



dwf

ITU Meetup

Technical framework for
DLT regulation

Regulatory constraints

Dr. Nina-Luisa Siedler

Legal Jurisdiction

Law is regionally organized

Jurisdictions rule

*UN counts 193 member states,
covering 99% of global population*

Main three principles of UN Charter:

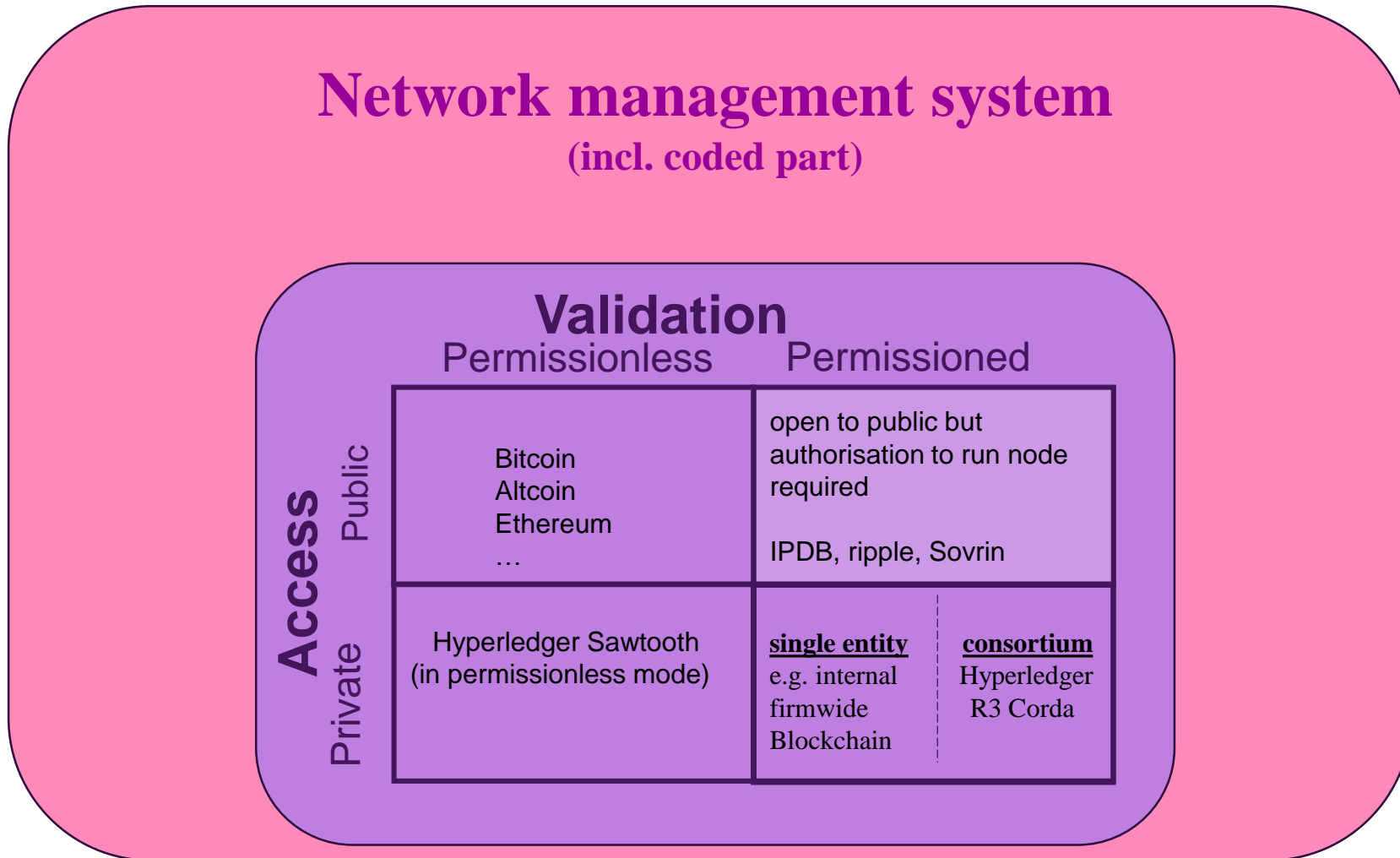
- ***Equality of states***
- ***Territorial sovereignty***
- ***Non-intervention***

Jurisdiction is territorial

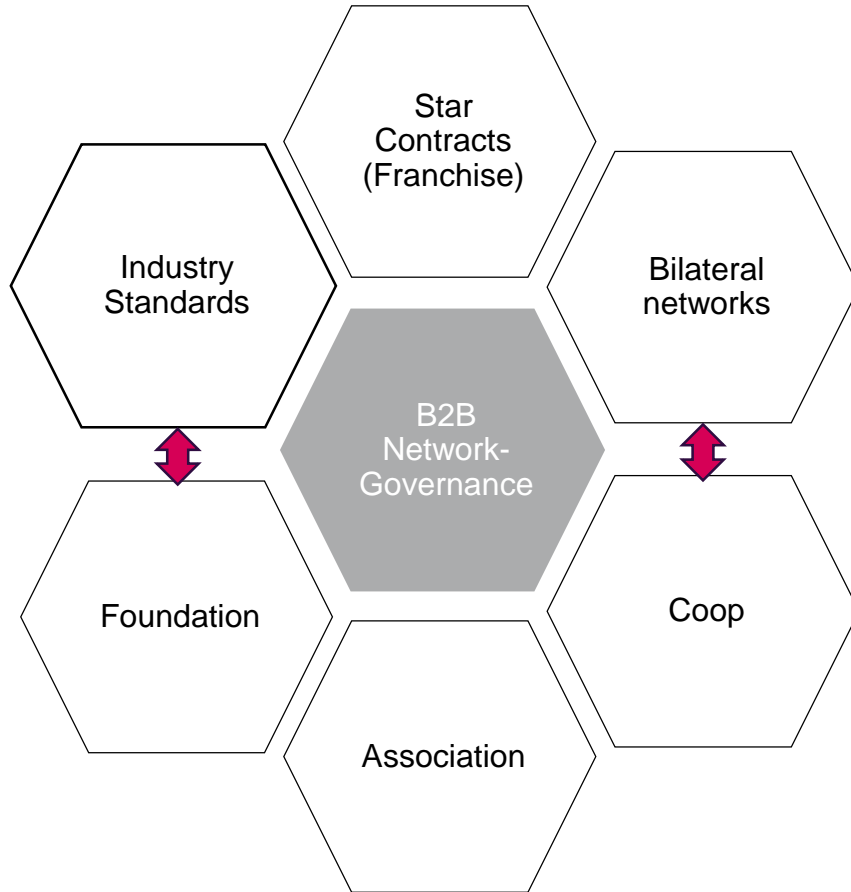
unless there is rule permitting this:

- *states may not exercise jurisdiction in territory of another state.*
- *states have wide discretion to determine jurisdiction over persons, property and acts within their own territory.*

Governance: decentralised?



Governance



Multiple parties collaborating to pursue a common goal easily create default entity by chance

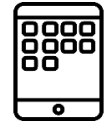
Alternatives

cooperation by agreeing on common standards, bilateral agreements



Foundation of a joint new legal person as governance vehikel

Network Structure



Application and Presentation Layer

Smart Contracts / Chaincode / DApps / User Interface



Network Layer

Peer-to-Peer (P2P)



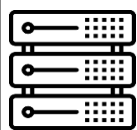
Consensus Layer

PoW / PoS / DPoS / PoET / PBFT



Data Layer

Data Structure / Digital Signature / Hash / Merkel Tree / Transaction

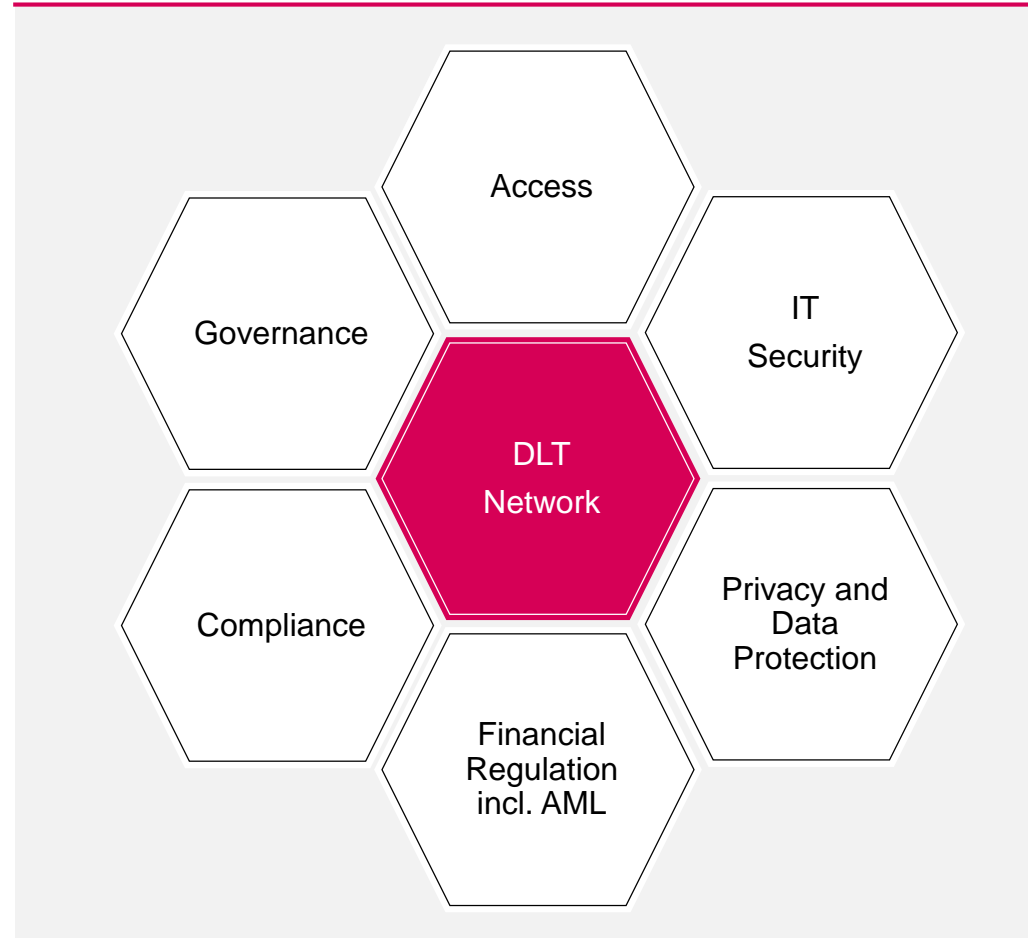


Hardware / Infrastructure Layer

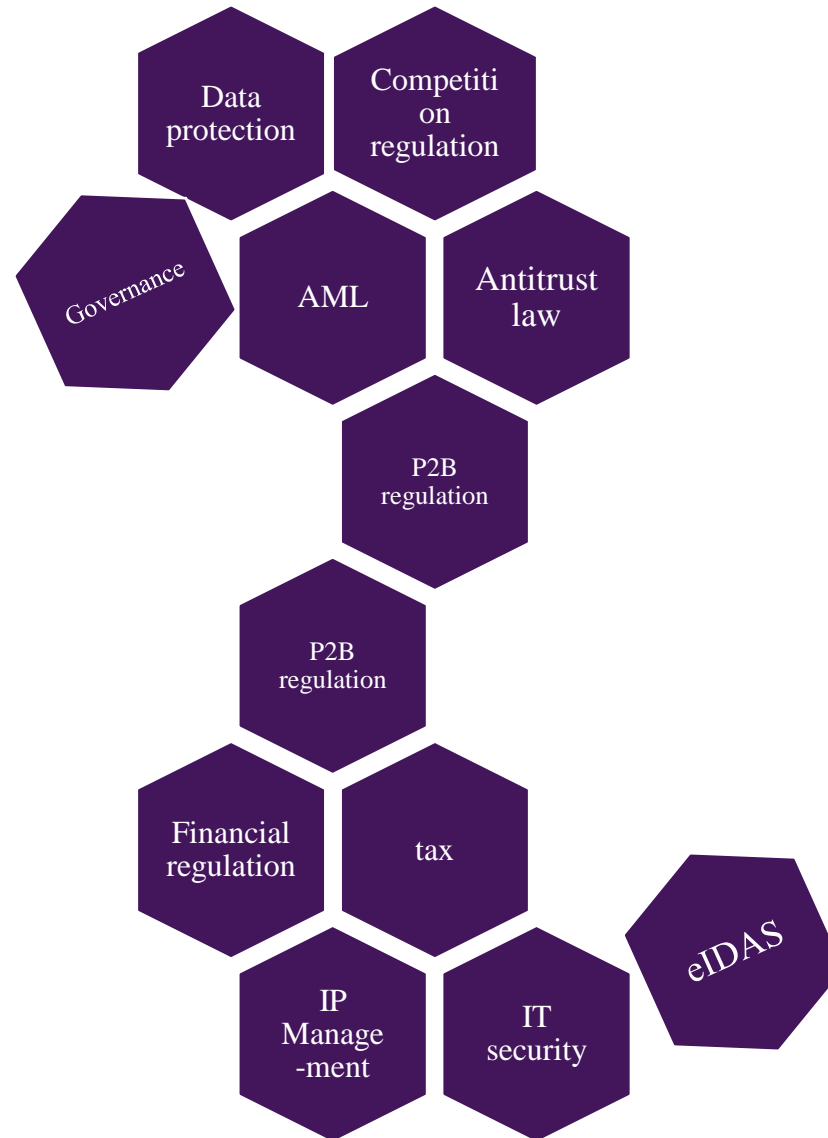
Virtual Machine / Containers / Services / Messaging

Further legal challenges

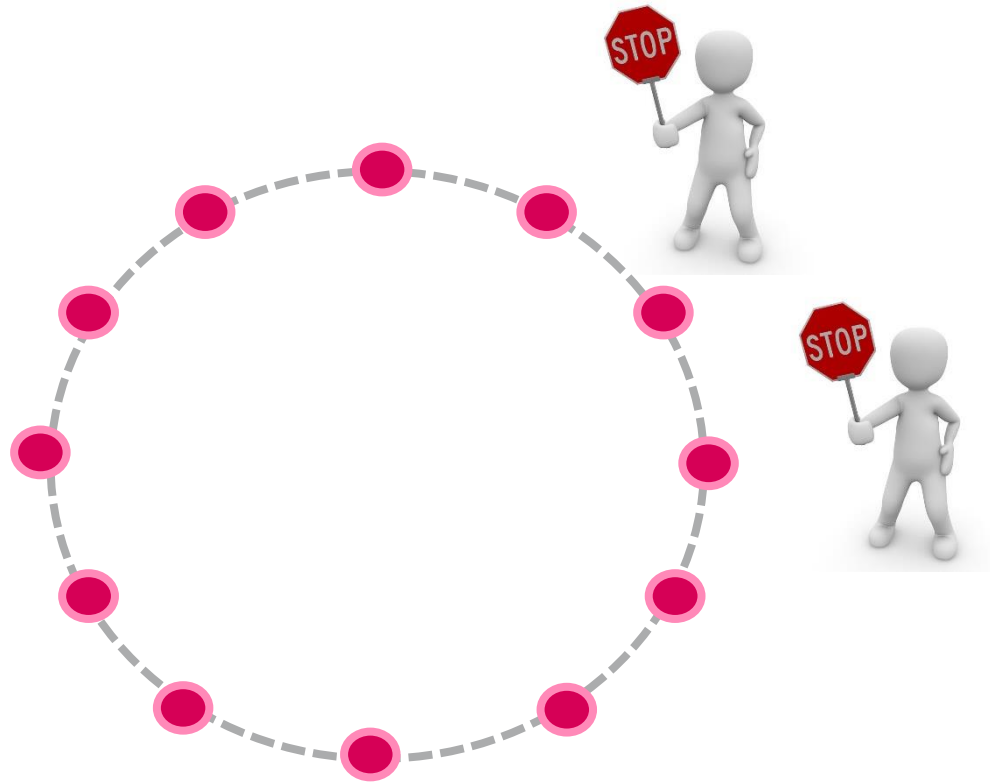
Overview



Compliance



Access – Merger Control



The governance structure chosen needs to comply with merger control law!

- The mere foundation of a consortium maintaining a blockchain/DLT may be subject to merger control.
- If so, the consortium needs to be notified to and cleared by the relevant competition authorities (e.g., EU COM) prior to being implemented.
- Infringements may give rise to high fines and/or result in an invalidity of contracts.
- Merger filing requirements will particularly depend on:
 - whether future shareholders hold a certain amount of shares or may block strategic decisions,
 - the size of the future shareholders in terms of turnover.

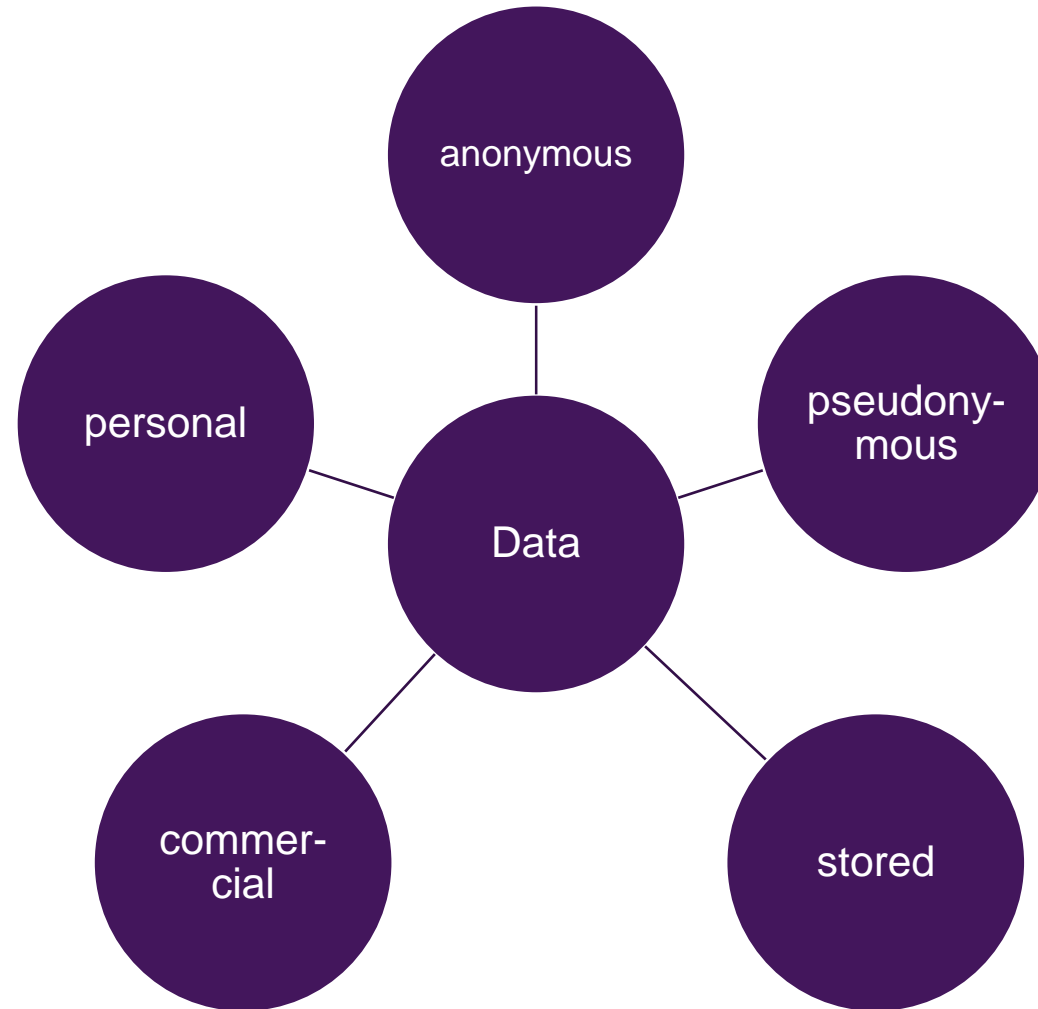
Access – Abuse of Dominant Market Position



Be careful when determining access criteria!

- The agreements in question may qualify as a form of standard setting.
- Network access must be granted in a transparent and non-discriminatory way.
- Market participants must be free to develop or abide by alternative standards, which do not comply with the agreed standard (no exclusivity!).

Privacy and Data Protection



Method of data processing

Challenges when processing personal data (even hashes might be personal data)

Implementation of key principles may be demanding in decentralized systems involving immutable states:

- The right to be forgotten.

- The right to correction.

- The right to data portability.

- The principle of transparency.

- The principle of data economy (obligation to reduce data processing).

Parties involved in data processing

Responsibility depends on the determination of **purposes** and **means** of data processing.

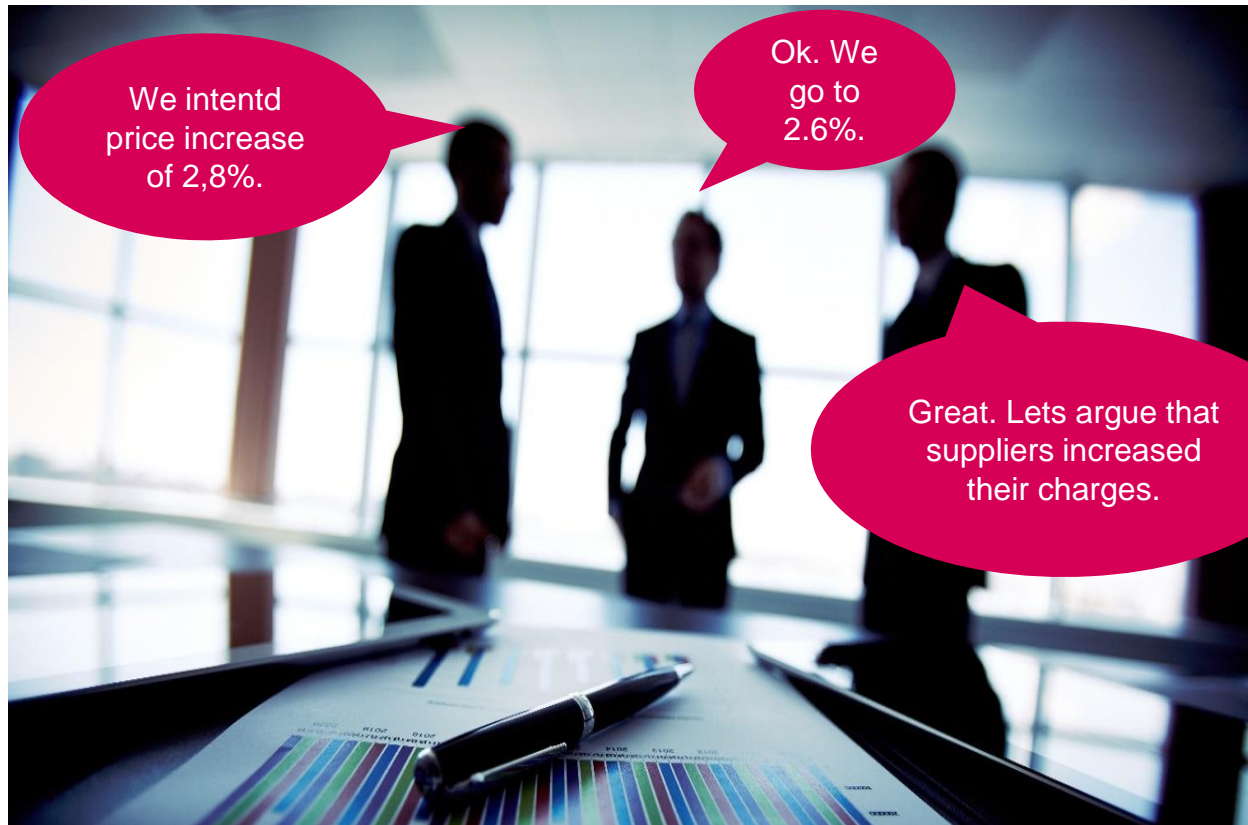
Who determines purposes and means in a multi-actor situation?

Who is processor and who is controller?

Which actors are joint controllers?

Tendency: The more the governance can be classified as "**permissioned**" and "**private**", the more the actor governing the network will have to be classified as responsible

Information Exchange – Cartel Prohibition



Blockchain may not serve as a tool to disguise an unlawful information exchange between competitors!

- Competitors may not exchange on strategically relevant information.
- This particularly includes exchange on
 - prices (gross, net, margins, costs, etc.),
 - customers, quantities, future projects *inter alia*.
- Infringements may give rise to high fines.
- Ensure that there are no tacit mechanisms in place, which inadvertently result in an undue coordination of market behaviour.

Financial Regulation

EU level

MiFID II

PSD2

E-Money Directive

AMLD

Prospectus Regulation

Draft Market in Crypto Asset Regulation

Germany

Banking Act *Securities Trading Act*

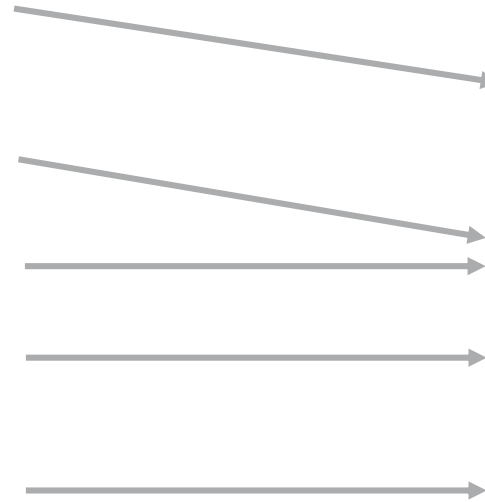
Payment Services Supervision Law

Money Laundering Act

Securities Prospectus Law

Investment Asset Law

draft eSecurities Law



Upcoming Regulation

Digital Finance Package published by European Commission in Sept 2020 comprising of three proposals:

- Digital Operational Resilience (DORA);
- Markets in Crypt-assets (MiCA);
- Pilot Regime for use of DLT in capital markets.

Purpose of MiCA

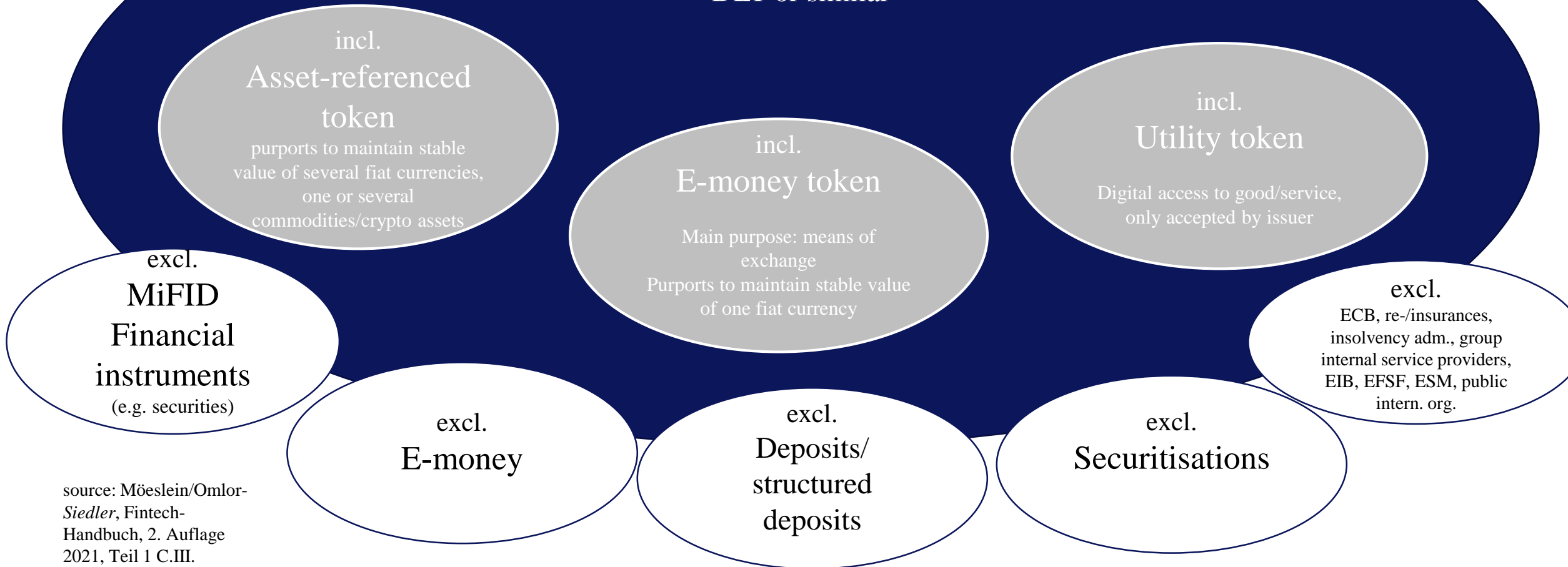
- Harmonise digital financial services across EU
- Same business, same risks, same rules
- Digital sovereignty: push back on LIBRA/Diem and alike
- Setting a global precedent, potentially a blueprint, for regulating entire crypto space (expressly including non-financial crypto assets)

Expected timing

- Proposals published in Sept 2020
- European Parliament adoption: maybe Q1 2022
- Grandfathering period of 18 months

MiCA Regulation: Crypto Assets

digital repr. of value/rights which may be transferred and stored electronically using DLT or similar



source: Möeslein/Omlor-Siedler, Fintech-Handbuch, 2. Auflage 2021, Teil 1 C.III.

Personal scope

- **Issuer of crypto-assets**
 - Legal person
 - offering to the public (=offer to third parties to acquire a crypto-asset in exchange for fiat currency or other crypto-assets) any type of crypto-assets or
 - seeking admission of crypto-assets to a trading platform for crypto-assets

- **Crypto-assets service providers**
 - service to third parties on a professional basis
 - one or more crypto-asset services:
 - custody and administration of crypto-assets on behalf of third parties;
 - operation of a trading platform for crypto-assets, within which multiple third-party buying and selling interests for crypto-assets can interact in a manner that results in a contract;
 - exchange of crypto-assets for fiat currency that is legal tender or for other crypto-assets by using proprietary capital;
 - execution of orders for crypto-assets on behalf of third parties;
 - placing of crypto-assets;
 - reception and transmission of orders for crypto-assets on behalf of third parties
 - providing advice on crypto-assets (personalised or specific recommendations to a third party, concerning the acquisition or the sale of crypto-assets, or the use of crypto-asset services).

Contact



Dr. Nina-Luisa Siedler

Rechtsanwalt, Partner

E: nina.siedler@dwf.law

D: +49 (0)30 25090110-11

M: +49 (0)173 5983343

Nina-Luisa Siedler has twenty years' experience in advising on financing transactions, especially asset-backed securities, structured covered bonds, acquisition and project financings, mostly within international context. Nina is used to manage complex transactions and to cooperate seamlessly with auditors, tax advisors, software engineers and other parties involved. Having worked on both borrower/issuer and lender/investor sides, she has a deep understanding of the interests of all parties involved in a financing situation, including their (factual and regulatory) restrictions.

Nina is highly interested in new technology and advises FinTech companies as well as blockchain ventures on financial regulatory questions as well as new governance structures. She founding member of the Blockchain Bundesverband, the German blockchain association where she headed the financing working group. Nina had been designated as Working Group member in the EU Blockchain Observatory & and is currently part of its Expert Panel as well as the Unidroit Working Group on Digital Assets. She serves as member of the board of thinkBLOCKtank and has been director of INATBA and IPDB. Further, she is co-editor of the magazine for the law of the digital economy (ZdiW) and teaches at the University of Applied Sciences in Berlin.



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That's why we're always finding agile ways to tackle new challenges together. But we don't simply claim to be different. We prove it through every detail of our work, across every level. We go beyond conventions and expectations.

Join us on the journey.

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