GIURETA
Rivista di Diritto dell'Economia, dei Trasporti e dell'Ambiente
Vol. XXIII
2025

FINANCIAL INSTRUMENTS VS. CRYPTO ASSETS: ITALIAN LAW PERSPECTIVE [*]

Giorgio Mattarella [**]

SUMMARY: 1. How to distinguish between financial instruments and crypto-assets? – 2. Italian legal system and case law before MiCAR – 3. Crypto-assets and financial instruments in italian law after MiCAR – 4. How to fix MiCAR's downgrade in investor and market's protection.

1. – In order to distinguish between crypto-assets and financial instruments we should look at the ways member states implemented directive MiFID II, because, while some States used a closed list in order to define transferable securities, others used more generic definitions [1]. For instance, in France financial instruments are defined by a list [2], while instead in Germany,

[*] This text reproduces the paper on "Financial instruments vs crypto-assets. Italian law perspective" that was presented on 19th June 2025 at the online conference on "Drawing the line between MiFID and MiCAR – concepts of financial instruments and crypto-assets" organised by the Digital Law and Computational Legal Studies' Research Team and the Department of Commercial and Financial Law of the University of Opole, Poland.

[**] Fixed term tenure track researcher in Economic Law, University of Palermo, Department of Law.

[1] Esma, *Advice. Initial Coin Offerings and Crypto-Assets*, 9 January 2019 | ESMA50-157-1391, 4-5. For an overview on the distinction between *rules* and *standards* see A. Perrone, *Il diritto del mercato dei capitali*, Milano, 2016, 47 ss.; L. Kaplow, *Rules Versus Standards: An Economic Analysis*, in *42 Duke Law Journal,* 1992, 557 ss.; E. Posner, *Standards, Rules, and Social Norms*, in *21 Harvard Journal of Law and Public Policy 101*, 1997, 101 ss.; B. Schäfer, *Legal Rules and Standards*, in *German Working Papers in Law and Economics*, 2002, vol. 2, 1 ss.; on *rules* see C.R. Sunstein, *Problems with Rules*, in *83 California Law Review 953*, 1995, 955 ss.

[2] Art. L-211-1 *Code Monétaire et financier* in the first paragraph establish that «*Les instruments financiers sont les titres financiers et les contrats financiers*», and the second paragraph include among the *titres financiers* «1. *Les titres de capital émis par les sociétés par actions ; 2. Les titres de créance ; 3. Les parts ou actions d'organismes de placement collectif*». Even *contrats financiers*, «*également dénommés " instruments financiers à terme "*», are indicated in a closed manner by 3° paragraph as «*contrats à terme qui figurent sur une liste fixée par décret*»: see Autorité des Marchés Financiers, *Discussion paper*

Rivista di diritto dell'economia, dei trasporti e dell'ambiente, vol. XXIII – 2025
ISSN 1724-7322

Spain and Italy financial instrument's concept has some flexibility due to the flexibility of transferable securities notion [3].

The italian law definition of financial instrument is fundamental given that, according to italian legal scholars, MiCAR (reg. UE 2023/1114) defines its scope in the negative, without explaining what kinds of cryptoassets are not financial instruments [4].

After all, even antimoney laundering regulation in art. 1, n. 18) of directive 2018/843 that defines virtual currencies as «a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically» [5], gives a negative definition of virtual currency, because the ability to be transferred and stored electronically is not an exclusive

on initial coin offerings (ICOs), 2017, 7.

[3] The flexibility of italian concept of transferable security is supported by G. Gitti, *Emissione e circolazione di cripto attività tra tipicità e atipicità nei nuovi mercati finanziari*, in *Banca borsa*, 2020, 29 ss.; M. Fratini, *Prodotti finanziari, valori mobiliari e strumenti finanziari*, in *Il Testo Unico della Finanza*, a cura di Marco Fratini, Giorgio Gasparri, Torino, 2012, 16 ss.; cfr. Perrone, op. cit., 26-28. Contra V. V. Chionna, *Strumenti finanziari e prodotti finanziari nel diritto italiano*, in *Banca borsa*, 2011, 1 ss. In Spain *Ley 6/2023 de 17 de marzo, de los Mercados de Valores y de los Servicios de Inversión* defines "*valores negociables*" as «*cualquier derecho de contenido patrimonial, cualquiera que sea su denominación, que, por su configuración jurídica propia y régimen de transmisión, sea susceptible de tráfico generalizado e impersonal en un mercado financiero*». In Germany § 1, paragraph 11, of German banking law (*Kreditwesengesetz*) consider financial instruments shares in joint stock companies and in other companies if equal to shares, and the other means of investment listed in § 1 par. 2 of law on capital investments.

[4] On the topic see F. Annunziata, *Tassonomia delle cripto attività e mercato dei capitali. Primi spunti per un confronto USA-UE*, in *Giur. comm*., 2024, 903 ss.; European Central Bank, *Parere della Banca Centrale Europea del 19 febbraio 2021 su una proposta di regolamento del Parlamento europeo e del Consiglio relativo ai mercati delle cripto-attività e che modifica la direttiva (UE) 2019/1937 (CON/2021/4) (2021/C 152/01)*, 1 ss; F. Annunziata, *Verso una disciplina europea delle cripto-attività. Riflessioni a margine della recente proposta della Commissione UE, Ottobre 2020*, in www.dirittobancario.it, 12-13

[5] Lo rileva Cass., 22 novembre 2023, n. 44378, in *Giur. comm*., 2023, 957, con nota di G. Schneider, *Le cripto-attività quali prodotti finanziari: il fine giustifica i mezzi?*, ivi, 959 ss. Directive 2018/843/UE was implemented in italian law by d.lgs. 125/2019, that is analysed by N. Mainieri, *Quinta direttiva europea antiriciclaggio: il decreto di recepimento 125/2019 entra in vigore*, Novembre 2019, 1 ss., in www.dirittobancario.it.

feature of virtual currencies, given that also electronic money can be transferred and stored electronically.

It's so hard to distinguish ex ante cripto-assets and financial instrument that this task is entrusted by MiCAR to the issuer itself, who must include in the White Paper a statement that the offer of crypto-assets does not constitute an offer or solicitation to purchase financial instruments.

One could question the efficiency of this choice, because the lack of guidelines for issuers and the harshness of administrative and criminal sanctions – in case the issuer doesn't issue prospectus for what ex post is assessed as an offer of financial instruments –could create an overdeterrence effect, inducing issuer to qualify every asset as financial instrument and to public a prospectus, eventually damaging the growth of crypto-assets market.

Focusing on the italian legal system, the issue of the distinction between cryptoassets and financial instrument has already been debated by legal scholars. Unfortunately, given that all the provisions of MiCAR apply only by 30th december 2024, at the moment, for all we know, there isn't italian case law or decisions of ADR mechanisms who had to deal with the distinction between the scopes of MiCAR and MiFID II.

After all, due to the great burden of litigation in Italy, we can assume that the first case law will arrive in some years; as a consequence, the debate between italian legal scholars becomes more important.

Some days ago the italian supervisory authority (Consob) decided to comply with the Esma Guidelines on the conditions and criteria for the qualification of crypto assets as financial instruments [6].

As a consequence, what is interesting on italian legal system are its specific features, such as case law and Consob guidelines issued before the introduction of MiCAR and the debate among scholars.

2. – The main italian law on financial instruments is Testo Unico della Finanza, issued in 1998, which regulate the various forms of investments in the capital market trying to balance certainty of rules for issuers and firms

[6] ESMA, *Orientamenti sulle condizioni e sui criteri per la qualificazione delle cripto-attività come strumenti finanziari, 19/03/2025 ESMA75453128700-1323*, 3 ss. Consob, Avviso del 3 giugno 2025, *Avviso in merito agli Orientamenti ESMA sulle condizioni e sui criteri per la qualificazione delle cripto-attività come strumenti finanziari,* in https://www.consob.it/web/area-pubblica/-/avviso-consob-del-3-giugno-2025.

with a legal system that keeps the pace of financial market's innovations.

The first need is adressed by financial instrument's notion contained in Annex I, section C, TUF, which is caracterised by a closed list of assets that has some flexibility. Italian Parliament, in short, has adopted to the letter the definition of financial instrument contained in Annex I, section C, of MiFID II, as usually happens with european directives.

The second need is adressed by art. 1, par. 1, lett. u), tuf, which provides the notion of financial product in the form of a general clause or, as common law scholars would say, of a standard.

According to the majority of italian legal scholars, financial instrument's category refers to a subset of financial products that possess two additional requirements, such as standardization and negotiability in the capital market, as shown by the list of financial instruments contained in annex I, section C, TUF, such as transferable securities, money market instruments and shares of collective investment schemes [7].

The definitions of transferable securities and money market instruments refer to «categories of securities» and to «categories of instruments» that are «traded» in the capital market and in the money market.

The mentions of the categories led legal scholars to derive the mandatory standardization of financial instruments, which means that financial instruments should give the same rights and duties and should create relationships with a mass of investors [8].

Equality of right and duties concern categories of financial instruments and not all the financial instruments issued by a firm, as suggested by Civil Code provisions on shares (art. 2346 ss. c.c.), which are a subcategory of transferable securities (and so of financial instruments) and are classified in preferred shares, savings shares and ordinary shares, all giving different rights and duties [9].

According tho the scholars, in order to be negotiable the financial instrument should be able to be traded in the capital market in a broad sense, be-

[7] Fratini, Prodotti finanziari, valori mobiliari, cit., 16 ss.; Chionna, Strumenti finanziari, cit., 1 ss.; L. Gualandi, voce *Valori mobiliari*, in *Dig. disc. priv., sez. comm*., Milano, 1999, 388 ss. Contra M. Onza, L. Salamone, *Prodotti, strumenti finanziari, valori mobiliari*, in *Banca borsa*, 2009, 569.

[8] Chionna, op. cit., 3 ss.; Gualandi, op. cit., 388 ss.; Annunziata, *Tassonomia delle cripto attività*, op. cit., 919; Onza, Salamone, *Prodotti, strumenti finanziari*, cit., 574-576.

[9] See O. Cagnasso, voce *Azioni di società*, in *Dig. disc. priv., sez. comm*., vol. II, Torino, 1987, 133 ss.

cause capital market is understood as the place where supply and demand meet, therefore it doesn't match with the definitions of trading venues provided by art. 4, par. 1, nn. 21), 22), 23)MiFID II (regulated market, multilateral trading facility, organised trading facility) [10].

According to Testo Unico della Finanza, financial products are every financial instruments and every other form of financial investment. As a consequence, the boundaries of the category of financial product, that includes the notion of financial instrument, are not determined but require an interpretation case-by-case of the single asset.

The category of financial product is very similar to that of investment contract created by US case-law [11]. According to the Howey Test, since the case SEC c/ Howey Co., in 328 U.S. 293, 1946, an asset should possess four requirement in order to be qualified as an investment contract and regulated by the financial law (the *Securities Act*): (a) an investment of money (b) an operation that involve a mass of people (c) the expectation of a profit (d) an activity of third parties on which such profit depends [12].

The similarity between investment contracts and financial products is confirmed by the requirements of financial investment provided by the italian supervisory authority, Consob, that qualify financial products every investment's proposal that requires a sum of money, an expectation of profit and a risk of losing all the money [13].

A "financial product", therefore, requires that the investment has "financial nature" and to distinguish between the latter and the investment with a consumption aim: while in the first case the investor transfer his money due to a promise of gain, in the second case the money is transferred in order to enjoy a good or a service [14].

[10] Fratini, op. cit., 28; Annunziata, *Tassonomia delle cripto attività*, op. cit., 919-920; Onza, Salamone, op. cit., 574 ss.; cfr. M. Cian, *La nozione di cripto attività nella prospettiva del MiCAR. Dallo strumento finanziario al token, e ritorno*, in *Oss. dir. civ. comm*., 2022, 64-65.

[11] Chionna, op. cit., 6-7.

[12] Chionna, op. cit., 6-7; v. Annunziata, *Tassonomia delle cripto attività*, op. cit., 907 ss. On the Securities Act see E. Keller, *Introductory Comment: A Historical Introduction to the Securities Act of 1933 and the Securities Exchange Act of 1934*, in *Ohio State Law Journal 49*, 1988, 329 ss.

[13] Consob, Comunicazione n. 0385340 del 28 aprile 2020, 2, in https://www.consob.it/documents/1912911/1979253/c0385340.pdf/247e8990-af6f-7da7-1752-036b74b27753; v. Consob, Delibera 25 luglio 2024, n. 23221, in *Soc.*, 2025, 480.

[14]Consob, Comunicazione n. 0385340 del 28 aprile 2020,(nt. 13), 2.

Given the flexibility of the category, is not a surprise that the new crypto-assets were usually defined as financial products by the legal scholars and the italian case-law before the introduction of MiCAR [15].

Even though the boundaries of financial instrument have some flexibility, given that the definition of transferable securities requires a similarity between a given asset and securities or other debt instruments, in order to qualify as transferable security an asset the latter must entail a sharing of the firm's risk or a loan with the duty to repay the credit. As a consequence, crypto-assets issued in a decentralized way without a firm, such as Bitcoin, can't be considered a transferable security.

The notion of transferable security is caracterised by a given degree of flexibility since d.l. 95/1974 [16], that, in order to create a regulation always updated and "future-proof", in art. 18 provided that the pubblic offer of transferable securities or of other means of investments had to be previously transmitted to Consob with the features of the offer, and that only italian joint stock companies, foreign companies and public entities were allowed to offer to the public transferable securities other than shares and bonds.

Notwithstanding the lack of legal definition of bonds into the italian legal system, they can be considered a subcategory of the loan contract able to be transfered and negotiated, given that the firm, as the borrower, promise to repay the loan with the payment of an interest [17].

Securities equals to shares, instead, create a transfer of money whose function is similar to the contribution in firm's fund by the shareholder, with the aim to exercise a common economic activity and to share profits (art. 2247 c.c.), but with the risk of losing capital due to issuer insolvency risk [18].

Nevertheless, actually there aren't opinions or guidelines of the italian case law that distinguish between crypto-assets and financial instruments. In

[15] For instance P. Carriere, *Le "criptovalute" sotto la luce delle nostrane categorie giuridiche di "strumenti finanziari", "valori mobiliari" e "prodotti finanziari"; tra tradizione e innovazione*, in *Riv. dir. banc*., 2019, 154 ss.; G. Gasparri, *Riflessioni sulla natura giuridica del bitcoin tra aspetti strutturali e profili funzionali*, in *Dialoghi di Diritto dell'Economia*, Dicembre 2021, 27 ss.

[16] Converted with law 216/1974.

[17] See Perrone, Il diritto del mercato, cit., 21; see G. F. Campobasso, voce *Obbligazioni di società*, in *Dig. disc. priv., sez. comm*, X, Torino, 1994, 280 ss.

[18] Perrone, op. cit., 21. See art. 2346 c.c., that defines the share in term of the representation of participation in firm, interpreted by scholars as the group of rights and duties linked to social managamente: see Cagnasso, op. cit., 133 ss.

fact, the main concern of italian case law that has dealt with the distribution of crypto-assetts was to apply the rules of transparency provided by Testo Unico della Finanza in case of offer of financial products, in order to remedy to the asymmetric distribution of informations between investors and firms.

As a consequence, italian case law mainly qualified crypto-assets as financial products, even though in many cases qualified them both as financial products and as financial instruments and overlooked the different requirements provided by Testo Unico della Finanza for the two kinds of assets [19].

As an example, in one of the first rulings on the pubblic offer of crypto-currencies, which were bought by investors in exchange of currency, the Tribunal of Verona qualified those assets as financial instruments [20], taking for granted the existence of the requirements of standardization and negotiability required by italian law for an asset to be defined financial instrument.

In a judgement of 2022 regarding the possibile violation of article 166 TUF, the italian Suprem Court (Corte di Cassazione) qualified tokens that gave the right to enjoy a platform's service as "investement instruments" consisting of financial products, even tough in ruling's reasoning the Suprem Court also talked about financial instruments [21].

Moreover, in a judgement of 2020, the italian Suprem Court established that bitcoin's offer advertised as an investment's proposal is regulated by art. 91 tuf and, as a consequence, a prospectus must be published before the offer. In this judgement the Suprem Court provided that Bitcoin isn't a payment's instrument but didn't explain if the latter are financial instruments or financial products, even though according to some scholars the ruling take for granted that bitcoin is a financial product [22].

As a consequence, actually there is a total lack of italian case law that dis-

[19] The opinion is expressed by G. Schneider, *Le cripto-attività quali prodotti finanziari: il fine giustifica i mezzi?* in *Giur. comm*., 2023, 963, talking about Cass., 22-11-2023, n. 44378, ivi and in *One Legale*; see also Trib. Verona, 24 gennaio 2017, n. 195, in *One Legale*, that considered cripto-currency equal to a financial instrument.

[20] Trib. Verona, 24 gennaio 2017, n. 195, cit.

[21] Cass., 22-11-2023, n. 44378, cit.

[22] Cass. pen., 25-09-2020, n. 26807, in *Giur, It.*, 2021, 2224 ss., commented by R. M. Vadalà, *La dimensione finanziaria delle valute virtuali. Profili assiologici di tutela penale*, ivi, 2225 ss. R. Lener, *Criptoattività e cripto valute alla luce degli ultimi orientamenti comunitari*, in *Giur. comm*., 2023, 379-380, argues that the ruling considered the pubblic offer of crypto-assets as an offer of financial products regulated by art. 1, comma 1, lett. u),tuf.

tinguish between crypto-assets with an investment's function and financial instruments.

After all, given the hesitation of italian parliament in regulating crypto-assets, there was the need to avoid to jeopardize the capital market and the protection of investors. If we consider the broad scope of the category of financial product, the use of the latter made judges able to apply the regulation of Testo Unico della Finanza on prospectus (art. 93-bis ss. TUF), that requires supervisory authority's supervision and authorization before the public offer of financial products, without verify the additional requirements – standardization and negotiability – that are needed for an asset to be qualified as financial instruments.

As a consequence, the protection of trust in the financial system, the protection of investors and of market's stability didn't require a new regulation and it didn't matters the difference between crypto-assets and financial instruments.

These could be one of the reasons that, apart legislative procedure's slowness [23] that isn't able to keep the pace of the evolution of financial markets, led italian Parliament to avoid to regulate crypto-assets.

The first regulations of crypto-assets, therefore, were mainly represented by the implementation of european directive. This was the case of art. 1, comma 2, lett. qq), d.lgs. 231/2007, that implemented the AML directive 2018/843/UE and applied anti-money laundering regulations to crypto-assets as well. The italian implementation of the AML directive, infact, only added that crypto-currencies can also have an investment function [24].

The lack of an italian regulation of crypto-assets was also caused by the reluctance of other public bodies with regulatory powers, which could have easily and quickly extended to financial crypto-assets the regulation of financial instruments without the intervention of the Italian Parliament, avoiding the long times of the ordinary legislative procedure.

Just think of the failure to exercise the power that art. 18, comma 5, tuf, give to the Ministry of Economy and Finance (MEF) to introduce by regulation new categories of financial instruments, new activities and investment services.

[23] This slowness has led to an abuse of decrees by governments, which was criticized by italian Constitutional Court: see Corte Cost., 17-24 ottobre 1996, n. 360, in www.cortecostituzionale.it.

[24] According to Mainieri, *Quinta direttiva europea,* cit., 9-10, the article concerns hybrid tokens issued with ICO'S, that, after the initial investment's part, change their function and become payment's instruments.

Such provision was introduced by d.lgs. 164/2007 with the aim to keep the pace of financial market's evolution, given that the list of financial instruments is essentially closed even though it has some flexibility.

Unfortunately this power was rarely used by MEF and never used to regulate crypto-assets in particular; we can assume that one of the reasons is the need of the italian legal system to comply with european investment services regulation contained in MiFID II, which prevails over every national regulation on the matter.

So, before MiCAR the only guideline to distinguish between crypto-assets and financial instruments was provided by Consob, who, many years before the DLT Pilot Regime, established that a financial instrument issued and traded with distributed ledger technologies is nevertheless regulated by MiFID II, and established also that some token could lack the requirement of negotiability in capital market [25].

3. – After the introduction of MiCAR the issue of the difference between crypto-assets and financial instruments matters. As we told before, given that italian case law before MiCAR qualified as financial product most of crypto-assets, the latter were regulated by the same rules that regulate the pubblic offer of financial instruments, due to the lack of great differences between Prospectus Regulation (reg. 2017/1129/UE) and artt. 91 ss. TUF [26].

Quite the opposite, now MiCAR regulates the public offer of crypto-assets with rules that are different from those regulating financial instruments public offer.

Apart crypto-assets that are payment instruments, such as e-money tokens and asset referenced tokens, the others crypto-assets (artt. 6 ss. MiCAR) can be offered to the public without a previous supervisory authority's approval of the White Paper, while according to reg. 2017/1129/UE it is mandatory supervisory authority's approval of prospectus before financial instruments are offered to the public.

[25] Consob, *Le offerte iniziali e gli scambi di cripto-attività. Rapporto finale 2 gennaio 2020*, 1 ss, in https://www.consob.it/documents/1912911/1938506/ICOs_rapp_fin_20200102.pdf/e83b06b8-6e7 a-2dd7-9fe5-f742e9f2621e.

[26] See E. Ginevra, *Le sedi e le operazioni di mercato*, in *Diritto commerciale. IV. Diritto del sistema finanziario*, edited by M. Cian, Torino, 2024, 314-316.

As a consequence, there is a regulatory arbitrage that allows different regulations of the public offers of assets depending on the qualification of the latter.

First of all, from the definitions of shares and bonds previously provided we can argue that some crypto-assets can't be considered financial instruments due to their structure. Just think of crypto-assets issued in a decentralized form, such as Bitcoin, which, given the lack of an issuer, can't be considered financial instruments because they don't create a credit relationship between a lender and a borrower, nor they represent the share of a company [27].

Quite the opposite, in order to qualify a crypto-asset issued in a centralized form as a financial instrument, the first step is to look at its function and to assess if the asset create a financial relationship that possess all the requirements established by italian case law and Consob.

As an example, e-money tokens don't have an investment function because art. 48, par. 2, MiCAR consider such tokens equal to electronic money, token holders are not at risk of losing their money because they can redeem tokens at any time and at par value according to art. 49, par. 2 and 4, and the prohibition of granting interest provided by art. 50, MiCAR rule out any possible remuneration or benefit related to the length of time during which a holder holds e-money token [28].

However, the assessment of a token's investment function is not enough to draw a line between tokens regulated by MiCAR and tokens regulated by MiFID II. Infact, italian scholars still debate if utility token and in general cripto-assets other than asset referenced tokens and e-money tokens could have an investment function.

[27] See Carriere, op. cit., 143. According to F. Annunziata, *An Overview of the Markets in Crypto-Assets Regulation (MiCAR), EBI Working Paper Series*, 2023-n. 158, 11/12/2023, 15 ss., the lack of a recognizable issuer is an obstacle for the regulation of Bitcoin by MiCAR. See. F. Mattassoglio, *Come intelligenza artificiale e DLT stanno trasformando lo strumento monetario*, Torino, 2022, 52 ss., who for the same reason provided that the MiCAR Proposal didn't apply to Bitcoin.

[28] Legal scholars argue that mandatory White Paper's publication and approval in order to offer *e-money tokens* is a disproportionate duty that will improve compliance's costs: on the MiCAR Proposal see F. Ciraolo, *La disciplina degli* e-money tokens *tra proposta di Regolamento MiCA e normativa sui servizi di pagamento. Problematiche regolatorie e possibili soluzioni*, in *Riv. reg. merc*., 2022, 258-259; see also R. Motroni, *I pagamenti non monetari nella finanza digitale europea. La prospettiva italiana*, Bari, 2023, 168; G. Mattarella, *La regolazione delle monete digitali pubbliche e private tra mercato unico digitale e normative settoriali*, Torino, 2024, 116 ss.

Distinguished scholars argue that utility token are not financial instrument because they are regulated by MiCAR, nevertheless if they are traded in capital markets, their value fluctuate and token holders can profit from buying and selling them, those tokens should be regulated by MiFID II as financial instruments [29]; negotiability is considered as a proof of the investment function of the token, even though according to other scholars this statement is valid only for hybrid utility tokens [30].

However, it is worth noting that the possibility to trade a token in the capital market and the possibility to profit from the difference between purchase and selling prices (arbitrage), are not enough to make a token an investment tool according to italian law nor to make it a financial instrument.

First of all, usually – even though not always, as we will show – all the tokens are negotiable and MiCAR in many provisions regulate negotiable tokens, which of course are not considered financial instruments, given that according to art. 2, par. 4, MiCAR, the latter regulation applies only to crypto-assets not yet regulated by european law [31].

As an example, art. 3, par. 1, n. 18, MiCAR gives the definition of trading platform for crypto-assets, showing that the possibility to sell the latter in a multilateral system by exchanging crypto-assets for funds or by the exchange of crypto-assets for other crypto-assets doesn't make the tokens financial instruments.

Secondly, every digital or physical good or commodity can be negotiable in a secondary market and his value can fluctuate between the moment of purchase and the moment of selling; nevertheless not every good with these two features can be considered an investment's tool.

[29] Lener, *Criptoattività e cripto valute alla luce degli ultimi orientamenti comunitari*, cit., 382; see M. De Mari, *Utility token*, in *Orizzonti del Diritto Commerciale*, 2024, 918 ss.; cfr. F. Annunziata, *Speak, if you can: what are you? An alternative approach to the qualification of tokens and initial coin offerings, Bocconi Legal Studies Research Paper Series*, 2019, 7 and 45 ss., who infers token's nature and the applicable law from token's negotiability on platforms, and so argue that negotiable tokens are regulated by MiFID II.

[30] F. Annunziata, *Verso una disciplina europea delle cripto-attività. Riflessioni a margine della recente proposta della Commissione UE, Ottobre 2020*, 7 ss., in www.dirittobancario.it; M. De Mari, *Le cripto-attività nella disciplina MiCAr e la finanziarietà delle "cripto-attività non finanziarie"*, in *Dialoghi di Diritto dell'Economia*, Dicembre 2023, 1 ss., spec. 21 ss.

[31] D. Sarti, *La funzione non finanziaria dei token MiCAR*, in *Orizzonti del Diritto Commerciale*, 2024, 794 ss. and notes 10 and 63.

Just think of internet websites or platforms that allow to trade goods such as luxury watches or diamonds, usually bought with the aim to profit from their value's improvement after the purchase.

However, in these contracts the aim to invest still remain an individual purpose that doesn't matter to private law, because the objective function of the contracts, both in the social economic sense and in the individual economic sense [32], is to exchange money for goods in order to enjoy the latter.

As a consequence, the structure of these contracts lacks of two elements of financial investment.

Firstly, a real profit's expectation would require a promise of gain by a third party, while, instead, in these contracts a gain could be obtained only if the buyer decide to sell the goods; however, the selling would not be part of the same financial bargain. Secondly, the contracts lack also the risk of losing all the capital, given that the buyers still own the goods.

Fluctuation of goods'value, be they digital or physical, cannot in itself make them financial products, otherwise every good could be considered a financial product, given that in every contract there is the risk of fluctuations in goods'value due to inflation [33].

Fluctuation in good's value is, as Rosario Nicolò would say, a form of uncertainty relating to the economic outcome of the contract which remain outside the contract [34]. According to Nicolò, the buyer of the good will make a good deal if demand for the good in the market will increase, while he will make a bad deal if demand for the good will decrease [35]; however, as Nicolò argue, this kind of uncertainty is not part of the contract [36].

After all, if negotiability and fluctuation of value were able to make every good a financial product, financial regulation and Testo Unico della Finanza would have a scope without boundaries: quite the contrary, private law regulation provided by italian Civil Code would always be ruled out (just think

[32] On the topic see M. Barcellona, *Della causa. Il contratto e la circolazione della ricchezza*, Padova, 2015, 1 ss., spec. 193 ss.; see. V. Roppo, *Il contratto*, in *Tratt. dir. priv.,* directed by G.Iudica-P. Zatti, Milano, 2011, 341 ss.

[33] See. V. Roppo, op. cit., 954.; see D. Sarti, op. cit, 794 ss.

[34] R. Nicolò, voce *Alea*, in *Enc. dir.*, II, Milano, 1958, 1025; see G. Scalfi, voce *Alea*, in *Dig. disc. priv., sez. civ.*, Torino, 1987, 253 ss.

[35] R. Nicolò, op. cit., 1025.

[36] R. Nicolò, op. cit., 1025.

of the provisions on purchase contracts). As a consequence, a sectoral regulation would become the general law of contracts and negative externalities would be produced at macro-economic level, such as an increase in transaction and compliance costs due to the enlargement of regulated activities.

It is worth noting that italian case law provided that the purchase of diamonds is not regulated by Testo Unico della Finanza, unless the purchase is linked to a more complex financial deal [37].

An example of such a deal would be a purchase of a good linked to another contract that require the management of a capital by a third party and a promise of gain.

For instance, Corte di Cassazione established that the purchase of artworks below the list price with the right to resell them at list price is a financial product and not a simple purchase, because it is caractherised by an investment of money, a promise of a gain and the seller's solvency risk [38].

Moreover, in a Comunication of 2013 regarding the purchase of diamonds Consob established that the increase of good's value over time due to the change in market demand isn't in itself a financial gain, because a financial gain require also the promise, since the begin of the contract, of a remuneration related to the lenght of time during which the buyer holds the good [39].

The simple purchase of a good or of a token, therefore, doesn't create a financial relationship because the latter require a deal that start and ends with the payment of money and require that the investment purpose is stated in a contract clause, while instead a simple purchase end with the exchange of money and goods (or tokens) without any management of money by third parties [40].

A profit could only be gained reselling the good or the token with a second purchase agreement that isn't linked to the first one.

As a consequence, negotiability and improvement of value cannot in itself make tokens financial products or financial instruments, even though they are issued and transfered by distributed ledger technologies; otherwise it

[37] Trib. Verona, 23 maggio 2019, in *One Legale*.

[38] Cass., 12-03-2018, n. 5911, in *One Legale*.

[39] Consob, Comunicazione n. DTC/13038246 of 6th may 2013. The same opinion is supported by Gasparri, op. cit., 27 ss.

[40] See Gasparri, op. cit., 27 ss.; D. Sarti, op. cit., 795 ss.; cfr. P. Ferro Luzzi, *Attività e «prodotti» finanziari*, in *Riv. dir. civ.*, 2010, 133 ss.

would be a violation of technology neutrality principle provided by recital 9 of MiCAR, even though MiCAR doesn't take into account this principle when regulating e-money tokens [41].

Instead, an utility token that is negotiable and that can improve its value can be considered a financial product or a financial instrument according to italian law when its purchase is part of a more complex deal, that give to token holder a promise of gain or benefit.

This opinion is supported by a prohibition to advertise a pubblic offer of crypto-currencies issued by Consob in 2017 pursuant art. 101, comma 4, lett. c), tuf. Consob considered that offer as an offer of financial products, but the financial feature of the deal was infered not in the purchase in itself of crypto-currencies, but in the firm's promise to redeem regularly crypto-currencies at an increased price of an half and in the promise, linked to the purchase of some of the crypto-currencies, to share firm's profits [42].

After all, just think that the financial component of shares and bonds lies in the two opposite money flows, at the begin and at the end, as Ferro Luzzi would say [43], because surplus unit – the shareholder or the lender – transfer money in order to receive a future gain, that is represented by the right to firm's profit (art. 2350 c.c.) or in the right to earn an interest (art. 2411 c.c.).

Even though negotiability in capital markets doesn't make crypto-assets in itself financial instruments, it doesn't mean that MiCAR's aim is to regulate only non financial tokens [44], because there are proofs in many MiCAR provisions that indicate that MiCAR's tokens can also have an investment function [45].

[41] Annunziata, *An Overview of the Markets in Crypto-Assets Regulation,* op. cit., 19-20; G. Mattarella, *La regolazione delle monete digitali*, op. cit., 118 ss; see Motroni, op. cit., 168; on MiCAR's proposal see Ciraolo, op. cit., 258-259.

[42] Consob, delibera 20th april 2017 n. 19968, in www.dirittobancario.it.

[43] Ferro Luzzi, op. cit., 133 ss.

[44] At the time of MiCAR'S Proposal, some scholars believed MiCAR regulated only non financial tokens: this opinion was supported by Cian, *La nozione di cripto attività nella prospettiva del MiCAR. Dallo strumento finanziario al token, e ritorno*, in *Osservatorio del diritto civile e commerciale*, 2022, 60; R. Lener, S. Furnari, *Cripto-attività: prime riflessioni sulla proposta della Commissione europea. Nasce una nuova disciplina dei servizi finanziari "crittografati*, Ottobre 2020, 3 ss., in www.dirittobancario.it

[45] Mattarella, *La regolazione delle monete digitali*, op. cit., 106 ss.; G. Mattarella, *L'attività degli intermediari alla luce del processo di digitalizzazione della moneta; la mancanza di una normativa* cross-sectoral, in *Riv. dir. banc.*, 2023, 632 ss.

For instance, the regulation of crypto-assets services in art. 59 ss. MiCAR is equal to MiFID II regulation of investment services, and art. 60 explicitly states that these services are equal to services regulated by Annex A, point 1, MiFID II.

Moreover, crypto-assets portfolio management clearly has an investment function, as indicated by the definition of art. 3, par. 1, n. 25, MiCAR and by art. 81, par. 1, MiCAR, that, regulating the suitability test both in portfolio management and advice services, establish that service providers must take into account client's knowledge and experience in investing in crypto-assets and their investment objectives.

As a consequence, we can assume that some of MiCAR's crypto-assets – other than e-money token (EMT) and asset-referenced token (ART) – have the features (investment of money, expectation of gain and risk of losing capital [46]) that require a financial regulation to protect the investors and a financial authority's supervision; moreover, we have shown that a functional analysis isn't enough in order to distinguish between tokens and financial instruments.

Nevertheless, there should be some differences, given that according to art. 2, par. 4, lett. a), MiCAR only regulate tokens that are not financial instrument; so we argue that investment tokens regulated by MiCAR haven't the requirements of standardization and trasferability that would make them transferable securities [47].

This opinion is supported by technology neutrality principle provided by recital 9 of MiCAR and in particolar by art. 18, reg. UE 2022/858, that, amending transferable security definition in MiFID II, asks for an equal legal treatment between similar financial assets and doesn't take into account the different technology (distributed ledger technology) used to issue and transfer crypto-assets.

However, some scholars argue that a non negotiable financial token is only a theoretical hypotesis and that this kind of token shouldn't be regu-

[46] See Consob, delibera 6th dicember 2017, n. 20207, 1 ss., spec. 2, in www.dirittobancario.it; Consob, Comunicazione n. 0385340 28th april 2020, 1 ss., spec. 2, in https://www.consob.it/documents/1912911/1979253/c0385340.pdf/247e8990-af6f-7da7-1752-036b74b27753. See Cass. pen., 22-11-2022, n. 44378, op. cit.

[47] Mattarella, *La regolazione delle monete digitali*, cit, 106 ss.; Mattarella, *L'attività degli intermediari alla luce del processo di digitalizzazione della moneta*, op. cit., 632 ss.; Annunziata, *Tassonomia delle cripto attività*, op. cit., 924.

lated by MiCAR in order to respect technology neutrality principle [48].

About the first argument, an investment token couldn't be considered a financial instrument if the Initial Coin Offerings (ICO's) provided not only contractual prohibition to token's transferability to other holders (lock-up provision), that could be violated [49], but also implemented technology measures in order to link permanently token's rights to a given public key in the blockchain [50]; such a measures would make tokens non transferable and would make impossibile to consider them transferable securities and, finally, financial instruments [51].

According to art. 6, par. 5 lett. b), MiCAR this is not a theoretical hypotesis, because art. 6, par. 5, lett. b), regulating the White Paper for crypto-assets other than EMT and ART, establish that the White Paper must contain a statement that «the crypto-asset may not always be transferable».

Such a statement establish that the crypto-asset could be offered to the public but couldn't be negotiable in the capital market. Art. 6, par. 5, lett. b), prevent a possible objection to our argument supporting the regulation of investiment token by MiCAR: that objection consist in many MiCAR provisions, such those on the management of trading platform for crypto-assets (artt. 3, par. 1, n. 16, lett. b), MiCAR e 76 ss.), which show that negotiability is a normal feature of tokens [52]: normal but not mandatory according to art. 6, par. 5, lett. b).

About the second argument concerning the violation of technology neutrality principle, we can argue that a non negotiable token is different from a financial instrument and that, given that it cannot be purchased by another investor, it is less able to produce damages in the capital market [53].

Finally, EMT and ART can be distinguished from financial instruments

[48] D. Sarti, op. cit., 804, note 89.

[49] P. Hacker, C. Thomale, *Crypto-Securities Regulation: ICOs, Token Sales and Cryptocurrencies under EU Financial Law*, in *European Company and Financial Law Review*, 2018, 645 ss., spec. 663 ss.; the same argument is supported by P. Zickgraf, *Initial Coin Offerings (ICO's),* in *The Law of Crypto Assets*. *A Handbook*, edited by P. Maume, L. Maute, M. Fromberger, Munchen, 2022, 193.

[50] Hacker, Thomale, op. cit., 663 ss.; Zickgraf, op. cit., 193-194.

[51] Hacker, Thomale, op. cit., 663 ss.; Zickgraf, op. cit., 193-194; see Consob, *Le offerte iniziali e gli scambi di cripto-attività*, cit. 5.

[52] See De Mari, Le cripto-attività nella disciplina MiCAR, cit., 923-924, who believes that admission to trading's platforms is a normal feature of tokens.

[53] Mattarella, *La regolazione delle monete digitali*, (nt. 29), 114.

from their payment function; MiCAR's investment tokens can be distinguished from financial instrument because they lack transferability that is instead a typical feateres of the latter [54], therefore investment tokens overlap with financial products regulated in italian law by art. 1, comma 1, lett. u), TUF [55].

However, italian regulation of financial products can't apply to investment tokens because the matter is now entirely regulated by european law [56], as art. 39 of d.lgs. 129/2024 provides, but this provision, whose aim is to remove uncertainty, is redundant and tautological.

Tokens which are financial instruments instead are still regulated by italian law implementing MiFID II directive, according to the technology neutrality principle established by art. 31, d.l. 25/2023 [57], that implemented Reg. 858/2022/UE, that considered financial instruments those issued with DLT [58].

The assessment of the changes in italian legal system produced by MiCAR suggests that with the latter european law provided a regulation for utility tokens and ART, which were not previously regulated, and confirmed that EMT are regulated by electronic money regulation, even though introduced some exceptions to the latter, such as the mandatory publication of a White Paper.

However, MiCAR didn't fill an empty place in the regulation of investment tokens, but instead in some way provides less market and investors protection than the previous applicable italian law.

Just think that art. 8, par. 3, MiCAR doesn't require a prior approval by supervisory authority of the White Paper on crypto-assets othen than EMT and ART, because the White Paper has only to be notified to supervisory authority before publication according to art. 8, parr. 1-7.

[54] Mattarella, *La regolazione delle monete digitali*, cit., 106 ss.; Mattarella, *L'attività degli intermediari alla luce del processo di digitalizzazione della moneta*, cit., 632 ss.; Annunziata, *Tassonomia delle cripto attività*, cit., 924; Schneider, op. cit., 980 ss.

[55] Mattarella, *La regolazione delle monete digitali*, cit., 109 ss.; Mattarella, *L'attività degli intermediari alla luce del processo di digitalizzazione della moneta*, (nt. 45), 632 ss.; De Mari, *Utility token*, cit., 926 ss.; Schneider, op. cit., 980 ss.; Annunziata, *Tassonomia delle cripto attività,* cit., 924.

[56] Schneider, op. cit., 982; Annunziata, *Tassonomia delle cripto attività,* cit., 924; Mattarella, *La regolazione delle monete digitali*, cit., 114-115.

[57] Converted by law 10th may 2023, n. 52.

[58] See U. Malvagna, *Digital Securities: prime note sul decreto di attuazione del DLT PILOT*, 20 marzo 2023, in www.dirittobancario.it.; F. Annunziata, *I DLT financial instruments tra Legge Fintech, MiFID e T.U.F.: questioni classificatorie dei tokens*, in *Orizzonti del Diritto Commerciale*, 2024, 876 ss.

Moreover, just think that investment tokens are not regulated by reg. UE 2017/119 (c.d. Prospetti), because art. 2 of the latter, regulating the pubblic offer of securities that requires previous approval of supervisory authority, defines Securities «transferable securities as defined in point (44) of Article 4(1) of Directive 2014/65/EU with the exception of money market instruments as defined in point (17) of Article 4(1) of Directive 2014/65/EU, having a maturity of less than 12 months».

Despite the introduction of Prospectuses Regulation, italian regulation of pubblic offer of financial products other than Securities, provided by artt. 94-bis ss. tuf, has still remained in force, because the scopes of the two regulations don't overlap, given that european regulation apply only to financial instruments negotiable in financial markets and financial products instead are part of a greater category [59].

Italian regulation of financial products pubblic offering, contained in art. 94-bis, par. 1, tuf that require prospectuses prior approval, could have regulated investement tokens other than ART and EMT as well, but the mentioned art. 39 of d.lgs. 129/2024 excluded such possibility.

4. – The analysis of italian legal system has shown the incosistency of MiCAR, which is a regulation caracterised by a financial nature, given that it considers crypto-assets services equal to services relating to financial instruments regulated by MiFID II [60], even though at the same time it provides less investor and market's protection than previous national laws, as in the italian case.

A possible explanation could be traced in the will to make European Union one of the main global markets of crypto-assets and to support innovation [61].

A possible solution to balance the lack of prior approval of White Paper

[59] Ginevra, op. cit., 314-315. On the current european regulation on prospectuses and on the importance of information in capital markets see P. Lucantoni, *L'informazione da prospetto: struttura e funzione nel mercato regolato*, Milano, 2020, passim, spec. 41 ss.; on information in capital markets see also A. Perrone, *Informazione al mercato e tutele dell'investitore*, Milano, 2003, 2 ss.

[60] M. T. Paracampo, *I prestatori di servizi per le cripto attività. Tra mifidizzazione della Mica e tokenizzazione della Mifid*, Torino, 2023, passim, spec. 6 ss., talks about "mifidization" of MiCAR.

[61] In securities law stronger or lighter regulations have effects in the global competition between legal system: see E. C. Chafee, *Finishing the Race to the Bottom: An Argument for the Harmonization and Centralization of International Securities Law*, in *Seton Hall Law Review*, 2010, 1581 ss.

could be the power to prohibit or restrict the marketing, the distribution or the sale of crypto-assets, even on a precautionary basis, before crypto-assets circulates in the market, according to art. 105, par. 2, MiCAR; this power is given to competent authorities, which in Italy are Consob and Bank of Italy according to art. 8, par. 2 and 3, d.lgs. 129/2024.

Consob and the Bank of Italy could issue such measures after the assessment of the requirements provided by par. 1 of art. 105, such as the requirement, provided by letter b), that «existing regulatory requirements under Union law applicable to the crypto-asset or crypto-asset service concerned do not sufficiently address the risks referred to in point (a)»(risks for investor protection or threat to the integrity of markets) «and the issue would not be better addressed by improved supervision or enforcement of existing requirements».

As a consequence, lack of prior approval of White Paper by Consob and Bank of Italy could be one of the reasons, among the others provided by art. 105, to prohibit or restrict on a precautionary basis the marketing, distribution or selling of investment tokens.

The analysis has also shown that risks of regulatory void in the regulation of new means of investment, such as crypto-assets, can be prevented not only by linking them to traditional categories of law – that is most of legal scholars approach –, but instead creating since the beginning "future proof" regulations.

As a consequence, a good mix of standards and rules is the perfect regulatory choice to grasp the changing nature of crypto-assets. So it's not a suprise that, before MiCAR, was financial product's category the one most used and applied by italian case law in order to define crypto-assets.

It's not a surprise that in the United States it is the investment contract category, created by case law and that inspired italian's notion of financial product, that prevented regulatory voids and allowed to protect investors through the regulation by enforcement by Security and Exchange Commission (SEC) [62].

In general, combining standards and rules balance certainty of law allowed by rules with the need to avoid regulatory voids or a patchworked regulation [63].

[62] See C. Sandei, *La nuova disciplina europea delle cripto-attività: un passo avanti (e due indietro)?*, in *Orizzonti del Diritto Commerciale*, 2024, 861 ss.; see Annunziata, *Tassonomia delle cripto attività*, cit., 907 ss.

[63] Perrone, *Il diritto del mercato dei capitali*, cit., 47 ss.; see Kaplow, *Rules Versus Standards*, cit., 557 ss.

For instance, MiCAR, as the italian Testo Unico della Finanza, includes a mix of definitions expressed in a closed manner, like those of ART and EMT contained in numbers 6 and 7 of art. 3, par. 1, and an open-ended definition of crypto-assets in art. 3, par. 1, n. 5).

Supervisory authority could take advantage of the latter notion when exercising art. 105 MiCAR tools, in order to allow a regulation by enforcement by sectoral authorities with expertise, that seems the best way to regulate assets continuosly evolving and not easily classifiable by lawmakers.

After all, they were Consob's measures to stop or prohibit marketing or sale of financial products that allowed to learn when crypto-assets had an investment function before MiCAR's introduction [64].

[64] See notes 39 and 42.

Abstract

Il presente saggio ha lo scopo di delineare una chiara distinzione all'interno dell'ordinamento italiano tra le cripto-attività disciplinate dal regolamento UE 2023/1114 (c.d. MiCAR) e gli strumenti finanziari disciplinati dal d.lgs. 58/1998 (TUF). Preliminarmente il contributo analizza le pronunce della giurisprudenza italiana, la quale ha prevalentemente inquadrato le cripto-attività all'interno della generica categoria dei prodotti finanziari, comprensiva anche degli strumenti finanziari. Tuttavia dopo l'entrata in vigore del MiCAR, che si applica solo alle cripto-attività che non sono strumenti finanziari, la distinzione tra le due categorie è divenuta invece rilevante per comprendere l'ambito applicativo del regolamento UE 2023/1114.
Dopo avere analizzato criticamente alcuni orientamenti dottrinali, che individuano nella diversa funzione la linea di confine tra strumenti finanziari e cripto-attività, il contributo ritiene che il MiCAR si applichi anche alle cripto-attività aventi funzione di investimento che non abbiano tutte le caratteristiche degli strumenti finanziari. Conseguentemente il contributo, ritenendo che il MiCAR fornisca una protezione degli investitori inferiore rispetto al quadro normativo italiano previgente, individua alcuni strumenti di public enforcement idonei a rimediare a tale problema.

This paper's aim is to provide a clear distinction in the italian law between crypto-assets regulated by regulation UE 2023/1114 (MiCAR) and financial instruments regulated by d.lgs. 58/1998 (TUF). First of all the paper analyses italian case law, which has mainly classified crypto-assets within the financial products general category, that includes also financial instruments. However, after MiCAR'S entry into force, that applies only to crypto-assets other than financial instruments, the distinction between the two categories has become relevant in order to understand regulation 2023/1114 field of application. After a critical assessment of some scholars opinions, which identify the different function as the dividing line between financial instruments and crypto-assets, the contribution provides that MiCAR applies also to financial crypto-assets that don't have all financial instruments features. Believing that MiCAR provides less investor protection than the previous italian law, the contribution indicates some public enforcement's tools in order to solve this issue.