

Faculty of Law, Economics
and Finance

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and Digital Finance
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Outline:

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A strong call for a reform of the EU AML strategy: toward a partial centralisation

Presenting AMLA: the EU Commission AML Package

Main pillars of the future supervisory strategy

Cryptoassets in the AMLA proposal

Interaction between MiCA and AML regimes

Supervision between MiCA and AML régimes: a different risk-based approach?

Provisional conclusions

A strong call for a reform of the EU AML strategy



Current legal framework:

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DIRECTIVE (EU) 2015/849

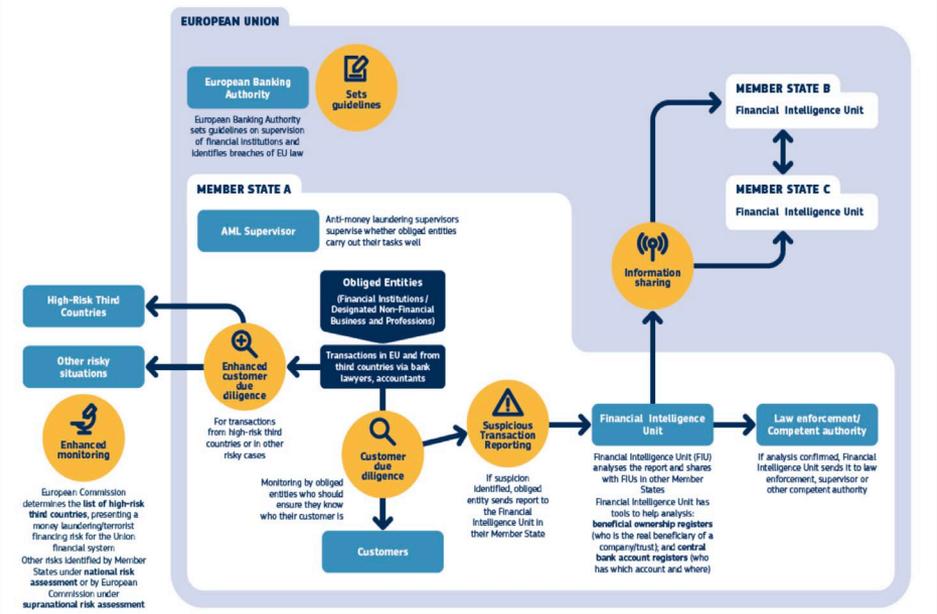
of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing as amended by:

DIRECTIVE (EU) 2018/843 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 30 May 2018

DIRECTIVE (EU) 2019/2177 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 18 December 2019

Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law

Figure 1 – Preventing money laundering and terrorist financing across the EU
How does it work in practice?



Source: European Commission, 2018.

1.2. The 2020 European Commission action plan

Communication from the Commission (24 July 2019)

Commission Action Plan (7 May 2020)

- AML & CTF: shared responsibility of MSs and Union; mechanisms for enhanced cooperation, coordination and mutual assistance
- Regulatory and supervisory fragmentation; inconsistent supervision across the internal market; insufficient coordination and exchange of information among Financial Intelligence Units (FIUs)
- Major divergences in the application of the legal framework; lack of clear and consistent rules
- Financial stability risk from abuses; banking sector: most likely to suffer
- Need for action: Centralised enforcement **Establishment of a new AML Authority?**

EU Commission AML Package → 20 July 2021

1st Proposal (420)

- Regulation on the prevention of the use of financial system for the purposes of AML/CFT

2nd Proposal (423)

- Directive on the mechanisms to be put in place by MSs for the prevention of AML/CFT

3rd Proposal (421)

- Regulation establishing a new central EU-level AML/CTF Authority (“AMLA”)

4th Proposal (422)

- Regulation on information accompanying transfers of funds and certain crypto-assets



1. Single Rulebook Regulation

- Currently in trilogue



2. 6th AML Directive

- Currently in trilogue



3. AMLA Regulation

- Currently in trilogue



4. Transfer of Funds and Crypto-assets Regulation

- Enters into Force January 2025

Trilogues started in April 2023rd

Regulation (EU) 2023/1113 of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets (TFR)

▪ Objectives

1. A common EU single rulebook on AML/CFT

- A clearer set of rules, including directly applicable provisions, will ensure more consistent application of the framework;

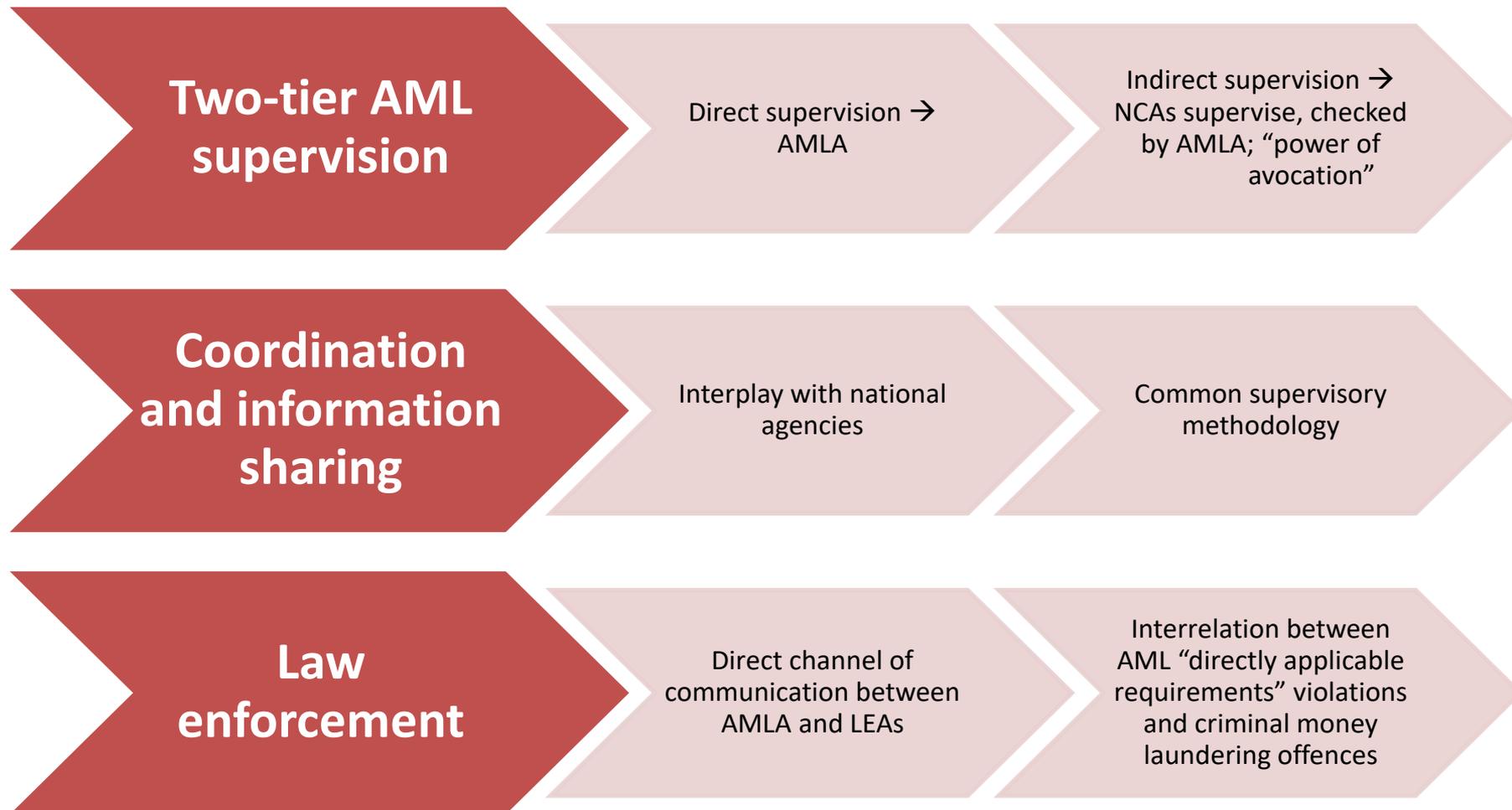
2. A new EU-AML Authority, AMLA - tasked with

- EU-level AML/CFT supervision;
- Establishing a support and cooperation mechanism for FIUs.

→ Integrated AML supervisory system



Toward a centralised AML regime: 3 pillars



DIRECT SUPERVISION

- for **selected obliged entities**: “(...) a limited number of the riskiest obliged entities should be directly supervised by the Authority.” (recital 15 Reg AMLA)
 - Entities which operate in a large number of Member States
 - or require immediate action to address imminent risks

INDIRECT SUPERVISION

- 'For **non-selected obliged entities**, the AML supervision is to remain primarily at national level, with national authorities retaining full responsibility and accountability for direct supervision'. (recital 27 Reg AMLA)
 - → AMLA will monitor and coordinate national supervisors
 - → **Support and cooperation mechanism for FIUs**

The authority will take over the direct supervision of a limited number of selected obliged entities periodically listed

(Recital 15):

1) *'high-risk cross-border credit and financial institutions with activity in a significant number of Member States*

(at least 4 MS Article 12);

2) *and, in exceptional cases, any entity whose material breaches of applicable requirements are not sufficiently or in a timely manner addressed by its national supervisor '.*

3) *(amendment of the PE): at least one entity per Member State*

Tasks and powers: Direct Supervision

For 'selected obliged entities' (both legal and natural persons)

No quantitative criteria = SSM (risks are not proportionate to the size of supervised entities)

Entity-based approach
Residual risk

Risk assessment based on **cross-border presence**

+ **inherent ML risk profile**

2) Power of avocation of non-selected obliged entities

In exceptional cases
Article 30: risk deteriorates rapidly or significantly

Under imminent ML risks requiring imminent action because of serious, systematic or repeated breaches

Article 30a: detailed procedure for the take-over

1) Cross-border presence in a significant number of MSs

- In the form of an establishment
- Based on the number of branches and subsidiaries in different MSs:
 - 1) Established in at least 2 MSs
 - 2) Provides services directly or via a network of agents in at least 8 more MSs
- Cryptoassets?
 - ➔ No local physical presence in more MSs

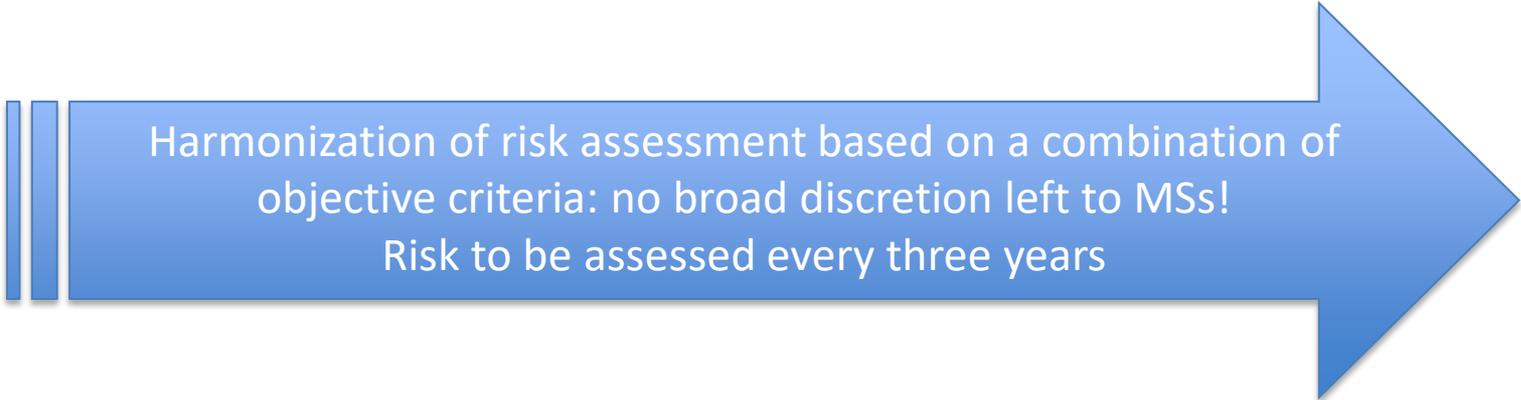
Cryptoassets in the AMLA proposal (EU Parliament version)

5 April 2023

- Recital 5: To bring AML/CFT supervision to an efficient and uniform level across the Union, it is necessary to provide the Authority with the following powers: direct supervision of a certain number of selected obliged entities of the financial sector, *including crypto-asset service providers*;
- Recital 16: *ML/TF supervision should be risk-based*. The first category of credit and financial institutions, *including crypto-asset service providers*, or groups of such institutions should be assessed every three years, based on a combination of **objective criteria** related to their cross-border presence and activity, and criteria related to their inherent ML/FT risk profile.
- Recital 17: The *Authority should also develop common residual risk benchmarks. Those methodologies* should be tailored to particular types of risks and therefore should follow different categories of obliged entities which are financial institutions in accordance with the Regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing [OP please insert the next number for [COM\(2021\)420](#)], *as well as crypto-asset service providers*.

1) + criteria related to inherent ML residual risk profile

- The assessment of inherent risk is harmonised:
 - 'the Authority shall lay out harmonised methodology and benchmarks for categorising the inherent risk as low, medium, substantial and high'. (recital 17)
- 1) Obligated entity classified as high risk in at least 4 MSs
- 2) and, in at least 1 of those 4 the entity was under supervisory or other public investigation for breaches of AML rules



Harmonization of risk assessment based on a combination of objective criteria: no broad discretion left to MSs!
Risk to be assessed every three years

- Article 12 Assessment of financial sector obliged entities for the purposes of selection for direct supervision
- 3. The methodology for classifying the *residual* risk profile shall be established separately for at least the following categories of obliged entities, *taking into account the specificities of each sector:...* ***(ja) crypto-asset service providers.***

2) Imminent risk requiring immediate action

- Recital 15: «**in exceptional cases**, any entity whose material breaches of applicable requirements are not sufficiently or in a timely manner addressed by its national supervisor would fall under the category of **selected obliged entities**».
- Exceptional circumstances (Art. 30):
 - 1) Indications of material breaches by a non-selected obliged entity or imminent risk of violation
 - 2) Request by the Authority to NCA to take specific measures to remedy the situation (including requesting to issue financial sanctions)
 - 3) Subsequent ***inaction*** or ***failure*** to follow the instructions within the provided deadline on the part of NCA

- **Art. 30(4)** : 'Where the financial supervisor concerned does not comply with the request (within 5 days) the Authority may request the Commission to grant permission to transfer the relevant tasks and powers related to direct supervision of the non-selected obliged entity from the financial supervisor concerned to the Authority'.

→ *power of avocation*: the Authority will take over the direct supervision of the entities for the time strictly necessary to deal with the risks at the entity level and should not exceed 3 years.

1. On its own initiative
2. with specific request to that end to the Commission being necessary

Tasks and powers

Supervisory powers in relation to selected obliged entities in order to ensure compliance with applicable requirements (Article 20):

Adoption of binding decisions

Adoption of administrative measures

Adoption of pecuniary administrative sanctions

Direct Supervisory Powers

Art. 20: These powers should apply in cases where:

- **a)** the selected entity does not meet its requirements
- **b)** certain requirements are not likely to be met
- **c)** and in cases where internal process and controls are not appropriate to ensure sound management of selected obliged entity's ML/FT risks.

→ The Authority can require actions, internal to the entity, to enhance the compliance of obliged entities



BREACHES OF DIRECTLY APPLICABLE REQUIREMENTS:

- Appoints independent investigatory team
- Imposes administrative pecuniary sanctions

Procedural rules for imposing sanctions (Art. 25)

- Obligated entity intentionally or negligently breaches directly applicable requirement
- or does not comply with a binding decision adopted by the Authority
- The Authority appoints an **independent investigatory team** within the Authority to investigate the matter
- It shall decide if one or more breaches have been committed and **imposes an administrative sanction**
- which is proportionate, dissuasive, both punitive and deterrent, and compliant with ne bis in idem

Interaction administrative-criminal enforcement

Art. 25 (8):

- *'The Authority shall refer matters for **criminal prosecution** to the relevant national authorities where, in carrying out its duties under this Regulation, it finds that there are serious indications of the possible existence of facts liable to constitute criminal offences'.*
- direct channel of communication between AMLA and LEAs
 - interrelation between AML “directly applicable requirements” violations and criminal money laundering

- Lack of coordination between preventive and repressive actions
- Blurred line between admin and criminal sanctions:
 1. **Punitive nature** of admin sanctions
 2. **Anticipation of punishment threshold** of criminal offence
 - mere attempts or offences committed by negligence included within the sphere of criminal law (Directive 2018/1673)
 - equation breach of directly applicable requirements = offence of ML
 - conflict between the two enforcement structures (prevention v. repression)

INDIRECT SUPERVISION

- The authority will **monitor** and **coordinate** national supervisors responsible for *non-selected obliged entities*
 - ➔ to ensure supervisory convergence (i.e., that supervisory actions at national level are consistent)
 - ➔ **Art. 7:** «The Authority shall develop and maintain an up-to-date and harmonised AML supervisory methodology detailing the risk-based approach to supervision of obliged entities in the Union. The methodology shall comprise guidelines, recommendations and other measures and instruments as appropriate, including in particular draft regulatory and implementing technical standards, on the basis of the empowerments laid down in the acts referred to in Article 1(2)».

INDIRECT SUPERVISORY POWERS (ART. 6)

**with respect to
national
supervisors**

- Assess the state of supervisory convergence (Art. 28)
- Coordinate and facilitation of work of AML colleges (Art. 29)
- Issue guidelines and recommendations
- Request to act in exceptional circumstances and instructions on measures that should be taken towards non-selected obliged entities (Art. 30)
- Require the submission of any information or document

**with respect to
FIUs**

- Collect information
- Request data and analysis
- Obtain and process information and data required for the coordination of joint analysis

Coordination of Financial Intelligence Unit

AMLA and FIUs

- mere coordination, no EU-FIU
- differences in structure, power, statute
- FIU.Net

with respect to FIUs and CASPs

- Technical/technological gap
- IT equipment and sufficiently trained personnel

MiCAR and AMLA

MiCAR is both asset-based and entity-based:

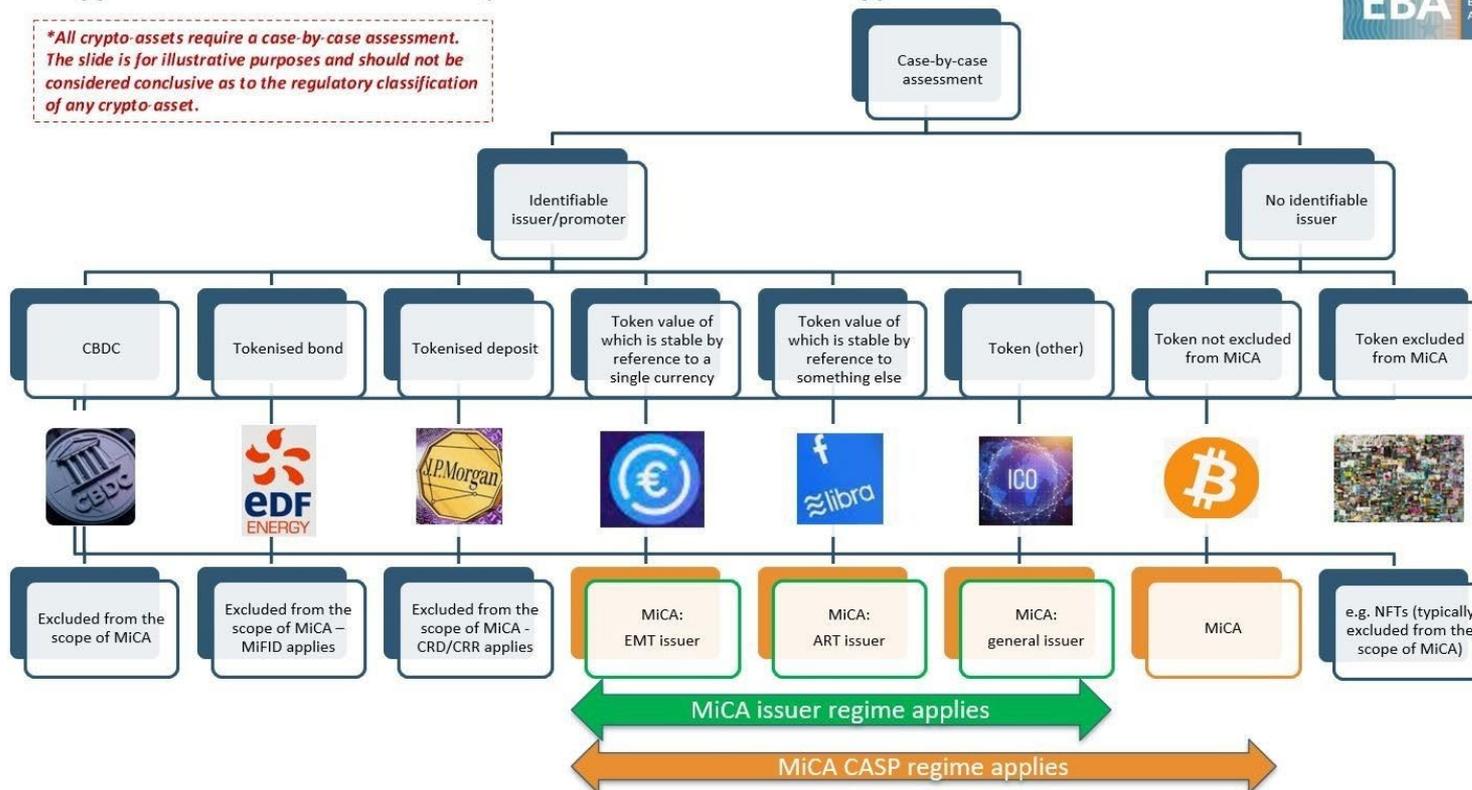
- it classifies cryptoassets according to several criteria:
 - Technology: centralised-decentralised
 - Token type: referenced v non-referenced, payment v non-payment; significant v less significant
 - Residual categories (previously regulated, i.g. investment tokens)
- It classifies certain entities:
 - Issuers
 - CASPs
- exclusions are also both asset- and entity-based

AMLA is only entity-based:

- it focuses on obliged 'entities'
- In the cryptofield, these are the 'CASPs: crypto-assets service providers'

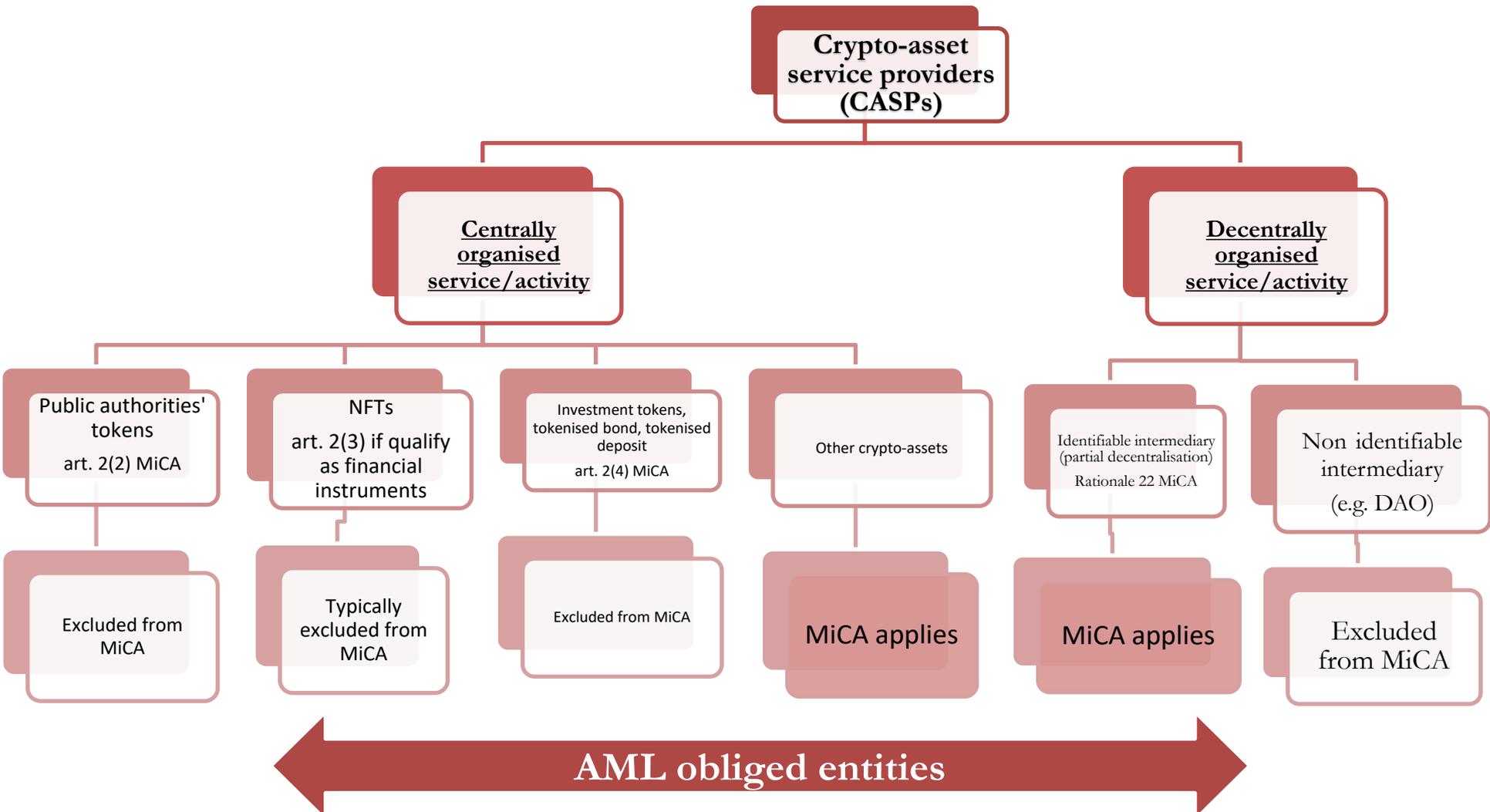
Crypto-asset classification (MiCA – illustrative only)

**All crypto-assets require a case-by-case assessment. The slide is for illustrative purposes and should not be considered conclusive as to the regulatory classification of any crypto-asset.*



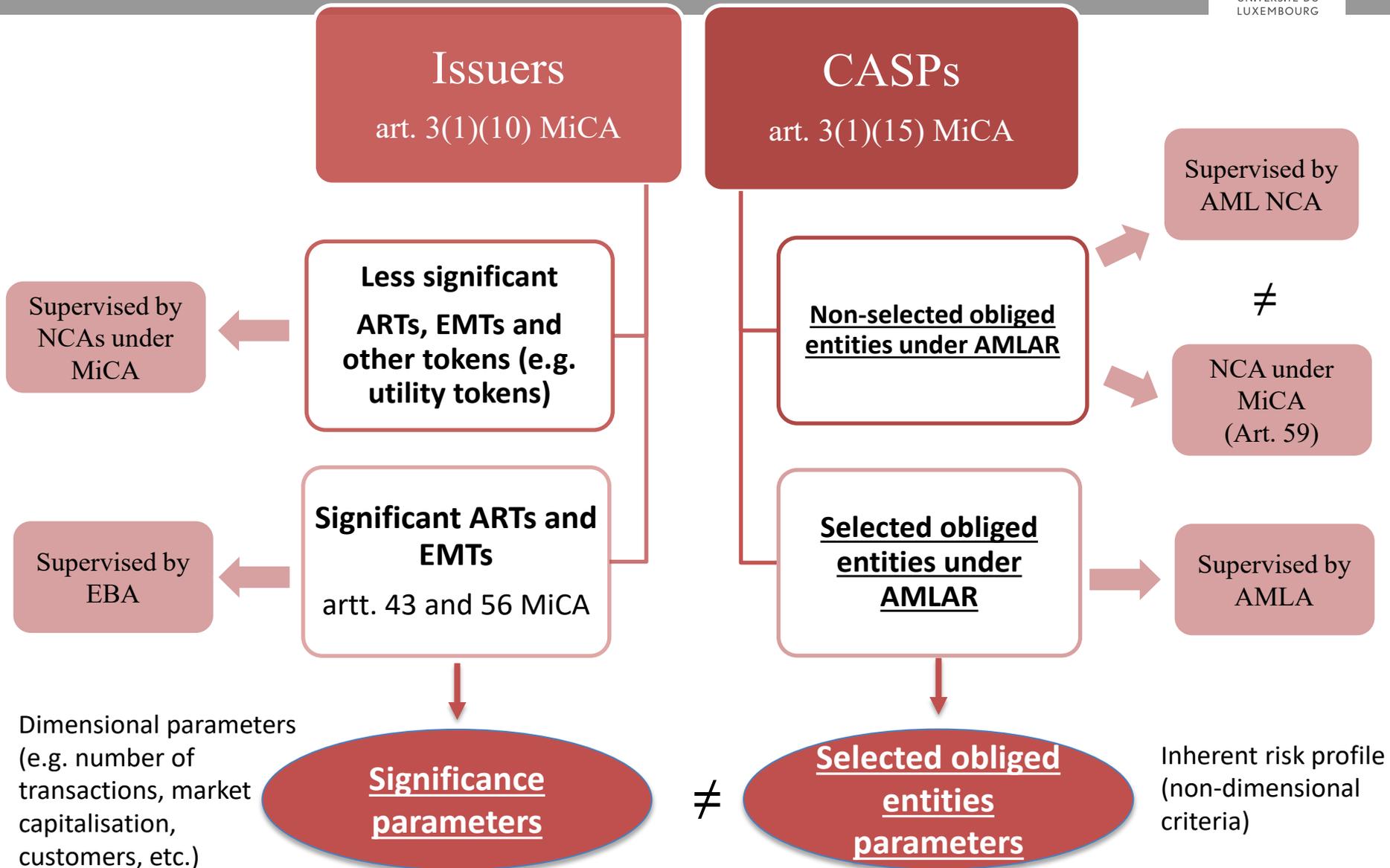
CASPs classification: interaction between MiCAR and AML regimes

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Supervision between MiCAR and AML régimes: a different risk-based approach?

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Conclusions

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Entity-based v technology-based

Selected obliged entities because of high risk v Significant crypto-assets

Technological geography, Normative geography, Enforcement geography: the need for a strong system of information exchange

A call for an integrated approach