

Eric: [00:00:00] I'm so excited to bring you today's episode with a panel of expert guests, Jonathan Galea, lawyer and Chief Executive Officer of BCA Solutions and the advisory firm bitmalta. William O'Rorke, co-founder and partner of ORWL Avocats in France, Francisco Patti, Professor of Private Law at the University Bocconi in Italy, Alexandru Stanescu, partner of SLV Legal in Romania, and Marina Markezic co-founder and Executive Director of the European Crypto Initiative out of Belgium.

Now, as you noted in the title, this is a series on the EU markets in crypto assets regulatory framework to be adopted and implemented in the EU over the next year. Now we're gonna be going down the rabbit hole on MiCA because it is a 380-page regulation. I wouldn't call that a light regime but as Marina [00:01:00] notes in the episode; there really isn't enough attention on MiCA and EU stands to be one of the few jurisdictions that is providing regulatory clarity designed to accommodate the long-term potential for digital assets.

It's also not a regime without its imperfections, but the EU approach is a forward-looking approach that is far ahead of where the U.S' approach is, which is currently regulation by enforcement and really in many ways shortsighted. It's being politicized by certain members of Congress.

Maybe now there might be some justification for some of that politicization because people want answers after post FTX and even D C G, but it's still fundamentally about the technology. Again, putting all that aside, this episode, why is MiCA important? What is the scope of MiCA? How are covered crypto assets defined?

And we also end this, we discussed the US' approach much like I just referred to, but this is why it's so critical to do [00:02:00] this now. The US itself has not led in implementing thoughtful digital assets regulation, and honestly, other countries in the world have also failed in this regard. And so, for the US, if it seeks to improve, it's the cross Atlantic market with the EU, it needs to really take account of MiCA with regards to any legislative efforts regarding digital assets going forwards for consistency.

In the meantime, the EU simply provides more regulatory stability for builders in a digital asset space. Now, in subsequent panel discussions, we'll be breaking down digital asset issuances and associate obligations of issuers, the definition of an obligation of crypto asset services providers, also known as Cass under the MiCA's regime, the role of ESMA the interplay of MiCA and MEV, minor or maximal extractable value, how MiCA regulates market abuse, security, and fraud, and all that in [00:03:00] the aftermath of ftx, and also considering how MiCA interacts with other EU regulations. Now, this is a great episode and it's truly gonna be a unique panel series.

If you have any questions or comments you wanna share, you want us to cover things in subsequent episodes or delve deeper, you can email me at Eric@Hesslegalcounsel.com or you can DM me on Twitter at [Hess underscore legal](https://twitter.com/Hessunderscore) on Twitter. I think you're really gonna enjoy this series and a lot of things to come in 2023.

Welcome to The Encrypted Economy, a podcast exploring the business laws, regulation, security, and technologies relating to digital assets and data. I am Eric Hess, founder of Hess Legal Counsel and your host. Join me on this journey exploring the reach of these transformative technologies

on this episode of The Encrypted Economy. I am super excited to have an esteemed panel of experts [00:04:00] on MiCA from the EU Rather than me introduce everybody individually, we'll start off with Marina. Please introduce yourself to the group and we'll go through the, we'll go through the rest of the names on the call.

Marina: Hi everyone. Very excited to be here and thank you so much for the invitation. My name is Marina and I'm the founder of the European Crypto Initiative, which is a nonprofit that is aiming at a better regulation of crypto assets in the European Union. So, we've been working with the European Union institutions for the last two years, discussing MiCA, and also trying to educate regulators in terms of cryptocurrency, blockchain in general and everything that is connected to the scope of what MiCA is today.

Eric: Excellent. Francesco Patti, do you want to introduce yourself?

Francesco: Yes, I'm an Italian law professor and a to a licensed also in [00:05:00] Italy. I teach at the university topics related to blockchain technology and smart contracts. At the moment I'm very focused on mica and I'm working on an academic essay on Mar Mica. And I've also organized a conference in in June concerning this this topic. And I'm happy to discuss with you like all the legal implications arising from MiCA for the industry.

Eric: Excellent.

John Galea, you wanna introduce yourself?

Jonathan: Hi, thanks everyone. Great to be here. I'm Jonathan, lawyer who's been crypto since 2013.

I head BCAS, which is a regulatory policy firm focused predominantly on the space work with Centralized exchanges in terms of helping them with regulatory matters, mostly in Europe as well as with decentralized projects, mostly in defi on matters such as decentralized governance. We've also worked on the framework of Malta, which [00:06:00] as its framework, and have also advised the Japanese and various government entities in Serbia.

Currently, I'm also part of technical expert group advising European Banking Authority on implementation of transfer funds regulation.

Eric: Excellent. Alexandru Stanescu.

Alexandru: Hi, I'm Alexandru Stanescu coming from Romania. We represent Centralist Europe at this round table. I'm based in Bucharest.

I've been working with crypto for more than six years now. I was one of founder of a crypto project back in the days and now a partner with Slv Legal boutique law firm, specialized in tech and deep tech. We are working mostly with exchanges, but also web three startups and really happy to see this going forward in terms of European regulations.

Happy to discuss with you. I'm also a new qualified [00:07:00] attorney, so we'll be helping Eric in creating the passage between Europe and the us given that we all know that we are in a cross-border world. So, most of the protests are international by nature. Thank you.

Eric: Excellent. And William O'Rorke?

William: Yes. Hi everyone. Very glad to participate to this long form podcast with you. So, I'm William I'm the founder of ORWL Law Firm, which is a leading, the leading crypto boutique law firm in Paris. So, we advise numbers of regulated and unregulated project in regulatory matters, but also in tax and education.

Eric: Excellent. Excellent. Why don't we start off, we're obviously gonna talk about MiCA. We have a number of sessions to dig into it because it's certainly not a quick topic, but marina w why not we kick it off with you and to talk about the [00:08:00] significance of MiCA for the EU and non-EU digital assets and service provider?

Marina: Yes. Great. So, I'll really start at the beginning. The MiCA was

Eric: good

Marina: issued as the first draft in 2000 in September 2020 by the European Commission, but it was a part of the FinTech action plan that started in March 2018. So, within this action plan, actually European Commission wanted to see how the Europe one could be fit for the digital age.

And of course, a part of it was the digital or crypto assets that we are in way talking about. And they're regulated by MiCA. So why is important, I would say, is because it's one of the first. Overarching regulation, a bespoke regime in the word that regulates crypto assets. And also, it's important within the EU because it is the first time that we define crypto [00:09:00] asset as a specific asset that is, has not been defined before, has not been talked before within any of the EU regulations, any legislation.

And I think that's quite revolutionary as we heard before. We'll, we're going to discuss what is the difference between the European regulation and the US and maybe some others around the world. But I think that what is very important is now. Especially when there's a lot of discussion about the US regulating crypto assets.

We've seen this discussion from what is the utility token, what is the security token from the beginning? And I think what's very important here is that MiCA and way defines tokens. So, I would say most of the tokens that we know today that might seem as a utility token as a us I would say definition, they, there are crypto assets which are different from the financial in [00:10:00] a way asset that we know before so financial instruments before. So, I think that is one of the first very important things. The second one is actually the thing that happened in the EU since we knew crypto assets and since we knew crypto, was that different member states regulated crypto assets in different ways. And some member states they even haven't regulated crypto assets in any way.

So, what we have right now in the EU is basically a non-unified approach to regulation. And that happened before MiCA. So now with MiCA, we'll have a unified approach.

Regulation. MiCA is basically, it's not, the directive is a regulation, which MiCAs that it's going to be directly applicable to all the member states with this specific.

Text with a draft that we have today. So, no need [00:11:00] for changes, and I think that's also something that will bring a lot of positive aspects to how we see today and how we approach the whole European Union market. And the other thing is that MiCA in general regulates issuers and also service provider.

So, MiCA is regulating the European market. Whoever would like to offer services or issue crypto assets in the European Union market, they would need to be compliant with MiCA. And I think this is very important because it's not only for entities that are incorporated in the European Union, but it's also for all the entities that are incorporated around the world. But they would like to access the European Union market. And I would like to stop a little bit here to see if some others might have some other opinions on this topic.

Jonathan: If I may first of all, thanks a lot for that Marina, and I fully agree with you [00:12:00] that MiCA's a very much needed step in order to harmonize the treatment of crypto assets across the EU.

I would also add that over and above what you mentioned about let's say the different treatment of, for instance, financial instruments across EU member states, due to the fact that the logistic act, regulated financial instrument, this is directive, being known for directive rather than regulation would also let's say potentially.

Inhibit the full harmonization of treatment of crypto assets across European Union since there are various member states such as, for example, in Germany, which for instance, treat all crypto assets as financial instruments. And therefore, I would just add that in order to have the maximum level of levelization possible, I would say that the next step would also then be to effectively transition from a directive to a regulation.

When it comes to the markets in in financial instruments. Therefore, going [00:13:00] from a method to effectively I would say an extended, which also of course lists all the types of financial instruments for which of course there would need to be a separate regime treating them in full of harmonized.

Eric: What happens in February of next year with we could talk about Germany, how do we bridge that gap? And even just recently was it the central bank in France talked about how they wanted to actually, now, before the implementation date of MiCA, they want to have a category of digital asset service providers.

Sounds very similar to crypto asset service providers, but you tell me like, how does the harmonization actually take an effect, particularly if you have like regulators who are now suggesting imposing new requirements in advance of the implementation.

Alexandru: So maybe, can I take it one?

Marina: Yeah.

Eric: Sure.

Francesco: So, I wanted to say that it's true. [00:14:00] So like from an American perspective sometimes we speak about European law, but in theory, like there are a lot of differences between the member states. And as Jonathan pointed out, the most dramatic one is the one concerning financial in.

What is called securities in the US because there is a different understanding and so the fear is that once we will have MiCA, there will be a bit of difference with respect to what is com, what is intended as a financial instrument. And I think that we are going to discuss about it when we are going to talk about the tokens.

With respect to the broader question, like looking at countries that go in different directions we've seen like different strategies. For instance, my feeling is that the French strategy was always the one-off trying to anticipate a bit to European Union in order to influence the political proceedings at a European level.

And so, the Triability front run-in order to, let's say [00:15:00] then influence a bit more the system to show that things work better. Or let's say that they're a model and put France in a particular position. Italy was, Italy started strong, like with a public consultation in 2019. Wanted to regulate everything immediately.

A lot of responses. But then once MiCA started, they are basically. Stopped everything for a while because they were waiting for the European laws to come. And my feeling is that the approach normally is an approach of waiting and seeing except for Germany that made this this let's say identification of service providers with regulations that already existed in Germany.

And if it's a custodian, they applied rules which are very similar to banks. And I have to say the approach seems a bit, let's say very rigorous, but it's not absurd because you can put MiCA in connection to other [00:16:00] already existent European laws. And you will see that at least for service providers, there are a lot of similarities.

And so that basically these requirements that will be adopted by MiCA are very similar to requirements that already exist. For instance, for financial intermediaries. And so, like I think that Germany was only a bit stronger in making clear the fact that these rules apply to this service providers, whether other countries basically did not intervene.

And so, the hope is that MiCA will bring an additional harmonization level with respect to the service providers. I think that there, you will really feel the fact that there is. Very strong harmonization. With respect to the countries and countries that are different right now that have different rules, they will have to adopt them to, to MiCA.

What remains really to be seen is how tokens will be handled. And here I think that an important role will be played by the guidelines that will be [00:17:00] enacted by the European authorities, in particular by asthma. And the key point is understanding like when the token is not a security, which I think it's a paramount question that everyone puts.

And I'm sorry to say that MiCA does not really indicate clearly how this how this differentiation should be made.

Eric: Alexandru

if

Alexandru: I may, just to follow up, and I'm pretty sure that William also has some interesting stuff to tell us from France which indeed was one of the pioneers in Europe together with Malta at some point together with Estonia. So in terms of regulatory arbitrage, if you want to have seen in the last four years, some different speeds across the European Union with, the countries who were leading the way Malta [00:18:00] as Francesco was mentioning France, Germany and then you had also countries who created the sort of internal availability or a sort of let's say led more tolerance towards crypto assets and how you are dealing operationally with them, but also countries who had literally no regulation on the topic.

Was the case for Romania. So, whatever those type of countries incorporated, they were incorporated as part of other European legislation that needed to be enacted, such as the anti-money laundering directive five for example. So, you had, for the first time there, the definition was digital.

What's a custodian? What's an ex, what is an exchange? The so those officials proved the important, at least, for lawyers to juggle with all these concepts and put them into, into [00:19:00] a legal interpretation. And again, like in Italy, also, Mr. Europe, from discussions with my colleagues, but also on Romania specifically there is, there was this, wait and see when MiCA was starting to move forward in an accelerated way the Romanian authorities decided that it's better, to, to follow the European path.

Last point here. While for other, for companies from across the world, MiCA, with its 308 pages seems, quiet. A sound, but also cumbersome regulation. Let's not forget that it provides a lot of opportunities in the fact that once you are licensed in one of the European countries, then your playground is really the European Union in its whole. So that's [00:20:00] that's a crucial point with the regulation. Basically, the regulation assures you that you have a new passport, across the market. Excellent.

William: Yeah. J Ju, just to say just a very quick word about what happened in France right now, because of course the head of the French Central Bank have an express is an intent to accelerate the unrest and force in Mica found to have a, like a monetary license in France right now before the application of Mica.

It is just a word from the head of the French Central Bank. This institution have always been in favor of the regulation. Of course, it's absolutely natural. What happened right now, there is just some like negotiation to accelerate for 12 months. The license the monetary agreement, but only for the newcomers [00:21:00] actually.

So, it's not, it is just like a technical organ. It's just like organization with the French market. It's not really something like very significant for all the actors that I currently registered with the mf. So, it's not really a big deal for the French like crypto ecosystem in my view.

And yeah. And about, about the Yes, the politics of France towards crypto., I totally agree with you. Francesco France have been since the PAC Law in, in 2019, and always been to be

in the forefront of the crypto regulation in Europe. Both for internal aspect and external one is the main internal aspect is that Mac is like pro-business and pro-innovation. And it's here it has a huge impact within the French administration and the other aspect, [00:22:00] it's of course the Brexit France, like Germany we will found willing to be the next financial place in Europe. I don't know if it's a success, but at least it have some help to accept the more and more virtual asset service provider in front of.

Eric: If you're a digital asset service provider in France and you're like trying to get in before the implementation date of MiCA, so you have 18 months to now roll out all the different controls. But now all of a sudden Jonathan,

Jonathan: no precisely on this point we're about to see some movements happening from, let's say a logistic perspective, I would say in most your member states due to the article under MICA, dealing with trans transitional Measures, which is Article 1 23 effectively the, so there's the date of entry into force of MiCA which is set to be hopefully sometime soon, as early as February.

Next, [00:23:00] then there's going to be the date of application, which is effectively when it's each different member state having to abide by MICA and offer services if you have a MiCA license. So, data went the force again, sometime the next few months. Date of application for service providers, for instance, will be 18 months after that.

Then there is what is known as the transcript period, which is 18 months over and above the date of application. So, 18 months after date of application. Now, member states, potentially, depending upon how you interpreted this hard skill, can only afford this additional 18 months of let's say the transitional period if they already have a national framework, which is close to Mica and which has been communicated to the European Commission and to ESMA and therefore approved by the European Commission and esma.

So, any member states, which let's say. Have a framework which [00:24:00] is not aligned with MiCA or potentially don't, they don't have a framework at all. And therefore, they don't have national laws which are aligned with MiCA. Potentially they won't be able to afford any nationally regulated service providers. This additional grace period of operating under MiCA without having the formal MIC license in place.

And that's quite a considerable benefit. And I'm sure that most Ember states would want to try and give this additional 18-month grace period to all their national service providers. Cause effectively we're talking of course about the whole new sector and I'm sure that most Ember states will be rushing to try and get a lead in this new industry.

Eric: Great. Thanks for clarifying. Before we, we move on from just talking about the overall scope of MiCA, before we dive into some of the definitional aspects, what about fully decentralized digital asset projects? How is that treated or not treated under MiCA?

Jonathan: If [00:25:00] I may have answer so go ahead, Maria.

Marina: Yeah. Thank you. There is no definition of decentralization anywhere in MICA or any other documents that I have seen until now in the EU, which might be a little bit

different from what we have seen in the e us, at least from like some guidance from the SEC. But what we have is there is a thing within what is within the scope is that the fully decentralized entities will fall outside of the scope of MiCA.

And there is a specific part that says that just partially decentralized ones will not be excluded. And as Francesco said before, that's nice to know, but what does MiCA fully decentralized and what is partially decentralized? So, this is also something that I hope we'll see over time and we'll see how the national competent authorities are [00:26:00] also going to interpret this decentralization in a way.

Jonathan: So just to add to, to what Marina rightfully said, the only hint we have in terms of what effectively constitutes full decentralization, which again, as we know it is not really possible, as in what does full decentralization MiCA in practice. But the only hint we have is that effectively. Fully decentralized MiCAs without any intermediary.

So effectively providing services without any intermediary. I'm sure there will be a discussion on what an intermediary constitutes potentially. This may be supplemented through let's say technical guidelines that will be issued by Ebn as, but so far, this is the only, let's say hint that we have in recital 12 A of what effective, effectively food decentralization may MiCA.

Eric: Could you say that if you can speak on behalf of a project and say, we're definition, and you use the word we're definitively fully decentralized, you probably have a problem!

Jonathan: The thing is that [00:27:00] they're simply, it depends, first of all, on, on what kind of metrics do you use to, let's say Measure decentralization.

Is it being it from a network perspective? Is it from the developers, economics, legal structure? So again, decentralization can wear various forms and shapes and that, that's why effectively I would go as far as to say that full decentralization is a bit of a myth. And that's why there will definitely need there will be a lot of discussions and the potential would be the need of further guidance.

From the relevant European authorities, unaffected. What do they MiCA by this? And as I said, what do they exactly MiCA when providing services without any intermediaries? Is intermediaries in terms of legal entities isn't no intermediaries Meaning that it's fully done automated manner are using today.

Smart contracts. We don't really know this. Do you think

Eric: there's any projects out there that would just naturally fall into the fully decentralized, obviously [00:28:00] like Bitcoin, nobody would say that's centralized as William. Yeah.

William: No, but my, my, my answer would say I believe that is that it'll not happen because for me this notion of fully decentralized, I've just been introduced within mica because the regulatory is not deaf to the narrative of the decentralization.

But we, we can easily understand that the full decentralization only apply to, to protocol. And the protocol will never apply to become casp or will never apply to something like to be to have a visa to be SUD or to, yeah. To be sued. So, for me, it's, it does not apply to application and project, which are the entities that are subject to this text.

So, it, it is just in case of something happen because the regulator. Maybe not 100% sure, but what happens? The crypto, but it'll, yeah, I'm not sure this notion will be useful [00:29:00] for practitioner like us.

Francesco: One has not to forget that like this indication of fully decentralization is in one of the recitals.

So, it's not like in the proper laws in the articles of markets, just in the recitals. And the recitals normally like only indicate political goals of the legislation. And I think that the indication that we can get, and this is my personal take, is that basically the European Union. Didn't want to focus on defi like they know defi.

We know it also from studies that were made at the level of European authorities. But the willingness was not to focus on decentralized finance, but to focus on particular, in particular two topics, which are stable coins and crypto asset service providers. And I totally agree that basically what is what we can infer from this indication is the fact that like protocols and decentralized finance will not be treated.

As crypto asset service providers, because even if you then look into the [00:30:00] provisions, you find out that there are a lot of difficulties in applying these provisions to decentralized finance. And hopefully like the goal is to, if in the future decentralized finance will be regulated it will be done with a different instrument.

This is a bit, my, my take on this, and here I think it's interesting to make a comparison with the United States for the US listeners, the fact that like here the focus is really on the crypto asset service for providers from the beginning. And I'm not aware about case law against groups of decentralized finance projects.

I know that are also relevant projects in France. And I think that there is a kind of abstention from authorities in let's say intervening against these projects right now. And I don't see the MiCA to be like the instrument to break this this, let's say tolerance. Towards this kind of projects because the focus is so specific on this kind of [00:31:00] providers which are there, and which will bring a lot of scrutiny and interventions and prudential regulations.

And so, my feeling is that the focus will not be on defi, at least for the next two years.

Eric: Excellent. With that let's start to talk about the definitions for crypto assets that we're gonna be covering in our series here. John, maybe lay out the categories and we'll start to break 'em down.

Jonathan: Sure. In terms of let's say the, I guess one of the main reasons why MiCA was pushed forward, such an accelerated rate is precisely the definitions that, or the categories that have caused the most discussion being stable coins that are effectively split. Into two separate categories.

We have the asset reference tokens and we have the [00:32:00] electronic monitor tokens or the e monitor tokens. In short, probably just be focusing briefly on these two definitions and then effectively covering also the third category being utility tokens. So, the main difference between asset reference token and then email token is that the letter is a crypto

asset that maintains or per pers to maintain a stable value by referencing the value of one official currency.

So, it has to be a token that refers to the value of just one official currency and by official currency, we it's an is issued by central bank or other monetary authorities, Euro, US dollar, G P, et cetera. What matters is that it's just one currency being referred to, whereas an asset reference token is a type of crypto asset that first of all is not e money.

Secondly, maintains a stable value by referencing and here on port law to any other value or right, or [00:33:00] combination the row, including one or more official currencies now.

So, if there's, for example, a crypto asset, which is referencing, say, the value of the US dollar and the value of gold, as an example, which would be an asset reference token.

Or if it's referencing the value of the Euro on Swiss Franc, then it's also an assets reference token. Effectively it's referencing, let's say the value of effective an asset, another asset or a commodity. Then it stands a high chance of being classified as an asset referenced token.

Now, before just mentioning one other point, reading to these two particular tokens, we also have the third category of tokens, which is utility tokens.

And this effectively is crypto, which is only intended to provide access. To a good or a service supplied by the issuer of that token. So, we're talking specifically about access to a good or a service, and that needs to be [00:34:00] supplied by the issuer of that same token. What's important to note is that, let's say, I would say if we were to classify them order of how strictly they're being regulated under MiCA we have utility token, which is on the lowest run, I would say, where effectively, in order to issue a utility token or to make an offer to the public for such utility token, you just need to register to notify the white paper to the competent authority.

Then you have asset reference tokens where rather than just notifying the white paper actually need to have it approved. By the competent authority. And then I would say at the highest possible rank, we have minor tokens where they can only be issued by financial or credit institution. So, this have a brief overview of the category of tokens that are [00:35:00] regulated under MiCA.

Eric: So, to help our understanding here let's take a circle or a tether would circle or tether fall into e-money or in an asset reference token? I

Jonathan: would say that under the current text of me, current draft text, they would definitely be e money tokens.

Eric: Okay. And what about die algorithmic stable coin?

Jonathan: The thing is that here the focus is not so much on the medical stabilization, although this was part of the original draft micex, but this was changed in future and the following iterations. What matters over here is whether the crypto itself purpose to maintain stable value by reference to value of one official.

So, the method used in order to refer to the value of official currency doesn't really matter over here, since that refers to the value of the US dollar. Then potentially it would also be classified as [00:36:00] an eto, which is quite interesting because here we're not talking

about a token as being issued in the same manner as U S DT or U S D C, namely by a centralized legal entity, but rather it's of course a crypto asset that has more decentralized route and mechanisms.

So, it'll be interesting to see how and if it will, let's say, actually be regulated. And what will be the repercussions and impact on algorithm stable coin like

Does

Eric: anybody else have a view on algorithmic staple coins?

Francesco: Oh yeah. One second. I think that the approach, even though it's not true, like the European Union wants to be technological, natural.

And so, the fact that it's algorithmic should not play a significant role like in the classification of the tokens, at least according to the willingness of the EU legislator. But with respect to die. I think that [00:37:00] another interesting point is as it was mentioned, like the fact of decentralization.

I think that we have a use case to evaluate here this recital understand whether the fully decentralized character of the PRO project could, in a case like this, avoid the classification under Ioni tokens. And I think that there are arguments to, to argue this because if you take into consideration the rules which are framed for Ioni tokens, they really hardly can apply to a phenomenon like, like the, die and like Maker DAO.

And so, I think that there can be arguments to state that the fully decentralized clause can be applied here or create an argument to state that they cannot fall under the scope of MiCA.

Jonathan: What I would just like to add to Francesco's comments is that the legislation mostly seeks to regulate the issuance.

Of asset reference tokens or my tokens, and by [00:38:00] issuance Meaning and offer to the public thereof or otherwise when the issuer is seeking admission to trading of such crypto assets. So, one would go as too far, as far as to consider. What if an issuer is not making an offering in the public or otherwise it's not seeking to trading of such crypto assets being as asset reference tokens or MI tokens.

Could they potentially, let's say, not have to worry about complying with certain provisions under the maker regulation? Again, this is a subject of course, to interpretation of the relevant provisions under MiCA, but results with that consideration. Keep in mind, certain no stable coins like Dai U SDC and U S D T, potentially if there are no active efforts to make further public offerings or seek to trading may actually, let's say be less impacted or not impacted at all by the relevant MiCA clauses.

William: I have actually a question for all of us, but maybe especially for you, [00:39:00] marina as you are working as a crypto, euro crypto initiative, is that when I see Mi MiCA for the first time, I was very surprised to see two very different regulation joined together. The one about the ca the crypto asset service provider which makes sense actually. It's just the next step after the, all the local cast regulation in Europe. And you have this big

regulation with iani, token asset, reference token and so on. And maybe tomorrow the e euro, the virtual like central Bank digital currency.

And I still believe that it was maybe a political reaction to Libra or I don't know if you have something to talk about it. Marina maybe at a higher level.

Marina: Yeah. Thank you for this question. So maybe the first comment for the algorithmic stablecoin, we also have a comment in [00:40:00] REITs in the 26th that mentions algorithmic stablecoin.

And I would also like to add a comment in general, or the whole process of the last two years of MiCA was also a result of what was happening in the market, in the industry. Algorithms, stablecoin were never mentioned before. What happened with Luna, so now they are mentioned in MiCA.

It was very similar what happened with NFTs in the first draft that the commission issued NFTs were not mentioned. Now they are. And maybe just a very general comment to, to your question. Of course, it was a reaction to Libra and to what happened at the time would potentially be DM or Libra as a stablecoin that would have a significant, I would say, impact and also a huge user base.

And that's also one of the main goals for MiCA is [00:41:00] to preserve financial stability in the European Union. And this is also why we can see this regulation when it comes to stable coins, that in a way it wants to limit the use of stable coins that would reference the foreign currencies and its use within the eu.

So also comments around die. I think that's very important and it's going to be one of the most significant consequences of MiCA. Let's just imagine if die or some other stablecoin would be maybe limited or different service providers would be limited from using Die. I think that this is also something that we all still need to understand how it would happen, what it would happen and I think that service providers here are going to have a really important role, mainly the exchanges.

So, the [00:42:00] listing to my opinion is one of the most important elements and of course important thing within crypto. So, what is going to be their decision even when talking to certain exchanges? I think that they have a certain opinion on different things related to MiCA, but their opinion has been not formalized like I, I think, formalized yet. Of course, because we're still waiting for ESMA's guidance as was mentioned before, regarding the difference between crypto assets and also the financial instruments, and of course the opinion from the national competent authorities.

Francesco: Yes, I want to say it's something on this Libra dm story. Because we have to remember that MiCA, like the first discussions were in 2000 19 with consultation papers. And at this stage Libra [00:43:00] DM was a project that was heavily discussed. And you have to consider that the stable coins that now are very big.

U S D C, Tetra, were very small at the moment. And to give you a bit the background there is a kind of fight going on between the European Union and the big tech companies and

the US companies. We saw this with the GDPR a lot of decisions are against Facebook and Google.

And the idea of the GDPR was really like protecting the data of the Europeans. Against that the exploit of the American companies, I would not. And so, the scope of application of G the g r is very broad and it and compares all the activities that are made with data of the European customers.

I would say that on the same as level of trying to protect the stability of the European Union and the European customers, consumers there was the willingness of [00:44:00] blocking directly this attempt by Facebook of creating their own currency. And this this topic was very important.

If you read the first the first articles written on the first per version of MiCA, it was all framed, presented as a kind of reaction against DM and Libra. Now this narrative is not so strong anymore because obviously the attempt of having the stable con now, like Silver Gate wanted to buy the technology of meta, but apparently it will not work anymore. And so, this is not a problem anymore, but in the Mica time, like they

Eric: can't afford it anymore.

Francesco: Yes, exactly. But in the Meanwhile, Tether and U S D C grow a lot and they're not suffering too much from the bear market because the market cap is remained basically the same.

There were also other stable concepts that were growing from exchanges, for instance the Binance one. And so now they're really seen as a kind [00:45:00] of and the problem is that they're also packed to the dollar, which is not so nice from a European perspective. And therefore, I think that now basically there are new arguments to, to try to avoid that the stablecoin grow too much from a European political perspective.

And therefore, this is really something that will need to be seen because the requirements that are set by MiCA are really re rigorous and will be difficult to meet for Circle and for Tether.

Eric: Is it, so I, is it possible that some of these stable coins could be classified as asset reference tokens and not e-money?

Alexandru: That's a very good question Eric, and we are the forefront of a new type of regulation that is being born. And if, let me get step back [00:46:00] and get back to the algorithmic stable cause, because at the end these are, the next frontier if you want, we are in the world of a new breadth and woods, the underlying assets are creating this new type of economies based on the digital assets.

What I would like to mention from a perspective, and here I'm, I'm trying to play a bit devil advocate in terms of algorithm stable points. One of the essential requirements for being category qualified as iani is you need to have a claim against the issuer., but algorithmic stablecoin is just a generic qualification.

You, you can have plenty and there will be many ideas. It's like opening the Pandora box to what and how this algorithmic stablecoin will work. What are the baskets? What are

[00:47:00] the rules are, bring towards algorithmic stable coins. So, from this perspective, it'll be interpreted on. From my perspective as a lawyer on two sides if it's a really a claim against the issuer, each stable, each algorithm stable.

Cause by the way, it fluctuates and the specific rules. And the second one, let's not forget that the iani directive does provide some exemptions. And it'll depend a lot on how this stablecoin will be used because it's going to be fact specific of whether that stablecoin is used broadly.

Just to give you an example, or on a narrow channel used for specific purposes within, let's say a defy ecosystem. So, things are still moving, these are moving pieces. And we might not have all the, the answers or some of the answers will be [00:48:00] very much based on, on, on the specific facts.

Jonathan: Just to jump in on the point rating, for example, a claim against issue, et cetera, in one of the reciters under Mica. The legislator clearly pointed out that under the directive, these were treated as criteria, which effectively lead to an asset or instrument being classified as electronic. So therefore, in the past and up until now, cause has not yet of course applicable.

If, for example, the issue, a stable coin, which is per to the US dollar, but effectively don't have a claim against the issuer, or rather the whole does not have a claim against the issuer, then effectively that token cannot be classified as electronic money. And the legislature caught onto this and said, listen, we know about this, but this time round we're not going to treat those as criteria which effectively have [00:49:00] to be met in order for token to be classified as electronic money.

But rather if a token references the value of US dollar or an official currency, it also has to abide by these. Obligations, including you need you need to grant the holder a claim against the issuer. You need to make it renewable against at par value, et cetera. So, the legislators is now turning tables on the status quo and effectively treating now those criteria as obligations that are imposed on any issuer, which effectively issues a crypto asset that is impact to an official currency.

So again, this is something that I believe was a bit of an overreach by the legislator cuz effectively it's almost going to impose. certain, perhaps hard to meet obligations on, say, issuers of algorithm, mixed stablecoin. But this is precisely one of the reasons why.

Although MiCA, I [00:50:00] think offer was very well structured, there may have been a bit of an overreach by the regulator on, on, for example, on stablecoin and whether it was for due to the blower or D incident or whether because effectively, and we all know now that there's a Euro C BDC on the cards and the European Center bank has already been quite vocal on its stance again, on anything which is not, its C bdc.

And we also have unfortunately, some members of the ECP board, which are ac actively attacking gender, but at least now we know what the agenda is. We know that effectively that they're paving the way for your BDC and that, and which BBC should be subject to the strictest level of regulation possible.

Eric: And so, when we talk about the referencing to a single currency to the extent like a stablecoin has a basket of government treasuries and, not precisely the currency per [00:51:00] se, but treasuries that could be convertible into does that change the application of the definition at all?

Jonathan: In in, in that case, if it's referencing to a basket of currencies, then it would be potentially treated as an, as a reference token. Must not let's say effectively mix the fact that the token refers to a value of an official currency and effectively what constitutes the reserves?

And incidentally, currently, I would say under the loss and against general statement, cause we're talking about directive, but most human member. Would only treat a particular asset as e-money. If in the reserves you are keeping a one-to-one backing or reserve of what that particular token actually presents.

So, in fact, say in the case of a stablecoin, which has, let's say reserves that are made up [00:52:00] of treasury bills and securities, et cetera, and the mere fact that the reserves are constituted of different kinds of assets would potentially lead to that particular token not being classified as electronic money.

Under the current email direct. Once again, this is something that MiCA seeks to, too. in, in that if the focus is on the, effectively, if the crypto asset refers to the value from official currency, then stop whatever you're doing. It's an eman token and you need to buy it by this list of obligations no questions asked on of course.

And you find one of the exceptions. But this is what you need to do, otherwise you're going to be in trouble. And that is the intention of the legislator in that it seeks to effectively eradicate these kinds of loopholes that have up until now and let various companies issuing crypto assets that effective reports refer to the value of official [00:53:00] currencies, all called stable Francisco.

Yes, I wanted to say, I think that the elephant in the room in this legislation is the emo to the directive, and there was the willingness of creating a kind of parallel with this like without impacting the already existent European law. And they created this correspondence with some additional requirements for electronic money, which is issued in tokens.

And therefore, like they didn't want basically to avoid the application of what was already. Established at a European level and they added some additional requirements. And this will be like very impactful on, on stable coins. And I want to say that it's very enigmatic understand when asset reference tokens will be really applied.

And when you can qualify an asset reference token, my feeling is that all these stable coins that we know that were mentioned before will fall [00:54:00] under the definition of electronic money tokens. And I want also to indicate, because it's interesting the fin the audience Switzerland elaborated some guidelines concerning stable in 2019.

And you can see that the regulatory technique was completely different. There is like one umbrella for all the types of stable coins and then depend. on the way in which you create

the reserves, you apply a different regime. For instance, if you invest the money that back the stable coin, then you apply the rules on investment funds.

If you work as a bank, then you apply the rule on financial intermediaries. And I think that this was a very clear approach and a very I would say rational approach because depending on the way in which you treat the reserves, and I also saw that like your question was proper, but if I invest the money, if I invest the money, like what I am and I think I agree with Jonathan, you are an electronic money tokens because you have the [00:55:00] duty of respecting certain thresholds of reserves and the rest can be used in a different way.

But I think that's like the way of addressing the issue by this Swiss legislator. Very simple and very clear. Makes more sense at this. But we will see, of course. So, I have problem for instance, in, in indicating what exactly an asset reference tokens will be, to be honest.

Eric: Yeah. And so, I guess that's the next question.

I think we; we have a clear we've talked a fair amount about emo and it's such a critical classification. What do we think naturally falls into asset reference token before we start talking about utility tokens?

Jonathan: So, I think there are some examples of stablecoin out there, which, for instance, refer to a form of N A v case in point being the rise stablecoin. I in my opinion, which would be like an example of what could potentially [00:56:00] co. And asset reference token, since it does prepare to maintain a stable value by referencing to a right or value, as the definition of a r t states and of my memory serve me well, effectively arrive, maintains stable value by referencing to the basket of assets that's being held against reserve. So effectively it is referencing to an arrival value. And its price, its value has relatively remained stable at somewhere around \$2 and 80 cents. So that could be an example of a r T. Now what's also interesting is that throughout various parts of MiCA, there has been not dimension of a right or value, but at times there has been specific mention of assets. and in the previous version of MiCA, there was an outright reference to just [00:57:00] commodities. So, one would ask what the intention of the legislator is. Is it basically trying to define a RTS as a catchall category that if effectively you have you are trying to keep an asset at a particular price, then effectively it's going to potentially be seen as an. or is it just using the term right or value to widen a bit the scope of commodities, but basically effectively leading the reader to think that the reference needs to be to a commodity or something similar to a commodity. Again, this is potentially subject to interpretation. I would find it rather hard to digest that effectively.

They're trying to treat a RTS as a catchall definition, because that would also be quite worrying as a potential stifle innovation. And we, for example, last year, we were close to seeing the full emergence [00:58:00] of protocol issued stablecoin, which I was actually looking quite forward to. And if the definition of a r t is intended to be as wide as possible, then it can potentially lead to, let's say, such protocols going back to the drawing board, anything, whether they can come up with.

with something which would not fall under the definition of A R T or e emt again, would need to be something that does not reference its value to any or any other value, which I find it quite d

Eric: A r t actually has limitations imposed on it under meka, correct.

Jonathan: There are really enormous requirements to the issuance also concerning the type of organization that can issue the token.

It must be in the European Union. There, there are really a lot of additional requirements that have to be met. Whereas as was said before by Jonathan, like the UT tokens, it's the lowest level of compliance that that exists in market. It's even [00:59:00] less than MiFi because the willingness was like to create a category which is let's say there for innovation. And whereas like asset reference tokens, it's something which where you see like the angry phase of the European legislator that wanted to regulate very strictly. And yes, I see the point of Jonathan and I think that there must be the effort of trying to clarify exactly which case fall under asset reference tokens because it's.

it does not become like a catchall definition. And I think it, there isn't the willingness of doing so. I was reading to prepare the meeting also the recitals concerning the different categories of tokens. And they make clear that there are three categories basically. One are the tokens that are financial instruments.

Then we have asset reference tokens and emo token tokens. And then there is this third category, which is made by u utility tokens and every other [01:00:00] token in the word. And therefore, I think this is the catch all category. It is a residual category in which you don't apply the pre previous two.

And it's composed by something else that needs to be clarified. And I think that like we're going to discuss about it and having. Positive box. I would call it like this, like a box where you can fit, when you can put token to something which will be of paramount importance for the regulatory future of the European unit because it's something which we don't have at least it's not clearly stated at the US level.

And that's the big difference in my opinion. Like the fact that we recognize the existence of these tokens that are, do not fall into this category. It's very important and we have to wait the guidelines, but we have also to front run a bit and to indicate a narrative, which brings us to recognize which are these tokens that do not fall into the other categories.

Eric: Great. So, John,

Jonathan: I just wanted to also add that there [01:01:00] was also the questionable limit being imposed on asset reference token issuers. In the case of the use of the art in question to the point where it's used as a MiCAs of exchange and there's more than 1 million transactions taking place or otherwise.

The transactions total more than 200 million Euro being transacted. So over here the legislators saying that if it's being used in such a manner or therefore exceeding these part of thresholds, then the issuer has to stop issuing the a r t altogether and has to present a plan in in how it can curb its use so that it stays below dimensions thresholds, which of

course then leads to discuss the discussion on what effectively constitutes a MiCAs of exchange and when does an A r t transition from being used as a MiCAs of exchange to a MiCAs of payment.

So again, there's [01:02:00] a lot of questions being raised on this point as.

Eric: I'm not entirely sure how an asset reference token could be decentralized, but that could be like if it was something that was achievable, that could be a potential off ramp. As you're starting to hit that threshold, you really start to double down on decentralization because who wants us to, reach that stopping point.

Jonathan: Yes. I would say that first of all, in terms of let's say point straight into decentralization, I think there's going to be a lot more importance being given to those structuring this kind of projects on effectively how to become, I would say, decentralized to a point where you don't have to worry about meeting these kind of, almost go to say not reasonable obligations that are being imposed.

On the issuers of such kind of crypto assets. Secondly as well, it's just very clear that once again the intentional of legislature legislator seems to be limiting the use of these kind of assets [01:03:00] as a MiCAs of exchange, which then of course begs the question, okay, then how to ensure that such tokens only are only used as a MiCAs of payment.

If you are let's say simply decentralized or trying to go to become as decentralized as possible, then it's a bit at odds in terms of trying to limit its particular used. Because the more centralized you become, the more difficult to effectively control and manage what the total question is being used for.

So, our talking about something that is like at odds to abide by Again, all these questions are being raised. The more than one reads throughout Mica, because I feel that there has been a bit of a knee-jerk reaction from the legislator when it comes to stablecoin. And now we are seeing the extent of these knee-jerk reaction through these kinds of Measures that have been, some of which have been introduced at the very last minute.

[01:04:00] And it's clear that some of them have been region in quite a large manner.

Eric: Alright. So, with that I think we'll jump into utility tokens, which I think is that that certainly from an American perspective, much more exciting to be in Europe than in the US. Francesco, do you want to do you wanna take that one?

To start off anyway.

Francesco: Yes, apparently, it's very exciting and so like this approach of trying to subdivide tokens in different categories exist of course at a technical level, like we distinguish between the different functionalities of the tokens. But here, like we have brought it, like the European Union has brought it, and at a different level in trying to distinguish also from a legal point of view, different categories of tokens.

This approach is not new also in Switzerland. It was adopted since this guideline of FIN of 2018. And the United States was always aware of [01:05:00] the fact that there. Countries that try to distinguish between the different functions of tokens. And basically, the main,

the most important element is the fact that you don't apply the rules concerning financial instruments.

And so, in, in Europe, the rules of MiFi to tokens which are not considered financial instruments. And as I said before, in mica, we have the third categories, which are utility tokens, and then a receivable, all crypto assets that do not enter into this category that are defined. And so, I would start from the definition of utility token which are tokens that basically give access to a service or a good like the definition is, indicates that like the only function of the token must be to access the service or the good.

And this, of course, is not fantastic news because even though it's not clearly [01:06:00] indicated in mica, one of the problems will be to assess like what happens if the token has a utility, but at the same time presents elements that belong to a category of financial instruments. So, the mix at nature of the token, and for instance, like the Swiss authority fin, indicates that in this case, the token falls under the regulation, the securities regulation. The European Union does not do it in a precise way. There isn't an express provision that tells this. But nonetheless, the fact that there is the indication that the token must only provide access to a service may bring you to the conclusion that it must be really like the dominant function, at least of the tokens.

And so also here we can make the exercise, what is a utility token? What is not a utility token? And I think that all the layer wants, which are, which provide for coins that are used to [01:07:00] pay for transactions have a strong argument to basically say that our utility tokens. But it's very difficult to address like many other cases in which you have a utility, for instance, accessing to a given platform or also providing like governance.

What is governance? Because it is something which recalls a bit the shares of a company which brings you more in the direction of a financial instrument. At the same time, it is something which let you belong to a certain community. It could be seen as a kind of service. And so, I think that's the thing to understand will really to make a separation between this these two categories and the.

And the only basically category that can be used as the UT token to ta to say that it's, it'll not be a financial instrument. And so, I would say that layer once, if there isn't like a really [01:08:00] a willingness to push so much on the prize and declarations and it's just there in order to provide the function of paying transactions, I would say that there could be concert utility tokens.

Another example that is made that we can discuss is that the example of file coin. This is always used in the articles that address these issues because you clearly have a service which is provided. And so, I think that this will be the element to evaluate. If the MICA is a friendly regulation towards crypto or not, because if we take this definition and we interpret them in a strict way, then this category of utility tokens will be very small and, in the end, there will not be such an enormous difference with respect to what happens in the United States.

If we arrive with, there is an effort in the guidelines to make clear that UT tokens is a broad category, then we will have more room [01:09:00] for innovation in this. Because as it was already said, like the categorization as a U T E token gives you the possibility of applying a regime, which is not so strict, like the regime in which you can offer a token to the public through a white paper, which will not be like an impossible requirement to meet and therefore, like this is really one of the central points that we are going to address. I'm happy to speak more, but I want also to hear the others of course.

Jonathan: Just wanted to point out that there may be a bit of a problem coming up in terms of, let's say token issuers who would like to be in be clear, when it comes to classification of the token under, let's say EU loss and under US laws, in [01:10:00] order for them to be classified as the utility token, potentially they'll have to forego ever, let's say, not satisfying the how test.

Because if they, if the issuer provides a good or service, then effectively it created, diminishes the chance for the token issuer not to satisfy the fourth pro of heart as being major efforts of others. It, we could potentially come up to a situation where the issuer of token has to, let's say, for lack of a better word, pick their poison.

Would they want to be in satisfaction of the definition of utility token under MiCA, but then potential, of course have their token never being potentially satisfied as a non-security for the purpose of US laws, or would they effectively go around in terms of issuing token as a non-security on their US laws.

But then potentially let's say they, they would have no clarity as to there would be the applicability of Themic regime in their instance. Because if the issue isn't providing good [01:11:00] service, then you can't really argue that the token will be classified diseases token. Would that MiCA that token falls outside the purview of Mica?

Potentially. But again, it seems that if one takes a restrictive interpretation of the definition of detailed token, then as Francesco said, there's only going to be a small set of tokens that would, let's say, be full satisfaction of this definition. And therefore, the question is what happens to all those other kinds of tokens?

Case in point, governance tokens. Does a governance token really grant you access to a good door service? I would say depending on the governance token and the rights being granted, potentially not. I would say that there's still a good chunk of crypto assets, which could potentially not fall under one of the three s being listed under the ME regulation.

Marina: Maybe [01:12:00] one thing that I want to mention, and it's really concerning all the, is issues of all the different types of tokens, is that as Francesco said, when the, especially the commission was thinking about MiCA, it was 2018 19 and that is when ICOs were still fresh. And so basically one of the only ways how projects were issuing tokens was all at once.

So, we had a bunch of tokens that were issued at once. Similarly, as we know from the just general exchanges with stock markets. So, what the problem might be with different projects, and we can talk about dye and some other projects, is when the issuance is not

happening all at once. And so, the obligation that we have for writing white paper might not be possible to be I would say observed because sometimes it might happen that first the tokens are not issued all at once.

They might be even issued, or the [01:13:00] user might be the one triggering the creation of a new token or the additions of a new token. And that making it impossible for them to basically issue a white paper at the same time or even talk to the National competent authority to address this time timeframe of the issuance of the tokens.

So, I'm not really sure how that is going to be addressed. I'm opening also the floor for the questions here if somebody has different ideas. But I think that might be also one of the main limitations just. Yes, MiCA was designed at that time, again, having in mind in mind stable coins that we knew from that time, but also the way how different crypto assets were issued at that time.

William: Yeah, marina your question is very interesting. I obviously don't have the answer, but I can just talk about [01:14:00] what I have experienced in France for the last two years because France have created like a dedicated regime for I C U and token insurance and a definition of token, which is not so far from the definition in mica.

And actually, I feel quite comfortable with the definition provided by MICA being understood that it's separate from the definition of financial instrument, of course but in France, so they created this ICO o like framework. It was optional. So, you were not supposed to get this visa to do your icu, but it was of course recommended and encouraged by the regulators.

But actually, it was a huge failure because exactly for. What we're talking about, like the era of the one shot ico, like i p o we are talking, it's not it's not so popular right now. Most of the token shows we see, it's I don't know, you have a game and [01:15:00] the user can min token in the game of can buy a token within a game or within the services.

So, all this like rules defined to protect the investors. For instance, in France, when you are, when you ask for the IC visa, you need to, for the issuer need to put all the cryptocurrency, all the funds into an escrow during the token sale. So, token sale is the, is not supposed to last for more than three or six months, but there is a lot of rules that make sense if you are issuing an issu if you're doing 1, 1 1 insurance.

But that's not appropriate at all. If you are like just. Using and issuing a token within the services. So, it's, and we, I, maybe we will have the same problem with regulation, depending of course on the interpretation of the rules. [01:16:00]

Jonathan: Oh, I'm sorry. Yeah. One element which is interesting and I don't know if it was like this also over, if it is like this in France, is the fact that I totally agree with what you say concerning, like the I C O era is terminated. And nobody wants really to have another one. But like an interesting point here is that you don't need an authorization to issue the token, which is because you have to notify the fact that you are offering the token to the public. And so, like basically sending a letter to the authority, but you don't need to have a prior authorization. And this was made because they. Thought that it was like too much for the

authorities. And in fact, what we see also, like Switzerland, which is very fast, but it takes six months in order to have a no action letter that basically clarifies that your tokens is not a security.

And so, this is something [01:17:00] which, which is nice, I think it is not of interest for very big projects, but like some real estate tokenization, stuff like this, I think that you can have a clear utility and it will be nice like to have. A small fundraise in this way. I think that there can be a kind of new utility that, that will spring out of this, of these provisions.

And so, I wouldn't say of course, like the expectations were different when MiCA was presented and, but nonetheless it's interesting. And then my other point and perhaps like I'm too optimistic, but here I want also to hear our host, like the fact of presenting this category could be important like at a global level because you really indicate something which exists from a region which is important for the crypto industry, and therefore, like the fact that UT tokens exist make all things easier also when you are, I don't know, preparing soft agreements and stuff like this.

And [01:18:00] so the recognition of this category can perhaps influence also our US France in the direction of recognizing a category which is not, which is, which are not of tokens, which are not securities,

Eric: It, one thing that I find interesting about this category is the way that it, you know the room for interpretation can have such a significant impact, right?

So, to the extent that it, it encompasses more of these projects and has a requisite standard, then that is gonna happen. It is gonna be more of a magnet for innovation. Europe is being gonna be seen as leading the world. If it's interpreted narrowly or there's a lack of clarity. I know you were mentioning like an L one for a utility token, but in a lot of cases, an L one might also just simply might fall out of MiCA just because of their decentralized nature.

And I, I would guess, and maybe others have a different view that even File coin might not fall within MiCA [01:19:00] as well. So, it might be more of a subset of, not fully decentralized projects. That also meet the, that fall with the new utility standard.

Marina: I think that's very interesting.

And if we think that there is a category of, there will be, let's say File coin Bitcoin and similar, that would be decentralized enough to be excluded for mica, then we still need to think about the listing action. And there's also description, we'll, I know we'll talk about this in, in, in the next episodes.

There is an idea if the issuer is not writing or they're not issuing a white paper, then for example, an exchange would need to write that white paper in the name of the issuer if they would want to still list that token on their own exchanges. And I think that poses a ton of questions.

I think it's going to [01:20:00] be very interesting to see how this is going to be evolving in the future. And of course I think thinking again about, in a way the plans responsibility, but also the thoughts around the biggest crypto as a service providers versus also all this

guidance that we are waiting from esma eBay and also, again, the national competent authorities that in some cases will need to be notified as it was said before, what Francesco said, or even they would need to issue a license.

Alexandru: If I may, Eric, for me, one of the, and I would like to, to go to Francesco and John with this one, but for me, one of the expectations in terms of guidance is in relation to utility tokens and the work future, [01:21:00] either utility tokens, they will provide you future access to services or. Or is it, various, we can create various interpretations or access to future goods or future services because this will affect a lot the industry in terms of s as we discussed, this will affect the way SAS will be built or structured in terms of if we do it in Europe this will affect the way iOS will be created, either partial or ICOs.

The way we and in this respect, I'm making a parenthesis on the white paper requirements that we'll be discussing, in, in our future episodes. But for example, the white paper says that you are not allowed to discuss the or to create assumptions on the future price of the tokens for example.

So, you know, this relationship with [01:22:00] with the world future. For me, it's very important in order to how to structure an issue. This might take us also in a clearer light than what we see in the world of securities in the US with, the reasonable expectation of future profits. So, a lot will be in the realm of what's happening next once you issue the tokens.

And for that while we have a broad interpretation of the utility tokens specific point based on guidance will be

Jonathan: needed. Just a point related, because we mentioned Bitcoin and let's say for example, ether, et cetera. The legislator under Title 14 B category. That crypto assets are offered for free or that are automatically created as a reward for the maintenance of the dlt all validation of transactions [01:23:00] are excluded from MiCA. For instance, Bitcoin, clearly then with four outside scope of MiCA and any other coin, which let's say is effectively distributed to those assisting or providing services for the validation of transactions. Such kind of is issuance and such kind of assets would be excluded from the scope of MiCA.

So just want to make that point in order of course to let's say clarify this point relating to such transcript.

Francesco: Yeah, that's a great point. I made the example of layer one, just to make an example of something which has utility. Imagine that there will be another layer one with an offering in Europe or something like this.

I wanted to tell also something about the regulation more in general. Not about the white paper that will be like discussed in the next episode. But there are some elements [01:24:00] which may appear strange. I think that this first part of Mya resembles a lot like the technique that normally is used by the European Union to regulate consumer law.

Like you have a lot of information duties, which should help like the consumer to understand what he's doing and which are the risks involved. And actually, to be honest,

that's not so bad because what we've seen in the I c O area was the fact that you had almost always this white papers or light papers, which were very different, one from each other.

Sometimes they were jokes, sometimes they were well made or only with technical information's, which were non understandable by consumers. And we will have with this regulation, basically an indication of. What needs exactly to be put within the white paper. And also, here we have the indication that asthma will provide technical guidance as to how to draft the white papers.

And I think that this standardization [01:25:00] will be useful for the industry because if there is a project which is serious, which in any case wants to have a white paper, I think that this will be a nice model to, to adopt and like also will give a bit of certainty to the project of doing things in a proper way.

Because it it's, it resembles what is required by the European law in, in a way, which is, in this case, precise.

Marina: I would say maybe just a comment on this I see that Francesco just mentioned the technical part. We discussed this before. The marketing encrypt assets regulation is now going to be voted on.

And of course, the secondary part, the technical part technical process starts, which MiCAs that mainly the agencies, ESMA and Eva will be going to work on those technical standards. So basically, defining the ways and the information that different crypto service [01:26:00] providers or issuers are going to need to basically send to the national competent authorities or in some instances, the agencies.

And as you said, this is going to be a very important part on really technically what needs to be sent there and what is important for evaluate, evaluating this project. And of course, that's also a process that we are going to be a part of. And I think it's going to be quite significant.

We've seen this process being already finalized for another, quite important document. The DLT pilot regime that has already been finalized in Europe. And we see that in way again this is important for everyone that will go through this process in the future.

Eric: And one thing that, that Francesco mentioned is, could be very also important for the US is, when the standards are being developed for the white [01:27:00] paper the disclosures that could also end up being an opportunity for us and European regulators to actually I guess draw from each other's statute or legislation to the extent or guidance to the extent that they start to formulate

guidance around disclosures that make sense? So, in, in the US one of the biggest problems with securities registration is the types of disclosures that are required just aren't fitting for digital assets. And they can force the imposition of structures that. That aren't aligned with the project and actually fail to incorporate certain things that are critical about a project while over, including other ones that are more appropriate for a, a more traditional company.

So perhaps the white paper, and I guess one we'll end up talking more about the white paper later, [01:28:00] particularly as it relates to ongoing disclosures and ongoing updates, I think that's something where certainly the US regulators I think are starting to grapple with. Right now, they're probably focusing more on, on trying to stamp out <LAUGH> altogether it seems but I think ultimately the disclosure component of it is an area which has a lot of acknowledged difficulty by the regulator in, in, in terms of applicability. And it's something that they've stated that they are looking to try to figure out. But we'll see what that effort actually produces, particularly in a post FTX and now D C G likely implosion era.

William: but yeah, j just about this, Eric, I think creating a brand new a brand new legal framework like MiCA and like the vs. P every VSP regulation in Europe except in Germany, which is the [01:29:00] Germany is very interesting because they have taken another path we will all learn at the same in MiCA but they have choose to assimilate crypto asset to financial instrument.

Is that it give you like the opportunity to. To, but to, to creating a requirement in the white paper that fit with what you can do and what you can do with the token. I know that I think in Switzerland there have some guidelines about what, what should have what should be mentioned in the white paper.

When if you're doing an ICO in front, there is also guidelines to the disclosing what you need to disclose in your white paper if you want to fall within the scope of the French market, which visa and it's not perfect of course, but it's making sense. It's not something like, it's not a copy path from what you expect from a financial instrumentation.

Eric: Excellent. So, I think as we start [01:30:00] to close out for these discussions the classification of crypto assets under MiCA, and we'll certainly be opening it up again with future episodes. I wanted to touch on the distinction between what MiCA proposes and the state of play in the US. In Europe maybe just talk a little bit about the forces that allowed the, these definitions to take effect because it seems like it's been a more thoughtful, organized process to create this legislation. And there's much more consensus. And whereas in the us we have certain bills. We have the Lewis Gilland bill, which is very well thought through. We had the stab now Bill, apparently Stabenow is now not seeking reelection. So, I guess that's, that suggests that it's may not have as much weight. I think it was losing weight anyway, but the processes are very different. And I just would like to [01:31:00] get your thoughts on how you view the processes as having influenced where MiCA ended up versus where the US is struggling with now.

Marina: If I may start, I think first the differences between the US being a common law basically space where versus what is happening in the eu. And I'm really happy we have the opportunity to talk about the EU regulation here in this podcast because I feel that in general there's not enough.

maybe discussion around what's happening in the EU and how the EU functions. So, the commission basically usually That's the whole process and the kind of political agenda, what it wants to regulate in the four years when it has the mandate. And within those four years, the commission issued the first draft of MiCA, which then goes to European parliament that issues their own draft.

And [01:32:00] then the council, this issues its own draft. The council is usually composed by different member states. So, everyone in a way in the EU has its own place to give to give feedback and to address their own interests. And this is how, it was what happened with MiCA. And in a way it was something that started in 2019 already.

So, it takes a lot of time, but we also have a kind of a predictability that might not happen right now in the us. So, when we first saw the first draft in 2020, we already had. An idea of where it'll go and then it change it. Of course, it changed of course in the next two years, but the main ideas remain the same.

And now if you think about it, if you are a start or a company, four years in advance, ideally what will happen and how you will need to think about maybe being compliant in now in 2024 when MiCA will be applicable. [01:33:00] So I think this is one of the first differences. And the others, as of course, the discussion right now between the SS c or so the tokens mainly I would say being a security or being commodities.

I think this is now very clear with the eu which tokens are going to be securities or financial instruments, and which are the ones that are going to be crypto assets. And maybe another thing that is very important right now and I think it is also very positive thing coming out of MiCA, is that Defi is not yet regulated under MiCA.

So, we still have some time. The commission has. Commissioned research that was written about defi so decentralized applications. And in this research, we have seen also very positive aspects saying defi is different than centralized entity. So, it would need to be regulated in a different way.

And I know that some of our colleagues in the US we are very [01:34:00] much looking into this report and taking some ideas from it when they're also arguing in the US how do new crypto regulation should be in a way drafted. That's briefly,

Jonathan: To also add to what Marina said. I think one of the main issues in the US is that first of all, there's no clear leader in who is establishing the strategy and the roadmap for crypto regulation.

And therefore, there are all sorts of mixed messages being sent out case endpoint. And the current s c chairman Gary Gensler, went completely back on the previous statements of Hinman on what effectively could potentially fall outside the scope of the how test in terms of sufficient decentralized projects.

And this is something that, for example, we almost risked in Malta after the 2017 when we were discussing crypto regulation. And it was [01:35:00] only when the administration at the time decided to effectively take control on all the efforts that were, and discussions

taking place in trying to enact a crypto regulated framework, appointed a team of persons to take the lead on this.

And then what emerged effectively is the first framework of its kind in the European Union, which this remains the closest national framework there is to meet us. Since it was modeled off the directive, it was only possible cause there was, let's say, a champion of sort, which emerged and said, listen, forget what everyone else is discussing.

Forget what the first authorities are saying about themselves. This what's going to happen? Either follow this or just step out of line. It's a bit passive auto critical approach, but when trying to regulate on something as innovative and as divisive as a crypto, you need to have a clear strategy. You need to have a clear road on that you want to pursue.

Otherwise, it's going to be ineffective. The case of [01:36:00] too many cooks, spoiling the broad.

Alexandru: if I may, Eric fully agree with my colleagues in relation to the US versus Europe, European Union. It has been, part of the fiber of the legal and politics of the country. That regulation by enforce.

it's more common to the US than to Europe. And in this respect, Europe has taken, best practices from, from the DOJ, for example, in the antitrust. So, regulation by enforcement in the US has been, critical in addressing market failures in various aspects of the of the US economy and society.

While on the EU side, we've been more, code civil driven. [01:37:00] We are more onto the statutes rather than, and we want the law rather than case law will help us or guide us in the way we are going to regulate and legislating for the future. So, in this respect, that's the, the critical difference.

The problem is that crypto and crypto assets and virtual assets are not a market failure. This is a new economy. So, for that, you need, as Jonathan was mentioning, you need, a strategy for the long run, which cannot be done by short term or midterm type of agency strategies. But you need a sort of a legislation legislature type of approach as being, the ultimate goal in, in regulating and legislating an area of society.

My 2 cents on the topic I last [01:38:00] la last point it has been coined by Professor Ann Bradford from Colombia, who's professional in the antitrust space, but the cob the concept that we are discussing now, if you want this the Brussels effect. And we've seen it in other areas, and I think that MiCA will have the same impact basically, whenever EU managed to innovate in the area, like the GDPR or the sustainable or energy sustainable goals in the past you could see the spillovers of these type of regulations across the world.

And Professor Bradford at some point provides an example. For example, when European Union decided to impose stricter regulations on the filters of the cars. And you know how, it filters the diesel and the oil you could see this spillover [01:39:00] effect in the car manufacturers from California to Asia.

So, this is the process effect, and we hope to have this same type of effect also in the space of virtual assets.

Eric: Francesco.

Francesco: Yes.

I also want to comment on this and continuing a bit the discussion of Alex concerning the, that regulation by enforcement. I was quite astonished to see it in the last two years in the United States.

I think that this kind of interventions without having a clear framework are not possible in the eu. I think that the approach is different. I think that there was also like a slowdown, as I've said before, because everyone was waiting a bit for MiCA, and so like also the authorities for instance, the one in my country, we invited one time the commissioner at the university.

Of concept and I [01:40:00] was astonished like how much he knew about RPU and all this stuff, which is going on in Defi. But nonetheless, there was not the willingness to intervene because like they were waiting for mic. He was just a bit disappointed. I can tell you about the fact that he clearly stated that MiCA does not encompass Defi.

I was happy about it. I didn't show it in this moment, but like he was saying it'll not cover all the situations which are so dangerous, et cetera. On the same time, I have to say that some actions which were provided in the US against very. Perhaps weak projects as the and library.

I didn't like this kind of intervention because I had the feeling that they wanted basically to create a kind of signaling function in going against very weak projects to create a kind of case. And I think this is not the way of regulating in in a field which is very unclear from a technical [01:41:00] point of view and also from a legal standpoint.

And therefore, I think that this regulation by enforcement for technology is not something which really works so well because we are in a phase in which we are in which like there are experiments concerning the technology. And so, it is something which is very harmful. You don't do nothing or you create a framework which is credible you don't like, basically impact so hardly on the technology without having a framework.

And then the other thing that I find. Really different in the us It's related also to the activity of the lawyers, given the fact that class actions are so widespread in the US and that there is also the willingness of law firms of investing in two cases. It is something which I think it's growing a bit in the eu now.

We have also financial intermediaries to pay for big cases. But it's something which is very at the [01:42:00] beginning, but like reading a claim like the one that was made against.

Compound like a class action in which the class is made by three people that lost like \$1 and a half. It's something which really is astonishing for a European person.

And I would say that like a European lawyer would not invest in this kind of in this kind of claims. And this creates an atmosphere in the US which really brings on the one side to be afraid and like to avoid beginning something in the us. And on the other side it brings like for people that have the MiCAs to do it because they raise money also to an over compliance of things that nobody knows if are if are really required.

But it's really inefficient to, to address things in this way. And so, I think that in this case it's [01:43:00] a case in which you need some guidelines because the technology is completely new and you cannot really apply the same rules that you had until now. And like in this way, I think that Mica presents a lot of similarities to already existing rules, but I love the fact that it is a brand-new instrument that was made for a brand-new technology.

Eric: And to that point Francesco when you have a regulatory regulation by enforcement regime, it does signal an open season to class action lawyers, right? Because you've gotten, a hostility out of the federal regulators. Potentially hostility out of state regulators. And it really just seems like an ey doo, like it just opens up a whole new avenue. Oh, if they're gonna do it, or I can bootstrap off of these claims that they made in like the Wahi case, even though the action wasn't directly against those projects, they didn't really have [01:44:00] the opportunity to defend themselves.

But yet, you're making law by association or some indirect MiCAs. It does give rise to that environment where it is open season and I do think we're entering into open season on crypto more so in the us. Unless something is more sensible is done and it is gonna definitely impact US long term.

But I'm going off on my own. I haven't asked William for his thoughts on it before. We close out this episode.

William: I will not repeat because every, everything has been said by my dear colleague. But yeah, my, my last thought was about this difference of way to regulate between the US and the eu.

The, yeah. The US have a very strong way to regulate by enforcement both from the regulators and from lawyers in class action, which is as Francisco outline is absolutely impossible and unbelievable [01:45:00] in, in most of the eu, on the EU country, but in the other way. Yeah, I still thinking that the EU have, with MiCA and especially with the stablecoin and utility token part of mica, we have been very far in the detail to and the way to try to regulate as much as possible as we can.

Europe is trying to, giving a. Comprehensive framework of stablecoin without having any significant stablecoin issue. So, it's very interesting to see this huge difference of approach between eu. We are trying to have a kind of GDPR for the crypto, and it's sometime too much. How discussion, very complex discussion about what like asset reference token, his or is not, is one example of this complexity.

And I sometime regret that. In Europe it's very complicated for investors to, [01:46:00] to, yeah. To obtain like the sanction of bad actors. And sometimes the regulators, at least the French regulators that I know quite well now are very predominant, very sometime very quiet.

And sometimes we would like to have a sheriff in town. But it's just my opinion.

Eric: All right with that I want to thank everybody for their participation in this episode. We'll be we'll be doing more of these. And I'm excited with the way it happened the way the way the discussion went today.

So, thanks so much for [01:47:00] joining.