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Offer and Admission to Trading of Crypto-assets other than ARTs and EMTs

Heikki Marjosola – Marika Salo-Lahti

5.1 Introduction

This chapter focuses on Title II of MiCAR¹ (Articles 4 to 15), which concerns the offer to the public of crypto-assets other than asset-referenced tokens (ARTs) or e-money tokens (EMTs) as well as the admission to trading of such crypto-assets. Under MiCAR, the offering to the public and admission to trading of Title II crypto-assets² are regulated activities, which means that several requirements must be met, and steps completed, before either of the activities can be carried out in the EU. Title II encompasses a mix of regulatory strategies. On the one hand, Title II of MiCAR stands out from the rest of MiCAR by focusing primarily on information regulation. The majority of the rules concern the publication and notification of a specific primary market disclosure document (ie, crypto-asset white paper) and marketing communications. These rules differ little in substance from the regulation of ordinary capital raising in the EU,³ except by being less prescriptive. On the other hand, Title II includes a consumer protection measure that is less familiar in capital markets law. Under Article 13 of MiCAR, all retail holders who purchase Title II crypto-assets directly from an offeror, or from a crypto-asset service provider (CASP) placing crypto-assets on behalf of the offeror, have 14 calendar days to withdraw from the agreement. Title II also includes principles-based conduct of business obligations, such as the duty to act honestly, fairly and professionally (Article

¹ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937, OJ L 150, 9.6.2023, pp 40–205.

² We use the term ‘Title II crypto-assets’ throughout this chapter to refer to all crypto-assets falling under MiCAR’s Title II.

³ For the primary market, see, eg, Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30.6.2017, pp 12–82 (Prospectus Regulation).

14(1)(a)), that are similar to those applicable to investment firms under the Markets in Financial Instruments Directive 2014/65/EU (MiFID II).⁴

In this chapter, we present a systematic picture of MiCAR Title II and analyse its key features. In section 5.2, we discuss the scope of Title II, which is carefully tailored but also somewhat ambiguous, particularly with respect to the type of assets falling under its remit. Section 5.3 goes through the key duties and rights of holders of Title II assets and persons offering them and seeking admission to trading. To better understand the nature of these rules, we will highlight certain similarities and dissimilarities with existing EU financial regulation such as MiFID II, the Prospectus Regulation, the Transparency Directive,⁵ and the Crowdfunding Regulation.⁶ Section 5.4 discusses the remedies and enforcement powers designed to ensure the effectiveness of Title II rules. In section 5.5, we provide analytical commentary, focussing particularly on the hybrid nature of Title II rules, which combine elements from traditional financial law and consumer law, and the critical role of investor disclosure as a regulatory strategy. The chapter also includes a brief comment on the potential role of technology in enhancing investor protection and how MiCAR Title II might help enabling it. Section 5.6 concludes.

5.2 The Scope of Title II

The personal scope of Title II is relatively straightforward. Except for explicitly exempted entities listed under Article 2(2) MiCAR, Title II applies to all persons or undertakings that offer to the public crypto-assets other than EMTs or ARTs or who seek admission to trading of such assets.⁷ Natural persons are prohibited from engaging in either of the activities; both the persons offering to the public of crypto-assets and the persons seeking their admission to trading must be legal persons.⁸ Offerors are defined as persons who offer crypto-assets to the

⁴ Article 24 of Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, OJ L 173, 12.6.2014, p 349 (MiFID II).

⁵ Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC, OJ L 390, 31.12.2004, pp 38–57 (Transparency Directive).

⁶ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, OJ L 347, 20.10.2020, pp 1–49.

⁷ MiCAR, Article 2(1).

⁸ MiCAR, Article 4(1) and Article 5(1).

public, ie, communicate to persons in any form, and by any means, ‘presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets’.⁹ The offeror and the issuer of Title II crypto-assets can be the same entity,¹⁰ but this is not necessary.

The material scope of Title II, ie, type of crypto-assets to which it applies, is defined in exceptionally broad terms. The asset must first of all fulfil the general qualities of crypto-assets as defined in MiCAR, ie, represent value or a right in a digital format and to be able to be transferred and stored electronically using distributed ledger technology or similar technology.¹¹ If the asset fulfils those qualities, and it does not qualify as an ART or EMT, it falls as a rule under Title II. By defining Title II crypto-assets in such open-ended and residual manner, MiCAR ensures that it is future-proof and captures ‘all types of crypto-assets that currently fall outside the scope of Union legislative acts on financial services.’¹²

In contrast to its open-ended scope, Title II explicitly identifies only one specific type of crypto-asset that falls under it: utility tokens. The term ‘utility token’ is defined broadly as a crypto-asset intending ‘to provide access to a good or a service supplied by its issuer’.¹³ Utility tokens represent the part of the token economy having the clearest connection to the real economy, in that their basic purpose is to ‘provide consumptive rights on services and products through a blockchain-based platform.’¹⁴ Utility tokens are therefore designed to support a productive enterprise.

By regulating the issuance and marketing of utility tokens more leniently than other types of crypto-assets, MiCAR seeks to support innovative and inclusive financing methods, particularly in relation to the financing of small and medium-sized enterprises (SMEs).¹⁵ The

⁹ Article 3(1)(12)–(13). The definition under Article 3(1)(12) trails closely the definition of an ‘an offer of securities to the public’ in Article 2(i)(d) of the Prospectus Regulation.

¹⁰ For instance, in so-called initial exchange offerings (IEOs), where the asset is admitted to trading on the operator’s own initiative, the rules on admission to trading under Article 5(1) apply to the operator of a crypto-asset trading platform. See MiCAR, Article 5(2).

¹¹ MiCAR, Article 3(1)(5)).

¹² MiCAR, Recital (16).

¹³ MiCAR, Article 3(1)(9)).

¹⁴ H Benedetti, C Caceres and L Abarzúa, ‘Utility Tokens’ in HK Baker, H Benedetti, E Nikbakht and SS Smith (eds), *The Emerald Handbook on Cryptoassets: Investment Opportunities and Challenges* (Emerald Publishing Limited 2021) 79-92, dx.doi.org/10.2139/ssrn.4088568.

¹⁵ MiCAR, Recital (2).

universe of utility tokens is diverse and expanding. Established utility tokens include, inter alia, Filecoin (FIL), which provides access to a decentralised storage network, and Basic Attention Token (BAT), which facilitates the functioning of a blockchain-based private ad platform. Utility tokens may also entail governance rights which allow holders to influence, typically by casting votes, certain decisions by the issuing entity.¹⁶ An example is UNI, which allows voting within the Uniswap decentralised exchange protocol. Although primarily a ‘governance token’, UNI also facilitates the functioning of the exchange by enabling their staking within the Uniswap liquidity protocols. The most important utility tokens are those that facilitate transactions on blockchain networks such as Solana (SOL), Ethereum (ETH), or Binance (BNB) where the tokens are used, eg, to pay for transaction fees.

MiCAR’s rules on offering of crypto-assets under Title II are more calibrated to ensure that they are proportionate and risk-based. Title II sets out a threefold structure: Some crypto-asset offers are subject to all the requirements imposed in Title II; certain offers are exempted entirely from Title II; and, certain other offers are exempted only from the requirement to draw up and publish a crypto-asset white paper and marketing communications.¹⁷ These three categories are illustrated in Table 4.1 below.

¹⁶ DA Zetzsche et al, ‘The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy’ (2021) 16(2) *Capital Markets Law Journal* 203, 206.

¹⁷ As set out under Article 4(1) points (b), (c), (d) and (f).

Table 4.1. The scope of MiCAR Title II rules on offers of crypto-assets

#TableB		
Entire Title II applies	Title II applies in part (Article 4(2))	Title II does not apply (Article 4(3))
<p>All crypto-assets other than EMTs or ARTs that</p> <ul style="list-style-type: none"> • have an identifiable issuer (Recital 22); • are not unique and are fungible (Recital 10); • are not captured by other relevant EU legislation (notably MiFID II and Prospectus Regulation); and • do not qualify for specific exemptions under MiCAR. <p>For instance:</p> <ul style="list-style-type: none"> • utility tokens; • algorithmic crypto-assets that do not aim to stabilise their value by referencing one or several assets (Recital 41); • unique physical assets that have been tokenised and issued in fractional parts (Recital 11). 	<p>The requirement to draw up, notify and publish (along with marketing communications) a crypto-asset white paper does not apply to:</p> <ul style="list-style-type: none"> • Offers to fewer than 150 persons per Member State where such persons are acting on their own account; • Small offers (total consideration does not exceed 1 million EUR per 12 months); • Offers made solely to qualified investors; • Subsequent offers of the same crypto-asset where MiCAR-compliant white paper has already been published and relevant consents are received (Article 4(7)). 	<p>No requirement of Title II applies where any of the following conditions are met:</p> <ul style="list-style-type: none"> • The crypto-asset is offered for free;¹⁸ • The crypto-asset is automatically created as a reward for maintaining/validating tasks related to the distributed ledger; • The offer concerns a utility token that provides access to an already existing good or service; • The crypto-asset gives the holder the right to use it only in exchange for goods and services in a limited network of merchants with contractual arrangements with the offeror.

¹⁸ The second subparagraph of Article 4(3) further clarifies that ‘a crypto-asset shall not be considered to be offered for free where purchasers are required to provide, or to undertake to provide, personal data to the offeror in exchange for that crypto-asset, or where the offeror of a crypto-asset receives from prospective holders of that crypto-asset any fees, commissions, or monetary or non-monetary benefits in exchange for that crypto-asset.’

The first column of Table 4.1 again reflects the open-ended scope of Title II. But it also confirms that there are several important crypto-assets that fall entirely outside MiCAR. The crypto-asset must first of all be such that it has an identifiable issuer. As Recital 22 of MiCAR explains:

Where crypto-asset services are provided in a fully decentralised manner without any intermediary, they should not fall within the scope of this Regulation [...]. Where crypto-assets have no identifiable issuer, they should not fall within the scope of Title II, III or IV of this Regulation.

MiCAR is not entirely clear on what types of activity fall under the ‘issuance’ of crypto-assets. Unlike the case with EMTs and ARTs, Title II does not directly regulate the issuance of crypto-assets. The term ‘issuer’ is defined tautologically under Article 3(1)(10) as someone ‘who issues crypto-assets’. Recital (20) further clarifies that issuers are ‘entities that have control over the creation of crypto-assets.’ However, the exclusion of crypto-assets without an identifiable issuer from the scope of Titles II, III and IV of MiCAR does not exempt them from other provisions of MiCAR, including those applicable to CASPs providing services with respect to such crypto-assets.

Another important asset class completely excluded from MiCAR’s scope is unique and non-fungible crypto-assets. According to MiCAR’s reasoning, such assets are excluded because they cannot have ‘financial use’.¹⁹ However, the designation of an asset by the issuer is of no definitive legal consequence: following the substance over form approach, a crypto-asset designated as a non-fungible token (NFT) can *de facto* have features that make it fungible or not sufficiently unique, and thus it would be captured by MiCAR’s substantive scope.²⁰ To be excluded, both the issued token and the underlying right or asset must be unique and non-fungible. Where a crypto-asset does not meet these requirements – for instance where the underlying asset is unique but it is tokenised in fractional parts – the crypto-asset falls under MiCAR.

The third excluded asset class is financial instruments such as shares, debentures, units in collective investments schemes and derivatives. Whether tokenised or not, they remain

¹⁹ According to MiCAR, Recital (10), non-fungible and unique crypto-assets ‘are not readily interchangeable and the relative value of one such crypto-asset in relation to another, each being unique, cannot be ascertained by means of comparison to an existing market or equivalent asset.’

²⁰ MiCAR, Recitals (10)–(11).

regulated under existing EU financial markets law.²¹ This respects the key principle of ‘same activities, same risks, same rules’ and technological neutrality.²² MiCAR provides little guidance on what distinguishes Title II crypto-assets from financial instruments covered by the MiFID regime.²³ The responsibility for the correct classification of crypto-assets lies primarily with the offerors or persons seeking admission to trading, but this is subject to oversight by the ESAs and national competent authorities.²⁴ The classification can be challenged by the competent authorities, also after the offer has been concluded.²⁵ Competent authorities can request opinions from the ESAs on the classification of crypto-assets.²⁶ Resolving such classification questions in a consistent and predictable way throughout the EU will be challenging, and regulatory arbitrage risks are evident.²⁷ The task is made more challenging by the fact that the assets themselves continue to evolve with their native ecosystems.²⁸ To cope with such uncertainty, MiCAR calibrates the perimeter of Title II rules in a way that is familiar to EU financial law, ie, mandating ESMA to develop guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments (Article 2(5)).²⁹

Columns 2 and 3 of Table 4.1 include the qualified exemptions provided under Articles 4(2) and 4(3) MiCAR regarding the offering of Title II assets. Exempting certain types of offer based on their size (small offers) or the quality or number of targeted investors (qualified investors; fewer than 150 persons per Member State) is in accordance with the EU’s prospectus

²¹ MiCAR, Recital (9). MiCAR also excludes e-money, deposits, and structured deposits and securitised assets. See ESMA, Consultation Paper, On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments, 29 January 2024, ESMA75-453128700-52.

²² See MiCAR, Recital (9).

²³ Zetsche et al (n 16) 219–20.

²⁴ MiCAR, Recital (14).

²⁵ *ibid.* See also DA Zetsche, RP Buckley, DW Arner and MC van Ek, ‘Remaining regulatory challenges in digital finance and crypto-assets after MiCA’, Policy Department for Economic, Scientific and Quality of Life Policies Directorate-General for Internal Policies. PE740.083 – May 2023, 112. Zetsche et al. propose the introduction of a default rule, under which all crypto-assets would be at first deemed as ‘transferable security’.

²⁶ MiCAR, Recital (14).

²⁷ T Tomczak, ‘Crypto-Assets and crypto-assets’ subcategories under MiCA Regulation’ (2022) 17(3) *Capital Markets Law Journal* 365, 370–71.

²⁸ For various use cases, functions, organisational models, and tokenomics designs of utility tokens, see HK Baker et al (eds), *The Emerald Handbook on Cryptoassets: Investment Opportunities and Challenges* (Emerald Publishing Limited, 2023). CoinMarketCap lists prices for 10,097 active crypto-assets. See CoinMarketCap, ‘Today’s Cryptocurrency Prices by Market Cap’, www.coinmarketcap.com.

²⁹ On 29 January 2024, ESMA published a Consultation paper ‘On the draft Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments’, which proposes guidelines for determining whether a crypto-asset is a financial instrument.

regime,³⁰ and the general goal of the Capital Market Union to ease access to capital market funding, particularly for SMEs.³¹

The full exemptions listed in column 3, which relate eg, to free token offers and certain automatically created tokens (including mining rewards), are more idiosyncratic. The fact that Article 4(3) exempts these activities and crypto-assets entirely from Title II is not as radical as it seems. No exemptions provided under Article 4, including those listed in 3 of Table 4.1, apply where the offeror or its agent ‘makes known in any communication its intention to seek admission to trading’ of the asset in question.³² Where such intent is signalled, the offeror will be subject to Title II in its entirety. And if the offered asset in question is already admitted to trading, the offer will fall under Article 5 of MiCAR which regulates admissions to trading.³³ Under Article 5, the person seeking admission will be exempted from the duty to draw-up, notify and publish a crypto-asset white paper only when there already exists a white paper drawn up and updated in accordance with Articles 6 and 12 of MiCAR. In addition, the person responsible for drawing up such a white paper must give a written consent to its subsequent use. As noted above, the application of these rules, along with the rest of Title II, nevertheless requires that a specific entity in control of the issue can be identified. It might be hard to predict when this is the case, given that the degree of decentralisation varies significantly between different systems.

5.3 Key Duties and Rights under Title II

5.3.1 Risks and Rationales

Crypto-assets are a risky asset class. This has not gone unnoticed by financial regulatory authorities, who have issued regular warnings to customers over the past decade.³⁴ In its 2022 warning, the European Supervisory Authorities (ESAs) listed the following key risks

³⁰ See Prospectus Regulation, Article 1(3)–(4).

³¹ N Moloney, *EU Securities and Financial Markets Regulation* (Oxford University Press, 2023) 95–96.

³² MiCAR, Article 4(4).

³³ MiCAR, Article 5(1)(b)–(d).

³⁴ The EBA issued its first warning on virtual currencies in 2013. See EBA, ‘Warning to Consumers on Virtual Currencies’, EBA/WRG/2013/01 (2013). See also, eg, ESAs, ‘ESMA, EBA and EIOPA Warn Consumers on the Risks of Virtual Currencies’ (2018).

associated with crypto-assets: extreme price movements; misleading information, lack of protection; product complexity; fraud and malicious activity; market manipulation; lack of price transparency; low liquidity; hacks, operational risks; and security problems.³⁵ To counter such risks, MiCAR subjects crypto market participants to a wide range of disclosure duties, organisational requirements and prudential rules.

Title II of MiCAR nevertheless stands out from the rest of MiCAR by focusing primarily on information regulation. The focus on disclosure is not surprising, given that in terms of risks such as fraud, misrepresentation, product complexity and lack of transparency, markets for Title II crypto-assets are not that different from traditional financial markets. Accordingly, the rationales for regulation are also similar.³⁶ At the same time, the risks posed by Title II crypto-assets are both different and less substantial compared to the market integrity, financial stability and monetary policy risks potentially created by EMTs and ARTs. Accordingly, Title II does not include any entry restrictions (authorisation and licensing requirements)³⁷ or prudential rules such as own funds or reserve requirements.³⁸ Also, whereas MiCAR imposes stricter requirements for significant ARTs (Title III) and significant EMTs (Title IV), as well as for significant crypto-asset service providers (Title VI), it does not recognise significant Title II crypto-assets.

As in EU securities regulation, the rules concerning offering and admission to trading of Title II crypto-assets are primarily designed to mitigate information asymmetries between issuers (and insiders) and investors. The main information regulation is contained in Articles 6 and 12, which regulate the content and form of the crypto-asset white paper (including its summary), and Article 7, which concerns marketing communications. In the following section we will compare these rules with similar regulation in MiFID II and the Prospectus Regulation. An analysis of the disclosure regime in MiCAR Title II would be incomplete without examining the rules mandating ongoing disclosure of material information. Therefore, we will briefly look

³⁵ The European Supervisory Authorities (ESAs), 'EU financial regulators warn consumers on the risks of crypto-assets'. ESAs 2022, 2, www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf.

³⁶ Zetzsche et al (n 25) 42.

³⁷ During Trilogues the European Parliament added an authorisation requirement: 'subparagraph (ba) was added to Article 4(1) and it imposes the requirement of authorization from a competent authority.' See Tomczak (n 27) 379. See the relevant European Parliament document from 17 March 2022, www.europarl.europa.eu/doceo/document/A-9-2022-0052_EN.pdf. The Compromise Text from 5 October 2022 data.consilium.europa.eu/doc/document/ST-13198-2022-INIT/en/pdf, and the final version of MiCAR do not include subparagraph (ba) and therefore do not impose authorisation requirements for offerors of crypto-assets other than EMTs and ARTs.

³⁸ MiCAR, Recitals (6), (18) and (49). See also Tomczak (n 27) 377–80.

at the rules requiring public disclosure of inside information (Article 88), although these fall outside Title II. Finally, we will analyse the key customer protection measure of MiCAR Title II, that is, the right of withdrawal under Article 13.

5.3.2 Crypto-asset White Papers

In primary securities markets, where securities are first offered to investors, disclosure rules are designed to reduce the risk of fraud and misrepresentation while also supporting issuers in signalling their quality and thus mitigating the ‘market for lemons’ effect.³⁹ Quality signalling problems have been particularly ubiquitous in crypto-markets where fraud has been prevalent. The historical data shows that initial coin offerings (ICOs) have a high rate of failure.⁴⁰ Many ICOs have been reported where the issuer was either non-existent or disappeared soon after the ICO.⁴¹ The US Consumer Financial Protection Bureau reported in 2022 that of the more than 8,300 crypto-asset-related consumer complaints since 2018, roughly 40 per cent were frauds and scams.⁴² Another problem has been the lack of standardisation. The content, length and structure of unregulated white papers have been diverse, making it difficult for investors to compare different crypto-assets.⁴³

The disclosure rules of MiCAR Title II follow the general logic of securities regulation. Their core function is to reduce information asymmetries by providing investors with the information necessary to make informed decisions. The information disclosed should be correct, and there should be enough of it. The economic rationale is simple. Due to externalities and public good problems, offerors, if unregulated, would disclose a sub-optimal amount of information, or would provide the information in a form that the market participants could not effectively use. Mandatory disclosure corrects incentive problems, prevents free-riding and promotes

³⁹ Moloney (n 31) 73–74.

⁴⁰ P de Andrés, D Arroyo, R Correia and A Rezola, ‘Regulatory and market challenges of initial coin offerings’ (2019) ECGI Law Working Paper No. 461/2019.

⁴¹ ESMA 2019, Advice, Initial Coin Offerings and Crypto-Assets, 14 www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf.

⁴² Consumer Financial Protection Bureau, Complaint Bulletin - An analysis of consumer complaints related to crypto-assets, November 2022.

⁴³ See eg J Thewissen, P Shrestha, W Torsin and AM Pastwa, ‘Unpacking the black box of ICO white papers: A topic modelling approach’ (2022) 75 *Journal of Corporate Finance* 102225.

standardisation, which is considered a public good.⁴⁴ The emphasis on primary market disclosure is particularly justified in the case of SMEs where there might be little historical data, or none at all, to evaluate the possible performance of the project.

The disclosure rules in MiCAR Title II also follow EU capital markets law in that there is a standardised document at the centre, a ‘crypto-asset white paper’, that is designed to give investors the core information about the characteristics, functions and risks of the crypto-assets. The white paper is ‘an information document containing mandatory disclosures’.⁴⁵ The required content and form of the crypto-asset white paper and the publication process are broadly similar to the EU prospectus regime. The obligation to draw up, notify and publish a white paper is associated with the acts of offering to the public of crypto-assets or the admission of crypto-assets to trading.⁴⁶ The original MiCAR proposal referred instead to ‘issuance’ and ‘issuers’ of crypto-assets, which departed from the wording used in the Prospectus Regulation. This received well-founded criticism and the proposal was subsequently amended.

As noted by Zetsche et al, the terms ‘offeror’ and ‘offerings’, unlike the term ‘issuer’, are well-established terms in EU financial law.⁴⁷ The entity offering crypto-assets to the public or the entity seeking their admission to trading is not necessarily the same entity that issued the crypto-assets. However, the lack of a clear definition of the term ‘issuer’ remains problematic because it is a key term for setting MiCAR’s perimeter.⁴⁸

The white paper must contain general information, including:⁴⁹

- (1) Information about the issuer, offeror or another person (eg, the operator of the trading platform) seeking admission to trading. This includes such information as the name, legal form, registered office, registration date, legal entity identifier, contact telephone number, email address, etc.
- (2) Information about the crypto-asset. This covers the crypto-asset type and a brief, clear and non-technical description of the characteristics of the crypto-asset, including its functionality. If a white paper relates to utility tokens, the relevant information should cover the quality and quantity of goods or services to which the utility tokens give access.
- (3) Information about the crypto-asset project to be carried out. Such information should generally include the name of the crypto-project and of the crypto-asset, a brief description of

⁴⁴ See eg Luca Enriques and Sergio Gilotta, ‘Disclosure and Financial Market Regulation’ in N Moloney, E Ferran and J Payne (eds), *The Oxford Handbook of Financial Regulation* (Oxford University Press, 2015).

⁴⁵ MiCAR, Recital (24).

⁴⁶ MiCAR, Articles 4(1) and 5(1).

⁴⁷ Zetsche et al (n 16) 222.

⁴⁸ As noted above, Titles II, III and IV of MiCAR only apply to crypto-assets with an identifiable issuer.

⁴⁹ MiCAR Article 6(1) and Recital (24).

the crypto-asset project, an indication as to whether the project concerns utility tokens, and where applicable, the planned use of any funds or other crypto-assets collected.

(4) Information about the offer of the crypto-asset to the public or its admission to trading. This information should cover, inter alia, the amount of the offer, including, where applicable, any minimum and maximum target subscription goals, issue price of the crypto-asset and subscription fees, the total number of crypto-assets to be offered, refund mechanism and timeline, etc.

(5) Information about the rights and obligations attached to the crypto-assets. This includes information about rights and obligations (if any) of the purchaser, procedure and conditions for the exercise of those rights and conditions, if any, under which these rights and obligations may be modified, etc.

(6) Information about the underlying technology. This encompasses information about the DLT and its functioning, protocols and technical standards, incentive mechanisms to validate transactions and applicable fees, etc.

(7) Information about the related risks. These generally include issuer-related risks (eg, its financial situation, business activity and industry, legal and regulatory risks, internal control risks, ESG risks), crypto-assets-related risks, project implementation-related risks and technology-related risks.

(8) Information about the adverse climate and environmental effects of the consensus-mechanism. The content, methodologies and presentation of information in respect of sustainability indicators in relation to adverse impacts on the climate and other environment-related adverse impacts must be laid down in draft regulatory technical standards by ESMA.⁵⁰

Apart from points (6) and (8), which address risks that are more idiosyncratic to crypto-assets, the other elements resemble those found in the Prospectus Regulation.⁵¹ Article 6 MiCAR also lists more specific disclosure items, such as statements about possible lack of liquidity and transferability, as well the risk that the crypto-asset may lose its value.⁵² Any speculation about the future value of crypto-assets is prohibited.⁵³ White papers should be concise and comprehensible and present information in a fair, clear and not misleading way.⁵⁴

White papers must be published together with marketing communications, if any, on the website of the offeror. The publication must be made at ‘a reasonable time in advance of, and in any event before the starting date of, the offer to the public of those crypto-assets or the admission to trading of those crypto-assets.’⁵⁵ Just as in the prospectus regime, MiCAR Title

⁵⁰ MiCAR, Recital (7) and Article 6(12). See also ESMA, Consultation Paper, Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) – second consultation paper, 5 October 2023, ESMA75-453128700-438.

⁵¹ Prospectus Regulation, Article 6.

⁵² MiCAR, Article 6(5).

⁵³ MiCAR, Article 6(4).

⁵⁴ MiCAR, Article 6(2).

⁵⁵ MiCAR, Article 9(1).

It requires that the white paper be accompanied by a summary. This instrument, which addresses the specific needs of retail buyers, will be discussed in more detail below.

MiCAR also replicates the distinction found in the Prospectus Regulation between primary and secondary issuances. Secondary issues can be subject to significantly lighter disclosure requirements or even no requirements at all.⁵⁶ Although the first paragraph of MiCAR Article 4(7) provides that ‘any subsequent offer to the public of the crypto-asset [...] shall be deemed a separate offer [...]’, the second paragraph of the same provision exempts such offers from the duty to draw up and publish an additional white paper. This is largely in line with Article 1(5)(a) of the Prospectus Regulation.

White papers and marketing materials, where applicable, must be modified ‘whenever there is a significant new factor, material mistake or material inaccuracy that is capable of affecting the assessment of the crypto-assets’ (Article 12(1)). Unlike prospectuses, which are not amended but ‘supplemented’ following a process outlined in Article 23 of the Prospectus Regulation, the modified crypto-asset white paper must be notified and published in its entirety, together with amended marketing communications, where applicable.⁵⁷ Somewhat confusingly, MiCAR Article 12(1) provides that the requirement to modify the white paper ‘applies for the duration of the offer to the public or *for as long as the crypto-asset is admitted to trading*’ (emphasis added). The intention has probably not been to extend the obligation beyond the point in time when trading on the market begins.⁵⁸ If applied throughout the entire trading period, such an obligation to modify the crypto-asset white paper would constitute a cumbersome way of implementing a type of continuous disclosure obligation. By contrast, in Article 23 of the Prospectus Regulation, the time period for supplements is defined as being the time between ‘when the prospectus is approved and the closing of the offer period or the time when trading on a regulated market begins, whichever occurs later.’ This type of definition would be preferable also in MiCAR.

Not only is the time span for updating the information defined differently in MiCAR compared to the Prospectus Regulation, but the time span for keeping the information publicly available is also different. According to Article 9 MiCAR, crypto-asset white papers and, where

⁵⁶ See Article 14 of the Prospectus Regulation for the simplified disclosure regime for secondary issuances.

⁵⁷ MiCAR, Article 12(6).

⁵⁸ The wording appears consistent in MiCAR’s other language versions, such as Finnish, Swedish and German.

applicable, the marketing communications shall remain available for as long as the crypto-assets are ‘held by the public’. Article 21 of the Prospectus Regulation, in contrast, states that all prospectuses approved shall remain publicly available for at least 10 years after their publication. This timeframe for public availability is aligned with that of annual and half-yearly financial reports under the Directive 2004/109/EC.⁵⁹

In terms of the content of the offering document, the MiCAR white paper requirements are generally more flexible and less prescriptive than their Prospectus Regulation counterparts. The Prospectus Regulation and its relevant annexes describe categories of information for different prospectus types in a fair amount of detail. The nearly 200 pages-long Prospectus delegated regulation sets out a granular list of further requirements.⁶⁰ Beyond MiCAR’s Annex I, which describes in broad terms the disclosure items required under Article 6, the form and content of the crypto-asset white papers are left to be developed by market practice. The provision mandates neither the ESAs nor the Commission to develop delegated or implementing acts specifying further the content and form of the crypto-asset white papers. However, ESMA, in cooperation with the EBA, must develop draft implementing technical standards to establish standard forms, formats and templates for the purposes of ensuring that white papers are machine readable (Article 6(11)). The scope of ESMA’s mandate is, however, limited by the items to be included in the white paper, as set out in Annex I of MiCAR. ESMA, therefore, cannot provide for additional disclosure requirements, at least in a form that would become binding EU law.

Another crucial difference between the prospectus and MiCAR regimes is that MiCAR does not set out a ‘materiality standard’ comparable to Article 6(1) of the Prospectus Regulation. According to the latter, ‘a prospectus shall contain the necessary information which is material to an investor for making an informed assessment.’ In the prospectus regime, this standard is used as the main benchmark for assessing the issuer’s liability for negligent or fraudulent prospectus disclosure in national private law systems.⁶¹ In terms of materiality of information, MiCAR only provides a negative standard according to which the white paper should ‘not contain material omissions’.⁶² It further explains in its preamble that the white paper ‘should

⁵⁹ Prospectus Regulation, Recital (63).

⁶⁰ Commission Delegated Regulation (EU) 2019/980 of 14 March 2019.

⁶¹ Moloney (n 31) 111.

⁶² MiCAR, Article 6(2).

not contain a description of risks that are unforeseeable and very unlikely to materialise.⁶³ It is not evident that this approach supports the effective enforcement of issuer liability as regards misrepresentations (see section 5.4 below) or the general obligation under MiCAR to present the crypto-asset white paper ‘in a concise and comprehensible’ form.⁶⁴

The most significant difference to the prospectus regime is that MiCAR Title II does not require prior approval by national competent authorities of crypto-asset white papers, or related marketing communications, before their publication (Article 8(3)).⁶⁵ As a rule, an offeror, a person seeking admission to trading, or an operator of a trading platform for Title II crypto-assets must only notify the white paper to the competent authority of their home Member State.⁶⁶ Here the treatment of Title II crypto-assets is again more lenient than in the case of ARTs, which can be offered to the public or admitted to trading only after the competent authority has approved the relevant crypto-asset white paper.⁶⁷ The notification must explain why the crypto-asset described in the white paper falls under MiCAR Title II, ie, why the asset is neither an EMT nor an ART or some other excluded asset, such as a financial instrument falling outside the scope of MiCAR.⁶⁸

Offerors and persons seeking admission to trading of Title II crypto-assets benefit from a ‘European passport’. Upon publishing the crypto-asset white paper in accordance with MiCAR Title II rules, the crypto-assets may be offered throughout the EU and be admitted to trading on any trading platform in the EU.⁶⁹ As is usually the case in EU financial law, the passporting right is subject to prior notification. MiCAR’s two-stage notification procedure for cross-border offers and admissions, set out in Article 8(6), is innovative. In the first stage, offerors and persons seeking admission to trading of Title II crypto-assets must provide their home Member State’s competent authority, together with the initial white paper notification, a list of

⁶³ MiCAR, Recital (24).

⁶⁴ MiCAR, Article 6(2).

⁶⁵ For a critical view, see Zetzsche et al (n 16) 212, noting that ‘mere ex post enforcement and accountability through liability does not really seem sufficient to ensure adequate levels of integrity and confidence in the market.’ According to Zetzsche et al., ‘Only public authorities’ ex ante review – coordinated by ESMA – can ensure a harmonized application of MiCA.’

⁶⁶ Under MiCAR Article 3(1)(35) ‘competent authority’ means one or more authorities (a) designated by each Member State in accordance with Article 93 of MiCAR concerning offerors, persons seeking admission to trading of Title II crypto-assets, issuers of asset-referenced tokens, or crypto-asset service providers; and (b) one or more authorities designated by each Member State for the application of Directive 2009/110/EC concerning issuers of e-money tokens.

⁶⁷ See MiCAR, Recital (43).

⁶⁸ MiCAR, Article 8(4).

⁶⁹ MiCAR, Article 11.

the host Member States where they intend to offer their crypto-assets or seek admission to trading. This notification must also include information on the starting date of the intended offer or intended admission to trading. In the second stage, the competent authority notifies the relevant authorities of the host Member States of the intended offer or the intended admission to trading, together with the corresponding crypto-asset white paper.

5.3.3 Ongoing Disclosure Rules

Since Title II crypto-assets are transferable assets that can be admitted to trading in a secondary market, there is an obvious need for disclosure after the publication of the crypto-asset white paper and, where applicable, the commencement of trading.

In secondary markets for securities, mandatory disclosure rules serve various goals and rationales. Disclosure mitigates information asymmetries and associated agency problems, such as excessive compensation, self-dealing and other forms of managerial (and blockholder) opportunism.⁷⁰ The need to incentivise disclosure with mandatory rules has been linked to the public good nature of information, positive externalities related to corporate disclosure (which also incentivises free-riding), and the need to standardise information and subsidise informed traders.⁷¹

In EU securities law, the relevant rules mandating disclosure are included in the EU Transparency Directive 2004/109/EC, which sets obligations relating to periodic financial reporting, and the Market Abuse Regulation 596/2014 (MAR),⁷² which mandates, inter alia, the prompt disclosure of inside information. MiCAR Title II contains, in contrast, no rules concerning ongoing disclosure of material information. The only exception is Article 10(2), according to which offerors of crypto-assets that do not set a time limit on their offer must publish on their website on an ongoing basis and at least monthly the number of units of the crypto-assets in circulation. The omission seems odd, not least because MiCAR mandates issuers of ARTs to disclose ‘any event that has or is likely to have a significant effect on the

⁷⁰ See P Mahoney, ‘Mandatory Disclosure as a Solution to Agency Problems’ (1995) 62 *University of Chicago Law Review* 1047.

⁷¹ A good overview of the debate is provided in Enriques and Gilotta (n 44).

⁷² Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, OJ L 173, 12.6.2014, pp 1–61 (MAR).

value of the asset-referenced tokens [...].⁷³ The shortcoming is nevertheless partly compensated by MiCAR's general rules on inside information, which apply to Title II crypto-assets as well. Under MiCAR Article 88, all issuers, offerors and persons seeking admission to trading must inform the public as soon as possible of inside information⁷⁴ that directly concerns them, in a manner that enables fast access as well as complete, correct and timely assessment of the information by the public.⁷⁵ Disclosure can be delayed, largely in line with the approach in MAR, where certain legitimate reasons exist.⁷⁶

Issuers of Title II crypto-assets will not be subject to specific duties regarding periodic financial or non-financial reporting. Such issuers – typically blockchain startups – are rarely publicly traded companies, which means that they are not subject to the Transparency Directive's reporting requirements.⁷⁷

There is a broader and worthwhile debate to be had as to what extent the above-discussed goals and rationales for mandatory disclosure in securities markets are consistent with the specific information needs of the markets for utility tokens and other Title II crypto-assets. This complex issue will be briefly discussed in section 5.5.

5.3.4 Marketing Communications

When it comes to practical investor decision-making, marketing information may be even more important than the official disclosure in the white paper. According to recent consumer research conducted by the UK's Financial Conduct Authority (FCA), social media plays a significant role in crypto-asset advertising, especially among young people (aged 18–24), 44 per cent of whom heard of crypto-assets for the first time through social media.⁷⁸ However, online news,

⁷³ MiCAR, Article 30(3).

⁷⁴ Largely in line with MAR, inside information is defined under MiCAR Article 87(1)(a) as 'information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers, offerors or persons seeking admission to trading, or to one or more crypto-assets, and which, if it were made public, would likely have a significant effect on the prices of those crypto-assets or on the price of a related crypto-asset.'

⁷⁵ MiCAR, Article 87(1).

⁷⁶ MiCAR, Article 88(2). On the prevention and prohibition of market abuse involving crypto-assets, see Title VI MiCAR and Chapter 9 of this book.

⁷⁷ For criticism of this omission, see Zetsche et al (n 25) 84, arguing that issuers of crypto-assets should be required to publish ongoing information through semi-annual and annual reports.

⁷⁸ M Aju and T Burrell, 'FCA – Research Note: Cryptoassets consumer research 2023' (Wave 4, 8 June 2023) 14. This result was for crypto-asset users. For non-crypto-asset users, traditional media, such as TV and newspapers, was the most common channel to hear of crypto-assets for the first time.

including blogs and forums, is still the most common channel for people to hear of crypto-assets for the first time.⁷⁹ The dominant role of marketing can be problematic, as the ESAs have explicitly warned consumers about the misleading advertisements concerning crypto-assets, including via social media and influencers.⁸⁰

The increasing regulation of marketing materials (and the recognition of consumer protection risks relating to new marketing channels such as social media) is part of a larger consumerist trend in the EU financial services regulation. The Commission has emphasised the need to strengthen consumer protection in the context of its digital finance⁸¹ and retail investment strategies.⁸² For instance, the recent proposal for an Omnibus Directive as regards the EU retail investor protection rules aims at adapting the framework to the increasing use of digital market channels such as social media for retail investing.⁸³

MiCAR's approach to investor protection with respect to marketing communications mainly relies on disclosure obligations. No specific intervention powers or monitoring duties are given to ESMA or national authorities with regard to online marketing activities by third parties.⁸⁴ The most important prohibition concerns the distribution of marketing communications before the publication of the crypto-asset white paper, where such is required.⁸⁵ According to Article 7(1)), all marketing communications, including materials disseminated through digital channels such as social media platforms,⁸⁶ should be fair, clear and not misleading and be consistent with the information provided in the white paper. All marketing communications must also be clearly identifiable as marketing, and they should state that no authority has reviewed or approved them (Article 7(1)).

⁷⁹ *ibid* 16–17.

⁸⁰ The European Supervisory Authorities (ESAs), EU financial regulators warn consumers on the risks of crypto-assets. ESAs 2022 15 (2022).

⁸¹ Commission Communication on a Digital Finance Strategy for the EU, Brussels, 24.9.2020 COM(2020) 591 final, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0591.

⁸² See Commission, Retail investment strategy (24 May 2023) finance.ec.europa.eu/publications/retail-investment-strategy_en.

⁸³ See Commission Proposal for a Directive as regards the Union retail investor protection rules, COM/2023/279 final. (the Omnibus directive proposal) eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0279.

⁸⁴ Compare the Omnibus directive proposal, Recital (32).

⁸⁵ MiCAR, Article 7(2).

⁸⁶ MiCAR, Recital (24).

Unlike crypto-asset white papers, which must always be notified to the competent authority of the home Member State, marketing communications must be notified only upon request from the competent authorities of the home Member State or the host Member State.⁸⁷ The competent authority of the Member State where the marketing communications are disseminated has the power to assess the compliance of the marketing communications with Article 7(1) content requirements (Article 7(3)).

The MiCAR rules on marketing may seem lenient, particularly compared to the recent initiatives under the EU's retail investment strategy. However, the strong right of withdrawal under Article 13, examined below, safeguards investors, also against aggressive marketing via digital and other channels.⁸⁸

5.3.5 General Conduct of Business Obligations

Article 14 includes general conduct of business obligations for offerors and persons seeking admission to trading. These largely resemble traditional EU financial services law and include a duty: to act honestly, fairly and professionally; to communicate with token holders in a fair, clear and not misleading manner; and to identify, prevent, manage and disclose potential conflicts of interest. These duties have their counterparts, for instance, in MiFID II.⁸⁹ Reflecting the idiosyncratic technological risks of crypto-asset markets, MiCAR also requires that offerors and persons seeking admission to trading of crypto-assets maintain their systems and security access protocols in conformity with the appropriate EU standards.⁹⁰ Such standards must be specified by ESMA by 30 December 2024.

MiCAR duties are nevertheless more relaxed and simpler than MiFID II duties. The duty to act in the best interest of holders and to treat them equally matches MiFID II requirements.⁹¹ In MiCAR, however, this duty can be exempted if the preferential treatment and reasons for it are

⁸⁷ MiCAR, Article 8(2). According to Article 3 of MiCAR, 'host Member State' means the Member State other than the home Member State where an offeror or person seeking admission to trading has made an offer to the public of crypto-assets or is seeking admission to trading.

⁸⁸ See section 5.3.6.

⁸⁹ MiFID II, Articles 23, 24(1) and (24)(3).

⁹⁰ MiCAR, Article 14(1)(d).

⁹¹ MiFID II, Article 24(1).

disclosed in the crypto-asset white paper as well as marketing communications.⁹² Again, the responsibility lies squarely with the investor who should know what they are buying. As another example, MiFID II imposes rather strict governance requirements in its Article 16 on investment firms (eg, duties related to compliance, product approval process, and record-keeping), which must also understand the products they offer and recommend to clients, and provide appropriate information to clients ‘in good time’.⁹³ MiCAR imposes no governance duties, whether corporate governance or product governance related, on issuers of Title II crypto-assets.

MiCAR Title II requirements are also more relaxed than those applicable to ARTs and EMTs. For example, Title II does not impose prudential requirements on issuers. In contrast, MiCAR Article 35 imposes own funds requirements for issuers of ARTs and Article 36 provides a requirement to maintain a reserve of assets. According to Article 34, issuers of ARTs must also establish, among other things, governance arrangements, including policies and procedures to ensure compliance with MiCAR, a business continuity plan, and a complaints-handling procedure. These ART-related requirements will be elaborated in chapter six of this book.

5.3.6 Right of Withdrawal

As the general obligations of Article 14 aim to safeguard investors at a broad level, Article 13 introduces a more direct, consumer law-type tool that seeks to protect retail holders: the right of withdrawal. Retail holders who have purchased Title II crypto-assets directly from an offeror or a crypto-asset service provider placing crypto-assets on behalf of an offeror, have 14 calendar days in which they can withdraw from their crypto-asset purchase without any costs and without giving any reasons. ‘Retail holder’ is defined as ‘any natural person who is acting for purposes which are outside that person’s trade, business, craft or profession.’⁹⁴ There is no withdrawal right if the crypto-asset has been admitted to trading prior to their purchase (Article 14(4)). No withdrawal rights are available for the purchasers of ARTs and EMTs.

⁹² MiCAR, Article 14(2)).

⁹³ See MiFID II, Section II.

⁹⁴ MiCAR, Article 3(1)(37).

The 14-day right of withdrawal is familiar in EU consumer law, but less typical in financial law.⁹⁵ Article 9 of the Consumer Rights Directive 2011/83/EU⁹⁶ gives consumers 14 days in which they can withdraw from a distance or off-premises contract, without giving any reasons and without any costs. Article 14 of the Consumer Credit Directive 2008/48/EC⁹⁷ also gives a 14-day withdrawal period for consumer credit agreements. The New Consumer Credit Directive, which will repeal and replace the Directive 2008/48/EC, also includes a right of withdrawal.⁹⁸

In contrast, the EU Crowdfunding Regulation gives non-sophisticated investors a ‘pre-contractual reflection period’, during which they can revoke their offer to invest without giving any reasons and without any penalty.⁹⁹ This right expires after four calendar days, which is much shorter than the right of withdrawal period in MiCAR and in consumer law. A 14-day withdrawal period is also included in the Distance Marketing of Consumer Financial Services Directive 2002/65/EC.¹⁰⁰

5.4 Remedies and Enforcement

As in EU capital markets law generally, the primary responsibility to spot and act on non-compliance with MiCAR rules lies with authorities. Although national competent authorities under MiCAR do not play a gatekeeper role comparable to that under the EU prospectus

⁹⁵ But see Article 23(2) of the Prospectus Regulation that gives investors two working days to withdraw their acceptances when a supplement to the prospectus has been published and certain other conditions are met.

⁹⁶ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 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.

⁹⁷ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers and repealing Council Directive 87/102/EEC.

⁹⁸ Directive (EU) of the European Parliament and of the Council of 18 October 2023 on credit agreements for consumers and repealing Directive 2008/48/EC, Article 26.

⁹⁹ Regulation (EU) 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European crowdfunding service providers for business, and amending Regulation (EU) 2017/1129 and Directive (EU) 2019/1937, Article 22(2).

¹⁰⁰ It has been argued that the Distance Marketing Directive even applies to equity crowdfunding. See M Meoli and S Vismara, ‘Information manipulation in equity crowdfunding markets’ (2021) 67 *Journal of Corporate Finance* 101866. However, this directive has recently been repealed with the Directive concerning financial services contracts concluded at a distance (EU) 2023/2673, which confirms that this is not the case. See eg Recital (18), which explicitly states that where an EU act governing specific financial services gives consumers time to consider the implications of the contract signed, only those specific rules will be applied unless otherwise provided. The precedence of specific legislation is not affected by the term used. Instead of right of withdrawal, the right can be called eg, a ‘cancellation period’ or a ‘reflection period’.

regime, where authorities scrutinise and approve prospectuses prior to the admittance of securities to public trading, their powers and responsibilities are far from negligible in MiCAR. The supervisory and investigatory powers are set out in Article 94. The national competent authority (NCA), duly notified of the crypto-asset white paper and of the marketing communications, may require the offeror or person seeking admission to trading to amend the crypto-asset white paper or the marketing materials where they fail to comply with the information requirements specified in Articles 6 and 7.¹⁰¹ The NCA may also have the power to suspend an offer to the public or an admission to trading of crypto-assets for a maximum of 30 consecutive working days where there are reasonable grounds for suspecting that MiCAR obligations have been infringed.¹⁰² Where MiCAR rules have already been infringed, or where there exist reasonable grounds for suspecting that they will be infringed, an offer or admission to trading can be prohibited.¹⁰³ Also, marketing communications can be suspended or prohibited.¹⁰⁴ For the purpose of ‘naming and shaming’, any infringement can also be made public.¹⁰⁵

Additionally, MiCAR empowers ESMA to impose temporary prohibitions or restrictions on the marketing, distribution and sale of Title II crypto-assets, and on activities and practices related to them, where, for example, a significant investor protection concern so requires.¹⁰⁶ Substantively similar ‘product intervention powers’ are given to NCAs.¹⁰⁷

The decentralised nature of certain crypto market infrastructures presents its own distinct enforcement challenges. Traditional financial law is based on the presumption that an intermediary in charge and liable for complying with law can always be identified, even when tasks have been outsourced or delegated.¹⁰⁸ The more decentralised the financial infrastructure, the more difficult it is to determine which court has jurisdiction and which laws, if any, apply.¹⁰⁹

¹⁰¹ MiCAR, Article 94(1)(i) and (j).

¹⁰² MiCAR, Article 94(1).

¹⁰³ MiCAR, Article 94(1)(m).

¹⁰⁴ MiCAR, Article 94(1)(p).

¹⁰⁵ MiCAR, Article 94(1)(r).

¹⁰⁶ MiCAR, Article 103.

¹⁰⁷ MiCAR, Article 105.

¹⁰⁸ Zetzsche et al (n 25) 46–52.

¹⁰⁹ *ibid* 49.

For MiCAR Title II, decentralised finance does not present an enforcement challenge, if only because it falls out of its scope entirely.¹¹⁰

MiCAR Title II also stands out by enabling effective delegation of responsibilities. Unlike crypto-asset service providers, who cannot outsource services or activities to third parties without remaining fully responsible for discharging all of their obligations under MiCAR,¹¹¹ an operator of a trading platform may effectively assume, by way of a contract entered in accordance with Article 5(3), the obligations set out under MiCAR Article 5(1), which normally apply to the entity that seeks admission of the crypto-assets to trading. These obligations include, inter alia, the key duties to draw up, notify and publish the crypto-asset white paper. Where such a contract is concluded, the person seeking admission to trading remains responsible only for matters not delegated to the operator of the trading platform, or when it has provided misleading information to the operator.¹¹² This could in principle help avoid the creation of ambiguous hierarchies of liability and accountability.¹¹³ But where a dispute arises as to what has been delegated, or whether the operator has assumed the responsibilities based on misleading information, enforcement could become cumbersome.

The effectiveness of private enforcement under MiCAR is more questionable. Just as Article 11 of the Prospectus Regulation, Article 15 MiCAR seeks to ensure that offerors and persons seeking admission to trading are responsible for the information provided in the crypto-asset white paper under Member States' civil liability rules. An offeror or a person seeking admission to trading, and the members of their administrative, management or supervisory bodies, can therefore be held directly liable for publishing a white paper that contains information that is misleading, incomplete, unfair or unclear.¹¹⁴ However, Article 15(4) ensures that the burden of proof will be on the holder of the crypto-asset, who must first establish that Article 6 requirements have been infringed, and then show that they relied on the information when deciding to purchase, sell or exchange the crypto-asset.¹¹⁵ The Prospectus Regulation, which contains no such provision, leaves more leeway to national private law systems on crucial

¹¹⁰ See n 113 below.

¹¹¹ MiCAR, Article 73.

¹¹² MiCAR, Recital (32).

¹¹³ D Zetsche, D Arner and R Buckley, 'Decentralized Finance' (2020) 6(2) *Journal of Financial Regulation* 172.

¹¹⁴ MiCAR, Article 15(1).

¹¹⁵ MiCAR, Article 15(4).

issues such as burden of proof. As argued by Ferrarini and Giudici, by placing the burden of proof squarely on the claimant or a sanctioning entity, MiCAR may erect insurmountable hurdles to establishing liability.¹¹⁶

For issuers of Title II crypto-assets, there is no requirement to establish complaints-handling procedures as is the case with ARTs.¹¹⁷

5.5 Assessing Title II and Looking Ahead

5.5.1 Between Consumerism and Efficiency

MiCAR borrows its logic from both capital markets law and consumer law.¹¹⁸ Its disclosure obligations are functionally similar to those laid down in securities regulation, even if narrower in scope.¹¹⁹ At the same time, MiCAR adopts a strong consumer law measure – the withdrawal right – that is unfamiliar to other spheres of financial market regulation.¹²⁰

Utility tokens, which provide access to a good or a service supplied by its issuer, have features of consumer products, which arguably justifies the consumerist approach. One purpose of the right of withdrawal has been to give consumers an opportunity to try the goods or services in

¹¹⁶ G Ferrarini and P Giudici, 'Digital offerings and mandatory disclosure: A market-based critique of MiCA' in E Avgouleas and H Marjosola, *Digital finance in Europe: Law, Regulation, and Governance* (De Gruyter, 2021) 87–107.

¹¹⁷ MiCAR, Article 31.

¹¹⁸ In order to systematise the overall regulatory logic of MiCAR, we could also use the 5-I's Model developed by Salo-Lahti and Annola to systematise crowdfunding regulation. The five I's in the model refer to the main regulatory objects in MiCAR: Investor, Investment, Information, Intermediary and Issuer. 'Investor' refers to the protective elements of financial market regulation that are based on the characteristics of investors. An example of this category is client classification: financial market regulation typically safeguards especially retail investors. In MiCAR, 'retail holders' have some specific rights, such as the right of withdrawal. 'Investment' in the model refers to the regulatory tools that relate to the investment itself. In MiCAR, the classification of crypto-assets determines their legal treatment. 'Information' includes disclosure requirements which are typical investor protection tools in financial market law. 'Intermediary' refers to the service providers, such as crypto-asset exchanges and wallet providers. In contrast to crowdfunding regulation, the role of issuers is strong in the crypto-asset regulation. As a result, the fifth 'I' – 'Issuer' – has been added to the original 4-I's Model of crowdfunding in order to better serve as a systematisation tool for MiCAR. Although, as already mentioned, there may not always be any issuer. See M Salo-Lahti and V Annola, 'Investor protection strategies in crowdfunding regulation' in P Kalmi, T Auvinen and M Järvenpää (eds), *Responsible Finance and Digitalization: Implications and Developments* (Routledge, 2022); M Salo-Lahti, 'Regulating Crypto-Assets: Investor Protection Strategies and the 5-I's Model' (2023) 34(4) *European Business Law Review* 585.

¹¹⁹ See sections 5.3.2 and 5.3.3 above.

¹²⁰ See section 5.3.6 above.

order to assess their value before making the final decision about committing.¹²¹ The right is therefore particularly useful for so-called ‘experience goods’, whose quality can be observed only after the good has been consumed.¹²² However, as acknowledged in MiCAR, utility tokens generally refer to goods that do not yet exist or services that are not yet in operation. In fact, Article 4(3)(c) of MiCAR Title II exempts utility tokens that provide access to an already existing good or service entirely from its scope.¹²³ It would therefore be more accurate to describe Title II crypto-assets as ‘credence goods’, whose quality may be known only years later.¹²⁴ In this sense, they are similar to financial products and services.¹²⁵ In other words, a purchaser of a utility token issued by a blockchain startup is unlikely to be able to ascertain within two weeks whether the purchased token, or the future service or functionality it gives access to, is worth the price paid.¹²⁶

The right of withdrawal – a deviation from the contract law principle of *pacta sunt servanda* – can also have significant and unpredictable behavioural consequences. It may increase the willingness to conclude transactions, as consumers can later withdraw from irrational decisions. The right generates confidence by helping to overcome lack of trust towards the trader or the goods and services provided. But it may also encourage irrational decision-making without appropriate and diligent risk assessment, behaviour that is contrary to the type of informed decision-making that capital market regulation aims to promote. Indeed, consumer psychology research indicates that a withdrawal right may encourage consumer laziness when

¹²¹ O Bar-Gill and O Ben-Shahar, ‘Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law (2013) 50 *Common Market Law Review* 109, 120; JA Luzak, ‘To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers’ (2014) 37 *Journal of Consumer Policy* 91, 95.

¹²² On different type of goods and quality disclosure, see A Ogus, *Regulation: Legal Form and Economic Theory* (Bloomsbury Publishing, 2004) 132–33.

¹²³ This exemption does not apply, however, where the offeror, or another person acting on the offeror’s behalf, makes known in any communication its intention to seek the token’s admission to trading. See MiCAR, Article 4(4).

¹²⁴ Ogus (n 122) 133.

¹²⁵ On financial products as credence goods, see J Armour et al, *Principles of Financial Regulation* (Oxford University Press, 2016) 56–57.

¹²⁶ MiCAR’s Recital (26) notes that ‘no requirements [of MiCAR] should apply to offers of utility tokens providing access to an existing good or service. Likewise, according to Article 4, Title II shall not apply to offers of such utility tokens.

it comes to gathering information before purchasing.¹²⁷ The right of withdrawal may also lead to cost inefficiency if traders compensate their losses by raising prices.¹²⁸

The withdrawal right may also encourage speculation. Although the value of purchased and unlisted tokens would not fluctuate during the two weeks withdrawal period, the value of monies or assets used as means of payment could change considerably – especially if the payment has been made in volatile cryptocurrencies. The offeror should nevertheless be able to mitigate such risks contractually: the second paragraph of Article 13(2) provides that the ‘reimbursement shall be carried out using the same means of payment as that used by the retail holder for the initial transaction, *unless the retail holder expressly agrees otherwise* [...]’ (emphasis added).

Issuers and offerors may also exploit the withdrawal right. Here the early experiences from crowdfunding are noteworthy. As mentioned earlier, the EU Crowdfunding Regulation includes a four-day pre-contractual reflection period.¹²⁹ One study has shown that this reflection or ‘cooling-off’ period may be manipulated to increase the bid’s attractiveness.¹³⁰ Members of crowdfunding platforms are much more likely than other investors to withdraw their investments before the end of the offering.¹³¹ The practice is reasonable in crowdfunding markets dominated by small and unsophisticated investors who are more likely to ‘herd’ after early participants.¹³² The behaviour of peer investors has an important signalling function also in crypto-markets. This is especially the case with utility tokens or similar platform-specific tokens where network effects are significant.¹³³ To counter risks of abuse, in our view, investors should be given information on the ratio of cancelled offers before the end of the withdrawal period.

¹²⁷ Luzak (n 121) 105.

¹²⁸ *ibid.*

¹²⁹ EU Crowdfunding Regulation, Article 22(2).

¹³⁰ Meoli and Vismara (n 100).

¹³¹ *ibid.*

¹³² See J Armour and L Enriques, ‘The promise and perils of crowdfunding: between corporate finance and consumer contracts’ (2018) 81(1) *Modern Law Review* 51, 84, noting that this means that ‘the collective decision actually gets made on the basis of less information than the investors may have possessed at the beginning.’

¹³³ In plain terms, ‘the more users the platform has, the easier it is for any user to find a transaction counterparty, and the more useful the tokens are’. LW Cong, Y Li and N Wang, ‘Tokenomics: Dynamic Adoption and Valuation’ (2021) 34(3) *Review of Financial Studies* 1105, 1106.

Beyond such consumerism, the fact that Title II crypto-assets can be – and often are – submitted to public trading warrants a more market-oriented approach.¹³⁴ However, market efficiency, which is hardly mentioned in MiCAR’s provisions or recitals, is clearly not among its primary concerns. In this, MiCAR departs significantly from modern securities regulation, which protects investors primarily via promoting market efficiency.¹³⁵ For instance, although retail investors may be unable or disincentivised to digest the wealth of disclosed information in securities prospectuses, this information is still useful for various information intermediaries such as analysts, underwriters and professional investors. The activities of such intermediaries and informed traders ensure that prices of financial instruments reflect all available information.¹³⁶ The rationale, in short, is that ‘in an efficient stock market, unsophisticated investors are already protected by market prices’.¹³⁷

The lesser emphasis on efficiency in MiCAR Title II probably reflects fundamental differences in the traded assets themselves. The valuation and pricing of crypto-assets – an emerging topic within financial economics or tokenomics – differ significantly from traditional securities.¹³⁸ Title II crypto-assets cannot entail dividend rights or other rights in the project’s cash flows (otherwise, they risk being classified as financial instruments).¹³⁹ The value of a utility token is based on capitalisation of platform growth and the practical or functional utility of a token within a DLT-based ecosystem rather than the discounted value of future cash flows, as is the case with securities like shares.¹⁴⁰

The evolving crypto market structure is also different. There are neither ‘informed investors’ on whom unsophisticated investors could free ride nor established information intermediaries supporting accurate pricing. Therefore, instead of efficiency concerns, the main rationale for

¹³⁴ L Hornuf, T Kück and A Schwienbacher, ‘Initial Coin Offerings, Information Disclosure, and Fraud’ (2022) 58 *Small Business Economics* 1741, 1755.

¹³⁵ Moloney (n 31) 73–77.

¹³⁶ Enriques and Gilotta (n 44).

¹³⁷ Enriques and Gilotta (n 44) 515.

¹³⁸ Cong et al (n 133) 1106, noting that ‘[i]n contrast to financial assets whose values depend on cash flows, tokens derive value by enabling users to conduct economic transactions on the digital platform, making them a hybrid of money and investable assets.’ On valuation of crypto-assets, see eg T Kostoula, ‘Valuation of cryptoassets in EU insolvency: Challenges and prospects’ (2023) 32(1) *International Insolvency Review* 8.

¹³⁹ See AS Kavuri and A Milne, ‘Trading and Regulation of Cryptocurrencies, Stablecoins and Other Cryptoassets’ in K Thomas Liaw (ed), *The Routledge Handbook of FinTech* (Routledge, 2021) 147–62, criticising the creation of a parallel regime for crypto-assets as unnecessary and, at worst, counterproductive, possibly resulting in regulatory arbitrage and weakening of the existing regime for financial instruments.

¹⁴⁰ Cong et al (n 133) 1106.

mandatory disclosure in the case of Title II crypto-assets stems from the need to mitigate various agency problems and conflicts of interest between principals (holders) and agents (offerors).¹⁴¹

The final difference between traditional securities and Title II crypto-assets concerns user groups. Whereas capital markets offer financing for mature companies, Title II crypto assets are more frequently used by young companies and SMEs for funding specific projects. Just as in crowdfunding, utility tokens are used by start-ups to raise capital from a large number of unsophisticated individuals who typically invest only small sums.¹⁴² The need for more cost-effective and flexible regulation – typical of the regulation of technological innovations – is therefore a key goal for both crypto-assets and crowdfunding. But in terms of investor protection measures, MiCAR falls short of EU crowdfunding rules. The EU Crowdfunding Regulation requires service providers to carry out a thorough appropriateness assessment of prospective non-sophisticated investors, including an entry knowledge test.¹⁴³ In the context of crowdfunding, it has even been suggested that the role of the service providers should be extended to include ensuring the accuracy of the provided information, especially when supervisory authorities are not involved in the assessment of the key investment information sheet (KIIS).¹⁴⁴ MiCAR Title V includes no such provisions.¹⁴⁵

To conclude, in the case of Title II crypto-assets, there exists neither gatekeeper-intermediaries comparable to crowdfunding markets nor information intermediaries protecting investors via the pricing mechanism. Risks are therefore primarily managed by unsophisticated investors themselves, making judgments based on regulated disclosure documents – and having two

¹⁴¹ We ignore here Decentralised Autonomous Organisations (DAOs) that lack management bodies and might thus avoid agency problems by design – at least those between management and token holders.

¹⁴² On crowdfunding, see Armour and Enriques (n 132) 52.

¹⁴³ EU Crowdfunding Regulation, Article 21(1). Macchiavello has nevertheless noted that the ECSPR seems to trust investors more to evaluate projects and manage risks compared to other financial regimes, despite at least equally serious information asymmetry. See E Macchiavello, 'The European Crowdfunding Service Providers Regulation: The Future of Marketplace Lending and Investing in Europe and the "Crowdfunding Nature" Dilemma' (2021) 32(3) *European Business Law Review* 557, 586.

¹⁴⁴ P Staikouras, 'The European Union Proposal for a Regulation on Cross-Border Crowdfunding Services: A Solemn or Pie-Crust Promise?' (2020) 31(6) *European Business Law Review* 977, 1098–1099.

¹⁴⁵ See ch 7 in this book for further analysis. According to Article 140, by 30 June 2027, the Commission shall present a report containing an evaluation of the possibility of introducing appropriateness tests in Articles 78, 79 and 80 'in order to better protect clients of crypto-asset service providers, especially retail holders'.

weeks to change their mind for whatever reason (where the tokens are not listed). The following section will assess the role of disclosure in more detail.

5.5.2 The Disputed Role of Investor Disclosure

Information disclosures are crucial for reducing information asymmetries and related agency problems. However, their contribution to better investor decision-making is often disputed. The European Commission study on investor disclosures found that disclosure is ‘a necessary but insufficient means’ in helping retail investors in their decision-making.¹⁴⁶ The Commission found that disclosure templates were not ‘engaging’, that is, they did not encourage investors to read them. This is a serious problem because engagement serves as a foundation for comprehension, and subsequent informed decision-making. Investor information documents that are too long, densely worded, and complex do not serve their intended purpose and can have negative effects on consumers.¹⁴⁷ In its retail investment strategy, the Commission accordingly notes that ‘retail investors have difficulties accessing relevant, comparable and easily understandable investment product information to help them make informed investment choices.’¹⁴⁸

These risks are pertinent in crypto markets as well. Thewissen et al found that among the sample of 5210 white papers they surveyed, the median length of a white paper was 30 pages, while the lengths varied from three pages to 167 pages.¹⁴⁹ Due to disclosure requirements brought by MiCAR, both the document length and the level of technical detail can be expected to keep rising. Assessing the offered instruments is even more demanding for crypto investors who may have to understand both the technical and financial sides of crypto-assets to manage risks effectively. Cyber-attacks and thefts remain persistent features of the crypto-markets. Due to the strict technology dependency, complications relating to the underlying technology can have adverse effects on market value. This emphasises the role of non-financial information

¹⁴⁶ European Commission, Disclosure, inducements, and suitability rules for retail investors study. Final Report. May 2022 – corrected in February 2023, 14.

¹⁴⁷ *ibid.*

¹⁴⁸ See Commission proposal for Omnibus directive, Brussels, 24.5.2023, COM(2023) 279 final, eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52023PC0279.

¹⁴⁹ Thewissen et al (n 43). The white papers in the sample were published between 2015–2020. The most discussed topics in the white papers were the ICO’s blockchain application and platform development. Interestingly, topics related to legal features and risk management were the least discussed.

related to issues such as IT architecture, system design and stability. It is therefore welcome that Article 6 of MiCAR lists ‘information on the underlying technology’ as one of the content requirements for a white paper. But further emphasis needs to be put on presenting such information in a clear and comprehensible manner. According to a study by the FCA, the understanding of the underlying technology is not strong among crypto-asset owners, and less than half (47 per cent) believe they have a good understanding of how the underlying technology works.¹⁵⁰

To alleviate the problems of overly lengthy and technical investor disclosures, the EU financial market legislation has introduced several simplified investor disclosure documents. A good example is the EU Crowdfunding Regulation and its KIIS. According to its Article 23, a KIIS must be fair, clear and not misleading and must not contain footnotes. Its maximum length has been restricted to six sides of A4-sized paper if printed.¹⁵¹ Much attention is paid to the understandability of information in a KIIS. Information must be presented in a way that is ‘easy to read’ and that facilitates understanding.

There are several similarities between a KIIS and Title II crypto-asset white papers. First, information on the project funded is at the core. The information provided under Title II crypto-asset white papers should be fair, clear and not misleading and it should be presented in a concise and comprehensible form.¹⁵² Second, both disclosure documents start with similar disclaimers, warning investors that the documents have not been approved by competent authorities. This is an important difference compared to more traditional financial disclosures, where an approval by competent authorities is more important in enhancing trust. In both Title II of MiCAR and the Crowdfunding Regulation, more emphasis is put on cost-efficiency. By not requiring prior approval from competent authorities, start-ups and SMEs can be offered cheaper and faster access to crypto or capital markets.¹⁵³ Unlike with a KIIS, however, Title II crypto-asset white papers must be notified to the relevant competent authorities.¹⁵⁴

¹⁵⁰ Financial Conduct Authority (FCA), Research Note: Cryptoassets consumer research 2023 (8 June 2023) 43.

¹⁵¹ ESMA has also developed a standardised KIIS model that must be followed. See ESMA, Final Report. Draft technical standards under the European crowdfunding service providers for business Regulation (10 November 2021), ESMA35-42-1183, elaborating the requirements and models for presenting the information in the KIIS, including the presentation of certain risks, financial ratios and costs and charges.

¹⁵² MiCAR, Article 6(2).

¹⁵³ See eg EU Crowdfunding Regulation, Recital (54).

¹⁵⁴ MiCAR, Article 8.

Both KIIS and Title II crypto-asset white papers must also include similar warnings, such as warnings of the risk of losing all invested money, problems with liquidity, and the lack of coverage by investor compensation schemes and deposit guarantee schemes. However, there are also some differences. Technology and environment related risks should be included in a crypto-asset white paper but are not mandatory for a KIIS. One remarkable feature in the Crowdfunding Regulation is that in the standardised risk warning of the KIIS, investors are advised not to invest more than 10 per cent of their net worth in crowdfunding projects. Such crude investment limit suggestions, which were not adopted in MiCAR, are a peculiar novelty in EU financial market law.

Simplified investor information documents existed already before the Crowdfunding Regulation's KIIS. For UCITS funds, key investor information documents (KIIDs)¹⁵⁵ replaced their predecessors, simplified prospectuses (SPs),¹⁵⁶ in 2012. KIIDs are restricted to only two A4 pages and must contain illustrations to foster understanding. The EU Regulation on key information documents for packaged retail and insurance-based investment products (PRIIPs Regulation)¹⁵⁷ introduced a similar type of disclosure item, namely, key information documents (KIDs) for packaged retail and insurance-based products.¹⁵⁸

Simpler and shorter investor disclosures increase cost-efficiency and generally reflect the idea that, especially from the perspective of retail investors, the emphasis should be on quality over quantity of information. However, existing research indicates that simplified investor disclosure documents and standardised risk warnings do not always have the intended effect due to persistent biases and motivational and perceptual limits.¹⁵⁹ The increased retail orientation has also faced criticism within the EU, particularly in the context of the prospectus

¹⁵⁵ Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (UCITS IV Directive).

¹⁵⁶ Simplified prospectuses were introduced in the UCITS III Directive. See Directive 2001/107/EC of the European Parliament and of the Council of 21 January 2002 amending Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) with a view to regulating management companies and simplified prospectuses.

¹⁵⁷ Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs).

¹⁵⁸ See eg M Salo and H Haapio, 'Putting Financial Regulation to Work: Using Simplification and Visualization for Consumer-Friendly Information' 4. JusletterIT, 25 February 2016.

¹⁵⁹ See eg M Mercer, AR Palmiter and AE Taha 'Worthless warnings? Testing the effectiveness of disclaimers in mutual fund advertisements' (2010) 7(3) *Journal of Empirical Legal Studies* 429. For an overview of literature, see G Helleringer, 'Retail Investors and Disclosure Requirements' in K Mathis (ed), *European Perspectives on Behavioural Law and Economics* (Springer, 2015) 193–209.

regime. The critics have noted that since public offers are rarely targeted at retail investors, prospectuses should primarily be designed to the needs of professional investors and information intermediaries. Issuers must also be able to make technical and detailed disclosures to manage litigation risks. It has become clear, then, that prospectuses cannot fully address the problems of retail market accessibility.¹⁶⁰ Instead of trying to make the prospectus fit the needs of both retail and professional investors, the most recent amendments to the prospectus regime introduced a parallel disclosure document – a prospectus summary – designed primarily to meet the needs of retail investors. The prospectus summary, which follows the ‘key investor information’ concept, has been described ‘as a reasonable compromise’.¹⁶¹

A similar compromise was adopted in MiCAR Title II, although crypto-asset white papers could be rarely targeted at professional investors. Article 6(7) of MiCAR requires that each white paper must be accompanied by a summary which provides ‘in brief and non-technical language’ key information about the offer to the public of the crypto-asset or its intended admission to trading. The white paper summary should be easily understandable and presented in a clear and comprehensive format, using characters of readable size, to help prospective holders of the crypto-asset to make an informed decision. Again, the requirements under MiCAR Article 6(7) are much less prescriptive compared to the Prospectus Regulation, which regulates the prospectus summary in a fair amount of detail.¹⁶²

5.5.3 Enabling Technology

Going forward, the authorities and legislators should bear in mind that the comprehensibility of information can also be enhanced by technological means. Natural language processing (NLP) has already been used to predict the likelihood of success of ICOs, but it can also help analyse the content of white papers. Camassa studied the white paper contents of ‘other than’ category of crypto-assets, referring to MiCAR Title II, and explored the possibilities of using NLP. She argues that in the future, NLP models, especially large language models (LLMs) such as GPT and BERT, could bring several benefits. They could be used to check automatically if a white paper complies with MiCAR requirements. Another possibility could

¹⁶⁰ For discussion of criticism, see Moloney (n 31) 135–37.

¹⁶¹ *ibid* 136.

¹⁶² Prospectus Regulation, Article 7. See also Moloney (n 31) 137, noting that the ‘level of specification is immensely granular.’

be to identify which regulatory norms are relevant in each part of the text. LLMs could also be used to prepare drafts of white papers. Investors would also benefit from the possibility to ask questions on the content of white papers, which could enhance their understanding of the project and risks related to it. Another helpful feature of LLMs is their ability to summarise information contained in long and dense texts.¹⁶³

To this end, the requirement under MiCAR Article 6(10) that crypto-asset white papers must be made available in a machine-readable format is welcome. MiCAR also mandates ESMA, in cooperation with the EBA, to develop draft implementing technical standards to establish standard forms, formats and templates to facilitate machine-readability. On 5 October 2023, ESMA published a Consultation Paper, which includes a section devoted to machine readability of white papers.¹⁶⁴ ESMA observes, *inter alia*, that ‘PDF and html are not consistent with MiCA requirements [...]’¹⁶⁵ ESMA identified two formats as fulfilling the machine-readability requirement, namely xHTML with Inline XBRL tags (for simplicity, iXBRL) and XML,¹⁶⁶ with the former being more preferable.¹⁶⁷ At the time of writing, no final position has been taken on this issue. Once such standards are finalised, it should be clearer how strictly the structure of white papers will be standardised in terms of content, form and length.

Legal experts are nevertheless needed to develop AI applications that could be used in the MiCAR context, given the specific and precise meaning of legal terms.¹⁶⁸ However, the challenges related to the specificity of legal language can be overcome, and there are already many AI applications in the legal field, such as Codify AI,¹⁶⁹ Spellbook¹⁷⁰ and ContractPodAi’s Leah Legal Copilot.¹⁷¹

¹⁶³ C Camassa, ‘Legal NLP Meets MiCAR: Advancing the Analysis of Crypto White Papers’ (2023) arxiv.org/pdf/2310.10333.pdf. On the possibilities of AI to help both readers and writers of legal information, see also M Salo-Lahti, M Ranta and H Haapio, ‘AI Tools for Sustainability – Actionable Information for both Humans and Machines’, JusletterIT, 30 March 2023.

¹⁶⁴ ESMA, Consultation Paper, Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) – second consultation paper, 5 October 2023, ESMA75-453128700-438.

¹⁶⁵ *ibid* para 226.

¹⁶⁶ *ibid* para 227. See also ESMA’s proof of concept illustrating a concrete application of the proposed format requirements, www.esma.europa.eu/document/mica-white-papers-poc#ft2.

¹⁶⁷ ESMA, Consultation Paper, Technical Standards specifying certain requirements of Markets in Crypto Assets Regulation (MiCA) – second consultation paper, para 244.

¹⁶⁸ Camassa (n 163).

¹⁶⁹ Codify AI, www.codifyai.com.

¹⁷⁰ Spellbook by Rally, ‘Draft Contracts 3x Faster with AI’, www.spellbook.legal.

¹⁷¹ ContractPodAi, ‘Generative AI Legal Assistant, Leah Legal Copilot’ contractpodai.com/leah-copilot-ai-legal-assistant.

5.6 Conclusion

The legal framework established in MiCAR Title II aims to support innovation and fair competition, while also protecting investors and the integrity of crypto-asset markets. It pursues these objectives with a hybrid set of rules combining elements from traditional financial law and consumer law. As capital raising instruments, utility tokens and other Title II crypto-assets bear family resemblance with other forms of capital raising regulated by EU law, such as traditional financial instruments and crowdfunding. As most financial instruments, they are transferable and can be admitted to public trading. But just as in crowdfunding, utility tokens are used by start-ups to raise capital from a large number of unsophisticated individuals who typically invest only small sums.

Given fundamental differences in users, assets and market structures, we argued that the goals and rationales for mandatory disclosure in securities markets are only partly consistent with the specific information needs of the markets for utility tokens and other Title II assets.¹⁷² Instead of efficiency concerns, the main rationale for Title II disclosure rules is to address issues such as inadequate disclosures, misrepresentations and fraud, which are still prevalent in crypto-markets.¹⁷³ To address such risks effectively, however, more is needed than publication of white papers and marketing materials, particularly when the tokens are submitted to public trading. Much also depends on how MiCAR's rules on the disclosure of inside information will be applied and enforced.

In contrast to disclosure rules, the 14-day withdrawal right under Article 13 of MiCAR is transplanted from EU consumer contract law. Apart from the EU Crowdfunding Regulation, which grants investors a four-day 'pre-contractual reflection period' to revoke an investment offer, such measures are alien to EU financial law. One possible reasoning for adding such an instrument in Title II is that utility tokens – the only non-referenced crypto-asset recognised and defined by Title II – provide access to goods and services. But investors are unlikely to use the right based on the quality of the goods or services, which are unlikely to exist when the right expires. The withdrawal right also risks inviting unintended behaviour, such as manipulation of demand to increase the offer's attractiveness prior to listing. Experiences from

¹⁷² Armour and Enriques (n 132) make a similar argument in the context of crowdfunding.

¹⁷³ Zetzsche et al 2021 (n 16) 211.

crowdfunding markets are not encouraging in this respect. It is also doubtful whether the withdrawal right is suitable for the ‘wide variety of crypto-assets’¹⁷⁴ falling under Title II of MiCAR (ie, all crypto-assets other than ARTs or EMTs).

Beyond addressing risks, MiCAR also aims to promote innovation. Whether this succeeds depends on MiCAR’s regulatory costs. Meeting MiCAR’s disclosure requirements will result in significant direct costs even if the requirements on white papers and marketing communications are less onerous than their Prospectus Regulation counterparts. Indirect costs might also fall if more standardised and comprehensive information reduces under-pricing of issued tokens.¹⁷⁵ The most significant costs are likely to accrue on those issuers who decide to go public, ie, seek listing of their tokens. It has been estimated that the requirement to continuously publish inside information will put significant regulatory burden on small and medium-sized issuers, which might opt for non-EU markets with less demanding rules.¹⁷⁶ The experiences from rapidly evolving crowdfunding markets suggest that relative regulatory costs affect geographic patterns of market evolution.¹⁷⁷

The two-weeks withdrawal period will also result in unpredictable costs that will be difficult to measure. The EU Crowdfunding Regulation shows more awareness of the potential effects of the right to revoke an offer on the costs of raising capital and thus mandated the Commission to assess ‘whether the reflection period should be shortened to allow for a more efficient capital raising process without harming investor protection.’¹⁷⁸ The Commission would be wise to carefully assess regulatory costs also in the case of MiCAR.

¹⁷⁴ MiCAR, Recital (18).

¹⁷⁵ David Florysiak, ‘Utility Tokens, Markets in Crypto Assets Regulation (MiCAR), and the Costs of Being Public’ (11 December 2022) 14, ssrn.com/abstract=4295913.

¹⁷⁶ *ibid.*

¹⁷⁷ Armour and Enriques (n 132).

¹⁷⁸ Crowdfunding Regulation, Recital (48).