The regulation of crypto service providers in the EEA – MiCAR ante portas

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Abstract

The Markets in Cryptoassets Regulation (MiCAR) aims to regulate digital assets, including cryptocurrencies, within the European Union (EU). MiCAR is part of a broader set of regulations designed to establish a comprehensive framework for digital finance in the EU.

MiCAR introduces a harmonized regulatory framework for issuers and service providers involved in cryptoassets. It covers various types of cryptoassets, such as cryptocurrencies, utility tokens, and stablecoins. The regulation aims to enhance investor protection, promote market integrity, and foster innovation in the digital asset space.

Key provisions of MiCA include:

Authorization and Registration: Most cryptoasset issuers, including those conducting initial coin offerings (ICOs), would need to obtain authorization from the competent authorities within the EU. Cryptoasset service providers, such as custodians, exchanges, and wallet providers, would need to register with the relevant authorities.

Capital Requirements: Cryptoasset service providers would be subject to specific capital requirements to ensure their financial stability and ability to withstand market risks.

Investor Protection: MiCAR introduces measures to protect investors, including requirements for clear and accurate disclosures, adequate risk warnings, and rules for handling complaints and disputes.

Market Integrity: The regulation sets out rules to prevent market manipulation, insider trading, and abusive practices in the cryptoasset markets. It also introduces transparency requirements for trading venues.

Stablecoins: MiCA includes specific provisions for stablecoins, which are cryptoassets designed to maintain a stable value. It sets out additional requirements and oversight for stablecoin issuers, particularly those with a significant impact on the EU market.

The following manuscript deals with the various regulations for the market entry of crypto providers.

Catchwords

crypto service provider, crypto service, token, DLT, crypto assets, authorisation, licensing, market access, virtual currency, digital asset, electronic money token (EMT), asset referenced token (ART), utility token, hybrid token

Regulations

MiCAR**, MIR***, FM-GwG, TTA

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*** Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot scheme for market infrastructures based on distributed ledger technology (Market Infrastructure Regulation-MIR), OJ (EU) 2022 L 151, 1.

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I. Introduction and definition of terms

A. Introduction

Anyone who wants to operate across borders as a crypto service provider in the EU because they want to offer a **business model focused on crypto assets**[1] via decentralised networks[2] is confronted with a variety of challenges. This already starts with **market entry,** i.e., the licensing process. Crypto service providers currently have to apply for authorisations from supervisory authorities from different states and go through several authorisation procedures (in parallel) if their business model does not fall under the »EU passport system« of EU financial market law.

Once the authorisation has been granted, the situation does not change. The business model must comply with the **market operating conditions** of different jurisdictions, taking into account separately other relevant EU law requirements, such as the Services Directive 2006/123/EC.[3] The service provider has to comply with the respective applicable exercise regulations, in particular of the national trade, data protection and financial market law. Finally, the individual project must be coordinated with the different civil and company law systems of the respective state in which the service provider is active.

Currently, there is **no uniform »market regulation law«** for crypto service providers in the EU region. The directly applicable EU data protection law, which is usually also binding for third-country service providers operating in the EEA (Art 3 para 2 GDPR[4]), is to be excluded here, as is EU communications law,[5] because it does not stipulate a licensing obligation for crypto service providers.

This initial situation will only be modified in part by MiCAR and MIR, insofar as the regulations entail a **gradual harmonisation** of the heterogeneous entry and exercise conditions for certain crypto service providers.

While the MIR has already entered into force (see point III.D. below), the regulation of crypto-assets and related services will only be harmonised in relevant parts in the EU by MiCAR.[6] However, until the regulation is applicable (i.e., 12 or 18 months after its entry into force, Art 149 leg cit), crypto service providers are subject to existing, **heterogeneous national regulatory standards.**

In contrast to the 4th EU Anti-Money Laundering Directive (AMLD[7]), which only covers certain cryptocurrencies under the term »virtual currencies« (Art 3 no 18 leg cit), the EU legislator intends to **harmonise the conditions of entry and exercise** for crypto service providers to a **maximum extent** with MiCAR.[8] The experience gained in the course of the implementation of the 4th AMLD was obviously the basis for counteracting further national fragmentation of the regulation of crypto service providers. Therefore, the EU legislator opted for the legal form of a regulation, which will be directly applicable in all 30 EU and EEA Member States (Art 288 TFEU, Art 7 EEA).[9]

However, the EU legislator does not consistently implement this initial goal. MiCAR will only be applicable

1 A »digital asset« or »crypto-asset« according to Art 3 para 1 No 5 MiCAR (FN**) is to be classified as a digital representation of values or rights that are transferred and stored electronically. This is done, among other things, by means of »distributed ledger technology« (decentralised accounting technology; see also FN 2 below). Cf the overview in *Büchel,* Technische Grundlagen in Sild (ed), Grundsatzfragen des TVTG (2021) 3 et seq and *Piska/Tyrybon,* Grundlagen der Blockchain-Technologie und virtueller Währungen in Piska/Völkel (ed), Blockchain rules (2019) 2 et seq.
»Crypto-assets« include, for example, »cryptocurrencies« without backing (such as »Bitcoin«) as well as such virtual currencies that are linked to state fiat currency; this serves to reduce price fluctuations (also known as »stablecoins«). For some time now, asset-based tokens have also been treated under this term, e.g., representing rights to financial instruments or precious metals (presentation according to CH State Secretariat for International Financial Matters, 2021, available at <https://www.sif.admin.ch/dam/sif/de/dokumente/finanzmarktpolitik/digitalisierung/fact-sheet_crypto.pdf.download.pdf/Factsheet%20Crypto.pdf>, 15.5.2023).

2 In order to realise their business model, service providers use decentralised technologies (e.g., the Stella Blockchain), on the basis of which encrypted data is distributed in the network and recorded by all participants (cf Art 2 para 1 no 1 MIR and Art 3 para 1 no 1 MiCAR). The technology enables transactions to be processed in a decentralised manner without a responsible intermediary in the network and, for example, crypto-assets to be exchanged or transferred without difficulty. See Federal Council, Legal Basis for Distributed Ledger Technology and Blockchain in Switzerland (2018) 23 et seq, <https://blockchainfederation.ch/federal-council-report-legal-framework-for-distributed-ledger-technology-and-blockchain-in-switzerland/> (15.5.2023); *Büchel,* Grundlagen 3 ff; *Piska/Tyrybon,* Grundlagen 6.

3 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ (EU) 2006 L 376, 36.

4 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data, on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation), OJ (EU) 2016 L 119, 1.

5 Art 12 Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018 on the European Electronic Communications Code (recast), OJ (EU) 2018 L 321, 36.

6 As things stand today, it can be assumed that the regulation will be modified and quickly incorporated into the EEA (in the interest of a level playing field).

7 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing, OJ (EU) 2015 L 141, 73, as amended by Directive 2018/843 of 30 May 2018 (OJ [EU] 2018 L 156, 43) and 2019/2177 (OJ [EU] 2019 L 334, 155). Hereinafter: AMLD.

8 See for example recital 6 MiCAR.

9 This is intended to limit the central objective of MiCAR, namely the creation of legal certainty for consumers and the containment of those risks that emanate from crypto-assets (e.g., financial risks and risks to market integrity).

to a **subset of currently known crypto assets;** NFTs and decentrally created assets such as Bitcoin remain excluded, for example. The regulation complements the existing sectoral acts of EU financial market legislation. Those financial instruments that are already covered by the applicable EU banking and securities legislation (CRD IV/V, MiFID II, etc.) are not subject to MiCAR for the time being (Art 2 para 2 and 4 MiCAR).

The **central regulatory subject of MiCAR** is the specification of the conditions for public offers of crypto assets, the admission of crypto assets to trading on a trading platform as well as the structuring of conditions for transactions and services in connection with crypto assets. MiCAR thus aims to establish uniform rules on transparency and disclosure requirements for the issuance, public offering and admission to trading of crypto-assets. In addition, the regulation establishes rules similar to financial market law for the authorisation and supervision of crypto service providers and issuers of crypto assets. The main focus of the regulation is on issuers of asset-based tokens and e-money tokens.

The regulation is to enter into force 20 days after publication in the Official Journal and be directly applicable in all EU/EEA member states after an 18-month transition period. Only for asset-referenced tokens (ARTs) and e-money tokens (EMTs) shall MiCAR already apply after 12 months (Art 149 MiCAR). By 2025, therefore, a harmonised legal framework for crypto-related products and services should be in place across the EU.

Using the example of **market access,** this article discusses the conditions under which crypto issuers and crypto service providers will be able to implement digital business models in the EU/EEA in the future, which are exercised by means of »decentralised technologies«[10] such as via the »Stellar blockchain«.[11]

B. Diversity and delimitation of terms

This article refers to the **licensing** of »**crypto service providers**«. To begin with, there is no uniform or consensual legal definition of this not-so-new legal phenomenon. Many EU states pursue independent approaches.

1. Initial situation – the EU level

MiCAR will set a first step towards legal harmonisation. Art 3 para 1 no 15 MiCAR defines a »**crypto service provider**« as a person whose professional or commercial activity (not necessarily in the sense of a principal activity) consists of providing one or more crypto services to third parties on a businesslike basis.

Art 3 para 1 no 16 MiCAR is linked to this, according to which MiCAR, in addition to the **issuance**[12] **of certain tokens,**[13] is to cover the following »**crypto services**« or activities in connection with »**crypto assets**« (cf FN 1):[14]

- Custody and administration of crypto assets for third parties;
- Operation of a trading platform for crypto assets;[15]
- Exchange of crypto values for nominal currencies which are legal tender;
- Exchange of crypto assets for other crypto assets;
- Execution of orders for crypto assets on behalf of third parties;
- Placement of crypto assets;
- Acceptance and transmission of orders for crypto assets on behalf of third parties;
- Advising on crypto assets;[16]
- »Portfolio management« of crypto assets;
- Provision of crypto asset transfer services to clients;

10 Cf already above FN 1 and 2. These technologies must be suitable for ensuring the integrity of digital assets, the unique assignment of these assets to identifiers, and the legally effective disposal and transfer of crypto-assets.

11 Some of these business models are also examined in research under the term »decentralised finance«. For an overview, see for example *N. Raschauer,* Decentralised Finance in Piska/Völkel (eds), Blockchain rules, 2nd edition (2023, in press).

12 As follows from Art 3 para 1 no 10 et seq MiCAR, MiCAR only covers token issues that are carried out centrally by a responsible issuer (possibly in cooperation with other entities); these tokens can then be acquired on the basis of a public offer (Art 3 para 1 no 12 MiCAR) during a certain period of time at an issue price fixed in advance. If, however, digital assets are »produced« in a decentralised manner by various interconnected entities in an »open network« according to a certain technical process (e.g., by mining) and if no public offer for the purchase of these assets takes place, the facts of the issue within the meaning of Art 3 para 1 no 12 MiCAR are not fulfilled. See in a similar context *Heckenthaler/Rakar,* Initial Coin Offerings in Binder/Grösswang (eds), Digital Law² (2020) 48 et seq. The crypto service of trading these assets via a trading platform is to be separated from this (Art 3 para 1 no 18 MiCAR).

13 Namely, the issuance of utility tokens, e-money tokens and asset-based tokens (Art 3 para 1 nos 6, 7 and 9 MiCAR).

14 It should be noted that MiCAR excludes crypto assets that qualify as financial instruments in their entirety (Art 2 para 4 lit a MiCAR). The requirements of MiFID II and other EU sectoral acts apply to these assets, even if the applicable EU legal framework does not yet explicitly classify the crypto assets of interest here as financial instruments (cf *Majcen,* Der Verordnungsentwurf über Kryptowerte in Sild [ed], Grundsatzfragen des liechtensteinischen TVTG [2021] 413 et seq [416]).

15 The operation of a DLT trading system through which securities (shares, bonds, corporate bonds) are exchanged will (also) be subject to the MIR in the future. Cf for further details *N. Raschauer,* Liechtenstein und das neue europäische »DLT-Pilotregime«, LJZ 2022, 252.

16 Art 3 para 1 nos 17–26 MiCAR contain further legal definitions for the aforementioned activities, which are not discussed here due to their lack of relevance. Nevertheless, these legal definitions will be of importance in the future for the delimitation of the scope of application of the MiCAR.

These definitions will be used as the basis for the rest of this article. At the **EU level,** there are **no**[17] **other relevant legal definitions** apart from the 4th AMLD.[18] See section I.B.3. and IV. below for further details.

2. Germany

Germany follows a similar approach, oriented towards the 4th AMLD, which requires **obligated parties** as defined in § 2 para 1 of the Anti Money Laundering Act[19] to comply with due diligence obligations. They are subject to the GWG if they transfer[20] **crypto assets**[21] with an equivalent value of more than € 1.000,– (§ 10 para 3 no 2 lit c GWG). The GWG, as well as other German supervisory law, does not contain a specific legal definition for »**crypto service providers**«.

However, German supervisory law subjects two significant crypto services to the licensing requirement: on the one hand, the »**crypto custody business**« (§ 1 para 1a no 6 of the German Banking Act[22]) and, on the other hand, **crypto securities register management** (§ 1 para 1a no 8 KWG). The former comprises the custody, administration and safeguarding of crypto securities or private cryptographic keys used to hold, store or dispose of crypto securities for others, as well as the safeguarding of private cryptographic keys used to hold, store or dispose of crypto securities for others pursuant to § 4 para 3 of the eWpG.[23] The latter includes the maintenance of a crypto securities register pursuant to § 16 of the eWpG.

3. Austria

Austria follows the currently authoritative regulatory approach of the EU. Austria explicitly covers crypto service providers, apart from the EStG, only within the scope of the FM-GwG.[24] § 2 no 22 FM-GwG subjects »**service providers in relation to virtual currencies**« to a **registration obligation** (§ 32a FM-GwG), irrespective of any other relevant registration or authorisation obligations.

Covered are **service providers** who offer one or more of the following services (cf still below section IV.):

- Services for securing private cryptographic keys to hold, store and transfer virtual currencies on behalf of a client (providers of electronic purses);
- the exchange of virtual currencies[25] for fiat money and vice versa;
- the exchange of one or more virtual currencies for each other;
- the transfer of virtual currencies;
- the provision of financial services for the issue and sale of virtual currencies.

The legal wording does not require that these activities are performed »**commercially**« or »for third parties« - unlike, for example, in the case of »trust service providers« pursuant to § 2 no 4 FM-GwG (cf also § 32a FM-GwG). However, Art 2 para 1 in connection with Art 47 of the AMLD states that service providers are only obliged to comply with due diligence obligations within the scope of their »**professional activity**«. Crypto service providers must therefore act commercially and in particular for **third parties** (their customers) in order to be subject to due diligence obligations. This must be taken into account when interpreting §§ 2 no 22 and § 32a FM-GwG in accordance with the Directive. Purely private transactions with digital assets, own issues or proprietary trading

17 It is not disregarded that, for example, ICOs can be conducted via crowdfunding platforms pursuant to Art 2 para 1 lit d of Regulation (EU) 2020/1503 (e.g., issuing digital company shares or financial instruments). However, the regulation does not contain any further legal definitions and in its core is not tailored to DLT-based business models. Therefore, it will not be discussed further here. For an overview, see *Pfurtscheller* et al, Zur Regulierung der Schwarmfinanzierungsdienstleistungen durch die europäische Crowdfunding-Verordnung, LJZ 2022, 234.

18 Only the AMLD as amended by Directive 2018/843/EU and Directive 2019/2177/EU contains a definition of a »custodian wallet provider«. The Directive subjects them to due diligence obligations (Art 3 no 19 of the Directive) and a registration obligation (Art 47 para 1 of the Directive). This includes those providers who offer services to secure private cryptographic keys on behalf of their customers in order to hold, store and transfer virtual currencies as defined in Art 3 No 18 of the Directive.

19 Money Laundering Act of 23 June 2017 (Geldwäschegesetz – GWG), German Federal Law Gazette I 2017 p 1822.

20 The transfer of crypto assets is defined in § 1 para 30 of the German Banking Act as the transfer of crypto assets between natural or legal persons in the context of the provision of financial services or the conduct of banking business within the meaning of the Banking Act, which is not exclusively crypto custody within the meaning of § 1 para 1a no 6 of the Banking Act.

21 Cryptocurrencies are digital representations of a value that has not been issued or guaranteed by a central bank or public authority and does not have the legal status of currency or money, but is accepted by natural or legal persons on the basis of an agreement or actual practice as a means of exchange or payment or serves investment purposes and can be transmitted, stored and traded electronically (§ 1 para 11 no 10 in conjunction with para 10 sentences 4 and 5 KWG; this legal definition is also authoritative in the scope of application of the GwG pursuant to § 1 para 29 German GWG). A comparable legal definition can be found in § 2 no 21 FM-GwG, Art 2 para 1 lit z[bis] FL-SPG, Art 3 para 1 no 5 MiCAR or Art 3 no 18 AMLD. See in addition § 165 para 6 AT-StGB; § 27b para 4 AT-EStG et al.

22 German Banking Act (Kreditwesengesetz – KWG), German Federal Law Gazette I 1998 p 2776.

23 Act on the Introduction of Electronic Securities (eWpG), German Federal Law Gazette I 2021 p 1423.

24 Federal Act on the Prevention of Money Laundering and Terrorist Financing in the Financial Market (Finanzmarkt-Geldwäschgesetz- FM-GwG), Federal Law Gazette I 2016/118 as amended.

25 For the legal definition of a »virtual currency« cf § 2 no 21 FM-GwG.

by legal entities are therefore not subject to the provisions of the FM-GwG.[26]

§§ 2 no 22 and 32a of the FM-GwG apply in particular to service providers who are active in the **financial services sector** and issue and sell virtual currencies. Legal advice, advertising offers and the preparation of annual financial statements as well as other accounting in connection with digital assets are not subject to the FM-GwG.[27]

4. Switzerland

Switzerland takes a different approach. Swiss supervisory law does not contain any specific legal definitions for crypto service providers or crypto services. It does, however, subject the **professional acceptance** (as defined in Art 6 of the Banking Ordinance[28]) of **crypto-based assets** by banks and other legal entities **primarily active in the financial sector**[29] (Art 1b para 1 in conjunction with Art 16 of the Banking Act;[30] Art 5a of the BankO) to a **licensing requirement.** These service providers are also subject to the due diligence requirements of the CH-GWG[31] (Art 2 para 2 lit a leg cit).

In addition, so-called »**DLT securities**« (Art 2 lit a no 5b[bis] FinfraG[32]), i.e. standardised securities or uncertificated securities suitable for mass electronic trading pursuant to Art 973c and 973d CO,[33] which are held in distributed electronic registers and which convey the power of disposition to the creditor, can be traded in Switzerland via **DLT trading systems** within the meaning of Art 73a FinfraG according to non-discretionary rules. Operators of these trading systems are also subject to a licensing requirement. However, Swiss supervisory law does not contain a further definition of the term »DLT«.

5. Liechtenstein

Liechtenstein is one of the few regions in Europe, along with Gibraltar and Malta, with a harmonised market regulation regime that covers DLT-based crypto services. The **TVTG**[34] is applicable if »**TT service providers**« domiciled in Liechtenstein **professionally**[35] provide **TT services**[36] or issue **tokens**[37] in Liechtenstein (Art 3 para 1, Art 12 as well as Art 50 para 1 TVTG). A TT service provider is a person who performs one or more functions (so-called TT services) according to Art 2 para 1 lit k to u TVTG. The law is applicable to these services if the activities are DLT-based, specifically via »**trusted transaction systems**« (TT systems;[38]

26 Cf *Wolfbauer,* Ausgewählte Fragen zur Registrierung von Dienstleistern in Bezug auf virtuelle Währungen, ZFR 2021, 545.

27 AB 644 BlgNR 26. GP.

28 Ordinance on Banks and Savings Banks (Banking Ordinance, BankO), SR 952.02.

29 Art 4 para 1a of the Banking Ordinance defines a company that is »primarily active in the financial sector« as a company that accepts crypto-based assets on a professional basis (Art 6 of the Banking Ordinance; cf Art 5a in conjunction with Art 6 of the Banking Ordinance). A company accepts assets on a professional basis if it accepts or manages a total of more than CHF 1 million of such assets (or more than 20 crypto-based assets held in collective custody; 1st case of application). The ordinance supplements this legal presumption with a second case of application. Anyone who publicly recommends the acceptance of crypto-based assets held in collective custody is also acting on a commercial basis.

30 Banking Act, SR 952.0.

31 Anti-Money Laundering Act, SR 955.0.

32 Financial Infrastructure Act (FinfraG), SR 958.1.

33 Code of Obligations (CO), SR 220.

34 Token and TT Service Providers Act (TTA, TVTG) of 3 October 2019, Law Gazette 2019.301.

35 The law covers any activity or TT service that is provided for remuneration. Only purely voluntary services are to be excluded. The concept of professionalism, which is not defined in detail in the TVTG, is narrower than the concept of »professionalism«, as it is otherwise used in the Banking Act or in the Liechtenstein Trade Act (GewG). The legislator thus also wants to cover such (especially larger) decentralised business models that are not provided with the intention of repetition (e.g., token issues of more than CHF 5 million within 12 months). For more details see BuA 2019/54, 214 (TVTG) and *N. Raschauer/Stern,* Anwendungs- und Geltungsbereich des TVTG, SPWR 2021, 245 (246 et seq).

36 This is one of the functions defined in Art 2 Para 1 lit k–u TVTG, namely the »token issuer« (a person who offers tokens to the public in his own name or in the name of a principal); the »token creator« (a person who creates one or more tokens); the »TT key custodian« (a person who holds TT keys in custody for principals); the »TT Token Custodian« (a person who holds Tokens in another person's name for another person's account); the »TT Protector« (a person who holds Tokens on TT Systems in his or her own name for another person's account); the »Physical Validator« (a person who ensures the contractual enforcement on VT Systems of rights in property represented in Tokens within the meaning of property law); the »TT exchange service provider« (a person who exchanges legal tender for tokens and vice versa, as well as tokens for tokens); the »TT verifier« (a person who verifies the legal capacity and requirements when disposing of a token); the »TT pricing service provider« (a person who provides aggregated pricing information to users of TT Systems based on buy and sell offers or completed transactions); the »TT identity service provider« (a person who identifies and registers the authorised disposer of a token); and finally the »TT agent« (a person who professionally distributes or provides VT services on behalf of and for the account of a foreign TT service provider in the domestic market). For further details, see *Laimer/Sillaber,* VT-Dienstleister in Sild (ed), Grundsatzfragen des Liechtensteinischen TVTG (2021) 436 et seq. With an amendment currently under discussion (VNB 2023-315), the service provider category is to be streamlined and adapted to MiCAR (cf *N. Raschauer/Stern,* Fürstentum Liechtenstein: Novelle zum TVTG ante portas, ZFR 2023, 206).

37 According to Art 2 para 1 lit c TVTG, a »token« is »information on a TT system which: 1. may represent rights of claim or membership in respect of a person, rights in property or other absolute or relative rights; and 2. is associated with one or more TT identifiers«. This definition is also relevant in the scope of application of the DDA [SPG] (Art 2 para 1 lit l[ter] TVTG). See, for example, *Walch,* SME Funding through Tokenization under the Liechtenstein Token and TT Service Provider Act, SPWR 2021, 161 (187 ff).

38 A TT system is trustworthy if it enables the legally secure transfer and storage of tokens or the allocation of an asset to its

Art 2 para 1 lit a and b TVTG). In Art 2 para 1 TVTG, the legislator has implemented a legal presumption that is questionable from a legal policy point of view: If such decentralised networks are used, they are considered **trustworthy**[39] in principle – with the consequence that the TT service provider creates »trust« among its clients through the systems used. However, it remains open what is to apply if this rebuttable legal presumption no longer applies, for example in the case of a data breach.[40] MiCAR does not contain a comparable ruling, but instead states that service providers are liable if, for example, tokens are not securely stored or transferred (see Art 75 para 8 MiCAR).

For the purpose of preventing money laundering, TT service providers must fulfil specific due diligence obligations; in this respect, the TVTG is supplemented by the FL-SPG.[41] For example, **token issuers** who issue tokens in the amount of 1'000 CHF or more (in their own name or in the name of a third party) and **operators of trading platforms** for virtual currencies or tokens (Art 3 para 1 lit s and t SPG) are considered to have due diligence obligations (Art 5 ff SPG). They must **register** the commencement of their activities with the FMA in advance (cf also Art 3 para 3 lit h and i SPG).[42]

Operators of trading platforms for virtual currencies or tokens are natural persons or legal entities that operate trading platforms through which their clients exchange virtual currencies or tokens for legal tender or other virtual currencies or tokens and vice versa, or have them exchanged, and whose activities go beyond mere intermediation without involvement in the payment flows, but who do not hold tokens or VT keys in safekeeping for their clients (Art 2 para 1 lit z^{ter} SPG).

C. Further thoughts – the connection between the offline and online world

In order for crypto service providers and their digital business models to be properly analysed, at least the following broader thoughts should be taken into account when considering a business model applied for authorisation:[43]

- **No restrictions:** Any physical right existing in the »offline world« can be »converted« into a digital asset or token by means of suitable technology and thus made into a tradable or transferable right in the »online world«. This makes it possible, for example, to record and represent the ownership right to an object, the right to purchase goods (e.g., vouchers), rights of use of all kinds, but also liens, rights of claim and membership rights and much more in a crypto-asset.[44]
- **Assignment** to a corresponding »**digital key**«:[45] The prerequisite for a crypto-asset to be transferred, traded, etc based on DLT is that this asset can be assigned to a suitable »key« or TT identifier and indirectly to an (authorised) user.[46] Therefore, the technology used in the background is also relevant for assessment, for example, under which conditions users are given access to a decentralised system.
- **No new right:** »Tokenisation«[47] does not create a new right in the »digital world«. Rather, the original (analogue) right remains intact and is now digitally represented via decentralised systems.[48]

D. No automatic »betterment« of DLT-based business models

For the correct analysis of a crypto-based business model, the following should be noted: Neither under current Union and national constitutional law nor on the basis of a legal policy discussion can a blanket »better treatment« of decentrally provided business models of a crypto service provider compared to centrally acting financial intermediaries be justified per se. The demand for the removal of regulatory »hurdles« or for »facilitated treatment« in the context of supervisory processes can therefore (not easily) be argued.[49]

holder. For further details see *Jörg/Layr/Lettenbichler,* Übertragung von Rechten auf VT-Systemen in Sild (ed), Grundsatzfragen des liechtensteinischen TVTG (2021) 209 et seq.

39 BuA 2019/54, 131 (TVTG).

40 BuA 2019/93, 17 et seq (TVTG).

41 Law of 11 December 2008 on professional due diligence to combat money laundering, organised crime and terrorist financing (Sorgfaltspfichtgesetz; SPG), Law Gazette 2009.47.

42 The registration requirement for own issues is to be abolished without replacement in the course of the upcoming TVTG amendment (FN 36). The reason given in VNB 2023-315 is that MiCAR does not comprehensively regulate own issues.

43 *Damjanovic/N. Raschauer/Pfurtscheller,* Liechtensteins »Blockchain-Regulierung« – Ein- und Ausblicke, ZEuP 2021, 397 (407 et seq).

44 BuA 2019/54, 58 (TVTG).

45 A TT identifier is an identifier that enables the unambiguous assignment of tokens (Art 2 para 2 lit d TVTG). See also the report of the CH Federal Council (FN 2) 20 et seq.

46 The user has control over the necessary keys. Most decentralised technologies known today are based on asymmetric cryptography. With this, the address is generated from the »public key«. The address can be publicly known so that other people can transfer tokens to it. In cryptography, the »public key« always includes a »private key« to release or sign transactions. However, asymmetric cryptography is only one of the possible solutions for the functionality of DLT (see BuA 2019/54, 20 [TVTG]). For further details, see *Walch,* SPWR 2021, 167 et seq.

47 On the term, for example cf *Jörg/Layr/Lettenbichler,* Übertragung 209 ff, *Walch,* SPWR 2021, 166 et seq.

48 *Walch* at the indicated location (FN 37).

49 Consider, for example, the legal policy discussion on facilitations for »fintechs« within the framework of a »sandbox« and the like (on this *Pfurtscheller/N. Raschauer/Stern,* Von regulatorischen Sandplätzen und Innovationsknotenpunkten – rechtsvergleichende Bemerkungen zur Förderung von Fintechs in der DACH-Region, ZFR 2021, 4).

This can be justified as follows: Crypto services are subject to comparable regulatory principles that EU law prescribes for other commercial services in the form of competition, consumer protection and financial market law. The following principles, for example, are worth mentioning in this context:[50]

- **Principle of technology neutrality:** EU market regulation law is designed to be technology neutral. Whether provisions of trade or competition law are applicable is not determined by the technology used by a service provider.[51] Recital 9 MiCAR also emphasises this principle.
- **Same services, same risks, same regulations** (see recital 9 MiCAR): EU market regulation law recognises different policy areas and professions (e.g., communication service providers vs. financial intermediaries). The fact that not every professional field is to be structured »equally« does not need to be elaborated here. However, Art 20 GRC in conjunction with Art 7 B-VG requires that the relevant standards for entering and exercising the profession within a »regulatory system« (professional field, e.g., DLT-based crypto services) are in principle »comparably« regulated. A different drafting and interpretation of the standards for crypto issuers on the one hand and other crypto service providers on the other hand is permissible under the principle of equality, insofar as the risks associated with this service and the decentralised technology used entail relevant differences compared to the other service.[52] This explains why MiCAR, for example, defines different regulatory standards for the issuance of ARTs and EMTs (Art 16 ff, 48 ff), as these tokens obviously pose different risks. The above also applies to other areas, such as data protection and financial market law: It is therefore not surprising that the EU legislator regulates crypto service providers (e.g., token custodians) in a functionally similar (but not congruent) manner as traditional financial intermediaries (e.g., listed issuers) - both MiCAR and Regulation 486/2014 contain regulations to prevent market abuse, which are, however, not congruent. Violations of these provisions are also sanctioned differently.
- **Substance over form:** In the scope of application of MiCAR, crypto-based business models are also to be examined according to **objective and substantive aspects,**[53] i.e., on the basis of their **economic effects,** but not on the basis of their legal effects.[54] The business models in question must not only comply with the MiCAR requirements, but also with other, parallel regulatory requirements, such as those of EU financial market law.[55] The EU regulators had emphasised the importance of this approach some time ago.[56]
- **ex-officio**-principle: If a supervisory authority has to assess a licence application within the scope of MiCAR, it has to determine and apply the aforementioned assessment criteria and the applicable law ex officio (§ 6 AVG). Art 63 para 5 MiCAR clearly expresses this when it obliges the competent supervisory authority to pay special attention to links between financial intermediaries and crypto service providers subject to MiCAR.

II. MiCAR – Basic Regulatory System

A. Regulatory system

The crypto-services-related regulations covered by MiCAR can be roughly divided into the following blocks.

- **Personal and material scope of application** (Art 1–2): The regulation only covers a subset of the currently known crypto-assets. MiCAR will not apply to unregulated assets such as NFTs (Art 2 para 3 MiCAR[57]) or decentrally issued products such as »Bitcoin«, which are created by »mining« in the decentralised network. The same applies to crypto-assets that are to be classified as financial instruments according to MiFID II/Prospectus Regulation – these are subject to the existing regulations of EU financial market law (Art 2 para 4 lit a MiCAR[58]).
- **Whitepaper:** Issuers of certain crypto-assets (asset-backed tokens, e-money tokens and other crypto-tokens subject to MiCAR) must prepare and publish a

50 Parts of the principles listed below can also be found in the introductory recitals to MiCAR (cf recitals 6, 9, etc).

51 Instead of all report CH Federal Council (FN 5) 46.

52 *N. Raschauer,* Art 36 LV no 21 in Liechtenstein-Institut (ed), verfassung.li (as of 2021). Therefore, the principle of proportionality is also of essential relevance as an underlying principle in the scope of application of the MiCAR.

53 Cf e.g., Art 62 MiCAR. Cf on the legal situation prior to MiCAR *Damjanovic/N. Raschauer/Pfurtscheller,* ZEuP 2021, 397 (408) and *Kleinert/Mayer,* Elektronische Wertpapiere und Krypto-Token, EuZW 2019, 857 (860).

54 *Weitnauer,* Initial Coin Offerings (ICOs): Rechtliche Rahmenbedingungen und regulatorische Grenzen, BKR 2018, 231; *Heckenthaler/Rackar,* Initial Coin Offerings 46.

55 Cf e.g., the link in Art 60 MiCAR: If financial intermediaries provide crypto services under MiCAR, they must comply in parallel with the requirements of the applicable sectoral act (e.g., PSD 2).

56 Cf e.g., the EBA in a statement on ICOs 2019, <https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf> (15.5.2023).

57 The exemption covers crypto assets that are unique and not fungible with other crypto assets.

58 With the exception of e-money tokens, insurance and pension products or comparable assets that are covered by the existing financial market regulation (Art 2 para 4 MiCAR) are not subject to MiCAR.

crypto-whitepaper prior to the start of the issuance. This information document is functionally equivalent to a capital market prospectus, but – unlike the latter – does not have to be approved by the competent supervisory authority (cf e.g., in detail Art 6 et seq MiCAR regarding utility tokens, Art 19 MiCAR regarding asset-backed tokens and Art 51 MiCAR regarding e-money tokens[59]).

- **Organisational requirements:** MiCAR stipulates strict licensing requirements for certain providers of crypto services and issuers of certain crypto assets, specifically EMTs and ARTs, as well as requirements for the organisation of the company (cf e.g., Art 17 in conjunction with 30 et seq MiCAR concerning credit institutions issuing asset-based tokens). Issuers of utility tokens are not subject to authorisation requirements.
- **Conduct of business rules:** The aforementioned issuers of crypto-assets and providers of crypto-services have to comply with conduct of business rules in the interest of their clients, comparable to banks and investment firms under the MiFID II regime (e.g., the duty to act in the best interest of investors; see in more detail Art 66 MiCAR).
- **Market abuse regime:** Art 86–92 MiCAR provide for comparable regulations for the prevention of insider trading and market manipulation in connection with the issuance and trading of crypto-assets, as they are contained in MAR (Regulation 486/2014) and the national stock exchange regulations.
- **Duality of supervisory authorities:** While the competent national supervisory authorities will be responsible for the supervision of issuers of crypto-assets and crypto-service providers (see in detail Art 93 et seq MiCAR), issuers of significant asset-referenced tokens and significant e-money tokens[60] will be subject to the supervision of EBA (Art 117 et seq MiCAR).

B. Asset types covered by MiCAR

MiCAR does not cover all of the cryptoasset types currently in use. Those assets that are regulated by MiCAR are listed below. It is assumed that cryptoassets, i.e., digital representations of values or rights, can be transferred or stored electronically using distributed ledger technology (»DLT«) or a similar technology (Art 3 para 1 no 5 MiCAR).

59 At most, it must be checked for completeness or, if applicable, be the subject of a supervisory approval process.

60 For the definition of so-called significant tokens, see Art 43 and 56 MiCAR.

1. Utility Tokens

Utility tokens provide their holders with access to certain applications (e.g., on online platforms) or services of the issuer, which are exercised on the basis of DLT.[61] Regulators classify utility tokens as »digital vouchers« that convey a claim to services against the respective issuer.[62]

As long as utility tokens only have the aforementioned functions at the time of issue, they are generally **not financial instruments.**[63] However, if utility tokens can also be used for other purposes, for example as an investment or payment instrument, these assets are to be classified as financial or payment instruments.[64] As a consequence, such tokens are not subject to MiCAR but to other regulatory areas (such as MiFID II, PSD 2 etc).

Issuers of utility tokens do not have to fulfil any due diligence obligations according to AMLD; they are currently not mentioned in the group of persons subject to due diligence pursuant according to Art 3 AMLD. Only if the tokens in question also fulfil other functions is the scope of application of the AMLD opened up. In this context, it is not overseen that the member states also subject the issuance of utility tokens to the national anti-money laundering regime.[65]

If utility tokens are to be traded on a trading platform, the issuer can apply for a corresponding **authorisation** from an already authorised **operator of a trading platform** for **crypto assets** after publication of the white paper (cf Art 5 MiCAR).[66]

2. Asset-Referenced Tokens (ARTs)

ARTs[67] are assets, also known as »stablecoins«, which are backed by other rights such as official currencies

61 Cf the legal definition of Art 3 para 1 no 9 in conjunction with recital 26 MiCAR: »Utility token« is a crypto value that is exclusively intended to provide access to a good or service provided by its issuer.

62 *Maute,* § 4 no 45 in Maume/Maute/Fromberger (eds), Rechtshandbuch Kryptowerte (2020); *Siadat,* Markets in Crypto Assets Regulation, RdF 2021, 14.

63 Cf only recital 14, 26 MiCAR, according to which tokens that qualify as financial instruments are in principle excluded from the scope of MiCAR. Conversely, it follows that utility tokens as defined in Art 3 para 1 no 9 in conjunction with Art 5 et seq MiCAR are generally not to be classified as financial instruments under the MiCAR system.

64 Recital 3 MiCAR.

65 Cf Art 3 para 1 lit r and s FL-SPG.

66 While utility tokens may be issued EU-wide without a national permission, issuers of EMTs and ARTs (cf Art 3 para 1 nos 6 and 7 MiCAR) must first apply for permission from the national supervisory authority. For further details, cf point III.A.

67 MiCAR uses the term »asset-referenced token« (Art 3 para 1 no 6 leg cit). This refers to a crypto-value that is not an e-money token and whose value stability is to be maintained by reference to another value or another right or a combination thereof, including one or more official currencies.

(Art 3 para 1 no 8 MiCAR), by commodities (e.g., gold or oil) or by other crypto assets such as Bitcoin. The use of a combination of **reference values** as underlyings (e.g., several precious metals) would also be conceivable.

The decisive factor is that the underlying reference right has a value that is formed periodically (e.g., on the basis of a stock exchange listing etc), fluctuates because it is dependent on external political and economic influences and is publicly announced, e.g., on a website of a price service provider. The value of the ART depends on this reference value; it rises and falls depending on how the underlying asset develops.

If ARTs exceed at least three of seven criteria defined in MiCAR, such as market capitalisation and number of users (cf in more detail Art 43 para 1 MiCAR), EBA has to classify ARTs as **significant tokens.** The regulation specifies general lower limits for the threshold values.[68] The Commission specifies the criteria by means of delegated acts (Art 43 para 11 and Art 139 MiCAR). Issuers of significant ARTs have to comply with additional conduct obligations, such as the introduction of a sound remuneration policy and the performance of periodic liquidity stress tests.[69] In this respect, issuers of significant ARTs are subject to legal supervision by the EBA (Art 117 para 1 MiCAR).[70]

3. E-money tokens (EMTs)

EMTs[71] are assets or »stablecoins« that are backed only by an official currency such as Euro, CHF or USD. A link to other underlying assets is not permitted. It is interesting from a regulatory point of view that EMTs are ex lege classified as **electronic money** in the sense of the 2nd E-Money Directive[72] (arg from Art 2 para 4 lit c in conjunction with Art 3 para 1 no 44 and Art 48 para 2 MiCAR in conjunction with Art 2 no 2 EMD). Therefore, certain provisions of the MiCAR on the one hand and certain provisions of the 2nd EMD on the other hand have to be applied to them in parallel,[73] unless the Regulation excludes certain business constellations from its scope of application.[74]

If EMTs exceed at least three of the seven criteria defined in MiCAR, such as market capitalisation and number of users (cf in more detail Art 43 para 1 in conjunction with Art 56 MiCAR), EBA must classify EMTs as **significant tokens.** The regulation specifies general lower limits for the threshold values.[75] The Commission specifies the criteria by means of delegated acts (Art 43 para 11 and Art 139 MiCAR). Issuers of significant EMTs have to fulfil specific behavioural obligations, such as the obligation to hold a solid asset reserve.[76] In this respect, issuers of significant EMTs are subject to legal supervision by the EBA (Art 117 para 1 MiCAR).[77]

4. Not covered: Payment tokens

MiCAR only covers »**payment tokens**« if they are classified as e-money tokens (recital 3, 9, Art 2 para 4 lit c MiCAR). Payment tokens can be electronically transferred, traded and stored in private wallets within a multi-person payment system.[78]

Payment tokens are only issued by **private issuers** under the current PSD 2[79] requirements. Payment tokens issued by central banks and other state institutions (»digital euro«, etc) are planned, but are not currently relevant for assessment.[80]

Payment tokens are to be classified as »**payment instruments**« within the meaning of Art 4 no 14 PSD 2 or as corresponding means of exchange, such as »mobile points« or digital vouchers. The tokens can be exchanged for goods or services via an online application.[81]

Therefore, if the holder can exchange such a token for **goods** or **services** with (third party) trading partners of the issuer within a private payment system on a vol-

68 For example, in terms of market capitalisation EUR 5 million, in terms of number of holders 10 million.
69 Art 45 MiCAR.
70 Only to the extent that these issuers also provide other crypto services regulated by MiCAR, the competent national supervisory authority is responsible for the supervision of these activities (Art 117 para 2 MiCAR).
71 Cf the legal definition in Art 3 para 1 no 7 MiCAR.
72 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions (OJ 2009 L 267, 7; »EMD«).
73 The MiCAR conclusively defines the extent to which the 2nd EMD applies to EMTs (cf Art 48 et seq).
74 See, for example, Art 48 para 5 MiCAR: According to this, EMTs issued within the framework of so-called »limited networks« are largely exempt from MiCAR.
75 For example, market capitalisation EUR 5 million, number of holders 10 million.
76 Art 58 MiCAR.
77 Only to the extent that these issuers also provide other crypto services regulated by MiCAR, the competent national supervisory authority is responsible for the supervision of these activities (Art 117 para 2 MiCAR).
78 If the tokens in question here are – as is often the case – only accepted by the issuer, but not by other contracting parties, there is reason to doubt whether the token is subject to authorisation under PSD 2. In general, the exception according to Art 3 lit k PSD 2 will be fulfilled (limited network). Furthermore, payment tokens may not be equated with other known payment instruments under PSD 2 without further ado: Payment tokens are not necessarily personalised. In contrast, the definition of payment instruments in PSD 2 (Article 4 no 14) is based on »personalised« instruments.
79 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, OJ (EU) 2015 L 337, 35 (PSD 2).
80 Arg from the negative delimitation in Art 3 no 18 AMLD in conjunction with § 2 no 21 FM-GwG and comparable provisions: »not issued by any central bank or public body...«.
81 *Kleinert/Mayer,* EuZW 2019, 857 (859).

untary basis (i.e., contractual agreement),[82] this process is subject to the regulations of PSD 2 or the national payment services regulations. It therefore requires multi-personal agreements that payment tokens are accepted as a means of exchange; however, **merchants** are **not** legally **obliged to accept** them.

5. Not covered: »Investment assets«

Also not to be assessed according to MiCAR, but according to MiFID II,[83] are so-called »**investment assets**« or **financial instruments** (recital 3, Art 2 para 4 lit a MiCAR). Due to their economic functionality, such assets are to be classified as financial instruments within the meaning of Art 2 para 1 lit a EU-Prospectus Regulation.[84] This refers, for example, to certificates similar to shares, bonds, derivatives or the like.[85] Such investment assets are usually subject to the **prospectus obligation** pursuant to Art 3 et seq of the Prospectus Regulation or comparable national information obligations.[86]

In the future, the regulation will also cover assets that typically enable their holders to receive income or dividend payments, such as participation certificates or participation loans.[87]

Issuers of investment assets as defined in Art 3 para 1 of the 4th AMLD must fulfil comprehensive due diligence obligations.

6. Not explicitly regulated: Hybrid assets

At first glance, it seems unclear how to assess business models that have characteristics of different asset classes. One could think of tokens that qualify as ARTs but also fulfil payment functions, for example. In this case, regulators speak of so-called »**hybrid tokens**«.

Due to the **accumulation principle**,[88] it must be assumed that such business models are only legally provided if the business model is compatible with all relevant regulatory standards.[89] I.e., if a hybrid token falls under different legal acts, it must fulfil all authorisation requirements of the relevant legal regime. This does not only apply to token issuers, but also to crypto service providers: This becomes clear, for example, when looking at Art 60 para 3 MiCAR, according to which investment firms that provide crypto services are also subject to the requirements of MiFID II in addition to certain MiCAR standards.[90] This leads to the assessment that for an individual crypto-based business model, **different market regulation standards** can be relevant in parallel.

7. Only a temporary stopover … What about NFTs?

The rapid technological change in the crypto sector will force the EU legislator and regulators to periodically review and adapt their regulatory assessment.[91] It may be necessary to expand and adapt the scope of MiCAR. This is already evident in the current regulatory approach of MiCAR: the legislator regulates certain crypto assets regardless of the technology used in the individual case.[92]

The legislator's decision not to subject so-called »non-fungible tokens« (**NFTs**) to MiCAR (Art 2 para 3 and recital 17 leg cit) is currently noteworthy. NFTs are data units that are mapped on a decentralised transaction system and represent a unique digital object of art, audio files, videos, etc; they cannot be traded and transferred at will.[93] However, such assets, if they cannot be traded or transferred, are not to be classified as investment or utility tokens. One can think of the »**Belvedere token**«,[94] for example, which does not embody any rights of use or other share rights and ultimately does not even grant the investor membership rights in a company, etc. The token can also be used as an investment or utility token.

82 *Maute,* § 4 Rz 45 in Maume/Maute/Fromberger (eds), Rechtshandbuch Kryptowerte; *Siadat,* RdF 2021, 14.

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

84 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 (EU) 2017 L 168, 12.

85 *Riehtmüller,* Aufsichts- und kapitalmarktrechtlicher Gehalt der ECSP-Verordnung, BKR 2022, 153 (154); *Rennig,* KWG goes Krypto, BKR 2020, 23 (24).

86 Cf on the KMG below IV.B.

87 *Siadat,* RdF 2021, 14; *A. Varmaz/N. Varmaz/Günther/Poddig,* Ch 1 no 40 in Omlor/Link (eds), Kryptowährungen und Token (2021).

88 See, for example, *Giese,* Das Betriebsanlagenrecht und andere Bereiche des öffentlichen Rechts Rz 305 in Stolzlechner ua, Die gewerbliche Betriebsanlage[4] (2016).

89 This requirement also applies to all other categories of crypto-assets.

90 For example, VwGH 24.4.2007, 2004/05/0285.

91 Such a periodic duty of review by the competent administrative authority already follows from the principle of equality and the principle of good faith (for AT, e.g., VfSlg 18.322/2007). The application of outdated technology-based review criteria would violate the principle of objectivity of the principle of equality.

92 Recital 6 MiCAR.

93 Cf e.g., *Kulnigg/Tyrybon,* Non Fungible Token (NFTs) - ein Fall für die Finanzregulierung?, ecolex 2021, 560 et seq.

94 <https://www.belvedere.at/nft>, retrieved on 15.5.2023.

III. The licensing of crypto issuers and crypto service providers according to MiCAR

In the following, the respective licensing process is to be dealt with according to crypto issuer and crypto service provider.

A. The licensing of crypto issuers

1. Excursus: Issuance of Utility Tokens

The (own) **issuance of utility tokens** is entirely **exempt** from **authorisation** under MiCAR. The regulation only requires that the **issuer**[95,96] is a legal entity[97] and complies with the conduct of business rules[98] pursuant to Art 14 MiCAR. Accordingly, issuers must

- act honestly, fairly and professionally;
- communicate in a fair, clear and non-misleading manner;
- avoid, identify and, where appropriate, disclose potential conflicts of interest;
- maintain their systems and protocols to ensure access security »in accordance with relevant Union standards«;[99]
- act in the best interests of crypto holders and treat them equally;
- in the event of the cancellation of a public offer, duly refund to holders any sums of money owed to them no later than 25 calendar days after the date of cancellation.

It is noteworthy that the legislator has not defined a **threshold** for such issues as a requirement for authorisation or registration.[100] Issuers of utility tokens only have to prepare and notify a white paper if they issue tokens with a total value of more than EUR 1 million in the EU within 12 months (Art 4 para 2 MiCAR). Issuers can apply separately to have their tokens traded on trading platforms.[101]

2. Issuance of ARTs

Only **legal entities** with their registered office in the EU are permitted to issue ARTs in the EU in the future (Art 16 para 1 MiCAR). If this company has not previously been licensed as a credit institution in the EEA[102] and the issuer intends to offer ARTs with an equivalent value of **more than EUR 5 million** to the public in the Union within one year, the issuer requires prior **authorisation**[103] from the competent authority of the home state.[104]

The **application for authorisation** must include in particular (cf in detail Art 18 para 1 and 2 MiCAR):

- Information on the business model and detailed descriptions of the internal control mechanisms as well as
- a »**white paper**« pursuant to Art 19 MiCAR, which describes, among other things, the characteristics, functions and risks of the ART, the reserve assets and the redemption rights in accordance with Annex II MiCAR.

The competent authority must submit the complete application and the white paper to a **determination procedure**, which must be completed within 60 days.[105] The ECB, EBA as well as ESMA are to be heard in the procedure. After a further 25 days, the supervisory authority must decide on the application for authorisation or whether the conditions for authorisation have been met[106] (Art 20 MiCAR). The authority may **refuse authorisation** if the issuer's business model poses a serious

95 Art 3 para 1 no 10 MiCAR defines the issuer as a natural or legal person or another company that issues crypto securities.

96 In this context, it seems confusing and legally questionable that the legal definition of »issuer« in Art 3 para 1 no 10 MiCAR is broader and also includes natural persons.

97 The issuer does not necessarily has to have a registered office in the EU.

98 The conduct of business rules that MiCAR lays down for issuers of utility tokens are functionally and substantively similar to the standards to which investment firms and banks are subject under the MiFID II regime. It makes sense to interpret Art 14 MiCAR in accordance with the requirements of MiFID II and the delegated acts issued in this regard. For reasons of space, this aspect will not be dealt with in depth here.

99 ESMA will issue guidelines in cooperation with the EBA in which these standards will be specified. Banks with a valid licence that want to issue an ART do not need any additional approval from the home state authority. They only need to prepare a white paper, which must be approved by the competent authority (Art 17 para 4 in conjunction with Art 19 MICAR).

100 The FL-TVTG, for example, currently still provides for corresponding thresholds (>5 million CHF). However, Liechtenstein has decided to eliminate the threshold of >5 million CHF and the registration obligation for own issuers in the course of the upcoming amendment (cf FN 36).

101 In this case, the legal basis is a private agreement with the operator of the trading platform (Art 5 MICAR).

102 Banks with a valid licence that want to issue ARTs do not need any additional approval from the home state authority. They only need to prepare a white paper, which must be approved by the competent authority (Art 17 para 4 in conjunction with Art 19 MiCAR).

103 Below the threshold of EUR 5 million, the issuer only has to prepare a white paper. Furthermore, the approval requirement does not apply if the issuer only offers ART to qualified investors within the meaning of Art 3 para 1 no 30 MiCAR (Art 16 para 2 lit b MiCAR).

104 Cf on the definition Art 3 para 1 no 33 and 35 MiCAR.

105 On the course of the investigation procedure, see also point III.B below.

106 In this context, Art 34 and 35 MiCAR are particularly important: The members of the issuer's management must be reliable and have sufficient expertise. In addition, issuers must meet the mandatory capital adequacy requirements (including EUR 350,000,–).

threat to financial stability or market integrity or if the managers are not reliable (Art 21 para 2 MiCAR).[107]

If the authority **approves** the application for authorisation or the white paper submitted for review, the issuer may **distribute ARTs throughout the EEA** (Art 16 para 3 MiCAR).[108] ESMA must record valid licences in the register of service providers pursuant to Art 109 MiCAR.

Issuers with a valid authorisation must comply with comprehensive **organisational and conduct of business obligations**, which are strongly reminiscent of the obligation of banks and investment firms to comply with conduct of business rules under MiFID II. Inter alia are to be mentioned (in addition to the duties already listed in connection with issuers of utility tokens; cf Art 27 et seq MiCAR):

- Duty to act in the best interests of token holders;
- Establishment of complaints procedures;
- monthly reporting on the number of ARTs in circulation, their value and the composition of the reserve assets;
- Implement adequate risk management and state of the art ICT infrastructure;[109]
- Introduction of a conflict of interest policy;
- Maintaining an asset reserve that can be segregated in the event of insolvency and is kept separate from the company's assets; this is intended to cover the risks associated with ARTs.[110]

3. Issuance of EMTs

EMTs may only be issued by **banks** or **electronic money institutions** with a valid EEA licence (Art 48 para 1 MiCAR).[111] No separate authorisation is required for the issuance of an EMT. These qualified issuers may offer EMTs to the public in the EU if they have notified the competent authority of the intention to issue in due time (Art 48 para 6 MiCAR) and have notified a previously prepared white paper; the document is neither checked for content nor formally approved. EMTs, like ARTs, may be issued throughout the EU (Art 48 para 1 MiCAR; Art 3 of the 2nd EMD).

Issuers of **significant EMTs** must comply with comparable organisational and conduct of business obligations as issuers of ARTs (Art 58 MiCAR). For issuers of normal EMTs, the requirements set out in the 2nd EMD essentially apply (Art 48 para 3 MiCAR).

Issuers of EMTs, like providers of ARTs, must comply with the requirements for marketing communications; in addition, they must prepare a **white paper** in accordance with the requirements of Annex III of the Regulation and publish it on their website (Art 51 MiCAR).

Specific **conduct of business obligations** apply to issuers of EMTs (cf Art 49 et seq MiCAR):

- EMTs must be issued at the nominal value of the amount of money received and must be redeemed at any time at this nominal value;[112]
- Issuers of EMTs may not grant interest on EMTs and related services;
- The redemption of an EMT shall be free of charge;
- Funds received must be invested in a low-risk and diversified manner; at least 30 % of the funds must be deposited in separate bank accounts;
- Issuers of EMTs, like providers of ARTs, must develop a recovery and redemption plan.[113]

B. Licensing of crypto service providers

In addition, MiCAR also stipulates a **licensing requirement** for the provision of other crypto services by **crypto service providers** (Art 3 para 1 no 15 MiCAR[114]) in the EU (Art 59 in conjunction with Art 63 MiCAR).[115] A total of ten crypto services are subject to a licensing requirement. These are (cf Art 3 para 1 no 16 MiCAR):[116]

107 If, on the other hand, the licence application was not complete or the applicant failed to complete the licence application, the authority must discontinue the procedure.

108 Cf on the withdrawal of a valid authorisation Art 24 MiCAR.

109 From 2025, the requirements of the Digital Operational Resilience Act »DORA« (Regulation 2022/2554) will be decisive.

110 Issuers of ART must hold reserve assets, including cash or short-term government bonds, at all times to stabilise the value of ART and ensure effective and prudent management. Any creation or destruction of ARTs must be accompanied by a corresponding increase or decrease in the reserve assets. In this context, the issuer must describe its strategy for stabilising its tokens, including which assets ARTs reference, the composition of the reserve assets and the risks – e.g., credit risks – associated with the composition of the assets.

111 The only exceptions are those issuers who offer e-money tokens in the context of so-called »limited networks« (Art 48 para 7 MiCAR).

112 As already pointed out by the EFTA Court 30. 5. 2018, E-9/17, the value of the EMT must not fluctuate during the holding period; otherwise, it is an investment activity. In this case, the token would be classified as an ART.

113 While EMT holders may demand the redemption of their tokens at any time, this only applies to holders of ARTs to the extent that the market value of the ART deviates significantly from the value of the reserve assets or the holders have been granted a redemption right. If issuers of EMTs or ARTs cease their business activities or their authorisation is withdrawn, the token holders are entitled to the proceeds from the reserve assets.

114 This is any person whose professional or commercial activity consists of providing one or more crypto-services (Art 3 para 1 no 16 MICAR) to third parties on a business basis.

115 Comprehensive *Majcen,* MiCAR 413 ff.

116 Cf Art 3 para 1 no 17–26 MiCAR for corresponding legal definitions.

a. Custody and administration of crypto assets for clients;
b. Operation of a trading platform for crypto assets;
c. Exchange of crypto values for a sum of money or other crypto values;[117]
d. Execution of orders for crypto assets on behalf of clients;
e. Placement (marketing) of crypto assets on behalf of third parties;
f. Accepting and transmitting orders for crypto assets on behalf of clients;
g. advising on crypto securities;
h. portfolio management of crypto securities;
i. provision of crypto-worth transfer services to clients.

These services must be provided in connection with **crypto assets** as defined in Art 3 para 1 no 5 MiCAR. This requires that these services are provided using distributed ledger technology or a similar technology. These decentralised networks must be capable of transmitting and storing crypto assets electronically.

Crypto services may only be provided by **legal entities** established in the EEA. They must provide at least part of their services in their home state (Art 59 para 1 and 2 MiCAR). A valid licence entitles crypto service providers to provide their services throughout the EEA (single-licence principle, Art 59 para 8 MiCAR).

For example, a legal entity wishing to **hold crypto assets in custody** (Art 3 para 1 no 17 MiCAR) must obtain prior authorisation from the competent supervisory authority of its home state (Art 62 et seq MiCAR).[118]

Certain **financial intermediaries** with a valid EEA authorisation (e.g., credit institutions, investment firms and electronic money institutions) are **exempt from the authorisation requirement:**[119] They may provide crypto services in the EEA within the scope of Art 60 MiCAR and after notifying the competent supervisory authority (Art 3 para 1 no 6 MiCAR[120]).

The crypto service provider must submit a **complete application** for authorisation to the authority (Art 3 para 1 no 33 MiCAR) prior to the planned commencement of activities. This must include the following information according to Art 62 para 2 MiCAR:[121]

a. Company name, legal entity identification of the applicant, contact details;
b. Information on the legal form of the applicant;
c. Articles of association and business plan showing the types of crypto services the applicant provides, including where and how these services are marketed;
d. Evidence that the applicant complies with prudential requirements under Art 67 MiCAR;
e. Description of corporate governance arrangements;
f. evidence that the members of the management body are of sufficiently good repute and possess appropriate knowledge, skills and professional experience;
g. the identity of any shareholder or member holding, directly or indirectly, qualifying holdings in the applicant and the size of such holdings, and evidence that such persons are of sufficiently good repute;
h. a description of the applicant's internal control mechanisms and policies and procedures for identifying, assessing and mitigating risks, including money laundering and terrorist financing risks, and a description of its business continuity strategy;
i. technical documentation of the ICT systems and security arrangements and a non-technical description thereof;
j. a description of the procedure for the segregation of crypto-value and client funds;
k. a description of the applicant's complaint procedures;
l. a description of the custody and administration policies.

Within 25 working days, the **competent authority** shall determine whether the **application** for authorisation is **complete.**[122] The applicant shall complete any missing information and documents (Art 63 para 1 MiCAR). If the application is not completed within the time limit, the authority must reject the application (Art 63 para 3 MiCAR in conjunction with § 13 para 3 AVG). In the opposite case, the authority has to initiate the investigation procedure (Art 63 para 4 MiCAR).[123]

The authority has to **complete** the investigation procedure, calculated from the completeness of the application, **within 40 days** at the latest.[124] The authority must clarify whether the applicant fulfils the licensing requirements according to Art 58 ff MiCAR (Art 63 para 9

117 In the MiCAR, these services are divided into two numbers.
118 See *Siadat,* RdF 2021, 172 (174 et seq).
119 The same applies to third country companies that provide crypto services exclusively at the instigation of their EEA clients (reverse solicitation principle; Art 61 MiCAR).
120 This is a legal entity that offers crypto assets of any kind to the public or applies for the admission of such crypto assets on a trading platform for crypto assets.
121 See also *Majcen,* MiCAR 423 et seq. The supervisory authority may only request the above-mentioned information if it has not yet received this data. If this information is already available from other authorisation procedures, the authority may not request the data again (Art 62 para 4 MiCAR).
122 If the application is incomplete, the authority must have the application completed (§ 13 para 3 AVG in conjunction with Art 63 para 2 MiCAR).
123 The authority has to inform the applicant without delay when the application is complete and when it starts the actual examination procedure (Art 63 para 4 MiCAR).
124 This is a specific decision deadline within the meaning of § 73 AVG.

MiCAR). In the licensing procedure, the supervisory authority may hear other bodies (cf esp Art 63 para 5 and 6 MICAR).

At the end of the investigation procedure, the authority must **approve** the crypto service provider's application or **reject it.** In its decision, the authority must also take into account the nature of the planned activity and the associated risks.[125]

The authorities shall **refuse to approve** the applicant if there are objective and demonstrable grounds for believing that

- the applicant's management body or its owners are not reliable or may pose a threat to the effective, sound and prudent management and continuation of the business;
- the applicant does not meet the requirements for authorisation (Art 63 para 10 MiCAR).

The authority must issue its decision in writing within five working days and deliver it to the applicant (Art 63 para 9 MiCAR). The crypto service provider must be registered in the service provider register pursuant to Art 109 MiCAR.

From the time the **licence** becomes **legally effective,** the crypto service provider must comply with all **licensing requirements** pursuant to Art 58 et seq MiCAR, otherwise the licence will be withdrawn (Art 64 para 1 lit e MiCAR).

The MiCAR also follows the common structural principles of EU financial market law: A valid authorisation as a crypto service provider (in this case: custody of crypto assets) entitles the authorisation holder, after appropriate **notification** (Art 65 MiCAR), to carry out its activities across borders in other EU/EEA Member States **(European passport principle);** the opening of branches in other host states is not required.[126]

As of the **legal validity** of the **licence,** the crypto service provider must fulfil specific **duties of conduct:**[127] It must serve its clients honestly, fairly and professionally (Art 66 MiCAR), implement a security policy (Art 67 and Annex IV MiCAR), keep crypto assets and client funds safe (Art 70 MiCAR) and comply with outsourcing standards according to Art 73. For further obligations of the service providers, especially in the area of money laundering prevention (which were issued in implementation of the AMLD), see below in the text.

125 Cf e.g., Art 63 para 6–8 MiCAR.

126 See *N. Raschauer,* Strukturprobleme des Europäischen Bankenaufsichtsrechts (2010) 249.

127 See also *Siadat,* RdF 2021, 176.

C. Transitional provisions

MiCAR aims to facilitate the **transition** to the new legal regime for existing service providers, i.e., crypto issuers and service providers who have already provided crypto services in their home state on the basis of the current law, as well as for the member states. Legacy service providers are, for example, completely exempt from MiCAR (e.g., in the case of completed issues), can continue to provide their services, but may have to apply for a licence or prepare a white paper in due time.[128] In part, the regulation exempts existing service providers from the scope of the regulation during a transitional period.

The authorisation of these old service providers can be granted in a simplified **pilot procedure** (Art 143 para 6 MiCAR). The Member States must specify the detailed requirements in an implementing law for MiCAR.[129]

D. Pilot regime for DLT market infrastructures after MIR

Shortly before the MICAR was finalised, the EU legislator adopted the **new Regulation 2022/858,**[130] which contains a **pilot regime for DLT-financial market infrastructures.** The new DLT pilot regime is applicable at EU level **since 23 March 2023** (Art 19 MIR). The regulation regulates the conditions under which providers receive a licence to operate a DLT market infrastructure.[131] The

128 Same view *Majcen,* MiCAR 424.

129 While the national supervisory authority has to ensure that the existing service provider also fulfils all relevant licensing requirements under the new regime, the national legislator will have to ensure that the investigation procedure is conducted in a streamlined manner and only covers those issues that are to be examined by MiCAR for the first time (compared to the national legal situation) and have not been assessed so far. Therefore, the authority will only request such documents that allow for a supplementary review of open questions.

130 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot scheme for market infrastructures based on distributed ledger technology, OJ (EU) 2022 L 151, 1 (MIR).

131 The MIR contains organisational and conduct rules for DLT market infrastructure operators. The understanding of a DLT market infrastructure underlying the regulation comprises two business models, namely multilateral trading and securities settlement systems. They are hereinafter referred to as
- DLT-MTF (Multilateral Trading Facility), which admits financial instruments to trading,
- DLT-SS (settlement system), which settles transactions in financial instruments against payment,
- and DLT-TSS (Trading and Settlement System – a combination of the first two services). These providers are to be enabled via the new pilot regime to test new and technically innovative solutions based on DLT under the supervision of a national financial market authority in the coming (up to six) years from authorisation.

When we speak of a DLT »market infrastructure« as defined in Regulation 2022/858, we are referring to automated trading and settlement systems that bring together the interests of a large number of investors in the purchase and sale of financial

regulation also defines (restrictively) which DLT financial instruments are tradable via market infrastructures.

The new supervisory framework is primarily aimed at licensed **investment firms,**[132] **market operators**[133] and **central securities depositories.**[134] The new market regime is only open to other financial intermediaries, especially banks, if they are licensed as investment firms.

The aforementioned service providers can apply for a **licence** to operate **multilateral trading facilities** and **securities settlement systems** based on DLT. Corresponding applications can be submitted in the EU area **since 23 March 2023.** The national supervisory authorities that were previously responsible for the authorisation and supervision of central securities depositories and investment firms (e.g., FMA AT; BaFin) are also responsible for handling applications for authorisation under Regulation 2022/858.[135]

They can grant an authorisation for the operation of a market infrastructure for a period of up to **six years** (e.g., Art 9 para 11 MIR concerning DLT-SS[136]). Such an authorisation is valid throughout the EU (**passporting**). An authorisation is only open to legal persons. Within the scope of the authorisation procedure, the competent supervisory authority must observe tight deadlines and, if necessary, involve ESMA, which must issue a non-binding opinion on the applicant's business model.

The regulatory »special feature« of the new legal framework is not only the explicit integration of DLT-based business models into the EU financial market architecture,[137] but the creation of a temporary »**regulatory EU sandbox**« for the trading and/or settlement of financial instruments using DLT.

The competent national supervisory authority may also grant operators of a market infrastructure **exemptions** from existing, per se mandatory organisational and conduct obligations of the CSDR or MiFIR upon request, if this is necessary in individual cases to promote the planned business model and is compatible with the interests of investor protection (cf e.g., Art 4 para 2, 3 or 5 para 3 et seq MIR). However, the mandatory requirements of MAR (Regulation 596/2014) cannot be waived.

The new DLT pilot regime is initially **limited to certain financial instruments,** specifically shares, bonds and unit certificates of UCITS/UCITS. This is subject to the condition that they are issued, transferred and stored via a DLT-based system (Art 2 no 11 MIR).

In addition, the MIR imposes a **market capitalisation limit** of

- max € 500 million for shares,
- max € 1 billion for bonds and
- max € 500 million for UCITS/UCITS unit certificates (Art 3 para 1 and 2 MIR),

whereby this threshold value applies per issued financial instrument.[138]

In total, the **total value** of DLT financial instruments traded and/or settled on a DLT market infrastructure may not exceed the **limit of six billion euros** (Art 3 para 2 MIR).[139] The operator is obliged – in relation to the total capitalisation of the financial instruments traded on average per month – to submit a monthly report to the supervisory authority on the instruments traded or booked (Art 3 para 5 MIR).

It should be emphasised that the **scope** of the new regulation has been kept narrow, probably also for reasons of precaution. The legislator first wants to gather experience and then consider further suitable regulatory measures. Market operators who want to make use of the pilot regime should not grow too quickly or become »too big and too powerful«. The competent supervisory authority should be able to understand and effectively supervise the DLT-based business model,

instruments and can handle multilateral transactions of several investors almost in real time. The systems must therefore be technically designed in such a way that several purchase contracts for financial instruments can be processed on a DLT basis, the purpose of which is the transfer and storage of DLT financial instruments.

132 Cf Art 4 para 1 no 1 MiFID II (Directive 2014/65/EU).

133 Art 4 para 1 no 18 MiFID II.

134 Art 2 para 1 no 1 CSDR (Regulation (EU) 909/2014).

135 This is subject to the condition that a corresponding allocation of competences in favour of the national supervisory authority is made in national law (Art 2 no 21 lit c in conjunction with Art 12 MIR). It is obvious that the Member State will also assign the competence to implement Regulation 2022/858 to the national supervisory authority already responsible for the supervision of investment firms and central securities depositories. At least Regulation 2022/858 is based on this concept.

136 In the investigation procedure, the authority has to assess, among other things:
a) Business plan and organisational structure of the operator (Art 7 MiFID II);
b) Functioning of the trading system (Art 6 para 3 MIR) and the technology used;
c) information on the safekeeping of clients' securities (Art 6 para 5 MIR); In the authorisation procedure, the Authority must obtain an opinion from ESMA (Art 7 para 3 MIR). The authority may only approve the application if the operation of the trading system does not entail any relevant risks for investor protection, market integrity or financial stability (Art 7 para 4 MIR). The authorisation is initially limited for up to six years (Art 7 para 5 MIR).

137 The previous regulations in the area of AMLD and the Penal Directive 2018/1673/EU generally focused on »virtual currencies« and only occasionally on DLT-based business models (e.g., »wallet solutions«).

138 Corporate bonds issued by issuers whose market capitalisation did not exceed EUR 200 million at the time of their issuance are excluded from the calculation of the threshold.

139 If the admission to trading of an additional instrument or the first book entry of a new DLT financial instrument would result in the total market value of EUR 6 billion being reached or exceeded, the DLT market infrastructure shall not admit the DLT financial instrument to trading or book it.

especially the number of financial instruments traded. This explains why the legislator has, for example, very narrowly defined the circle of authorised financial instruments and has not yet integrated other token types that do not constitute financial instruments into the pilot regime.

So far, it has been shown that the DLT pilot regime under MIR is primarily **addressed to existing investment firms, market operators** and **central securities depositories.** However, the regulation also allows **new market participants** that are not yet subject to MiFID II or the CSDR (**start-ups**), i.e., that have not yet been authorised as investment firms or market operators, to apply for a **temporary authorisation** to operate a DLT-MTF or a DLT-SS[140] (but not other investment services) (cf e.g., Art 8 para 2 or 9 para 2 MIR).

For the supervisory authority, this means that the application for authorisation is not to be assessed according to the requirements that are to be imposed on financial intermediaries already operating on the market, but according to the standards that are provided for the operation of a DLT market infrastructure in Regulation 2022/858.

E. Differentiation from MiCAR

MiCAR differs from the DLT pilot regime in terms of its **scope of application.** While the DLT pilot regime applies to selected DLT financial instruments as defined in the MiFID II nomenclature, **MiCAR** is intended to create a supervisory framework for **other crypto assets** that do not constitute financial instruments under the directive in question (e.g. virtual currencies).

IV. Lex lata: Crypto service providers and conduct of business obligations, the example of Austria

After registration, crypto service providers already have to fulfil certain duties of conduct under current law. The most important of these duties of conduct are described below.

A. Registration obligation

According to the AMLD, certain crypto service providers are subject to the relevant due diligence obligations (cf Art 3 para 1 no 3 lit h and i AMLD); in doing so, they are to be supervised by the competent supervisory authority.

Austria has implemented the EU requirements of the AMLD for the supervision of service providers in relation to virtual currencies[141] in §§ 32a and 32b of the FM-GwG. The provisions in question provide for an **obligation to register** with the FMA for service providers in relation to virtual currencies as defined in § 2 no 22 FM-GwG.[142] The definition of the term »virtual currencies«, which is critical for the scope of application of the relevant provisions, is contained in § 2 no 21 FM-GWG, which in turn adopts Art 3 no 18 of Directive 2015/849 as amended by Directive 2018/843.[143] As a result, this is an implementation of the 4th AMLD that is close to the wording of the Directive. On the other hand, the supervisory regulation of crypto services that goes beyond this, such as the introduction of new licensing conditions, as has been done in Germany,[144] has been waived (for the time being).

With regard to the issue at hand, it must first be examined whether a particular coin or token is considered a virtual currency within the meaning of § 2 no 22 FM-GWG (see chapter I.B.3.; cf also the exemplary analysis under II.). If a service provider intends to operate in Austria with regard to virtual currencies (§ 2 no 22 FM-GwG) or to offer its activities from Austria, it must **first apply for registration** with the FMA pursuant to § 32a para 1 FM-GwG, and the application must be accompanied by the information and documents specified in no 1 to 5 *par cit.*

Of central importance in this context is the description of the internal control system that the applicant intends to introduce, which must be submitted pursuant to § 32a para 1 no 4 FM-GwG, as well as a description of the planned strategies and procedures to meet the requirements of the FM-GwG and the Money Laundering Ordinance 2015/847. This refers to the requirements under §§ 23 f FM-GwG for the internal corporate organisation (»**internal governance**«) of the obliged entity at the company or group level with regard to combating money laundering and terrorist financing.

If the FMA has **concrete indications** on the basis of the information and documents to be submitted that the requirements of the FM-GwG cannot be fulfilled or if the FMA has doubts about the **personal reliability** of the manager(s), the natural person holding a qualified

140 Or as a combination solution in the form of a DLT TSS.

141 Cf Art 1 no 29 Dir 2018/843, which amends Art 47 para 1 Dir 2015/849.

142 Cf *Farahmandnia,* Verhinderung der Geldwäscherei und Terrorismusfinanzierung, in Piska/Völkel (eds), Blockchain rules (2019) 203.

143 See in detail *Völkel,* Zum Begriff »virtuelle Währung«, ZFR 2019, 346.

144 Cf e.g., *El-Ghazi/Laustetter,* Das Gesetz zur Verbesserung der strafrechtlichen Bekämpfung der Geldwäsche – Ein Überblick über die wichtigsten Änderungen beim Straftatbestand des § 261 StGB und bei der selbständigen Einziehung nach § 76a Abs 4 StGB, NZWiSt 2021, 209; in general on the topic *Freygner,* Die Novellierung des Geldwäschereitatbestandes nach § 165 StGB und damit verbundene Herausforderungen für Finanzdienstleister, insbesondere Banken (2021).

participation or the natural person intending to act as a service provider pursuant to § 2 no 22 FM-GwG, it shall not proceed with the registration (§ 32a para 1 FM-GwG).

According to a recent opinion of the Federal Administrative Court (BVwG), the related case law of the Administrative Court of Austria (VwGH) on the Banking Act and comparable areas should be consulted for the interpretation of the requirements for personal reliability.[145] The VwGH understands personal reliability within the meaning of § 5 para 1 no 8 BWG to mean a certain (positive) »attitude of mind and way of thinking«.[146] It should be noted, however, that in contrast to § 5 para 1 no 8 Banking Act, the FM-GwG does not explicitly require the professional qualification (knowledge and experience) of a manager.

Pursuant to § 32a para 4 FM-GwG, the FMA must **publish** registered companies on its website and keep the information to be published up to date.[147] Pursuant to § 32b FM-GwG, the FMA must **prohibit** the activities of service providers pursuant to § 2 no 22 FM-GwG without registration pursuant to § 32a para 1 FM-GwG. While the cursory legal regulation of the registration procedure gives rise to a number of ambiguities with regard to procedural issues,[148] it should be noted that acting as a service provider under § 2 no 22 FM-GwG without prior registration under § 32a para 1 FM-GwG is in line with the systematics of the law – after all, under § 32b FM-GwG the FMA must **prohibit the activity of service providers** without prior registration under § 32a para 1 FM-GwG.[149]

The purpose of registration under § 32a FM-GwG is to create a regulatory **level playing field** between the traditional financial market intermediaries and the (new) service providers in relation to virtual currencies by including the latter in the circle of norm addressees of the supervisory regulations on combating money laundering and terrorist financing.[150]

On the other hand, § 32a FM-GwG does not create an independent licence. The question of whether or which authorisations (in particular) are required on the basis of the GewO or the financial market supervision laws must be examined in each case on the basis of the specific design of the coin or token or the business model of the service provider.[151] See also what was said in chapter I.C. (»No new law«) and I.D. (»Technology neutrality«).

B. Prospectus obligation

Depending on the design of a coin or token or the respective terms of issue, their issuance may lead to a prospectus requirement (iwS), whereby »investment assets« (see II.B.5.) are particularly relevant here. Since a legal systematisation or codification of specific types of coins or tokens has not yet been carried out with regard to the relevant material laws, a case-by-case examination must be carried out in relation to the respective instrument against the background of the legal requirements.

The **Prospectus Regulation**[152] regulates the requirements for the preparation, approval and distribution of a prospectus to be published when **securities are offered to the public** or admitted to trading on a regulated market in a Member State (Art 1 para 1 Prospectus Regulation).[153] Coins and tokens that qualify as transferable securities within the meaning of Art 4 para 1 no 44 MiFID II with the exception of money market instruments within the meaning of Art 4 para 1 no 17 MiFID II with a term of less than 12 months (Art 2 lit a Prospectus Regulation, »tokenised securities«) are thus covered.[154] The Prospectus Regulation provides for a number of exemptions from the prospectus requirement.

In the present context, the exemption from the prospectus requirement for offers of securities in the EEA with a total value of less than EUR 2 million, as set out

145 BVwG 29.6.2021, W148 2235101-1/19E.

146 See *Siegl,* § 5 BWG no 63 in Dellinger (ed), BWG-Kommentar (10. EL 2021).

147 Currently (as of 15.5.2023), 20 legal entities are registered as service providers in relation to virtual currencies in the register of the FMA: <https://www.fma.gv.at/unternehmensdatenbanksuche/>, viewed on 15.5.2023.

148 See *Wolfbauer,* Ausgewählte Fragen zur Registrierung von Dienstleistern in Bezug auf virtuelle Währungen, ZFR 2021, 545.

149 If there is a registration obligation on the merits: See Fn 150.

150 Cf § 25 para 1 no 4 FM-GwG: The FMA shall ensure compliance with the provisions of this Federal Act and Regulation 2015/847 by (no 1) credit institutions pursuant to § 2 no 1, (no 2) financial institutions pursuant to § 2 no 2 lit a, which belong to a group of credit institutions pursuant to § 30 Banking Act or a group to be supervised by the FMA pursuant to § 197 para 1 VAG 2016, (no 3) financial institutions pursuant to § 2 Z 2 lit b to h FM-GwG and (no 4) service providers pursuant to § 2 no 22 FM-GwG with the **aim of preventing the use of the financial system for the purpose of money laundering and terrorist financing.** If companies that are already subject to the money laundering supervision of the FMA with regard to their licence also intend to act as service providers pursuant to § 2 no 22 FM-GwG, teleological arguments speak against a registration obligation pursuant to § 32a FM-GwG against this background.

151 *Piska/Tyrybon/Wackenheim,* Digitale Assets im Lichte der Kompetenzverteilung in Piska/Völkel (eds), Blockchain rules (2019) 47 et seq; *Schopper/Raschner,* Privat- und aufsichtsrechtliche Rahmenbedingungen für Krypto-Banking, ÖBA 2022, 262. Cf on the whole in detail: WKO, Leitfaden zu Krypto-Assets, 5.7.2021, available at: <https://www.wko.at/branchen/information-consulting/finanzdienstleister/leitfaden-krypto-assets.pdf> [15.5.2023]; see also the information provided by the FMA via the »Fintech Navigator«: <https://www.fma.gv.at/kontaktstelle-fintech-sandbox/fintech navigator/licensing/> [15.5.2023].

152 Regulation 2017/1129 of the European Parliament and of the Council of 14.6.2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, OJ (EU) 2017 L 168, 12.

153 See *Wilfing,* Ausgewählte rechtliche Aspekte der neuen EU-Prospektverordnung, ZFR 2018, 172.

154 *Marek,* Ausgabe digitaler Assets im Kapitalmarktrecht in Piska/Völkel (eds), Blockchain rules (2019) 214 et seq.

in **§ 12 para 2 of the Austrian Capital Market Act 2019,**[155] appears to be of particular practical relevance: In this regard, it should again be noted that such offers in Austria are generally subject to the provisions of the **AltFG**[156] (§ 1 para 1 AltFG):[157] Accordingly, issuers must prepare a specific **information sheet** for public offerings that may result in the total consideration of the securities issued exceeding EUR 250.000,– within twelve months (§ 4 para 1 no 1 AltFG).[158]

In addition, the Austrian legislator also subjects **investments** within the meaning of § 1 para 1 no 3 of the Austrian Capital Market Act 2019 to the prospectus obligation (**»investment prospectus«**): These are asset rights over which no securities are issued, whereby the management from the direct or indirect investment of capital is not carried out by the investor himself.[159] § 3 para 1 no 3 KMG 2019 contains an exemption from the prospectus requirement comparable to § 12 para 3 KMG 2019; the AltFG also applies here (cf § 1 para 1 AltFG).

C. Distinction from the AIFM regime and the Swarm Financing Regulation

In view of the almost boundless breadth of the AIF concept, considerations must be made at this point regarding the demarcation from the **scope of application** of the **AIFM regime.** According to § 2 para 1 no 1 of the AIFMG, an »AIF« is any collective investment undertaking, including its sub-funds, which (lit a) collects capital from a number of investors in order to invest it in accordance with a defined investment strategy for the benefit of these investors, without the collected capital directly serving operational activities, and (lit b) does not require authorisation pursuant to Art 5 of the UCITS Directive 2009/65. Accordingly, these are vehicles that raise capital from a plurality of investors (at least two);[160] their management does not necessarily have to be risk-diversified, but a certain investment strategy must be agreed upon, which limits the scope of action of the fund management.[161] The absence of this criterion will often provide an escape route for investment asset providers from the application of the AIFM regime. Similarly, an AIF does not exist if the collected capital serves a directly operational activity,[162] whereby certain »utility tokens« are particularly to be thought of here.

Art 2 para 1 lit a of the **Crowdfunding Regulation**[163] defines a »crowdfunding service« as the matching of business funding interests of investors and project owners through the use of a crowdfunding platform and which consists of any of the following activities (i) the facilitation of granting of loans; (ii) the placing without a firm commitment basis, as referred to in point (7) of Section A of Annex I to Directive 2014/65/EU, of transferable securities and admitted instruments for crowdfunding purposes issued by project owners or a special purpose vehicle, and the reception and transmission of client orders, as referred to in point (1) of that Section, in relation to those transferable securities and admitted instruments for crowdfunding purposes. Accordingly, these are **certain services with regard to the placement of financing.**[164] The main features of the regulation are a licensing requirement for crowdfunding service providers (Art 12)[165] and the provisions regarding the provision of a basic investment information sheet for each crowdfunding offer to potential investors (Art 23); the competent national supervisory authority is the FMA.[166]

V. Summary

There is still **no harmonised market access or market regulation law** for crypto service providers. The EU member states have reacted differently to the phenomenon of decentralised service providers and their business models; currently, the business models of the individual service providers still stop at national borders.

Only MiCAR or MIR have the potential to unify the fragmented crypto-regulatory landscape. As in other

155 On the interaction between the Prospectus Regulation and the KMG 2019, see *Zivny,* Wesentliche Aspekte des neuen KMG 2019, ZFR 2019, 241.

156 Federal Act on Alternative Forms of Financing (Alternativfinanzierungsgesetz – AltFG), BGBl I 2015/114 as amended by Federal Law Gazette I 2021/225.

157 However, the issuer may voluntarily prepare a prospectus. *Marek,* Ausgabe digitaler Assets 220 et seq.

158 The information sheet must contain certain information about the issuer, the planned project, the conditions for raising capital, special risk factors and information about the offer of the securities. *Marek,* Ausgabe digitaler Assets 221.

159 *Marek,* Ausgabe digitaler Assets 222 et seq. According to *Marek,* the representation of assets in tokens corresponds to the issuance of securities over these asset rights (securitisation), which is why »tokenised securities« do not fall under the concept of investments iSd KMG 2019.

160 *Kalss/Oppitz/Zollner,* Kapitalmarktrecht² (2015) § 20 no 23.

161 *Kalss/Oppitz/Zollner,* Kapitalmarktrecht² § 20 no 33.

162 *Kalss/Oppitz/Zollner,* Kapitalmarktrecht² § 20 no 36.

163 Regulation 2020/1503 of the European Parliament and of the Council of 7 October 2020 on European business crowdfunding service providers, OJ (EU) 2020 L 347, 1. See *Marek/Völkel,* Die neue EU-Verordnung für Crowdfunding-Dienstleister, RdW 2021, 91.

164 Cf in this context recital 15 Crowdfunding Regulation: *»Whilst initial coin offerings have the potential to fund SMEs, innovative start-ups and scale-ups, and can accelerate technology transfer, their characteristics differ considerably from crowdfunding services regulated under this Regulation«* [emphasis added by the author].

165 Authorised service providers must be entered in a list maintained by ESMA, which must be made publicly available (updated) on its website: Art 14.

166 § 2 Schwarmfinanzierung-VollzugsG, Federal Law Gazette I 2021/225.

policy areas, it can be assumed that Switzerland will subsequently adopt the European requirements for crypto service providers into national law, at least partially and in a modified form, as has been done in the data protection and securities services sector in the interest of market equality.

Finally, it is positive that the uniform supervisory criteria for the assessment of decentralised business models, which have so far been agreed upon by the regulatory authorities, will also be continued in the scope of application of MiCAR – this creates legal and planning certainty.

Ultimately, it is up to the European legislator to quickly fill existing gaps[167] and, if necessary, to clarify individual open problem areas in terms of investor protection: The token types in question do not necessarily fall under the EU's deposit guarantee and investor compensation regime. Investors act at their own risk. If necessary, it could be considered to set up a corresponding EU crypto insurance fund in the long term, following the example of the EU resolution fund for banks, which would be financed by membership fees of the registered crypto service providers.

167 See study of European Parliament/ECON (eds), Remaining regulatory challenges in digital finance and crypto-assets after MiCA (2023).

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