

MICAR ROUNDTABLE EXPERT SERIES

BERLIN

The MiCAR Roundtable Expert Series is an initiative of Validvent, thinkBLOCKtank and siedler legal with the aim to increase legal certainty within the realm of the EU crypto markets. As a new regulatory framework, the application of MiCAR still raises numerous questions and as such the MiCAR Roundtable Series aims at facilitating expert discussions, resulting in public reports and specific calls to action. The roundtables will be held across Europe throughout the year 2024.

Following the March roundtable in London, on April 23rd, the second MiCAR Roundtable of the series was held in Berlin in cooperation with Berlin Partner, the EUBOF and INATBA.

The Berlin roundtable included a keynote from Joachim Schwerin, Principal Economist at the European Commission.

This roundtable counted with expert contributions of Joanna Rindell on NFTs; Luiza Castro and Alireza Siadat on grandfathering issues; Dr. Max Bernt on Crypto-asset classification; Daniel Resas around frontend providers for DeFi; Tiana Whitehouse on Reverse Solicitation; and Jörn Erbguth on transaction history for privacy coins.

This report aims to consolidate the insights from these discussions. It is important to note that the perspectives and conclusions presented herein represent the collective understanding of the topics discussed and do not reflect the individual positions of any participants or the respective rapporteur



1. NFTs: Regulatory Perspectives and Challenges

The discussion around NFT was led by Joanna Rindell, General Counsel at World of Women. The discussions centred on the need for precise definitions and clearer assessment criteria to prevent the misclassification of NFTs either as typical crypto assets under MiCAR or as financial instruments under MiFID.

The participants debated the application of MiCAR's broad language to NFTs, stressing the importance of a substance over form approach in their classification. This approach necessitates a detailed evaluation of each NFT's components—artwork, technical standards, and utility offered by the project to ascertain their collective and individual value contributions. It was noted that the uniqueness of the artwork and the specific utility provided, such as governance rights in a DAO, contribute significantly to the NFT's value, distinguishing it from standard financial instruments.

A major challenge highlighted was the ambiguity in current regulatory frameworks, which could lead to inconsistent interpretations across EU member states and potentially curb innovation. The lack of explicit assessment criteria risks erroneous classification of NFTs, potentially subjecting them to inappropriate regulatory burdens meant for more traditional financial instruments.

The roundtable reached a consensus on the necessity for clear, tailored criteria for NFT assessment, focusing on

- Artistic Uniqueness: Evaluations should consider the originality of the artwork, trait variations, the artist's reputation, and the artwork's cultural significance.
- Nature of Utility: Utilities should be assessed based on the type of benefits they provide – distinguishing financial from non-financial benefits. Utilities offering access to exclusive content or community benefits, like voting rights in a DAO, should indicate a non-financial utility, thus not classifying the NFT as a financial instrument.
- Market Dynamics and Trading Volume: Analysis should include a review of trading volumes over significant periods to discern the NFT's market stability and interest, preventing misclassification due to transient market activities.
- Issuance and Seriality: The definition of a 'large series' of NFTs needs clarity. While MiCAR suggests that issuing NFTs in large series implies fungibility, this should be one of several factors considered in the assessment.

Implementing these recommendations would enable a more accurate evaluation of NFTs, recognizing their unique characteristics and the complex interplay of their artistic and utility-based values. This approach aims to ensure that NFTs are regulated in a manner that acknowledges their distinct nature from traditional financial assets, thereby fostering a regulatory environment conducive to innovation while ensuring appropriate consumer protections. By establishing a

comprehensive framework for NFT assessment, regulators can better navigate the evolving landscape of

digital assets, supporting innovation while safeguarding against potential market abuses and consumer risks.

Primary call to action for NFTs:

The primary call to action from the Berlin roundtable is to collaborate with the aim that regulators adopt and implement clear, detailed criteria for NFT classification that align with MiCAR's objectives. This involves:

- Developing guidelines that accurately reflect the unique artistic and utilitarian aspects of NFTs.
- Ensuring these guidelines are flexible enough to accommodate the diverse nature of NFTs and prevent their misclassification as traditional financial instruments.
- Proposing these guidelines to the regulators involved.

2. Crypto-Assets Classification under MiCAR and MiFID II

The discussion around crypto-assets classification under MiCAR and MiFID II was led by Max Bernt, Managing Director, Europe at Taxbit. The discussions brought to light the absence of a universal definition of "financial instruments" in the EU, a situation that contrasts starkly with jurisdictions like the U.S. that employ the Howey test for clarity. This disparity has been exacerbated with the advent of MiCAR, prompting urgent questions about how crypto-assets should be categorised under both MiFID and MiCAR regimes.

A key area of concern is the handling of crypto-assets resembling derivatives but settling in unconventional forms, such as stablecoins. These assets pose unique challenges due to their ambiguous classification under existing frameworks. In response, ESMA has proposed guidelines suggesting that crypto-assets which represent contractual rights to underlying assets be classified as derivatives. This

definition extends to assets whose values are tied to reference assets and involve financial settlements or deliveries of the underlying asset.

The roundtable recognized the need for a more nuanced regulatory approach to accommodate the complex nature of crypto-assets. Stakeholder responses advocate for regulatory flexibility, stressing the importance of substance over form in classification to avoid stifling innovation or enabling regulatory arbitrage.

To address these challenges, the roundtable emphasised several strategic recommendations:

Harmonisation across the EU is crucial, and while the introduction of a Howey-like test in the EU was debated, it was agreed that a more immediate and practical approach would involve establishing specific criteria based on the substantive qualities of tokens. These criteria should focus beyond the

mere "negotiability" of a token to include the intentions and functionalities outlined in its White Paper and the promises made by issuers.

Regulatory priorities should aim for clarity and certainty while fostering innovation. Regulators are encouraged to provide clear, accessible guidelines for National Competent Authorities (NCAs), which balance specificity with flexibility. This approach would ensure that the intrinsic qualities of tokens, especially those promising future returns or capital gains, are the primary factors in their classification.

An impact assessment is necessary to address the potential inconsistencies in how tokens are treated across different jurisdictions. The roundtable called for ESMA to ensure that a passport granted by one NCA is respected across all EU and EEA jurisdictions, and for the provision of operational definitions of negotiability and transferability with practical examples to aid NCAs.

These recommendations aimed to refine the regulatory landscape for crypto-assets, ensuring clarity and consistency while fostering an environment conducive to technological innovation and market stability.

Primary calls to action for Crypto-Assets Classification under MiCAR and MiFID II:

The primary call to action is to collaborate with the aim of regulators refining and clarifying the classification guidelines for crypto-assets within the MiCAR framework. This involves:

- Developing specific, substance-based criteria for crypto-asset classification that reflect the unique characteristics and functionalities of these assets.
- Supporting regulators to establish regulatory guidelines that are clear and tailored, allowing for flexibility in their application to accommodate the evolving nature of digital assets.
- Facilitating continuous dialogue and collaboration among NCAs and the crypto industry to harmonise regulatory practices and ensure that innovations in the digital asset space are supported rather than stifled.

3. Reverse Solicitation

The third topic of the Berlin Roundtable was presented by Tiana Whitehouse, Co-Founder & Managing Director of SWOT Team Consulting GmbH, focusing on the challenges posed by ESMA's Reverse Solicitation Guideline 1 under MiCAR Art. 61(3). According to the roundtable participants the current

guidelines, considered overly restrictive, potentially misinterpret social and professional activities as solicitations, potentially stifling educational and collaborative efforts rather than merely regulating commercial endeavours.

The discussions delved into how ESMA's broad interpretation includes various activities—from road shows to

educational courses—as potential solicitation methods, thereby exposing participants, particularly third-country firms, to undue regulatory risks. The guideline could lead to unintended consequences, such as limiting educational and professional development activities that are crucial for informed industry engagement and innovation.

To mitigate these impacts, the roundtable proposed several solutions:

- **Clarification of Purpose:** It was suggested that ESMA should delineate more clearly between commercial solicitation and non-commercial activities like education and professional development. Providing explicit guidelines on what constitutes solicitation would help differentiate brand promotion activities from educational or collaborative interactions.
- **Class Exemption:** Introducing exemptions for non-commercial gatherings was discussed. This could involve specific categories

for events like workshops, conferences, and academic meetings, which do not primarily serve commercial purposes but rather aim to foster industry knowledge and network building.

- **Risk-Based Enforcement:** Adoption of a risk-based approach to enforcement by National Competent Authorities (NCAs) would prioritise resources towards activities with higher risks of consumer harm rather than broad surveillance of all professional engagements.

Further discussions highlighted the potential negative implications of the current guidelines on international cooperation and discourse, crucial for advancing regulatory and technological understandings. The possibility of a labelling framework was also discussed, where events meeting specific non-commercial criteria could be recognized as exempt from solicitation categorization, aiding in clear compliance and fostering continued global dialogue.

Primary calls to action for Reverse Solicitation:

The primary call to action focuses on collaborating on refining ESMA's guidelines to prevent the overreach of reverse solicitation regulations into non-commercial, educational, or professional development activities. Industry stakeholders are urged to:

- Propose revised and clarified definitions within the guidelines to ensure a precise understanding of what constitutes solicitation, exempting inherently non-commercial activities explicitly.
- Propose a labeling system for events, providing a framework that clearly identifies and exempts non-commercial, educational, or policy-driven activities from being classified as solicitations.

- Encourage active dialogue between industry and regulators to develop practical, clear guidelines that support healthy industry evolution without compromising regulatory objectives or stifling necessary professional interactions.

4. Grandfathering: Crypto-asset offerings prior to 2025

The discussion on grandfathering, initiated by Luiza Castro from FiO Legal, delved into the critical transitional measures within the MiCAR framework. This discussion provided a detailed look at the grandfathering provisions essential for aligning existing operations with the new regulatory framework set to fully take effect after December 30, 2024.

The discussion started mentioning that MiCAR introduced a grandfathering regime affecting crypto-assets not classified as asset-referenced or e-money tokens, with the regulation becoming fully applicable in stages as outlined in Articles 149(2), (3), and (4). This transitional period allows entities time to align their operations with MiCAR's provisions, bridging the gap between the enforcement of MiCAR and their compliance.

The discussions highlighted that until December 30, 2024, crypto-assets already admitted to trading are exempt from MiCAR's new marketing communication rules. This provides a strategic window for entities to either conclude their marketing activities or ensure compliance with the impending regulations, suggesting a six-month transitional window into 2025 for additional adjustments.

The participants of the roundtable agreed on the following marketing communication challenges that will occur during the transitional period:

- Entities admitted to trading and publishing marketing communications before the deadline can temporarily avoid the new MiCAR standards. However, they must transition to compliance within a reasonable period, possibly six months into 2025.
- The responsibility for ensuring compliance in marketing strategies, especially in dynamic digital and social media campaigns, remains a significant challenge. These campaigns require meticulous planning to ensure that all content adheres to MiCAR standards post-deadline.
- The discussion also touched on the strategic opportunities and compliance risks associated with pre-deadline marketing, emphasising the importance of clear, strategic planning and the potential for regulatory scrutiny if reshared or reposted content fails to comply with new standards.

Based on those challenges, the participants highlighted some possible strategic and operational recommendations necessary to navigate the grandfathering provisions effectively.

For example, it was mentioned that entities should review and adjust their marketing strategies with the MiCAR timeline in mind, ensuring that communications set to extend beyond the 2024 deadline are compliant with new regulations.

Moreover, it was agreed upon by the participants that ongoing dialogue

between regulators and industry stakeholders is crucial to clarify any ambiguities in transitional measures and ensure that the implementation of these rules does not disrupt the operational capabilities of crypto-related businesses.

Primary call to action for grandfathering rules under MiCAR:

The primary call to action from the Berlin roundtable on grandfathering rules under MiCAR encourages entities to proactively plan and adapt their strategies to align with the upcoming MiCAR regulations. This includes:

- Developing detailed plans for transitioning marketing strategies to comply with MiCAR standards by the end of 2024.
- Engaging in continuous dialogue with regulators to address and clarify transitional provisions, ensuring a smooth adaptation process for all stakeholders involved in crypto-assets trading.

5. Grandfathering: Art. 143 subsec. 3 MiCAR

Following the previous discussion on grandfathering, Alireza Siadat, Partner at Annerton, delved into the transitional regime outlined in Art. 143 para. 3 of MiCAR, which has raised significant concerns due to its ambiguous provisions.

This discussion focused on the challenges and ambiguities surrounding the transitional regime of Art. 143 para. 3 of MiCAR. This article allows crypto-asset service providers that were operational in compliance with applicable laws before December 30, 2024, to continue their operations until July 1, 2026, or until a decision on their authorization is made, whichever is sooner. However, Member States have the discretion to opt out of

this regime or shorten its duration if their existing regulations are less strict than those proposed by MiCAR.

During the roundtable, concerns were raised about the clarity of the legislation, particularly the specific references to dates and the ambiguity around what qualifies as "services in accordance with applicable law." The discussions highlighted the need for greater transparency on how Member States will notify the Commission and ESMA about their implementation decisions, as well as the challenges CASPs face in navigating different national transitional regimes.

A significant part of the debate centred on the interpretation of "services in accordance with applicable law." There was a consensus that this should

include not only regulated CASPs but also those operating in areas not explicitly covered by current regulations, such as services related to utility tokens or portfolio management. This broader interpretation is crucial for those CASPs that are currently unregulated but still operate within the law.

The roundtable also stressed the importance of clear and harmonised guidelines from the NCAs and ESMA. These guidelines are essential for ensuring that CASPs can effectively plan their compliance strategies and for maintaining the integrity of the internal market. The discussion advocated for a proactive approach from NCAs, like Austria's FMA, which are already

addressing MiCAR's implications, to lead by example and assist other Member States.

To conclude, the primary calls to action from the discussion emphasised the urgent need for regulatory clarity and a harmonised approach to the transitional regime. It was suggested that regulators quickly provide detailed guidelines on the application and scope of Art. 143 para. 3 to aid CASPs in their compliance efforts. Furthermore, there was a strong push for consistency across the EU to ensure that the transitional provisions support a unified regulatory approach and foster a stable environment for innovation in the crypto asset space.

Primary calls to action for Grandfathering: Art. 143 subsec. 3 MiCAR:

The primary call to action from the Berlin roundtable on the transitional regime under MiCAR is for regulators and industry stakeholders to collaborate closely to navigate the complexities introduced by Art. 143 para. 3. Interested industry players are encouraged to:

- Collaborate in order to jointly propose clear, detailed guidelines explaining the application and scope of Art. 143 para. 3. Those will help CASPs plan and adjust their operations in compliance with the new regulations.
- Explain to NCAs the importance of a unified approach to the transitional regime. To eliminate discrepancies could hinder the functioning of the internal market and avoid disadvantages to CASPs based on their jurisdiction.
- Create proactive support and guidance to CASPs, particularly those that are not fully regulated under current laws but are compliant with the broader legal framework. This support is crucial for helping these businesses transition smoothly into the regulatory framework established by MiCAR.

6. Transaction History for Privacy Coins.

The discussion, led by Jörn Erbguth from Geneva Macro Labs and the University of Geneva, focused on the complex

requirements of MiCAR's Article 76 subsec. 3, which mandates the disclosure of "transaction history" for privacy coins. The current guidelines demand that trading platforms prevent the trading of crypto-assets with

anonymization functions unless the crypto-assets and their transaction histories can be identified by service providers.

The primary concern revolves around the interpretation of "their" in the regulation—whether it refers to the transaction history of the holder or to the crypto-asset itself, which could have changed hands multiple times. The roundtable debated the practicality and implications of each interpretation, emphasising the importance of clarity to prevent undue burdens on holders who may not have access to the full transaction history of their assets.

The conversation highlighted the GDPR implications, particularly the right to be forgotten, and how it conflicts with the permanent nature of blockchain records. Participants discussed how the integration of privacy by design in privacy coins could address these concerns by minimising the exposure of pseudonymous personal data.

The proposed solution focused on limiting the disclosure requirement to the transactions directly involving the holder, thereby aligning with the GDPR's principles and reducing the potential for

unnecessary exposure of personal data. The discussion also touched on the technical solutions like differential privacy and decentralised IDs, which could help reconcile privacy concerns with regulatory requirements.

To enhance the practical application of Article 76 subsec. 3, the roundtable suggested that exchanges should only be required to identify the direct customer, the immediately preceding transaction, and the counterparties involved in that transaction. This approach would protect privacy while complying with AML directives, emphasising that only transactions above a certain threshold should be disclosed to exclude micropayments.

In conclusion, the discussion underscored the need for a balanced approach that respects both the privacy rights enshrined in the EU Charter of Fundamental Rights and the regulatory mandates aimed at preventing money laundering and other illicit activities. The roundtable urged that the use of privacy-enhancing technologies that respect privacy by design should not be blocked by extensive and disproportionate interpretation of the disclosure requirements for trading privacy coins.

Primary calls to action for Transaction History for Privacy Coins

The primary call to action from the Berlin roundtable on the transaction history of privacy coins emphasises the importance of this technology, which adheres to the data protection by design principle. Any regulatory approach must be feasible and proportionate. Disclosure requirements must not extend beyond the last transactions of the transacting party.

- The industry should emphasise the importance of this technology to meet the increasing demands for data protection and privacy. All transactions being

openly available on a public ledger must not become a de facto legal requirement of financial regulation.

- Encourage the adoption of technologies that enhance privacy while meeting regulatory requirements, such as differential privacy techniques and decentralised identity solutions.
- Advocate for policies and regulatory guidance that respect privacy rights while addressing regulatory concerns, ensuring that privacy coins can operate within legal frameworks without compromising fundamental rights.

7. Frontend providers for DeFi operators

The discussion led by Daniel Resas from Placehodlr centred on the intricate role of non-custodial frontends in decentralised finance (DeFi) under the Markets in Crypto-Assets Regulation (MiCAR). This conversation explored whether these frontend providers qualify as "operators" under MiCAR, shedding light on the nuanced regulatory landscape these entities navigate.

Non-custodial frontends enable users to interact with decentralised protocols without the service provider holding custody of the user's assets, setting them apart from custodial platforms. This distinction is crucial, as it introduces unique regulatory challenges, particularly concerning the potential misclassification of these frontends as operators, which would subject them to stringent regulatory standards not aligned with their operational realities.

The roundtable highlighted the ambiguity in legal treatment and its significant implications for the operation of platforms like Uniswap. These platforms exemplify the ongoing tension between decentralised applications and

existing regulatory frameworks, emphasising the need for clarity in how regulations apply to non-custodial services to avoid stifling innovation.

Given that in most member states non-compliance with MiCAR by providing crypto-asset services without a required licence results in criminal charges, the conversation highlighted the principle of foreseeability in criminal law (*nullum crimen sine lege certa*) prohibiting an interpretation that goes beyond the wording of the specific crypto-asset services described.

Participants discussed the importance of distinguishing non-custodial providers from custodial services to preserve the integrity and innovative potential of DeFi platforms. They stressed the need for regulatory bodies to provide clear guidelines that accurately reflect the operational model of non-custodial frontends to prevent undue regulatory pressures.

The discussion concluded with several key takeaways:

- **Regulatory Clarity:** It is crucial for regulators to outline and communicate clear guidelines that recognize the unique operational models of non-custodial frontends, ensuring that these entities are not inappropriately burdened with regulations meant for traditional financial operators.
- **Legal Risk Management:** Non-custodial frontends must strategically manage legal risks by engaging proactively with regulators. This engagement will help foster a deeper understanding of decentralised technologies and mitigate risks associated with regulatory misclassification.
- **Industry Advocacy:** Stakeholders are encouraged to advocate for a regulatory approach that acknowledges the distinct characteristics of DeFi and non-custodial platforms. This advocacy should aim to shape regulations that support innovation while ensuring consumer protections and market integrity.

Primary calls to action for Frontend providers for DeFi operators

The primary call to action from this discussion is for stakeholders in the DeFi ecosystem to actively engage with regulatory bodies to ensure that the unique aspects of non-custodial frontends are understood and appropriately regulated. This includes:

- Efforts should be made to educate regulatory authorities about the fundamental operational differences between non-custodial frontends and traditional financial operators.
- Advocating for clear legal definitions and guidelines that reflect the non-custodial nature of these platforms, ensuring that regulations are both applicable and conducive to the growth of decentralised finance.
- Encouraging collaboration within the industry to present a unified voice in regulatory discussions, enhancing the effectiveness of advocacy efforts.

For an overview of the event please visit: <https://www.youtube.com/watch?v=xJYgKmvlszw>

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