

Feedback of the European Law Institute on the Targeted Consultation on the Review of Regulation on the Markets in Crypto-Assets (MiCAR)

European Law Institute



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I. Introduction

This Response rests on a draft Response to the Targeted Consultation on the Review of Regulation on the Markets in Crypto-Assets (MiCAR), which was prepared for the European Law Institute (ELI) by Anja Blaj Zajc (European Ethereum Institute, Belgium), Prof Dr Matthias Lehmann (University of Vienna, Austria), Prof Dr Francesco Paolo Patti (Bocconi University, Italy), Prof Dr Teresa Rodríguez de las Heras Ballell (University Carlos III of Madrid, Spain), Vyara Savova (European Ethereum Institute, Belgium), and Dr Fabian Schinerl (University of Vienna, Austria).

Rather than addressing every question raised in the Consultation, the contributors have chosen to focus on those issues they consider most pressing and to provide more detailed feedback on them. Accordingly, this Response focuses on: (1) questions concerning the scope of MiCAR; (2) the appropriateness of the legal framework for crypto-asset service providers (CASPs); (3) regulatory challenges relating to stablecoins; and (4) issues that currently fall outside the scope of MiCAR, including decentralised finance (DeFi) staking, and crypto lending.

II. Scope and Classification under MiCAR

1. MiCAR and EU Financial Law

The ELI supports maintaining the present distinction between crypto-assets governed by MiCAR and crypto-assets that qualify as financial instruments and are therefore subject to the Markets in Financial Instruments Regulation and Directive II (MiFIR/MiFID II), the Market Abuse Regulation (MAR), the Prospectus Regulation and other relevant acts of financial market regulation. The functional and technologically neutral approach of EU capital markets law are indispensable to ensure investor protection, avoid financial instability and secure a competitive level playing field.

A crypto-asset that qualifies as a financial instrument should therefore remain subject to the established EU financial law framework. The use of distributed ledger technology should not, in itself, determine the applicable regulatory regime. Where a crypto-asset conveys the rights and performs the economic functions of a financial instrument, it should in principle be regulated in the same manner as an economically equivalent financial instrument issued or recorded through more traditional means. Bringing all assets recorded or transacted on distributed ledgers within MiCAR would risk creating an even more technology-specific regulatory regime and subjecting economically comparable products to different rules solely because of the infrastructure used for their issuance, recording or transfer.

The rationale underlying Article 2(4)(a) MiCAR is therefore sound. The dichotomy between financial instruments and crypto-assets should be maintained in its current form.

2. The Concept of Financial Instruments

Determining whether an asset falls under MiFID II or MiCAR is not an easy task, particularly in borderline cases.¹ This difficulty was vividly illustrated by a study conducted by the European Securities and Markets Authority (ESMA), published in January 2019.² In that research, national competent authorities (NCAs) were asked to assess six real-world examples of crypto-assets to determine whether, and under what conditions, these assets could qualify as financial instruments. The results were striking: consensus was reached in only one instance (Filecoin), while in all others, views diverged.³ This lack of agreement underscores the continuing uncertainty surrounding the very notion of a ‘financial instrument’.

The need for clarification is also reflected in the fact that the EU legislator expressly tasked ESMA, under Article 2(5) MiCAR, with issuing Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments. ESMA fulfilled this task.⁴ The literature has, however, expressed doubts as to whether those Guidelines have resolved the underlying difficulties.⁵

¹ On the ‘fluidity’ of these boundaries, see Francesco P. Patti, ‘The European MiCA Regulation: A New Era for Initial Coin Offerings’ (2024) 55 *Georgetown Journal of International Law* 387, 404 et seq.

² ESMA, ‘Annex 1: Legal qualification of crypto-assets – survey to NCA’ (2019) ESMA50-157-1384.

³ *Ibid*, para 54.

⁴ ESMA, ‘Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments’ (19.3.2025) ESMA75453128700-1323.

⁵ Dirk Zetzsche and Jannik Woxholth, *The EU Law on Cryptoassets* (CUP 2025) 48 (noting that some of the classification difficulties are addressed in ESMA’s Guidelines ‘yet most are not’); Filippo Annunziata, ‘The ESMA Guidelines on Crypto-Assets and Financial Instruments’ (2025) *Bocconi Legal Studies Research Paper* No. 5084130, p 20 (highlighting that ‘taxonomies of this kind necessarily fail in being conclusive’); Matthias Lehmann and Fabian Schinerl, ‘The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR’ (2024) 19(4) *Capital Markets Law Journal* 330, 332 (arguing that ESMA’s approach ‘ultimately gets lost in minor technicalities of MiFID II’s laundry list’).

The ELI broadly shares these concerns. In its view, ESMA's Guidelines draw together and align what already follows from the existing framework, which is valuable in itself and gives welcome orientation on its application. They do not, however, provide sufficiently clear answers to the more difficult borderline cases.⁶ Consider, for example, a token issued to finance a 'cryptobank' that entitles its holders to a monthly share of transaction revenue while also being usable to pay the relevant transaction fees. Should such a token be characterised primarily as a means of payment or as an investment-type instrument?

A further example would be a token issued to finance the construction of a crypto museum. The token entitles its holders to 20% of the project's future operating profits, grants voting rights in relation to the location of the project, may be used as a means of payment on the premises and, above a certain holding threshold, provides lifetime free admission. Should such a token be treated as a financial instrument, or as a loyalty or membership arrangement incorporating investment features?

Similar uncertainty arises in relation to tokens that track the value of another asset, such as Bitcoin, gold or another commodity. Depending on their legal and economic structure, such tokens may potentially be characterised as Asset-Referenced Tokens (ARTs) under MiCAR or as derivatives under MiFID II. Faced with products combining several economic functions and legal characteristics, reasonable and legally defensible assessments may – and in practice do –

produce different outcomes⁷.

These difficulties are compounded by uncertainty concerning the relationship between EU financial law and the laws of the Member States. Some authors have suggested that the notion of a 'security' should, or at least could, be constructed from the bottom up, with national law determining what qualifies as a security.⁸ Others regard it as an autonomous concept of EU law.⁹ A third position adopts a middle ground and argues that EU law establishes a common regulatory perimeter, while the practical operation of the relevant concepts continues to depend on national law.¹⁰

The requirement of negotiability illustrates this latter view.¹¹ Neither MiFID II nor the wider EU financial acquis comprehensively regulates the creation, transfer or enforcement of the rights represented by transferable securities. These matters therefore remain, to a significant extent, governed by national private and corporate law. While the ELI considers the latter approach to be the most persuasive, the fact that competing approaches remain legally viable is itself a source of uncertainty.

In the ELI's view, the principal reason why ESMA's Guidelines do not provide a conclusive answer to these questions is the limited scope of its mandate under Article 2(5) MiCAR. ESMA itself notes that the Guidelines are 'not expected to clarify the entire scope of what constitutes a financial instrument'.¹² Their ambition is correspondingly limited. In ESMA's

⁶ The following examples are inspired by the PhD thesis, of Fabian Schinerl, *The Dichotomy between Financial Instruments and Crypto-Assets* (Vienna 2025) and Matthias Lehmann and Fabian Schinerl, 'The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR' (2024) 19(4) *Capital Markets Law Journal* 330, 331.

⁷ On hybrid tokens, see, *ex multis*, Francesco P. Patti, 'The European MiCA Regulation: A New Era for Initial Coin Offerings' (2024) 55 *Georgetown Journal of International Law* 387, 408–414.

⁸ See, for instance, Filippo Annunziata, 'The ESMA Guidelines on Crypto-Assets and Financial Instruments' (2025) Bocconi Legal Studies Research Paper No. 5084130, p 5; Katja Langenbucher, 'Insider trading in Europe: from financial instruments to crypto-assets' in Stephen M. Bainbridge (ed), *Research Handbook on Insider Trading* (2nd edn, Edward Elgar 2025) 305; Jacek Dybiński and Krzysztof Oplustil, 'Defining Securities in the European Capital Markets Code' in Rüdiger Veil (ed), *Regulating EU Capital Markets Union*, vol I (Oxford University Press 2024) 266.

⁹ See, eg, Dimitrios Linardatos, 'Finanzinstrumente im Digitalzeitalter (Teil 2)' (2024) 36 *WM* 1685, 1687.

¹⁰ See, eg, Matthias Lehmann and Fabian Schinerl, 'Towards a flexible definition of financial instruments: A comment on CJEU, case C-627/23, *Communes de Schaerbeek et de Linkebeek*' (2026) 2 *Tijdschrift voor Kapitaalmarktenrecht* 4, 10; Martin Miernicki, 'Anwendungsbereich – Erfasste Produkte' in Martin Miernicki and Fabian Schinerl (eds), *Handbuch Kryptowerte* (Linde 2025) para 5/62.

¹¹ See, among others, Novruz Aliyev, 'L'interprétation large de la notion européenne de valeurs mobilières à l'aune du principe de l'effet utile' (2025) 1 *International Journal for Financial Services* 60, 63–64.

¹² ESMA, 'Final Report on the Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments' (17.12.2024) ESMA75453128700-1323, p 5.

own words, the Guidelines can build only on the ‘lowest common denominator interpretation’ applied across the Member States.¹³ In the ELI’s view, this is insufficient. A lowest common denominator approach may promote a minimum degree of supervisory convergence, but it cannot provide the level of legal certainty and consistency required to determine the scope of MiCAR, let alone the scope of the wider EU financial law framework. The ELI, thus, calls for a more comprehensive review of one of the central building blocks of EU financial law: the concept of a ‘financial instrument’.

In particular, the ELI makes the following recommendations:

a) Towards a Conceptual Definition

The ELI recommends that the concept of a ‘financial instrument’ be reconsidered from the ground up and rebuilt around a conceptual definition. Such a definition would give issuers, supervisors and courts a reasoned and principled basis for determining what belongs inside the regulatory perimeter and what falls outside it.

Inspiration can be drawn from the existing literature, which has proposed a flexible or functional definition of these instruments.¹⁴ In the ELI’s preliminary view, three features recur across all financial instruments. *First*, they confer a bundle of legally enforceable financial rights and obligations, which sets them apart from mere expectations or records of value; *second*, they display a sufficient connection with financial markets, whether through actual or intended tradability or through the infrastructures that price, clear and settle them; and *third*, they serve to allocate capital or (financial) risk over time, which sets them apart from instruments of payment and from ordinary commercial contracts. The ELI is well aware that these features may not be present to the same

degree in all financial instruments currently traded or present on financial markets. The conceptual definition proposed here should, however, be flexible enough to accommodate the full spectrum of financial instruments.

As a matter of legislative technique, it seems preferable to insert this new definition into Article 4(1)(15) MiFID II while retaining the existing catalogue of instruments in Annex I Section C. The two components could then operate in tandem. The catalogue would continue to identify specific products that unquestionably fall within the concept, thereby providing the degree of legal certainty required of a regulatory regime that may entail administrative and, in several Member States, criminal consequences. The conceptual definition, by contrast, would articulate the broader rationale underlying the category of financial instruments and provide guidance in cases involving novel or borderline products.

Alternatively, consideration could be given to moving both the definition and the catalogue to MiFIR. The ELI considers the concept of a ‘financial instrument’ to be a harmonised concept of EU law irrespective of its present location in a directive. Currently, Member States follow somewhat varying notions of financial instrument. This seems to be allowed because the definition is presently found in a directive, which Member States can implement differently. Such variance is however unacceptable where the notion ‘financial instrument’ is key to determine the scope of a fully harmonising instrument, such as MiCAR or MiFIR. In such a case, a uniform concept that is binding for all Member States is needed. Its inclusion in a directly applicable regulation would make this uniform character more explicit and remove any remaining argument that the regulatory perimeter may differ between Member States.

¹³ *Ibid*, p 9.

¹⁴ See Matthias Lehmann and Fabian Schinerl, ‘The Concept of Financial Instruments: Drawing the Borderline between MiFID and MiCAR’ (2024) 19(4) Capital Markets Law Journal 330 and further Matthias Lehmann and Fabian Schinerl, ‘Towards a flexible definition of financial instruments: A comment on CJEU, case C-627/23, *Communes de Schaerbeek et de Linkebeek*’ (2026) 2 Tijdschrift voor Kapitaalmarktenrecht 4; Filippo Annunziata, ‘Speak, If You Can: What Are You? An Alternative Approach to Qualification of Tokens and Initial Coin Offerings’ (2020) 17(2) European Company and Financial Law Review 129.

b) Interpretative Letters

The ELI further holds that the scope of the regulatory perimeter should remain to be defined by Level 1 legislation. The concept of a financial instrument is too fundamental to the architecture of EU financial law for its boundaries to be determined by delegated or implementing acts.

However, this should not preclude the establishment of a procedure through which issuers and other market participants can request a ruling from ESMA, or the Commission where appropriate, on whether a product meets the criteria for being classified as a financial instrument. This would provide greater legal certainty before a product is brought to the market, while also contributing to the consistent application of the definition across the EU. The ELI thus strongly recommends the introduction of such a procedure.

c) Rationalising the Categories of Financial Instruments

The ELI further suggests that the categories of financial instruments currently listed in Annex I Section C MiFID II be redrafted to avoid overlaps between them.

At present, the categories are not mutually exclusive. Annex I Section C lists transferable securities (point 1), money-market instruments (point 2) and units in collective investment undertakings (point 3) alongside several categories of derivatives (points 4 to 10) and emission allowances (point 11). Because these categories are defined by reference to different characteristics, the same instrument may fall within more than one of them. This is evident in the case of securitised derivatives, which may qualify as transferable securities while at the same time possessing the characteristics of derivatives listed elsewhere in Section C. EU legislation itself recognises that securitised derivatives may constitute transferable securities within the meaning of Article 4(1)(44)(c)

MiFID II. Similar overlaps arise in relation to money-market instruments. The Prospectus Regulation, for example, excludes money-market instruments with a maturity of less than twelve months from its scope, suggesting that such instruments may otherwise fall within the broader concept of securities (see Article 2(a) thereof). The tension is also reflected in Article 57(1) second subparagraph lit d MiFID II, which refers to transferable securities under Article 4(1)(44)(c) that relate to a commodity or an underlying referred to in Annex I Section C point 10 MiFID II.

Logically, a single instrument cannot fall under different points of the same list. This is an inherent contradiction. The aim of this redrafting exercise should therefore be to eliminate such overlaps as far as possible. Each financial instrument should, in principle, fall within one category only. Annex I Section C should accordingly be organised in a way that makes their relationship to one another clear and avoids the same instrument being classified under several headings.

d) A Common Term for 'Digital Financial Instruments'

EU financial law currently lacks a settled term for financial instruments that exist on a distributed ledger. The Distributed Ledger Technology (DLT) Pilot Regime refers to them as 'DLT financial instruments',¹⁵ while in practice they are often described as 'tokenised financial instruments', 'security' or 'investment tokens', or 'crypto-assets that qualify as financial instruments'. National law adds further categories, such as the 'Kryptowertpapier' under the German eWpG.¹⁶ Liechtenstein, by contrast, employs the broader and content-neutral concept of a 'token'.¹⁷

Against this background, consideration could be given to introducing a defined term for financial instruments that are issued, recorded, transferred or held by means of distributed ledger technology. A term such as 'digital financial instrument' would serve this

¹⁵ See Art 2(11) Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology [2022] OJ L 2022/151, 1.

¹⁶ See § 4 para 3 of the German Act on Electronic Securities (Gesetz über elektronische Wertpapiere, eWpG) of 3 June 2021, BGBl I 2021, 1423.

¹⁷ See Art 2 para 1 lit c of the Liechtenstein Token and TT Service Provider Act (Token- und VT-Dienstleister-Gesetz, TVTG), LGBl 2019 No 301.

purpose. The ELI believes that introducing a common term would reduce terminological fragmentation and promote greater consistency across EU financial legislation and supervisory practice.

e) Clarifying the Interplay between EU and National Law

The ELI further recommends that the EU shall clarify the respective roles of EU law and national law in determining whether an asset qualifies as a financial instrument. In particular, it should specify which concepts are autonomous notions of EU law and which depend on national private or corporate law, with particular attention to terms such as ‘securities’, ‘capital market’, ‘instrument of payment’ and ‘negotiability’.

In the ELI’s view, the relationship between EU and national law can be understood as a two-stage process (syllogism).¹⁸ EU law provides the criteria and thus determines the meaning of the term ‘financial instrument’. It specifies, among others, the characteristics that an asset must possess, such as transferability or tradability. National law, by contrast, determines whether the particular asset actually possesses those characteristics. It may therefore determine whether an asset can be transferred, what rights it confers and how those rights may be exercised. In our view, it is the interaction between these two levels – the major and minor premise – that ultimately determines whether a particular asset qualifies as a financial instrument.

f) Preserving the Uniformity of EU Financial Law

The ELI also suggests limiting the extent to which Member States may supplement the EU concept of a financial instrument through their own (national) categories. Italian law, for example, recognises the wider category of ‘prodotti finanziari’ (financial

products), which encompasses financial instruments as well as other forms of investment of a financial nature.¹⁹ Such national concepts create an additional layer of classification and may blur the distinction between domestic categories and the harmonised EU concept of a financial instrument. They may also influence the way in which national authorities and courts approach the EU categories.

We therefore recommend clarifying that national concepts should not undermine the uniformity of the EU regulatory perimeter. An asset that does not qualify as a financial instrument under EU law should not, in principle, become subject to substantially the same regulatory treatment because a Member State has extended equivalent rules to a wider national category.

g) Asset-referenced Tokens and Financial Instruments

Lastly, the ELI recommends that the EU draw a clear and mutually exclusive boundary between asset-referenced tokens under MiCAR and financial instruments under MiFID II. Where a crypto-asset satisfies the definition of an asset-referenced token in Article 3(1)(6) MiCAR, it should be governed by MiCAR only.

In this respect, particular attention should be paid to the distinction between asset-referenced tokens and derivatives. A token designed to maintain a stable value by reference to another asset, right or value should, in the ELI’s view, fall within MiCAR. By contrast, a token whose purpose is to provide exposure to changes in the value of an underlying asset, without promising a stable value, should remain eligible to qualify as a derivative under MiFID II. This distinction should be made explicit for tokens referencing, for example, gold, diamonds, or other commodities.

¹⁸ Further see Matthias Lehmann and Fabian Schinerl, ‘Towards a flexible definition of financial instruments: A comment on CJEU, case C-627/23, *Communes de Schaerbeek et de Linkebeek*’ (2026) 2 *Tijdschrift voor Kapitaalmarktenrecht* 4, 10.

¹⁹ Article 1(1)(u) *Testo unico delle disposizioni in materia di intermediazione finanziaria (TUF)* (“‘prodotti finanziari’: gli strumenti finanziari e ogni altra forma di investimento di natura finanziaria; non costituiscono prodotti finanziari i depositi bancari o postali non rappresentati da strumenti finanziari”); and further Ugo Malvagna and Filippo Satori, ‘Cryptocurrencies as ‘Fungible Digital Assets’ Within the Italian Legal System: Regulatory and Private Law Issues’ (2022) *The Italian Law Journal* 2022 481 (486–488).

Such a clear rule would remove the present uncertainty as to which regime applies in borderline cases. It would also ensure that tokens qualifying as asset-referenced tokens are subject to the specific requirements that MiCAR provides for their issuance, reserve of assets and redemption.

3. Simplifying the Terminology of Title II MiCAR

The ELI welcomes the ongoing efforts to simplify EU financial law and reduce unnecessary regulatory burdens. In this context, one straightforward improvement concerns the terminology used throughout Title II MiCAR.

The Regulation repeatedly refers to ‘crypto-assets other than asset-referenced tokens or e-money tokens’. In its singular and plural forms and related variations, this expression appears a total of 68 times throughout MiCAR. It serves, in substance, as a catch-all category for crypto-assets that fall neither within the regime for asset-referenced tokens under Title III nor within that for e-money tokens under Title IV. While the distinction itself is sensible, the terminology used to express it is unnecessarily lengthy and cumbersome. Its repeated use complicates sentence structure and makes the relevant provisions more difficult to read and understand. The ELI therefore recommends replacing this expression throughout MiCAR with a shorter term, such as ‘other crypto-assets’ or ‘general crypto-assets’.

4. The Principle of Technology Neutrality

The EU legislator, the Commission and the ESAs have repeatedly emphasised the importance of technology neutrality in financial regulation. Even the introduction to this Targeted Consultation states that ‘financial regulation should remain technology neutral’, explaining that ‘[t]his is crucial to guarantee the freedom of choice for market participants without inciting them towards using any specific technology and to ensure financial regulation remains adapted to technological advancements without major amendments’.²⁰ The ELI strongly supports this objective. It considers, however, that MiCAR diverts from it.

Despite the emphasis placed on ‘technology neutrality’ in its Preamble,²¹ MiCAR is not neutral towards technology. It defines its scope by reference to a specific technology, namely distributed ledger technology, and therefore covers those ‘digital representations of a value or of a right that is able to be transferred and stored electronically’ using that particular type of technology.²² The regulatory perimeter is therefore determined not only by the characteristics of the relevant asset, but also by the technology through which it is transferred and stored. In this respect, MiCAR is not technology neutral but technology specific.

The reference to ‘similar technology’²³ mitigates this problem only to a limited extent. Neither the operative provisions nor the Recitals specify what constitutes a technology ‘similar’ to distributed ledger technology. Although Recital 16 indicates that the notion of crypto-assets should be defined as widely as possible so as to capture future technological developments, this does not resolve the underlying uncertainty. The concept cannot sensibly extend to every technology

²⁰ European Commission, Targeted Consultation on the Review of Regulation on the Markets in Crypto-Assets (2026) p 3.

²¹ See Recital 9 first sentence MiCAR.

²² Article 3(1)(5) MiCAR, and further see Article 3(1)(1)–(4) MiCAR.

²³ For the avoidance of doubt, the expression ‘single centralised database’ refers exclusively to the technical architecture through which information is organised and maintained. It does not encompass public legal registers established under the laws of the Member States, including commercial registers, companies registers, land registers and other registers of property rights, irrespective of the technical architecture supporting those registers.

that is capable of electronically storing or transferring data. At the same time, the absence of more precise criteria makes it difficult to determine where the boundary should be drawn.

Against this background, the ELI makes two interconnected recommendations:

a) A Technology-Neutral Definition of Crypto-Assets

The ELI recommends reconsidering the definition of ‘crypto-asset’ in Article 3(1)(5) MiCAR and, in particular, replacing the reference to ‘distributed ledger technology or similar technology’ with a criterion that does not depend on (a specific) technology.

One possible approach would be to focus instead on whether the relevant digital representation is maintained through a distributed or decentralised technical architecture rather than through a single centralised database.²⁴ Such a criterion would better reflect the underlying regulatory concern while avoiding both dependence on a particular technology and unintended interference with national systems of legal publicity and registration. The ELI is, however, aware that such an approach would not render the definition entirely technology neutral, since the organisation of the relevant system would remain relevant. It would, however, make the definition considerably less technology specific and reduce the risk that the regulatory perimeter becomes outdated as new infrastructures emerge.

b) Clarifying the Meaning of ‘Similar Technology’

If the EU decides to retain the reference to ‘distributed ledger technology or similar technology’, we recommend clarifying the meaning of ‘similar technology’.

In the ELI’s view, the decisive consideration should be the manner in which information is organised and maintained. A useful point of reference could be whether the relevant system relies on a decentralised

or distributed maintenance of records rather than on a single centralised database. This would reflect the functional characteristic that distinguishes distributed ledger systems from conventional centralised databases. Such an understanding would also align with the underlying philosophy of distributed ledger technology and blockchain systems, which were developed, at least in part, to challenge reliance on centralised intermediaries, be they states, banks or other service providers.

Any clarification adopted at Union level should, however, be without prejudice to the competence of the Member States to establish, organise and regulate public legal registers and to determine, subject to Union law, the substantive, evidentiary and third-party effects of registration.

²⁴ See Article 3(1)(5) MiCAR.

III. The Appropriateness of the Legal Framework for Crypto-Asset Service Providers

1. Prudential Requirements for CASPs

The ELI considers the basic prudential structure established by Article 67 MiCAR to be appropriate and does not support, at this stage, replacing it with a materially more complex regime modelled on the own-funds requirements applicable to investment firms, including the systematic use of K-factors. The present approach combines a permanent minimum-capital floor with a requirement linked to one quarter of the fixed overheads of the preceding year. In the ELI's view, this provides a workable form of proportionality.

For the same reason, the ELI considers the minimum initial-capital amounts currently provided for Classes 1, 2 and 3 CASPs in Annex IV MiCAR to be broadly appropriate. In its view, the present calibration of EUR 50,000, EUR 125,000 and EUR 150,000 should remain as it is. A general upward recalibration would risk creating a disproportionate barrier to entry for smaller providers irrespective of their actual scale, while the fixed-overheads limb already ensures that the prudential requirement increases with the development of the business. Any future recalibration should therefore respond to evidence of risks that the present structure does not adequately capture, rather than proceed from the assumption that all CASPs require a prudential regime comparable to that of investment firms.

2. Multi-Function Groups

MiCAR permits crypto-asset service providers to combine several crypto-asset services and, subject to the applicable regulatory framework, to form parts of groups carrying out other regulated or unregulated

activities. The ELI considers that this basic approach should be maintained. The combination of functions does not, in itself, require a different supervisory model, provided that the conflicts of interest generated by the relevant structure are effectively identified, managed and supervised by the competent authorities.

The decisive issue is therefore the quality of supervision rather than the mere existence of a multi-function structure. Where NCAs exercise effective oversight of conflicts of interest, the current model can operate satisfactorily without subjecting all multi-function groups to an additional layer of consolidated supervision. A different approach may, however, be justified for groups that can properly be regarded as significant. In those cases, the scale or complexity of the group may warrant a more unitary supervisory perspective and stronger coordination at group level. The ELI therefore favours a targeted approach under which enhanced group-level oversight is reserved for significant groups, rather than imposed horizontally on every entity combining crypto-asset services or other activities.

3. Reporting

The ELI does not consider that the absence of a general periodic reporting regime for all CASPs necessarily calls for the introduction of uniform, across-the-board reporting obligations. Crypto-asset service providers differ considerably in the services they perform, the scale of their activities and the risks they generate. Information that is highly relevant for one business model may be of limited supervisory value for another.

In the ELI's view, this issue can be addressed more effectively through risk-based supervision by the NCAs. Competent authorities should be able to

require reporting that reflects the specific risks associated with the services and activities of the supervised CASP. Such an approach would allow authorities to obtain the information necessary for effective supervision while avoiding routine reporting requirements that are disconnected from the provider's actual risk profile.

4. Cybersecurity and Proportionality under DORA

The ELI recognises the importance of the Digital Operational Resilience Act (DORA) in ensuring a high level of cybersecurity and operational resilience across the financial sector. At the same time, the practical application of DORA can create particularly significant burdens for smaller crypto-asset service providers. This concern remains relevant notwithstanding the different categories of financial entities and the proportionality mechanisms already incorporated into DORA.

Certain compliance requirements may, in practice, operate as barriers for small undertakings where their cost is disproportionate to the risks created by the relevant business. This may arise, for example, in relation to penetration testing and other forms of resilience testing, recurrent audit requirements, or the need to obtain contractual terms that fully satisfy DORA requirements throughout relationships with third-party Information and Communication Technology (ICT) providers and subcontractors. For a small CASP, the financial and organisational cost of satisfying these requirements may be substantial even where the scale and nature of its activities generate comparatively limited operational risk.

The ELI therefore recommends particular care in the application of the principle of proportionality under DORA. The intensity of cybersecurity and

operational-resilience requirements should be linked to objective indicators of risk, including the volume of activity and, importantly, the type of crypto-asset service provided. Services involving custody of client crypto-assets or the operation of a trading platform may, for example, justify a more demanding approach than services presenting a more limited risk profile. A more clearly risk-based calibration would preserve the objectives of DORA while reducing the danger that compliance costs become a de facto barrier to entry for small providers that do not present comparable risks.

5. Access to Global Liquidity

The ELI is concerned by supervisory approaches that require EU crypto-asset trading platforms to segregate their liquidity from non-EU liquidity pools or, in practice, to rely only on liquidity available within the EU.²⁵ In its view, such an approach may be contrary to the interests of EU users and investors.

Crypto-asset markets are global and access to deep liquidity is an important element of the conditions under which users can trade. Where available liquidity is already limited or fragmented, further restricting the pools accessible to EU trading platforms is liable to worsen the conditions available to EU market participants. Investor protection should not be understood in a manner that mechanically reduces the liquidity available to investors where the remaining MiCAR rules applicable to CASPs already provide a framework for supervising their operations and protecting clients.

The ELI therefore considers that the regulatory framework should recognise the omniterritorial nature of crypto-asset markets and allow EU CASPs that offer a trading platform service, subject to the applicable safeguards, to access the broadest possible liquidity pools. Otherwise, the regulatory framework

²⁵ See ESMA, Q&A, Question-ID: 2579.

may create incentives for providers to offer EU clients only simpler brokerage-type services, such as the exchange of crypto-assets for funds, execution of orders, reception and transmission of orders, or transfer services, rather than developing or operating trading-platform services in the EU. Such an outcome would not necessarily improve the position of EU users and could instead reduce the range and quality of services available to them.

6. Proportionality and Supervisory Convergence

The ELI does not consider that the proportionality and simplicity of the MiCAR rules applicable to CASPs can be assessed solely by reference to the wording of the Level 1 and Level 2 measures. A central difficulty arises from their practical application by NCAs. In particular, competent authorities may apply materially different parameters when assessing the organisational requirements that a CASP must satisfy, including the degree of local substance that is expected in the Member State of authorisation.

This divergence risks producing a fragmented supervisory landscape within what is intended to

be a harmonised European framework. Comparable CASPs may be subject to materially different expectations depending on the NCA responsible for their authorisation and supervision. This may impair fair competition between providers and create incentives for regulatory arbitrage between Member States.

The ELI therefore recommends more precise EU-level guidance on the substance and organisational requirements that should apply to CASPs, with particular attention to the manner in which those requirements are calibrated to the provider's size, activities and risk profile. Consideration should also be given to a dedicated proportionate framework for small CASPs that do not raise systemic concerns. Such a framework should preserve the core protections required by MiCAR while ensuring that governance, organisational and compliance requirements do not become disproportionate merely because they are applied without sufficient differentiation between very different business models. The same concern applies to both MiCAR Level 1 provisions and the Level 2 acts adopted under them. In addition, the ELI considers that the Union should further examine whether, and to what extent, a greater centralisation of supervisory responsibilities could help reduce divergences in the application of MiCAR, while taking into account the advantages of supervision by national authorities and the principle of proportionality.

IV. Regulatory Challenges for Stablecoins

1. Prudential Safeguards for EMTs Issued by Electronic Money Institutions (Question 25)

The ELI considers direct access to central-bank accounts for reserve assets to be highly desirable, particularly for E-Money Tokens (EMT) issuers of systemic relevance. The central prudential problem is not only the legal safeguarding of reserve assets but also the systemic risk created by the location of those assets. Under Article 54 MiCAR, at least 30 % of the funds received in exchange for EMTs must currently be deposited in separate accounts with credit institutions, while the remainder is invested in secure and highly liquid assets. Requiring a significant portion of the reserve to be placed with commercial banks creates a second layer of credit and liquidity exposure: the stability of the EMT becomes partly dependent on the stability of the banks in which its reserve is deposited.²⁶

The events surrounding Silicon Valley Bank provide a concrete illustration of that risk. In March 2023, the disclosure that a material part of the reserve of USD Coin (USDC) was held at Silicon Valley Bank was followed by a significant temporary deviation of USDC from its peg. Empirical work published by the Bank for International Settlements identified a sharp increase in USDC peg deviations following the disclosure of its USD 3.3 billion exposure to SVB. The episode shows that a stablecoin reserve held at commercial banks can transmit distress in the banking sector directly to the stablecoin market and, conversely, that large

redemptions of stablecoins may add pressure to banks holding reserve deposits.²⁷

Direct central bank reserve accounts materially reduce this channel of contagion because reserve cash is no longer exposed to the credit risk of a commercial-bank counterparty. This does not imply that every EMT issuer should enjoy unrestricted access to central-bank money. Eligibility criteria may properly reflect scale, systemic importance, operational resilience and supervisory status. Nor does access necessarily require remuneration of the relevant balances. The key point is that, where an EMT has reached a scale at which its failure could create financial-stability concerns, holding part of the reserve directly with the central bank is structurally safer than requiring the same assets to be intermediated through private banks.

Comparative developments reinforce this conclusion. In 2026, the Bank of England adopted a framework for systemic sterling stablecoins under which at least 30 % of backing assets are to be held as deposits at the Bank of England and up to 70 % may be invested in short-term UK government debt. The Bank expressly calibrated this combination as a liquidity anchor intended to meet redemptions promptly while preserving the viability of the issuer's business model. The ELI considers this architecture instructive for the Union.²⁸

2. Share of Reserve Assets Held as Bank Deposits

The ELI does not consider a rigid requirement that 30–60 % of EMT reserve assets be held as deposits

²⁶ Article 54 MiCAR requires at least 30% of the funds received in exchange for EMTs to be deposited in separate accounts with credit institutions; the remaining funds must be invested in secure, low-risk and highly liquid financial instruments denominated in the same official currency as the EMT.

²⁷ See Bank for International Settlements, Working Paper No 1164, Public Information and Stablecoin Runs (2024), documenting the sharp deviation of USDC from its peg after Circle disclosed that USD 3.3 billion of its reserves were held at Silicon Valley Bank.

²⁸ Bank of England, Sterling-denominated systemic stablecoins, Policy Statement and draft rules (June 2026), adopting a steady-state backing composition of 30% deposits at the Bank of England and up to 70% short-term UK government debt.

with commercial banks to be the optimal prudential solution. The lower end of that range may be defensible as a transitional liquidity requirement where issuers do not have access to central-bank money. A requirement approaching 60%, however, is difficult to justify. It would increase the stablecoin issuer's exposure to the banking system, concentrate operational and counterparty risk in private credit institutions and reduce the amount of reserves that may be invested in highly liquid sovereign instruments. At the same time, it may materially reduce the attractiveness and competitiveness of EU-issued stablecoins by lowering the economic return available on the reserve portfolio.

The better approach is functional rather than formal. MiCAR should require a sufficiently liquid, low-risk and diversified reserve capable of satisfying redemptions under severe but plausible stress, without prescribing an excessively high share of commercial-bank deposits. Where central-bank access is available, deposits at the central bank should be capable of satisfying the liquidity component of the requirement. The remaining reserve may be held in short-dated, highly liquid public debt and other assets meeting strict credit, liquidity and concentration standards. Such an approach would reduce the risk of contagion from commercial banks while maintaining immediate redemption capacity.

International developments point in the same direction. The Bank of England ultimately rejected a more restrictive allocation and adopted a 30 % central-bank deposit/70 % short-term government-debt structure for systemic sterling stablecoins. The comparison should not be transplanted mechanically into Union law, but it demonstrates that a high mandatory share of commercial-bank deposits is not an inevitable feature of a robust stablecoin regime. The ELI therefore recommends replacing any 60 % commercial-bank deposit requirement with a risk-based liquidity calibration that recognises central-bank deposits and short-dated high-quality public assets as the primary liquidity buffers.²⁹

3. Benefits and Use Cases of Global Stablecoins

The ELI considers global stablecoins potentially highly beneficial where their scale, liquidity and programmability address frictions that are not solved as efficiently by existing payment infrastructures. Their strongest use cases are cross-border transfers, crypto-market settlement, business-to-business payments, corporate treasury operations and the settlement of tokenised financial instruments. In those settings, a globally liquid settlement asset can reduce the need for multiple correspondent relationships, operate continuously across time zones and integrate directly with programmable infrastructures.

The prospective role of stablecoins in the settlement of tokenised financial instruments is particularly important. As securities and other financial assets increasingly move onto distributed-ledger infrastructures, a corresponding form of digitally native settlement asset is likely to become necessary if delivery-versus-payment is to occur efficiently on-chain. Stablecoins may perform that function where tokenised central-bank money is unavailable or restricted to particular market participants. Their relevance should therefore be assessed not merely by reference to current retail-payment volumes, but also in light of the future development of tokenised capital markets.

The benefits for intra-EU retail payments are somewhat less pronounced. The Union already benefits from efficient euro-denominated payment infrastructures, and the development of euro-denominated stablecoins may be preferable from the perspective of monetary sovereignty. Global stablecoins can nevertheless add value through 24/7 availability, interoperability with crypto and DeFi markets and programmability. The ELI therefore considers them beneficial in this field as well, while recognising that the incremental benefit over existing EU payment systems is lower than in genuinely cross-border or digitally native markets.

²⁹ Bank of England, Sterling-denominated systemic stablecoins, Policy Statement and draft rules (June 2026). The Bank reduced the proposed central-bank deposit share to 30%, allowing up to 70% of backing assets in short-term UK government debt.

Finally, global stablecoins can facilitate access to financial services in jurisdictions where payment, banking or foreign-exchange infrastructures remain costly or underdeveloped. This benefit must be balanced against AML/CFT, consumer-protection and monetary-sovereignty concerns, but it should not be underestimated. Global network effects are not in themselves a regulatory defect. The appropriate objective is to ensure that EU users can benefit from those network effects through appropriately regulated access points rather than being pushed towards unregulated offshore channels.

4. Access through EU-Based and Licensed Issuers and CASPs

The ELI considers it highly important that EU users can access globally used stablecoins through EU-based and licensed issuers and CASPs. A regulatory framework that protects users but, in practice, prevents them from accessing the globally liquid instruments used in international markets would risk producing precisely the opposite of the intended

result. Users would face incentives to migrate to third-country platforms, while EU-regulated intermediaries would lose competitiveness and supervisory authorities would obtain less visibility over relevant flows.

The availability of global stablecoins through regulated EU entities therefore serves both market-integration and supervisory objectives. It allows MiCAR's conduct, prudential, custody and organisational requirements to operate at the interface through which EU users access the market. It also facilitates supervisory cooperation, data collection and enforcement. The ELI would accordingly caution against an approach that equates strong regulation with the exclusion of global stablecoins. The better objective is regulated access, subject to safeguards proportionate to the risks of the relevant issuance structure.

This point is especially important for corporate users and financial-market participants. Where liquidity is concentrated in a small number of globally used stablecoins, excluding EU institutions from those assets can fragment liquidity and make EU-based tokenised markets less attractive. Ensuring lawful access through EU-licensed entities is therefore also relevant to the competitiveness of the Union's digital-finance ecosystem.

V. Issues Beyond the Current Scope of MiCAR

1. Decentralised Finance

At the time of MiCAR's adoption, the markets in crypto-asset remained 'modest in size' and were not considered to 'pose a threat to financial stability', as acknowledged in Recital 5 MiCAR. The very same assessment is even more true for decentralised finance (DeFi). In January 2025, the Joint EBA-ESMA Report on recent developments in crypto-assets observed that DeFi remained a 'niche phenomenon', with the amounts locked in DeFi protocols representing approximately 4% of the global crypto-asset market.³⁰ With regard to the EU specifically, the Report pointed to 'very low levels of DeFi activities in the EU' and further noted that DeFi adoption lagged behind that in other developed economies, most notably the US and South Korea.³¹

Against this background, the ELI considers that caution is warranted before extending MiCAR, or comparable financial regulation, to activities that are genuinely decentralised. As of 2026, DeFi remains of very limited scale in the European crypto-asset market and has yet to achieve significant adoption in the EU. At the same time, its technological structures and economic use cases continue to evolve at considerable speed. Regulatory intervention at this stage would therefore risk imposing a framework on a market that remains limited in scale while undergoing rapid transformation. In particular, it could prematurely cement regulatory concepts based on organisational structures that may soon change, while placing additional burdens on a sector whose future development remains difficult to predict.

This should not be understood as suggesting that DeFi can never give rise to risks requiring regulatory intervention. Rather, the EU should continue to

observe the development of these markets, identify risks as they emerge and take account of the regulatory experience of other jurisdictions before introducing yet another comprehensive regime.

In this respect, the ELI supports the approach reflected in Recital 22 MiCAR. The Recital makes clear, first, that the Regulation should not apply to 'crypto-asset services [that] are provided in a fully decentralised manner without any intermediary' and, second, that 'crypto-assets [that] have no identifiable issuer' should not fall within the scope of Titles II, III and IV MiCAR. Both limitations are persuasive. MiCAR is built around obligations imposed on issuers and service providers; where no such person exists, its regulatory model cannot readily be applied.

The present legislative technique, however, gives rise to legal uncertainty. Both exclusions are expressed only in the Preamble rather than in the operative text of MiCAR. While recitals are relevant to the interpretation of EU legislation, they do not themselves establish legally binding rules. The legal effect and precise scope of these exclusions therefore remain insufficiently clear, particularly as regards the meaning of the expressions 'fully decentralised' and 'identifiable issuer'.

a) Codifying the DeFi Exclusion

The ELI therefore recommends that both of these exclusions currently reflected in Recital 22 MiCAR should be incorporated expressly into the operative provisions of MiCAR. This would increase legal certainty and provide an appropriate legislative basis for clarifying the circumstances in which a crypto-asset service is sufficiently decentralised to fall outside MiCAR and when a crypto-asset should be regarded as having no identifiable issuer.

³⁰ Joint EBA-ESMA Report on recent developments in crypto-assets (13.1.2025), EBA/Rep/2025/01 or ESMA75-453128700-1391/, para 21.

³¹ *Ibid*, para 35.

b) Criteria for Assessing Decentralisation

The ELI further recommends clarifying the criteria for determining whether a crypto-asset service is provided in a ‘fully decentralised manner without any intermediary’. The criteria listed in the Consultation provide a useful starting point, but should not be treated as having equal weight or applied mechanically.³² In the ELI’s view, their relevance should be assessed as follows.

i) Identifiable Intermediaries

The existence of an identifiable intermediary is certainly a relevant consideration. However, the mere fact that no person or group of persons can be identified should not, in itself, support the conclusion that an arrangement is ‘fully decentralised’. A protocol may well be controlled or operated by one or several persons whose identity is unknown or merely pseudonymous, especially in the realm of crypto. In the ELI’s view, the absence of identification is not the same as the absence of an intermediary, and thus not the same as decentralisation.

Conversely, where a person or a group of persons can be identified as providing the relevant crypto-asset service, this is a strong indication that the arrangement is not, or at least not fully, decentralised. The decisive question is therefore not whether somebody can be named, but whether the provision of the service can, as a matter of fact, be attributed to a person or a group of persons.

ii) Effective Control over Protocol Functionality

The ELI considers the existence of effective control over the key functionalities of a DeFi protocol to be one of the strongest indicators that an arrangement is not fully decentralised. This may be the case, for example, where an identifiable person or group holds administrative keys or otherwise possesses the power to modify, upgrade or materially alter the operation of the protocol.

The assessment should, however, take into consideration what those powers actually enable their holders to do. Not every possibility of intervening in a protocol amounts to ‘effective control’. Consider, for instance, a power that is narrowly defined, allowing a body within the protocol to pause or trigger a predetermined emergency procedure in response to a serious security incident. Such a power differs materially from a broad discretionary power to alter the protocol’s operation at will. The former principally exists to protect users and should therefore carry considerably less weight in the decentralisation assessment.

The same applies to the delegation or transfer of governance or voting rights where the recipient has no substantive discretion as to how those rights are exercised, for example because their exercise is determined by binding instructions of the respective client. Such arrangements should not, merely by virtue of the formal transfer of voting power, be regarded as conferring effective control.

iii) Concentration of Governance Power

A significant concentration of governance power should likewise constitute an important indicator that a protocol is not fully decentralised. Where governance is, in practice, concentrated in the hands of only a small number of persons or entities, the protocol cannot readily be regarded as operating in a fully decentralised manner.

As regards the degree of concentration required, the ELI considers an analogy with takeover law instructive.³³ Control does not necessarily require an absolute majority of voting rights. It may arise at considerably lower levels where the remaining rights are widely dispersed and their holders are unlikely to coordinate effectively. The same logic applies to DeFi governance. A person or coordinated group may therefore exercise effective control with substantially less than 50 % of the governance rights, for example around 30 %, depending on how the remaining rights are distributed and exercised.

³² Similarly, see Principle 2 of the ELI Principles on Blockchain Technology, Smart Contracts and Consumer Protection.

³³ Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids [2004] OJ L 2004/142, 12.

The ELI considers that this approach could usefully be reflected in the legislative text. Rather than prescribing a rigid threshold, MiCAR could establish an indicative threshold or rebuttable presumption of effective control, while allowing the assessment to take account of the distribution and exercise of the remaining governance rights.

iv) Custody of User Assets

The ELI considers this criterion to be of comparatively limited relevance. The fact that user assets are held or locked within a DeFi protocol does not, by itself, indicate that the arrangement is decentralised. A protocol, as such, is not a person upon whom regulatory obligations can be imposed.

v) Open-Source Code

The ELI considers whether the protocol code is open-source to be a relevant, albeit not decisive, criterion for assessing decentralisation. Where the source code is publicly available, users and other market participants can independently inspect and verify how the protocol operates, without having to rely on information provided by a central operator. This is also characteristic of DeFi more generally. In this respect, the ELI agrees with the FATF's observation that DeFi is 'typically, though not always' developed on an open-source basis.³⁴

The absence of publicly accessible source code may therefore weigh against a finding of full decentralisation. Open-source code enables third parties to audit how a protocol operates, verify the absence of hidden influence and, depending on the applicable licence, potentially fork the protocol. Restrictive IP measures may not be aligned with the principles of decentralisation, and the significance of restrictive licensing and proprietary components should be assessed in their specific context.³⁵ While the ELI considers that the closed-source code does not necessarily imply the existence of an intermediary, it holds that the availability of open-source code can be a relevant criterion in determining the degree of (de-)centralisation.

vi) Marketing by Identifiable Persons

The ELI considers marketing by an identifiable person or entity to be a relevant indicator of whether a DeFi arrangement is fully decentralised. In particular, organised marketing undertaken or financed by a person with an economic or organisational interest in the use of the protocol may indicate that this person plays a more substantial role in the arrangement.

This criterion should, however, be applied with caution. The mere fact that a person promotes or explains a protocol does not mean that this person provides the underlying crypto-asset service or exercises control over the protocol. A foundation, developer, media outlet or other third party may engage in marketing without performing any of the activities regulated under MiCAR. Conversely, a person may exercise substantial control over a protocol without engaging in any form of marketing.

2. Access to Decentralised Finance

Crypto-asset service providers already operate within an extensive compliance framework requiring them to identify, assess and mitigate risks associated with their clients and crypto-asset transactions. Some of these obligations already extend to risks that arise from DeFi protocols. Article 66 MiCAR, for instance, requires CASPs to act 'professionally in accordance with the best interests of their clients' and to 'warn clients of the risks associated with transactions in crypto-assets'. In the ELI's view, CASPs must therefore warn their clients of the relevant risks of DeFi protocols in any event. Further, where a CASP knows, or in the exercise of due professional care ought to know, that a particular protocol exposes its clients to material risks, its duty to act professionally and in their best interests may also require further measures to protect them.

³⁴ FATF, Targeted Report on Regulatory Challenges from Decentralised Finance (2026), p 8.

³⁵ Sarah Brennan and Connor Spelliscy, 'Designing Policy for a Flourishing Blockchain Industry (April 2025) p 6, <<https://thedrcenter.org/wp-content/uploads/2025/04/DRC-Flourishing-v2.pdf>> (accessed 17.9.2026).

Requiring CASPs, in addition, to conduct substantive due diligence on autonomous third-party DeFi protocols which they neither control nor operate would represent a considerable extension of their present responsibilities. It would also run counter to the Commission's own simplification agenda and its broader objective of fostering innovation in the EU. Further, such an obligation is likely to have undesirable consequences. Faced with potential liability for protocols over which they exercise little or no influence, CASPs may choose to restrict the range of DeFi applications to which they provide access. This could ultimately reduce the services and protocols available to EU users. The ELI therefore recommends refraining from introducing an additional general due diligence obligation.

3. Certification Schemes

Financial regulation should generally respond to identifiable market failures and other socio-economic problems. In the ELI's view, it should not seek to shape or steer a market in advance. This is particularly important in emerging markets, such as the crypto market, where technologies and business models continue to develop at considerable speed. At present, the ELI cannot identify a market failure or other sufficiently serious problem that would justify a public certification regime. Where users value assurances as to the security or reliability of a protocol, market participants already have incentives to provide them. The ELI, therefore, recommends regulatory restraint and does not support introducing a certification scheme for DeFi protocols and smart contracts at this stage.

4. Staking as a Service

The ELI does not consider that a separate regulatory regime for staking services is presently warranted. To the best of its understanding, staking does not at

present pose risks of such a nature or magnitude as to justify the introduction of an additional category of regulated crypto-asset services under MiCAR.

This is particularly so where staking services are offered by an already regulated crypto-asset service provider, such as an exchange, which holds the relevant crypto-assets on behalf of its clients. In such cases, the custodial relationship is already subject to MiCAR. Article 3(1)(16)(a) MiCAR expressly qualifies the custody and administration of crypto-assets on behalf of clients as a crypto-asset service, while Article 75 MiCAR imposes specific requirements concerning, among others, custody arrangements, segregation of client assets and liability for their loss (ie in the case of 'slashing'). The ELI therefore sees no compelling reason to regulate staking as a separate crypto-asset service.

5. A Proportionate Framework for Crypto Lending and Borrowing

The ELI considers that there is, in principle, a case for regulating the lending and borrowing of crypto-assets. Where a business receives crypto-assets from clients and uses them to extend credit to third parties, its economic function may resemble that of traditional financial intermediation. It may also give rise to familiar risks, including counterparty risk, liquidity and maturity mismatches, and the possibility of runs where clients seek to withdraw their assets at the same time.³⁶

This provides a strong argument for applying the general principle of 'same activity, same risk, same rules'. Where crypto lending gives rise to risks comparable to those addressed by traditional financial regulation, there is no obvious reason why the use of crypto-assets rather than funds should, in itself, justify a different regulatory treatment. At the same time, the use of DLT or crypto-assets should not,

³⁶ See, eg, the collapse of Voyager and Three Arrows Capital. For further information on these, see Gary B. Gorton and Jeffery Y. Zhang, 'Bank Runs During Crypto Winter' (2024) 14 Harvard Business Law Review 298.

in itself, exclude an activity from the scope of existing EU financial regulation where the equivalent activity is already captured by that framework.³⁷

The ELI would nevertheless caution against simply extending the full regulatory framework applicable to credit institutions to crypto-asset lenders. A proportionate approach appears preferable, particularly while this market is still developing.³⁸ The ELI therefore recommends, if the EU decides to regulate crypto-asset lending and borrowing, introducing a graduated regime under which regulatory requirements increase with the scale and risk of the activity. Smaller providers could initially be subject to comparatively light requirements, while more substantial prudential obligations, including limits on large exposures, liquidity requirements or other safeguards, would apply once specified thresholds are exceeded.

At a minimum, however, the ELI considers that crypto-asset lending and borrowing activities should be subject to reporting requirements. Competent authorities need reliable information on the amount of crypto-assets lent and borrowed, the concentration of exposures, the maturity and liquidity structure of those activities and their interconnectedness with other parts of the financial system. Such requirements should, however, attach to identifiable intermediaries undertaking activities that give rise to these risks. They should not extend merely because lending or borrowing occurs, in particular to direct peer-to-peer transactions or activities carried out through genuinely decentralised protocols where no identifiable person exercises substantive and discretionary control over the provision of the service. Where relevant information is already reliably and publicly observable on-chain, this should also be taken into account to avoid unnecessary duplication of reporting.

6. Prediction Markets

Prediction markets sit at the intersection of gambling and financial markets and, where they rely on distributed ledger technology or crypto-assets, may also form part of the wider crypto-asset ecosystem.³⁹ They can provide useful mechanisms for aggregating information and expressing expectations about future events, but they may also expose users to financial losses and other familiar risks.

Such risks are not, however, unique to prediction markets. Financial and gambling activities inherently involve uncertainty and the possibility of loss. Regulation should therefore be cautious not to extend merely because an activity carries risk. In the ELI's view, intervention should instead respond to clearly identified market failures or other socio-economic concerns.

Further, prediction markets remain a developing and comparatively small market. Their business models, uses and potential risks are still evolving. The ELI therefore recommends a wait-and-see approach. The EU should, however, monitor their development.

The ELI further does not consider that a categorical answer can be given as to whether DLT-enabled prediction markets should fall under MiFID II or MiCAR. The applicable regime should depend on the characteristics of the products offered or traded on the relevant platform.

Some products offered on prediction markets may qualify as financial instruments and should therefore fall within MiFID II and the wider EU financial law framework. Others may qualify as crypto-assets within the meaning of MiCAR. Yet others may fall within neither regime and instead be subject, where applicable, to national gambling laws.

³⁷ See, for example, Regulation (EU) 2015/2365 on securities financing transactions (SFTR), which applies inter alia to securities lending and borrowing involving financial instruments.

³⁸ On this, see Ilya Kokorin, 'The Anatomy of Crypto Failures and Investor Protection under MiCAR' (2023) 18(4) Capital Markets Law Journal 500.

³⁹ Generally, see Filippo Annunziata and Thomaz de Arruda, 'Prediction Markets between the United States and the European Union: A Comparative Analysis of the Legal Classification of Event Contracts' (2026) SSRN, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=7074638>; Jonathan R. Macey and Luca Enriques, 'Different Markets, Different Regulatory Priorities: Insider Trading, Manipulation, and Corruption-Prone Event Contracts in Prediction Markets' (2026) ECGI Law Working Paper No. 955.

The ELI is well aware that this product-by-product approach may leave market participants with considerable uncertainty, particularly in borderline cases. This uncertainty, however, is not specific to prediction markets. It reflects the broader difficulties in distinguishing financial instruments from crypto-assets and other products, as discussed in Chapter II above.

The ELI therefore does not recommend creating a separate regime for prediction markets. Rather, greater legal certainty should be achieved through the clarification of the concept of a “financial instrument” proposed above. A more conceptual and functional definition would provide a clearer basis for determining when products offered through prediction markets fall within MiFID II, MiCAR or other applicable regimes.

7. Perpetual Futures

The ELI considers that perpetual futures on crypto-assets will generally qualify as financial instruments. They confer legally enforceable financial rights and obligations, are designed for trading on (financial) markets, and serve to transfer and allocate financial risk over time. They therefore display the central characteristics which, in the ELI’s view, justify treating these instruments as a financial instrument (see Chapter II above).

This example also demonstrates the usefulness of the conceptual approach proposed earlier. Perpetual futures are a relatively novel product and do not necessarily correspond to the traditional categories. Yet their classification becomes relatively straightforward once attention is directed to their economic characteristics. The same method can be applied to future products whose precise structure cannot yet be anticipated. A conceptual definition would, therefore, make the regulatory perimeter both

clearer and more adaptable to financial innovation, without requiring the legislator to create a new category whenever markets develop a new type of instrument.

8. Private Law Gap

There is considerable uncertainty as to the private law rules applying to digital assets and their treatment under such rules. This starts from the question of the legal nature and goes on to the protection of the holder of such tokens, the way the token is transferred, the possibility of good faith acquisition, the rights against a custodian, and the treatment of the token holder in the case of ‘theft’ or hacking or in the event of insolvency of an intermediary. Most Member States’ laws do not have any rules addressing these issues.⁴⁰

A few Member States, such as Germany or France, have introduced dedicated regimes for crypto-assets, but these regimes mostly concern digital financial instruments. The private law status and treatment of tokens that are covered by MiCAR remain uncertain.

One could apply existing rules, for instance of national property law. Yet in some Member States, such rules are limited to tangible assets (eg in Croatia, Germany, Greece and Hungary). It is uncertain whether they can be extended by analogy or other legal techniques to crypto-assets. Other Member States adopt a broader definition of property law, which captures tangible as well as intangible assets (e.g. Austria, Belgium, the Czech Republic, France, Italy, and Sweden). Yet also in these countries, most of the rules on the transfer and acquisition are tailored to tangible assets, which often rely on concepts such as possession that make sense only in the corporeal world.⁴¹ It is unclear how these concepts can be transposed to incorporeal assets.

⁴⁰ For an overview of 25 states, including 12 EU Member States, see Matthias Lehmann and Tetsuo Morishita (eds), *Cryptocurrencies in National Laws – A Global Survey* (Brill 2025).

⁴¹ The ELI is mindful of the particularities of national legal systems, some of which, such as Belgian law, conceive possession more broadly and do not restrict it to tangible assets.

The problems are compounded by the difficulties of identifying the applicable national law (see under 10). At present, there exists no EU rule of Private International Law that could be used to determine the law governing crypto-assets. Hence, great uncertainty reigns in this area, and divergence between national laws looms large.

9. Towards a Harmonised Private Law Framework for Crypto-Assets

The EU should urgently consider new rules to increase legal certainty in the treatment of tokens. The three most important elements that need to be addressed are: a) the rights of token holders, including their protection in case of insolvency; b) the rules concerning the transfer and the acquisition of tokens; c) their use as collateral.

a) Rights of Token Holders

The rights of token holders are presently unclear. Do they enjoy a property right, do they have a claim under the law of obligations, or another type of interest in the crypto-asset? To see the relevance of this question, it suffices to think of a 'theft' or 'hack' of crypto-assets, which then reappear in the public address administered by a crypto-custodian. The characterisation of the crypto-asset decides whether the former holder of the crypto-asset demands its return, or merely has a claim for damages, or no remedy at all.

The rights of the crypto-holder are also vital in the case of insolvency of a CASP. Article 70(1) MiCAR requires CASPs to make adequate arrangements to preserve the 'ownership rights' of clients in such circumstances. Yet under many Member State laws, this obligation is impossible to fulfil as ownership rights in intangible assets are not recognised. This makes legal reform urgently necessary.

b) Rules concerning the Transfer and the Acquisition of Tokens

In order to obtain legal certainty, it is also necessary to determine how crypto-assets are transferred and acquired. Only this allows the identification of the

legitimate holder, who enjoys the protection as an owner, creditor or the like. To illustrate, if A claims in the insolvency of custodian X that a certain crypto-asset belonged to them, they would have to prove how they acquired this asset, and when. The conditions for such transfer and acquisition, including the possibility of good faith acquisition, should be clearly set out. Given the uncertainty over the applicable law, it would be best to do so in a regulation.

c) Crypto-assets as collateral

Crypto-assets may have considerable value. They could be useful as collateral, which would permit their holders to obtain credit more easily. Take the example of a start-up company whose main assets are tokens. If the company wants to borrow money for investment, a bank or other lender would ask for collateral to reduce its loss in case of the borrower's default. The start-up could be willing to provide its crypto-assets as collateral, but could lack a legally safe way to do so given the absence of national rules on the subject. The Financial Collateral Directive allows the creation of a security right in financial instruments, and protects holders of such a security right in the event of insolvency of a custodian or other intermediary. Yet arguably, the Directive does not cover crypto-assets that do not qualify as financial instruments. This gap in EU law should be filled to improve borrowers' ability to obtain credit.

Ideally, all of these questions would be addressed in a fully harmonising regulation. If this should be politically unpalatable, a 28th regime could be envisaged as a second-best solution. Such a regime could provide legal certainty, yet its choice would entail difficult questions, such as the effects of its choice against third parties. Partially harmonised law would be insufficient as it would bring back the conflict-of-laws issue and many questions are too intertwined to be dealt with by different regimes. Even if a fully harmonising regulation or a 28th regime were to be adopted, a conflict-of-laws rule will be necessary to clarify its relation to the laws of third countries.

10. A Uniform Conflict-of-Laws Rule for Crypto-Assets

A uniform conflict-of-laws rule for tokens is indispensable for protecting investors and achieving legal certainty in the Single Market for digital services and products. Tokens are the paradigm of an omniterritorial asset. The ledger exists simultaneously on nodes in many states, so the traditional connecting factor for property, the *lex rei sitae*, has nothing to attach to. Without such a common rule, the national law governing crypto-assets and underpinning the rights of investors in them cannot be identified.

National rules on this subject are rare (for an example, see § 32 German eWpG). A panoply of different views exist on how the governing law is to be identified. Most Member States have no explicit conflict-of-laws rule that covers crypto-assets, and opinions diverge on how the governing law should be identified. It is safe to predict that if the EU does not establish a common rule, legislators and courts in the Member States will determine the applicable law differently.

Even if the EU adopted a uniform regulation or a 28th regime on private law issues of crypto-assets, their relation to the law of third states must be clarified. A

provision on the (territorial and personal) scope of the EU substantive laws is necessary. Yet such a provision alone does not suffice: It can also not be excluded that disputes between parties and assets that are mainly related to third countries and fall outside the scope of the EU substantive rules may arise before courts in the Member States. In order to avoid conflicting decisions between these courts on the applicable law, it is necessary to provide rules on how to solve such conflicts of laws. Hence it is necessary for the EU to provide a rule of Private International Law that identifies the applicable law to crypto-assets.

Such a conflict-of-laws rule could be based on the principle of party autonomy. This would allow CASPs that have their establishment in Member States with insufficient protections or rules to make arrangements that safeguard the ownership rights of their clients by choosing a law that protects the client. The choice of law could be limited to EU/EEA Member States and third states with equivalent protections.

In the absence of a choice, a waterfall of connecting factors would be applied. First, the law of the custodian could be determined as governing the ownership rights. For crypto-assets that are not held in custody, the law of the issuer could be identified as applicable. In the last instance, for non-custodied crypto-assets without an identifiable issuer, one could use the habitual residence of the holder as a connecting factor to determine the applicable law.⁴²

⁴² For more details and a suggestion of a provision, see Matthias Lehmann, 'Digital assets in the conflict of laws: A comparative search for the "ideal rule"', (2024) 1 Singapore Journal of Legal Studies 198-222.

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