siedler legal

de la Roche W. Consulting

MICAR ROUNDTABLE EXPERT SERIES

Vaduz

Initiated by Dr. Nina-Luisa Siedler and Mariana de la Roche W., the MiCAR Roundtable Expert Series aims to enhance legal clarity within the evolving regulatory framework of the EU Markets in Crypto-Assets Regulation (MiCAR). The series facilitates high-level expert discussions, leading to the creation of public reports that compile insights on MiCAR's implementation across Europe.

The seventh round table in this series was hosted at the University of Liechtenstein on October 4th, 2024. We extend our sincere gratitude to Dr. Clara Guerra, Director of the Office for Financial Market Innovation and Digitisation (SFID) in Liechtenstein, for delivering the keynote address, and to Prof. Dr. Konstantina Papathanasiou for her warm welcome and introductory remarks. We also thank our partners Bitpanda, Nägele Rechtsanwälte, Stabsstelle Finanzplatzinnovation & Digitalisierung, Token Summit Liechtenstein and the University Liechtenstein for their invaluable support, along with thinkBLOCKtank, INATBA, and CCA for their collaboration.

This report consolidates 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 nor the respective rapporteurs.

in cooperation with:

with the support of:

1. Handling Own Fund Requirements under MiCAR

Dr. Christian Steiner, Director of Regulatory Compliance, Bitpanda presentation focused on the new "own fund requirements" introduced under the MiCAR for CASPs. These requirements bring the crypto industry closer to traditional financial setups, aligning it with prudential standards observed in banking and investment firms. However, the application of these requirements poses several challenges, particularly due to their rigidity and the one-size-fits-all approach. Five key issues were discussed:

1. Threshold of Own Funds: MiCAR's initial own fund requirements, ranging from €50,000 to €150,000 depending on the services provided, seem reasonable for smaller CASPs. However, for larger CASPs, the ongoing own fund requirements based on fixed overheads (FOR) can become disproportionately high, sometimes reaching millions of euros. Unlike traditional financial institutions, such as banks or MiFID II investment firms, CASPs lack the flexibility of using risk-sensitive factors or internal models to reduce the burden of own fund requirements. This results in a one-dimensional system based on overhead costs, which can be particularly detrimental for CASPs investing heavily in development and technology.

The solution lies in recalibrating the own fund requirements to better reflect the scope and nature of the activities undertaken by CASPs. Borrowing elements from MiFID II or banking regulations, such as incorporating risk-weighted assets (RWA) or K-factors into the calculation, could create a more balanced and proportional approach. This adjustment would ensure that own fund requirements are tailored to the actual risks faced by CASPs, rather than being driven solely by overhead costs. Additionally, regulators should allow for greater flexibility in how CASPs meet these requirements, taking into account different business models and investment strategies.

2. Inclusion of Unregulated Services in Fixed Overheads: MiCAR requires CASPs to include all business expenses, even for non-regulated services, in the calculation of fixed overheads. This means that expenses related to unregulated business activities, such as IT consultancy or other ancillary services, are factored into the own fund requirements. This broad inclusion creates an inflated calculation of own funds, which could force CASPs to split their operations into separate entities

to reduce the regulatory burden—an inefficient and costly approach, particularly for smaller firms.

A precedent for addressing similar issues exists in MiFID regulations, which explicitly outline criteria for excluding certain non-core expenses from own funds calculations for investment firms. MiFID's approach demonstrates a way to balance comprehensive oversight with operational flexibility, offering a relevant framework for MiCAR to consider.

To address this issue, MiCAR should allow for the exclusion of non-regulated services from the fixed overhead calculation. This would enable CASPs to focus on their core crypto-asset services without being penalized for operating additional business lines. Regulators could also introduce thresholds or criteria for determining when these activities can be excluded from the fixed overheads calculation, providing much-needed flexibility. This would prevent the need for CASPs to split their operations, thereby reducing costs and complexity, while still ensuring regulatory compliance.

3. CET1 Instruments Only – Restrictions on AT1 and Tier 2 Instruments: MiCAR restricts CASPs to using only Common Equity Tier 1 (CET1) instruments to meet their capital requirements. This is in contrast to other financial sectors, such as banking and investment firms, where Additional Tier 1 (AT1) and Tier 2 instruments are also allowed. This restriction limits the flexibility of larger CASPs in managing their capital structure and may lead to overburdening requirements as they grow, particularly because no other risk-sensitive instruments are permitted.

To address this limitation, MiCAR should be expanded to allow CASPs to use AT1 and Tier 2 instruments, in line with the Capital Requirements Regulation (CRR) applied to banks and other financial institutions. These instruments are already well-regulated, and their inclusion would provide greater flexibility for CASPs, particularly larger ones, in meeting their capital obligations. While smaller CASPs may opt not to use these instruments, they should have the option available to them, creating a more level playing field across different types of financial entities. This adjustment would reduce the financial strain on CASPs and enhance their ability to manage capital more efficiently.

4. Monitoring Own Funds and Regulatory Clarity: MiCAR imposes a requirement for CASPs to continuously monitor their own

funds, but there is little legal clarity on how this should be implemented. For smaller CASPs, this presents a significant challenge, as they may not have the internal resources or personnel (such as risk managers or compliance officers) to carry out ongoing monitoring. Furthermore, the lack of standardized guidelines for how to monitor own funds could lead to inconsistent implementation across different CASPs and varying interpretations by national regulators (NCAs).

To address this challenge, regulators should provide clear and standardised guidelines on how CASPs should monitor their own funds. These guidelines should be uniform across the EU to ensure consistent application and reduce the compliance burden on smaller CASPs. Additionally, MiCAR should introduce clear reporting requirements, outlining the specific information CASPs must provide to NCAs. This would create transparency and predictability for both CASPs and regulators, helping to reduce the risk of ad-hoc reporting requests and last-minute compliance issues.

5. Deductions – Classification of Crypto-Assets as Intangible Assets: A critical issue discussed was the potential classification of crypto-assets as intangible assets under MiCAR, which would require them to be deducted from a CASP's own funds under the CRR. This presents a unique challenge for the crypto industry, as crypto-assets, while from a civil law perspective, intangible in nature, have a clear market value and liquidity. If treated as intangible assets, the deduction of crypto-assets from a CASP's own funds could lead to significant undercapitalization, especially given the volatile nature of these assets.

The solution lies in clarifying that crypto-assets should not be classified as intangible assets under the CRR. Unlike goodwill, software, or other intangible assets, crypto-assets have a tangible market value and can be liquidated in times of financial stress. Therefore, they should not be subject to the same deductions as other intangible assets. Additionally, if crypto-assets were treated as intangible assets, they could be subject to "double deduction" under the Basel Committee's strict capital treatment for crypto-assets, which would be both unnecessary and harmful to the industry. Regulators and auditors, whether under IFRS or national accounting standards, should align on this interpretation to avoid unintended consequences for the crypto industry.

Conclusion:

The roundtable discussion highlighted the importance of creating a more flexible and proportionate framework for own fund requirements under MiCAR. By allowing for the inclusion of AT1 and Tier 2 instruments, excluding non-regulated services from fixed overhead calculations, and clarifying the treatment of crypto-assets, MiCAR can better align with the unique characteristics of CASPs. These adjustments will ensure that the regulation remains supportive of innovation in the crypto space while maintaining the necessary prudential safeguards.

Primary Calls to Action for Own Fund Requirements
The primary calls to action based on the discussions are: • **Revise the Calculation of Own Funds:** Regulators should consider incorporating risk-sensitive factors (e.g., K-factors) and provide more flexibility for CASPs, particularly when calculating fixed overhead requirements. This will ensure the rules are proportionate to the size and scope of each CASP's business. • **Allow Deductions for Non-Regulated Services:** MiCAR should be amended to allow CASPs to exclude non-regulated services when calculating fixed overheads, or at least provide clear criteria for when such deductions can be made. • **Permit Use of AT1 and Tier 2 Instruments:** Expand the scope of allowable capital instruments under MiCAR to include AT1 and Tier 2 instruments, which are already in use by banks and other financial institutions under CRR. • **Clarify Monitoring Requirements:** Establish clear, consistent guidelines for the monitoring of own funds and ensure that all NCAs apply these standards uniformly across the EU. • **Exclude Crypto-Assets from Intangible Asset Deductions:** Explicitly clarify that crypto-assets should not be classified as intangible assets under CRR Article 36, given their market liquidity and unique characteristics. Regulators and auditors

should interpret this classification consistently, recognizing that the tangible market value and liquidity of crypto-assets distinguish them from traditional intangible assets and warrant a separate treatment.

2. Handling "Gas Fee Stations" and the Implications of Art. 75 MiCAR

Nina Gartmann from Celsion Finance AG led a crucial discussion on the implications of Article 75 MiCAR concerning the segregation of client and own funds for CASPs. The focus was on the practical and legal challenges surrounding "gas stations" used by CASPs to pay for network transaction fees (gas fees) and whether these practices comply with the strict segregation requirements outlined in MiCAR. The roundtable explored multiple facets of this issue, including the technical and legal complexities, as well as potential solutions.

1. Interpretation of Art. 75 MiCAR on Fund Segregation: Art. 75 para (7) MiCAR requires crypto-asset service providers offering custody and administration services to segregate client crypto-assets from their own on both a legal and operational level. This is akin to traditional banking rules, ensuring that in the event of bankruptcy, client funds remain safe and separate from the provider’s own assets. While this is straightforward at the operational level, the same article also mandates that client and provider assets be segregated on the distributed ledger.

In practice, many CASPs use omnibus wallets for multiple clients and maintain "gas stations" to pay for network fees. These "gas stations" raise concerns because the gas fees are paid from the provider’s wallet, potentially co-mingling client and provider assets in the process. This co-mingling, if interpreted strictly, could violate the segregation requirements of MiCAR, particularly when gas station funds are attributable to the provider, even though they are pre-financed through fees charged to the clients.

The solution lies in ensuring that client and provider assets are clearly distinguishable at all times, either through advanced technical measures, such as creating distinct wallets, or through proper documentation and

record-keeping practices that provide clarity on asset ownership.

2. Legal Argumentation Around Ownership of Gas Fees: A key point of the discussion focused on whether the assets used in gas stations could legally be considered client assets rather than those of the CASP. Several legal arguments were made to suggest that gas fees could be classified as client funds, particularly if clients pre-finance these fees through service charges or if the terms of service explicitly state that gas fees are part of the transaction cost borne by the client.

The proposed solution involves ensuring that legal documentation, such as general terms and conditions (GTC) or service agreements, clearly defines gas fees as client assets. This would provide a legal basis for treating gas fees as client funds, thus avoiding the need to classify them as CASP assets under MiCAR.

3. Technical Solutions for Asset Segregation: On a technical level, the roundtable participants discussed whether enhanced segregation techniques could be applied to prevent the co-mingling of client and provider funds in gas stations. Implementing a higher degree of segregation at the distributed ledger level might solve the problem, but it also introduces operational risks, as managing multiple wallets can be more complicated and may increase the likelihood of errors.

The proposed solution here is for CASPs to explore more advanced technical solutions, such as using multiple wallets to segregate client and provider assets. However, for smaller CASPs, this may not be feasible. Therefore, a balance between technical solutions and strong documentation practices could be the optimal path forward.

4. Third-Party Solutions for Gas Fee Management: Another option discussed was the use of third-party providers to manage gas stations. By outsourcing this function, CASPs could avoid holding gas fee assets themselves, thus circumventing the need to segregate these funds on the ledger. However, the use of third-party providers introduces additional costs, which could ultimately be passed on to clients.

Third-party solutions offer CASPs the ability to maintain compliance without significant internal changes to their systems. While this approach may increase operational costs, it provides a clear pathway to compliance, particularly

for larger CASPs that handle higher transaction volumes.

5. Provision of Transfer Services: The roundtable also considered whether gas fees could be reclassified as a transfer service under Article 82 MiCAR. By charging clients a fee for the transfer of assets, CASPs could argue that the gas fees are part of a distinct service, thus removing the need for strict segregation on the ledger.

This solution would require careful structuring of service agreements and might necessitate regulatory approval, but it provides a viable pathway for handling gas fees without breaching MiCAR's requirements for fund segregation.

6. Other Risk Mitigating Measures: Lastly, the discussion emphasised the importance of clear documentation and record-keeping as a risk mitigation strategy. Even if gas fees are handled through a gas station, as long as there is proper documentation of the ownership distribution via a core banking system or similar records, the risks of co-mingling can be minimised.

CASPs should maintain meticulous records of all gas fee transactions, ensuring that they can demonstrate at any time which assets belong to clients and which are their own. This level of transparency can help mitigate risks and ensure compliance with MiCAR, even when full segregation on the distributed ledger is not technically feasible.

The roundtable participants agreed that while the strict requirements of Art. 75 MiCAR pose significant challenges for CASPs using gas stations, there are several viable solutions. These include legal agreements that define gas fees as client funds, technical improvements in wallet segregation, outsourcing to third-party providers, and reclassifying gas fees as part of a transfer service. Clearer regulatory guidance would also be beneficial, particularly concerning the segregation of assets on the ledger and the legal structure of gas fee payments.

Primary Calls to Action on Gas Fee Stations and Fund Segregation
The primary calls to action based on the discussions are:

- **Clarify Regulatory Expectations on Asset Segregation:** Regulators should issue specific guidance on the technical and legal expectations for segregating client and provider assets on the distributed ledger.
- **Permit Flexibility in Gas Fee Handling:** Regulatory frameworks should allow for flexible solutions in handling gas fees, including the possibility of outsourcing or classifying gas fees as part of transfer services.
- **Provide Legal Templates for Compliance:** Regulators or industry bodies should develop templates for legal agreements that clarify the ownership of gas fees and ensure alignment with MiCAR's segregation requirements.
- **Encourage Best Practices for Risk Mitigation:** CASPs should adopt best practices in documentation and record-keeping to ensure transparency and compliance, particularly when full ledger segregation is not possible.

3. Intervention of NCA vs Passporting Art. 105 vs 65 MiCAR

The third topic, presented by Alireza Siadat, delved into the relationship between National Competent Authorities (NCAs) and the cross-border provision of crypto-asset services under MiCAR. The central question revolved around whether an NCA in a host Member State has the authority to intervene in the services of a CASP that operates across borders, and how the provisions of Art. 65 (Passporting) and Art. 105 (Product Intervention) apply in such scenarios.

Art. 65 MiCAR: Passporting and Cross-Border Services MiCAR establishes a harmonized framework across the EU, allowing Crypto-Asset Service Providers (CASPs) to provide their services across Member States under a single authorization from their home NCA. According to Art. 65, once a CASP receives authorization from its home Member State, it may notify the authority of its intent to offer services in other Member States. Upon notification, the CASP can provide services in the host Member States without needing additional permissions.

This system of passporting is designed to encourage cross-border business growth and provide equal opportunities for market entry, supporting the innovation and expansion of crypto-asset services across the EU. Furthermore, it ensures that crypto-assets can scale up their businesses without unnecessary regulatory hurdles from host Member States, fostering competition and efficiency in the EU crypto markets.

Art. 105 MiCAR: Product Intervention While Art. 65 MiCAR promotes cross-border activities, Art. 105 sets out specific conditions under which NCAs can intervene in the marketing, distribution, or sale of particular crypto-assets or activities that pose a significant risk to market integrity, investor protection, or financial stability. Such interventions are allowed only as a last resort and must be based on clear, objective criteria laid out by the Commission.

The key point of Art. 105 is that it restricts NCAs from broadly intervening in the services of CASPs, unless there is a specific product-related issue that justifies intervention. Therefore, any action taken by an NCA must be directed at a product or type of activity and cannot be a general intervention against the CASP.

Challenges with Implementation and Regulatory Discrepancies The roundtable discussion highlighted that, in practice, some NCAs do not fully respect the cross-border nature of MiCAR, particularly when it comes to product intervention. The rapporteur noted instances where host Member State NCAs were reluctant to allow certain CASPs to operate within their jurisdiction, despite the CASP having valid permission from their home NCA. In some cases, these authorities either delayed cooperation agreements between domestic and foreign CASPs or subjected them to intensive audits, creating a de facto barrier to entry.

This reluctance and resistance to cross-border activities create a regulatory environment that undermines the very purpose of MiCAR—fostering a unified, competitive market for crypto-assets in the EU. Some NCAs perceive cooperation agreements between domestic and foreign CASPs as attempts to bypass local regulations, leading to discrimination against both domestic and foreign entities.

Proposed Solutions and Best Practices The roundtable agreed that NCAs must adhere strictly to the framework set out by MiCAR. Art. 65 should be fully respected, allowing CASPs to provide services across Member States without undue

interference. Product interventions under Art. 105 must be limited strictly to situations where a specific crypto-asset or activity presents a significant risk. NCAs must not intervene in general service provision unless the intervention is directly related to the risks identified under MiCAR's product intervention rules.

To further support this, the roundtable proposed establishing a "whistleblowing" communication channel to the European Supervisory Authorities (ESAs) or the European Commission, where CASPs facing discrimination from NCAs can report these issues without fear of further discrimination. This would help create a more transparent and fair regulatory environment, ensuring that cross-border services can thrive under MiCAR's intended framework.

The roundtable underscored the importance of ensuring that NCAs across the EU implement MiCAR uniformly, respecting the rights of CASPs to offer their services cross-border under Art. 65, while limiting intervention to product-specific issues under Art. 105.

Primary Calls to Action on NCA Intervention and Passporting under MiCAR
The primary calls to action based on the discussions are: • NCAs must respect the cross-border framework established under Art. 65 MiCAR, allowing CASPs to provide services in host Member States without unnecessary barriers or delays. • Product interventions under Art. 105 must be directed solely at crypto-assets or specific activities that pose a significant risk, not at CASPs in general. • The European Commission and ESAs should establish a whistleblowing channel for CASPs facing discrimination from NCAs, providing a safe mechanism for reporting regulatory overreach. • Ensure cooperation between NCAs is in line with MiCAR's goal of fostering cross-border growth and innovation, with no undue interference from host Member States.

4. Outsourcing to Non-EU/EEA Based Service Providers

Dr. Thomas Nägele's presentation focused on the challenges posed by Article 73 of MiCAR, which mandates that Crypto-Asset Service Providers (CASPs) remain fully responsible for meeting all regulatory obligations, even when outsourcing certain services. CASPs must ensure that outsourced services comply with the same regulatory standards as those performed in-house. This requirement effectively restricts outsourcing to entities that hold the same MiCAR license, thereby limiting outsourcing to service providers within the EU or EEA. Traditional outsourcing destinations, such as the U.S. or Switzerland, are off-limits for key services under MiCAR.

It was highlighted the practical difficulties this creates, particularly for Liechtenstein-based companies that have historically outsourced services to Switzerland. MiCAR does not include a "Safe Harbor" provision, unlike the General Data Protection Regulation (GDPR), which allows data transfers to third countries deemed adequate by the European Commission. Consequently, organisations relying on non-EU/EEA service providers will need to seek alternatives within the MiCAR framework once the regulation comes into force.

The Austrian Financial Market Authority (FMA) has provided some guidance on what constitutes outsourcing, particularly regarding custody and management of crypto assets. The FMA specifies that if a service provider controls private keys, manages seed or recovery phrases, or holds one of the signatures in a multisignature wallet, this would be considered outsourcing under MiCAR and require a license. The FMA further indicated that even managing offline wallets could trigger the need for a MiCAR license, depending on the level of control exerted by the service provider. The overarching principle is that the more control a service provider exerts over crypto assets, the more likely they are to require MiCAR licensure.

During the discussion, participants explored potential workarounds, including relocating Swiss employees to Liechtenstein or setting up technical infrastructure in Switzerland while keeping the keys with a Liechtenstein-based CASP. However, these options may not be viable for companies unwilling to take on key management responsibilities. Ultimately, the most feasible solution seems to be discontinuing outsourcing to third countries and shifting to EU or EEA partners that comply with MiCAR regulations, unless the services in question do not meet MiCAR's definition of outsourcing as interpreted by the FMA.

Primary Calls to Action for Outsourcing to Non-EU/EEA Based Service Providers
The primary calls to action based on the discussions are: ● **Clarify the Definition of Outsourcing:** Regulators should provide more specific guidelines on what constitutes outsourcing under MiCAR, particularly with respect to key management and control over crypto-assets. ● **Establish a "Safe Harbor" Equivalent:** Similar to the GDPR, MiCAR should introduce provisions that allow outsourcing to third-country service providers that meet comparable regulatory standards. ● **Explore Alternative Approaches for Third-Country Outsourcing:** Develop practical solutions, such as relocating employees or setting up hybrid models, that allow continued collaboration with non-EU/EEA providers while remaining compliant with MiCAR. ● **Provide Detailed Examples and Interpretations:** Regulators, such as the FMA, should continue to offer examples and case studies that clarify how different outsourcing arrangements are treated under MiCAR.

We thank all participants of the Zug roundtable for contributing to the discussion:

Alireza Siadat (thinkBLOCKtank), Alice Zhang (Q Development), Asim Soysal (21X), Christian Steiner (Bitpanda), Clara Guerra (Stabsstelle Finanzplatzinnovation & Digitalisierung), Gezime Shaquiri (Stabsstelle Finanzplatzinnovation & Digitalisierung), Greg Chew (QPQ), Heinz Konzett (Stabsstelle Finanzplatzinnovation & Digitalisierung), Johannes Wirtz (Bird&Bird), Jörn Erbguth, Mariana de la Roche (de la Roche Consulting), Marta Chavarria Romero (Spain Gov.), Martin Angerer (Uni. Liechtenstein), Miguel Vaz, Nina Gartmann (Celsion), Nina Siedler (Siedler Legal), Prof. Dr. Konstantina Papathanasiou, LL.M. (Uni. Liechtenstein), Ricardo Simoes (INATBA), Sidney Lukman (Stabsstelle Finanzplatzinnovation & Digitalisierung), Siegfrie Herzog, Sven Hildebrandt (Crypto Risk Metrics), Thomas Nägele (Nägele), and Victoria Vickery(Nägele).