

The Foundations of MiCA in EU Financial Law

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- I. Introduction
- II. Financial Law Basis in Recitals
- III. Examples from the Binding Text of MiCA
- IV. Impact on Level 2 and Interpretation
- V. Towards Joint Principles of EU Financial Law

- MiCA announced as «*bespoke regulation*»
- But: in many respects «*copy out*» of EU financial law
- What does this mean in terms of
 - Level 2 law making?
 - Interpretation?
 - Supervision and enforcement?

II. EU Financial Law Basis in Recitals

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- Convergence by emphasizing the alignment of objectives
- Reference to:
 - Banking regulation: CRD/CRR, BRRD, SSMR, EMD, AMLD/CTF
 - Capital Markets regulation: MIFID II, MAR
 - Investment Funds Regulation: UCITSD, AIFMD
- Prospectus Regulation: blueprint for white paper rules (Title II)

III. Examples from Binding Text: Definitions

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Provision	Subject Matter	Provision equivalent to
Art. 3 (1) No. 1	DLT	Art. 2 (1) PilotR
Art. 3 (1) No. 2	Distributed Ledger	Art. 2 (2) PilotR
Art. 3 (1) No. 3	Consensus mechanism	Art. 2 (3) PilotR
Art. 3 (1) No. 10	Issuer	Art. 2 (1) (h) Prospectus Regulation
Art. 3 (1) No. 11	Applicant issuer	Art. 2 (1) (d) Prospectus Regulation
Art. 3 (1) No. 12	Offer to the public	Art. 2 (1) (i) Prospectus Regulation
Art. 3 (1) No. 13	Offeror	Annex I, Section B (1) MiFID II
Art. 3 (1) No. 16	Crypto-asset service	Annex I, Section A and B MiFID II
Art. 3 (1) No. 17	Custody and administration of crypto-assets on behalf of clients	Annex I, Section B (5) MiFID II
Art. 3 (1) No. 21	Execution of orders of crypto-assets on behalf of clients	Art. 4 (1) (5) MiFID II
Art. 3 (1) No. 24	Advice on crypto-assets	Art. 4 (1) (4) MiFID II
Art. 3 (1) No. 25	Portfolio management of crypto-assets	Art. 4 (1) (8) MiFID II
Art. 3 (1) No. 27	Management body	Art. 4 (1) (36) MiFID II
Art. 3 (1) No. 39	Client	Art. 4 (1) (9) MiFID II

III. Examples from Binding Text: Licensing of CASPs

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Art. 59 MiCA

- significant influence by PSD2, MiFID II, AIFMD & CRD
- sets a licensing requirement for all CASPs
- two options: new authorization **OR** extension of existing license
- licensing conditions: usual authorization requirements

III. Examples from Binding Text: Licensing of CASPs

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Provision	Subject Matter	Provision equivalent to
Art. 59 (2)	Choice of Home country	Art. 11 (3) PSD2
Art. 59 (3)	Applicant's legal form	Art. 4 (1) no. 1 MiFID II
Art. 59 (4)	Continuing compliance	Art. 6 (1) AIFMD, Art. 21 (1) MiFID II
Art. 59 (5)	Protecting the term "CASP"	Rec. 72 Commission Delegated Regulation No. 2017/565
Art. 59 (6)	Detailing crypto-asset services	Arts. 6 (1), 60 MiFID II
Art. 59 (8)	Expansion of license	Arts. 6 (2), 60 (1) MiFID II
Art. 59 (7)	European Passport	Art. 11 (9) PSD2, Art. 6 (3) MiFID II
Art. 60 (7)	Essential information to be provided by certain financial entities wanting to provide CA	Art. 8 (2) no. 1 CRD, Art. 5 (1) (k) PSD2, Art. 19 (1) (b) CRD, Art. 10 (1) (l) Commission Delegated Regulation No 2017/2055, Art. 6 (1) (j) Commission Delegated Regulation No 2017/1943
Art. 61	Crypto-asset services at the exclusive initiative of the client	Art. 42 MiFID II

III. Examples from Binding Text: Authorization of CASPs

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Provision	Subject Matter	Provision equivalent to
Art. 62 (1)	Submission of the application to the competent authority of the home Member State.	Art. 7 (1) AIFMD
Art. 62 (3)	Provision of proof by the CASP	Rec. 39, Art. 91 (1) & 62 (3) point (b) CRD
Art. 63 (1)	Acknowledgement of receipt of the application	Art. 12 PSD2, Art. 15 CRD, Art. 3 Commission Implementing Regulation No 2017/1945 Art. 12 (1) MiFID
Art. 63 (2)	Assessment of the application for authorisation and grant or refusal of authorisation	Art. 12 PSD, Art. 4 Commission Implementing Regulation No 2017/1945, Art. 15 CRD, Art. 46 (4) para 2 MiFIR
Art. 63 (4)	Notification of the applicant in case of a complete application	Art. 46 (4) para 4 MiFIR
Art. 63 (6)	Procedure before the granting/refusing of an authorisation	Art. 26 (2) AMLD/CFT
Art. 63 (7)	The existence of close links	Art. 14 (3) para 1, CRD, Arts. 7 (2) para 1, 29 (1) no (c) para 1 UCITSD, Art. 11 (7) PSD2; Arts. 7 (2) para 1, 29 (1) no (c) para 1 UCITSD, Art. 11 (7) PSD2
Art. 63 (8)	Refusal of the authorization in case of close links/difficulties preventing the effective exercise of supervisory functions.	Art. 14 (3) para 2, CRD, Arts. 7 (2) para 2, 29 (1) no (c) para 2 UCITSD; Art. 11 (8) PSD2, Art. 14 (2) CRD, Art. 10 (1) para 2 MiFID
Art. 63 (10)	Cases in which authorisation should be refused	Arts. 9 (4) & 63 (5) MiFID, Art. 8 (1) para 2 UCITSD
Art. 63 (12)	Further information necessary to complete the assessment	Art. 22 (3) CRD, Art. 12 (2) MiFID
Art. 64 (1)	Cases in which the granting of authorisation should be withdrawn	Arts. 7 (5), 29 (4) UCITSD, Art. 18 CRD, Arts. 8, 43, 44 (5), & 62 MiFID, Art. 11 AIFMD
Art. 64 (2)	Cases in which the granting of authorisation should be withdrawn	Arts. 7 (5), 29 (4) UCITSD, Art. 18 CRD, Art. 8, 43, 44 (5), & 62 MiFID, Art. 11 AIFMD

- Art. 66 MiCA
 - Fiduciary duties
 - MiFID II & Com. Dir. 2010/43/EU, UCITSD & AIFMD
 - « *Basic Law* » for all off-balance sheet intermediaries in EU

Obligation to act honestly, fairly and professionally in the best interests of clients

1. Crypto-asset service providers shall act honestly, fairly and professionally in accordance with the best interests of their clients and prospective clients.
2. Crypto-asset service providers shall provide their clients with information that is fair, clear and not misleading, including in marketing communications, which shall be identified as such. Crypto-asset service providers shall not, deliberately or negligently, mislead a client in relation to the real or perceived advantages of any crypto-assets.

III. Examples from the Binding Legislation

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- Art. 72 MiCA
 - Com. Del. Reg. No 2017/565, UCITSD & AIFMD;
 - conflict rules as specification of general fiduciary duties

Identification, prevention, management and disclosure of conflicts of interest

1. Crypto-asset service providers shall implement and maintain effective policies and procedures, taking into account the scale, the nature and range of crypto-asset services provided, to identify, prevent, manage and disclose conflicts of interest between [...]

Origin of rule important for application of MiCA

EU Financial Law Rule
(e.g. licensing,
authorization of CASPs)

1:1 EU Financial Law
interpretation

Mixed Rule
(e.g. Art. 75 on Custody)

?

Bespoke Rule
(e.g. significant ART, Art.
43/44)

MiCA-unique
interpretation:
DLT, DeFi-thinking

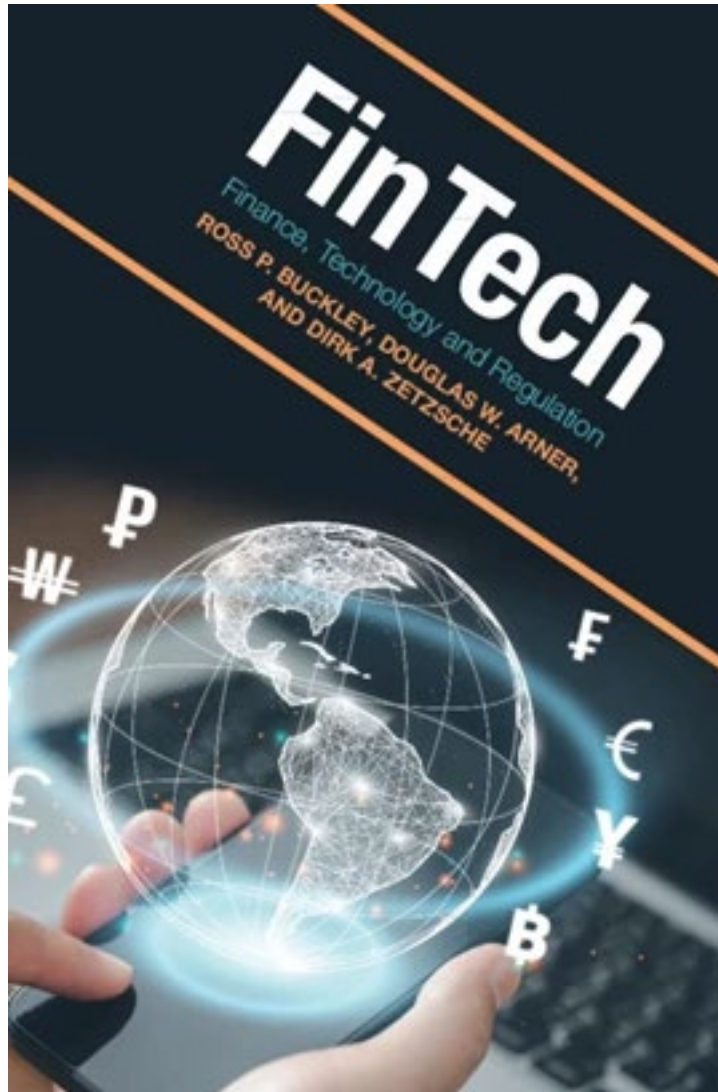
V. Towards Joint Principles of EU Financial Law

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- MiCA is partly drawn from existing EU financial law.
- Model in existing law determines interpretation and enforcement, and should guide L2 law making.
- Convergence of EU financial law a guiding rationale of MiCA application.
- Bespoke interpretation faces argumentative barriers.

Thank you!

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Please find our latest work at SSRN:
www.ssrn.com/author=357808

Coming out soon

Zetsche/Woxholth,
The EU Regulation of Cryptoassets
(Cambridge University Press, 2024).

More Readings on FinTech

Sandboxes vs Innovation Hubs
<https://ssrn.com/abstract=345587>



Digital Finance Platforms
www.ssrn.com/abstract=3532975



FT4FI Roadmap
www.ssrn.com/abstract=3245287



Future of Data-Driven Finance
www.ssrn.com/abstract=3359399



Covid 19, Sustainability Crisis
<https://ssrn.com/abstract=378360>



Corporate Technologies (AI etc.)
www.ssrn.com/abstract=3392321



Rise of Tech Risk
www.ssrn.com/abstract=3478640



Distributed Ledgers / Blockchain
www.ssrn.com/abstract=3018214



TechFin / Data-driven Finance
www.ssrn.com/abstract=2959925



AI in Finance: Putting Humans
www.ssrn.com/abstract=3531711



Regulating Libra
www.ssrn.com/abstract=3414401



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www.ssrn.com/abstract=3072298



eID / KYC Utilities
www.ssrn.com/abstract=3224115



Regulatory Sandboxes
www.ssrn.com/abstract=3018534

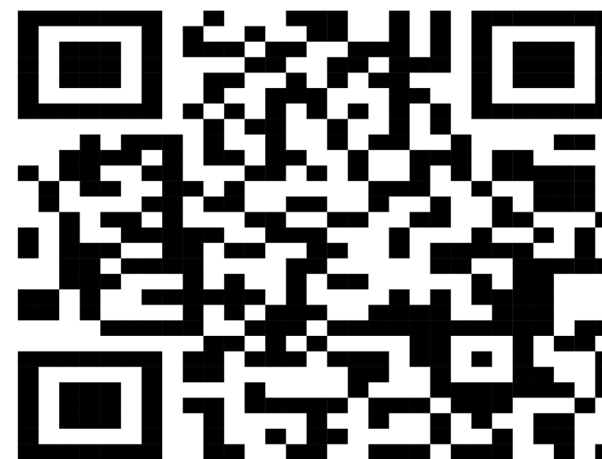


Start date: September

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2 Semesters

Thank you!