).

311. *See* Sirena, *supra* note 305, at 329. The extension of the timeframe to exercise the right of withdrawal is provided for in Directive 2011/83/EU, art. 10(1), 2011 O.J. (L 304) 64, 78 (EU).

312. *See infra* Part III.C.

313. Directive 2011/83/EU, art. 16(m), 2011 O.J. (L 304) 64, 80 (EU).

loading or streaming."[314] The situations addressed by the Consumer Rights Directive do not seem to concern fungible tokens that provide access to different functionalities, goods, or services.[315] MiCA regulates a token that can be used to access the functionalities or other features of a digital platform, and not the digital content itself considered in the "horizontal" consumer protection framework.[316]

Based on MiCA's recital quoted above,[317] it appears that the withdrawal rules contained in the soon-to-be amended[318] Distance Selling of Financial Instruments Directive may apply to crypto-assets, which are exempt from the white paper publication requirement.[319]

Under MiCA's withdrawal rules, all payments received by a retail holder, including, where applicable, any fees, shall be refunded without undue delay and in any event within fourteen days of the date on which the offeror or service provider placing crypto-assets on behalf of that offeror is informed of the retail holder's decision to withdraw consent to purchase the crypto-assets in question.[320] The reimbursement shall be made using the same means of payment used by the retail holder for the initial transaction, unless the retail holder has expressly consented to the use of another means and does not incur any fees or costs by the redemption.[321]

Similar to the right of withdrawal regulated in the context of distance selling of financial instruments, a cooling-off period is not provided if the crypto-assets were admitted to trading prior to their purchase by

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314. Directive 2011/83/EU, recital 19, 2011 O.J. (L 304) 64, 66 (EU). On the rationale for the exception to the consumer's right of withdrawal, see for all Marco B.M. Loos, *The Modernization of European Consumer Law (Continued): More Meat on the Bone After All*, 28 EUR. REV. PRIV. L. 407, 419–20 (2020).

315. *See* Directive 2011/83/EU, art. 16(m), 2011 O.J. (L 304) 64, 80 (EU).

316. A different argument could be made with respect to the sale of NFTs. Since such tokens are non-fungible and the "enjoyment" of the digital content is directly related to the purchase, the exception provided for in Art. 16(m) of Directive 2011/83/EU could be invoked. This was indeed the case with the sale of NFTs issued by the car manufacturer "Porsche," which triggered a debate in the media on the applicability of the withdrawal rules to NFTs. *See, e.g.*, Sander Lutz, *Can You Get a Refund on Porsche, Yuga or Other NFTs? It Depends*, DECRYPT (Jan. 27, 2023), https://decrypt.co/120137/nft-refund-porsche-yuga.

317. MiCA, *supra* note 8, recital (37) at 47.

318. *See* Proposal for a Directive of the European Parliament and of the Council, amending Directive 2011/83/EU concerning financial services contracts concluded at a distance and repealing Directive 2002/65/EC, as finally approved by the European Parliament and the Council.

319. *See* Directive 2002/65/EC, recital 5, 2002 O.J. (L 271) 16, 16 (EC).

320. MiCA, *supra* note 8, art. 13(1) at 74.

321. MiCA, *supra* note 8, art. 13(2) at 74.

the retail holders.[322] In such cases, the crypto-asset is subject to price changes that would induce the holder to exercise withdrawal depending on market developments. If offerors have set a deadline for their public offering of the crypto-asset in accordance with Article 10, the right of withdrawal cannot be exercised after the end of the subscription period.[323]

V. Conclusion

The scandals that have marked the cryptocurrency market in recent times, involving exchanges and stablecoins, have often focused on the part of MiCA dedicated to CASPs and the strict rules on asset-referenced tokens and e-money tokens.[324] These rules are fundamental to the credibility of the system, as they impose serious access requirements. However, Title II concerns one of the most important aspects of MiCA, as the precise identification of crypto-assets subject to this part of the regulation affects its overall scope of application. MiCA expressly recognizes a new asset class that might provide startups willing to raise funds through token sales with certainty as to the applicable regime. In this respect, Title II is not dedicated only to so-called utility tokens, but to a broader category of crypto-assets that are not financial instruments.[325] The problem concerning the delimitation between crypto-assets to be subject to MiCA and crypto-assets to be qualified as financial instruments does not seem alarming. In the field of "tokenization," the scope of MiCA is intended to be broad. The new rules provide more suitable solutions to regulate the issuance, offering, and market access of tokens linked to innovative blockchain projects than the rules on financial instruments. Ensuring a consistent interpretation at the European level turns out to be one of the most important and—at the same time—complex challenges arising from MiCA. Following the entry into force of the regulation, MiCA plans to ensure convergence in the classification of crypto-assets through the intervention of authorities at the national and European levels.[326]

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322. MiCA, *supra* note 8, art. 13(4) at 75.

323. MiCA, *supra* note 8, art. 13(5) at 75.

324. Articles and comments on the new rules often aim to understand whether the MiCA framework can prevent fraud by crypto intermediaries. *See also* Paracampo, *supra* note 42, at 1–6.

325. *See supra* Part II.

326. *See* MiCA, *supra* note 8, art. 97(2) at 149 ("The ESAs shall, in accordance with Article 29 of Regulation (EU) No 1093/2010, Article 29 of Regulation (EU) No 1094/2010 and Article 29 of Regulation (EU) No 1095/2010, respectively, promote discussion among competent authorities on the classification of the crypto-assets, including on the classification of those crypto-assets that are excluded from the scope of this Regulation pursuant to Article 2(3). The ESAs shall also

The detailed regulation of the white paper and its amendments is a strength of MiCA and solves a practical need, given the deficiency and uneven nature of the contents published in the absence of regulations.[327] Departing in part from the strictness of the prospectus framework provided for financial instruments, the standardization implemented by MiCA will enable interested parties to compare between different projects, through a series of disclosures that take into account the technological features of the purchased crypto-asset. Connected to the white paper, MiCA shapes new ground of liability for information "that is not complete, fair or clear or that is misleading."[328] The liability regime should prompt offerors to draft the white paper with particular care. Such a deterrent effect seems to counterbalance the absence of a prior authorization procedure for the launch of crypto-assets under Title II of MiCA.

Also, the link between white papers and marketing activities is a great innovation.[329] Promotion campaigns related to crypto-assets must always link to the white paper and provide information that is not misleading to prospective buyers. Additional safeguards for buyers pertain to the offerors' obligation to keep funds or crypto-assets with authorized intermediaries[330] and to the right of withdrawal, which grants retail holders a fourteen-day cooling-off period.[331] The last-mentioned rules build a bridge between typical rules of financial law and those set up to protect consumers. Such a mixture of regimes depends on the peculiar nature of Title II crypto-assets, which do not fall into MiFID II financial law categories. Within this framework, it is not always clear to what extent the "horizontal" rules provided in favor of consumers may apply. For cases not regulated by MiCA, a case-by-case examination will have to be carried out, and there should be a possibility of applying remedies of public enforcement, especially in the presence of misleading and unfair marketing communications.

Many transitional measures affect the regulations examined in this Article, which as a rule will not apply to public offering procedures for crypto-assets that were concluded before December 30, 2024.[332] Some

identify the sources of potential divergences in the approaches of the competent authorities to the classification of those crypto-assets and shall, to the extent possible, promote a common approach thereto.").

327. See *supra* Part III.B.

328. See *supra* Part III.C.

329. See *supra* Part III.B.

330. See *supra* Part III.D.

331. See *supra* Part III.E.

332. MiCA, *supra* note 8, art. 143(1) at 180.

MiCA requirements will instead apply to Title II crypto-assets admitted to be traded before December 30, 2024. In particular, rules on marketing communications encompassed under Articles 7 and 9 of MiCA will apply to marketing communications published after December 30, 2024. In addition, by December 31, 2027, trading platform operators must ensure that, if the regulation so requires, a white paper on crypto-assets is prepared, notified, and published under MiCA's framework.[333]

The effectiveness of the new rules in reviving the fundraising model pioneered by the early ICOs remains to be seen over time. However, European legislation has now established a modern and comprehensive framework that may set a benchmark for global regulatory approaches. Of note is the decision to develop a distinct regulatory regime, separate from traditional financial law. This approach reflects an understanding of the unique characteristics of blockchain technology and the importance of facilitating its growth without imposing undue restrictions.

In contrast, the U.S. legal system often applies existing securities laws to token offerings. While this approach is based on well-established legal principles, it does not always fully account for the novel aspects and potential of digital tokens. The European model, with its original and tailored legislative efforts, underscores the need for regulations that are both innovative and adaptable, specifically designed for the dynamic nature of crypto-assets and their underlying technology.

The challenge for legal scholars and practitioners involved in this new legislative landscape is maintaining this distinctiveness. Preserving the specificity of MiCA is critical not only for the continued development of blockchain technology, but also for influencing broader financial market regulation. This nuanced and forward-looking approach could provide valuable insights into how financial markets can evolve to embrace technological innovation, while ensuring robust consumer protection and market stability.

333. MiCA, *supra* note 8, art. 143(2) at 180.