

CONSIDERATIONS ON THE LEGAL REGIME OF CRYPTO-ASSETS AND SERVICE PROVIDERS IN THE CRYPTO-ASSETS MARKET. ELEMENTS OF COMPARATIVE LAW

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Abstract:

The crypto-asset market is considered a volatile market, subject to security, legality and tax risks, and customers must be aware of these risks before investing in such a market. At the same time, the market of crypto-assets is not regulated, therefore it does not provide protection to participants.

The great volatility of the market translates into sudden changes in the prices of these assets, under the influence of external factors (such as the expression of opinions of influential persons, the involvement of market companies in legal or fiscal issues, etc.)

The issue of regulating the legal status of crypto-assets is being raised more and more often, precisely to reduce the associated risks, and there are approaches for and against this Regulation; a question arises regarding how much the market needs to be regulated, so that regulation is not excessive.

The study aims to analyse the current legal status of the crypto-assets market and its prospects, internationally.

Key words: *crypto-assets, unregulated markets, providers of exchange services between virtual currencies and fiat currencies*

JEL Classification: *K10*

I. GENERAL CONSIDERATIONS

The crypto-asset market is subject to risks, in addition to its great volatility, namely risks related to taxation, cybercrime, money laundering and so on.

Depending on jurisdiction, crypto-assets can be considered as commodities, security or even currency, which can influence how transactions with them are taxed and which leads to differences in the authority that should supervise the market: the Central Bank or the National Authority that supervises securities.

As regards cybercrime, protection against cyber attacks must be a priority for companies operating in the market to protect the assets they hold for themselves and for trading platform customers.

With regard to the risks of money laundering or terrorist financing, the overwhelming majority of national or regional jurisdictions have adopted measures to prevent or combat market use in such criminal activities.

Of course, the crypto-asset market has its advantages, which makes it attractive to many people². Thus, it is considered that transactions in this market can be carried out relatively easily and at low cost, in a relatively confidential manner. Also, by their nature, it is estimated that they provide relatively safe trading, with transactions being made quickly and with low fees. The crypto-asset industry has seen a rapid and spectacular growth, but it is still not shielded from significant fluctuations, which have given participants significant gains but also led to losses. The use of virtual currency mixing services can make transactions more confidential and make it difficult to track transactions. The possibility of creating a diversified portfolio offers customers greater opportunities to gain. It is considered that crypto-assets can be a way of limiting the effects of inflation affecting fiat currencies. The crypto-asset market facilitates borderless payments and constitutes a more inclusive financial system that allows anyone to participate in it (with certain exceptions, such as China, which has banned the

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²For example, the national supervisory authority estimates that more than 30% of Canadians plan to trade crypto-assets by 2024. <https://cointelegraph.com/news/more-than-30-of-canadians-plan-to-purchase-cripto-by-2024-says-osc-head>

mining of virtual currencies). This market is always open (unlike classical stock markets - stock exchanges) and offers a freedom of trading (exchange can be made between two parties, independently, without the intervention of a third party)¹.

The advantages of the crypto-asset market and the risks it entails influence international policies on the regulation of their legal regime. A much too strict market regulation could lead to lower attractiveness and lower benefits, but legal rules governing the crypto-asset market need to be adopted in order to minimize risks.

The collapse of some service providers in this market (such as Luna, Terra USD², Voyager Digital³) or the insolvency of others (e.g. Celsius Network⁴) is increasingly raising the question of clarifying the legal status of the crypto-asset market, protecting investors and avoiding systemic financial problems. These events are part of that market volatility, in which some assets lose value at an accelerated rate, but the market continues to function.

The growing interest of some companies in this market, as well as the willingness of states to play an important role in the development of new technologies and the promotion of innovation, determine the need to clarify the legal regime of crypto-assets and market service providers.

II. THE CURRENT LEGAL STATUS⁵ OF CRYPTO-ASSETS ON THE INTERNATIONAL LEVEL

Canada has included the crypto-asset market under the control of the Canadian Securities Administrators⁶, which keeps a record of entities facilitating the trading of crypto-assets. CSA/ACVM aims on the one hand to support these entities in their compliance with the legislation⁷, and on the other hand to ensure the protection of investors and the public interest⁸. Virtual currencies are not considered a legal means of payment, but their exchange is legal. The exchange between virtual currency and fiat currency is subject to registration, with the same regime as the other financial services.

The **U.S.** does not consider virtual currencies a legal means of payment, but their exchange is legal and regulated by the Bank Secrecy Act (BSA)⁹, the most important anti-money laundering regulation. The legal regime applicable to companies trading virtual currencies shall be the same as those exchanging fiat currency. As for the exchange between virtual currency and fiat currency, regulations differ from one state to another.

Australia considers crypto-assets legal and includes them in the category of goods. Providers of services in the crypto-asset market must register¹⁰ with AUSTRAC (Australian Transaction Reports and Analysis Centre)¹¹ and are required to take action to prevent and combat money laundering and terrorist financing¹² (customer identification, record keeping, etc.). The suppliers' failure to register may result in their criminal and financial liability. In terms of prudential supervision, the crypto-asset market is under the authority of the

¹<https://www.sofi.com/learn/content/benefits-of-crypto/>

²<https://fortune.com/2022/06/08/citibank-terrausd-luna-collapse-hit-crypto-market/>

³https://www.reuters.com/technology/criptoverse-hack-jitters-push-bitcoin-investors-back-future-2022-10-11/?utm_source=Sailthru&utm_medium=newsletter&utm_campaign=daily-briefing&utm_term=10-11-2022

⁴<https://www.reuters.com/legal/government/bankrupt-crypto-lender-celsius-agrees-examiner-review-2022-09-09/>

⁵A chapter also developed with the support of information from the website

<https://complyadvantage.com/insights/criptocurrency-regulations-around-world/>

⁶Autorités canadiennes en valeurs mobilières (ACVM)/The Canadian Securities Administrators (CSA)

⁷<https://www.securities-administrators.ca/news/canadian-securities-regulators-publish-additional-guidance-for-entities-facilitating-the-trading-of-crypto-assets/>

⁸<https://www.osc.ca/en/securities-law/instruments-rules-policies/2/21-330/csa-iiroc-staff-notice-21-330-guidance-crypto-trading-platforms-requirements-relating-advertising>

⁹<https://www.occ.treas.gov/topics/supervision-and-examination/bsa/index-bsa.html>

¹⁰<https://www.austrac.gov.au/new-australian-laws-regulate-cryptocurrency-providers>

¹¹Financial Intelligence Unit, <https://www.austrac.gov.au/about-us/austrac-overview>

¹²CSB/CFT

Australian Securities and Investments Commission (ASIC)¹, which is the Australian integrated regulatory body for corporations, markets, financial services and consumer credit².

Japan treats crypto-assets as commodities, and trading them is legal. From a fiscal point of view, revenues from transactions with crypto-assets are considered miscellaneous revenues³, taxation being made according to this principle. crypto-asset exchange service providers are required to register with the Japanese Financial Services Agency⁴ and to comply with the CSB/CFT and cybercrime prevention rules.

China and India do not consider crypto-assets legal means of payment and have banned exchange services with these assets. China also declared mining of virtual currencies illegal in 2021.

In the UK, crypto-assets are not considered legal means of payment, but their trading is permitted subject to the registration of exchange service providers with the Financial Conduct Authority (FCA)⁵. From a tax point of view, there is no separate legal regulation for crypto-assets, and the tax regime applies depending on the activities and parties involved in trading. Regarding compliance with the CSB/CFT regime, the UK has adapted its legislation to the requirements of EU legal provisions, requiring service providers to comply with their obligations in the CSB/CFT field.

Switzerland recognizes crypto-assets as legal and they can be used as means of payment in certain situations. From a tax point of view, virtual currencies are considered assets and are subject to taxation; they must be mentioned in the wealth statements⁶. As regards providers of services with crypto-assets, they are subject to registration and licensing process and are subject to supervision by FINMA – the Swiss financial market supervisory authority⁷. The legal regime of crypto-assets was regulated by the adoption of a law in 2020, and in 2021 a law was adopted regulating the legal status of the Distributed Ledger Technology (DLT).

In the **EU**, the tax regime for crypto-assets has been left at the discretion of the Member States. As regards the legal regime, it differs, but no Member State has declared them illegal, nor are they considered means of payment. Also, so far, most Member States do not supervise the crypto-asset market.⁸ Specific regulations were adopted in Luxembourg⁹, Germany¹⁰, and most central banks warned of risks to consumers and risks of illegal use of the market (involvement in money laundering). The European Banking Authority (EBA) has also repeatedly warned about the risks of the crypto-asset market and recommended, together with the other supervisory bodies, the European Insurance and Occupational Pensions Authority (EIOPA) and the European Securities and Markets Authority (ESMA), adopting regulations that provide a common legal framework, able to capitalize on opportunities, but also mitigate risks related to the crypto-asset market¹¹.

¹<https://asic.gov.au/regulatory-resources/digital-transformation/cripto-assets/>

²<https://asic.gov.au/about-asic/what-we-do/our-role/>

³The Romanian Tax Code provides for a similar tax treatment, as these revenues are considered “income from other sources” and are taxed as such.

⁴Japan’s Financial Services Agency (FSA) <https://www.fsa.go.jp/en/about/index.html>

⁵The authority that oversees financial services firms and financial markets in the U.K. <https://www.fca.org.uk/>

⁶Eidgenössische Steuerverwaltung ESTV (Federal Tax Administration FTA) “*Arbeitspapier – Kryptowährungen und Initial Coin/Token Offerings (ICOs/ITOs) als Gegenstand der Vermögens-, Einkommens- und Gewinnsteuer, der Verrechnungssteuer und der Stempelabgaben*”, Bern, 14. Dezember 2021, <https://www.estv.admin.ch/estv/en/home/federal-direct-tax.html>

⁷<https://www.finma.ch/en/finma/finma-an-overview/>

⁸<https://www.bnr.ro/Pozi%C8%9Biile-exprimate-de-catre-statele-europene-cu-privire-la-monedele-virtuale-12132.aspx>

⁹<https://www.cssf.lu/en/virtual-asset-service-provider/>

¹⁰Gesetz zur Einführung von elektronischen Wertpapieren, Vom 3. Juni 2021, Bundesgesetzblatt Jahrgang 2021 Teil I Nr. 29, ausgegeben zu Bonn am 9. Juni 2021

¹¹<https://www.eba.europa.eu/financial-innovation-and-fintech/publications-on-financial-innovation/cripto-assets-esas-remind-consumers-about-risks>

With regard to CSB/CFT, EU-wide unitary regulations, European directives, known as AMLD 1 – 6, have been adopted as follows:

–Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering (AMLD 1), regulating customer knowledge, record keeping and reporting of suspicious transactions¹;

–Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC on prevention of the use of the financial system for the purpose of money laundering – AMLD 2, whose purpose was to update the legislative framework in the area of CSB/CFT²;

–Directive 2005/60/EC of the European Parliament and of the Council of 26 October 2005 on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing — AMLD 3, which already broadens the scope and financing of terrorism³ and Commission Directive 2006/70/EC of 1 August 2006 laying down implementing measures for Directive 2005/60/EC of the European Parliament and of the Council as regards the definition of politically exposed person and the technical criteria for simplified customer due diligence procedures and for exemption on grounds of a financial activity conducted on an occasional or very limited basis, which extended the CSB/CFT regime to other professionals, not just financial services (lawyers, notaries, accountants, real estate agents, casinos, etc.)⁴

–Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC – AMLD 4, which has reformulated and upgraded the entire EU legislative framework on CSB/CFT matters⁵;

–Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU – AMLD 5, regulating the legal status of the beneficiaries of fund sources⁶;

–Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law – AMLD 6, which broadens the scope of criminal offenses that can be considered criminal activity – source of money laundering funds⁷.

III. PROSPECTS FOR CHANGING THE LEGAL STATUS OF CRYPTO-ASSETS

In 2021, **Canada** adopted the latest legislative changes requiring the registration of crypto-asset exchange service providers with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)⁸, so no further changes are expected in the near future.

New legislation promoted by the U.S. Treasury is expected in the **U.S.**, a legislative framework that ensures responsible development of digital assets⁹ and ensures consumer and investor protection, protects financial stability, reduces risks of illegal financing, promotes

¹Published in the Official Journal of the European Union L 166/77, 28.06.1991.

²Published in the Official Journal of the European Union L 344/76, 28.12.2001

³Published in the Official Journal of the European Union L 309/15, 25.11.2005.

⁴Published in the Official Journal of the European Union L 214/29, 04.08.2006.

⁵Published in the Official Journal of the European Union L 141/73, 05.06.2015.

⁶Published in the Official Journal of the European Union L 156/43, 19.06.2018.

⁷Published in the Official Journal of the European Union L 284/26, 05.06.2015.

⁸Unit of Financial Information, equivalent to the National Office for Prevention and Fight against Money Laundering in Romania, <https://www.fintrac-canafe.gc.ca/intro-eng>

⁹<https://home.treasury.gov/news/press-releases/jy0854>

access to safe and affordable financial services, while supporting technological progress, which promotes the development and responsible use of digital assets.

In December 2021, **Australia** announced that it is considering creating a licensing framework for crypto-asset exchanges, allowing consumers to buy and sell crypto-assets in a regulated environment. given that providers of such services “now hold significant amounts of money and people’s investments”¹. This legislative framework is intended to be similar to that in the U.S.

In **Japan**, the FSA announced² that it plans to tighten legislation on the crypto-asset market in 2022, mainly in terms of strengthening the obligations of service providers in the field of CSB/CFT.

India is in an uncertain legal situation in the crypto-asset market because the Supreme Court has declared a ban on trading these assets, so a law would have to be adopted regulating the legal status of the crypto-asset market³.

The **UK** may take the same approach as the EU on the legal regime for crypto-assets. In January 2022, the government said it wanted to adopt legislation on advertising on crypto-assets so as to avoid “misleading crypto-asset promotions” and the regime would be the same as other financial promotions (shares, insurance, etc.).⁴ “This will balance the desire to encourage innovation with the need to ensure that ads for crypto-assets are accurate, clear and not misleading.”⁵

Switzerland aims to adopt legal rules that more effectively prevent the illegal use of crypto-assets, prevent their anonymous use and prevent money laundering through this market⁶.

The **EU** is working on a Regulation to unitarily govern the legal regime of crypto-assets and service providers on this market as a whole. It is considered that this Regulation will be an important step and will make “Europe a pioneer in the token economy”⁷. It will be a uniform legal framework at EU level and aims to protect consumers, ensure safeguards against market manipulation and financial crime. Rules will be introduced on the authorization and supervision of trading service providers and better information to consumers on risks and costs⁸.

The proposal⁹ for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937 (informally MiCA¹⁰) brings innovative regulations, but does not aim to also regulate the legal situation of non-fungible tokens (NFT), which are unique and cannot be replaced, traded or equated, with the mention that, if their legal situation in the market changes and they are reassessed as financial instruments, they will be subject to regulation.

MiCA introduces into the sphere of crypto-assets the notion of “inside information” meaning information of a precise nature which has not been made public, which relates directly or indirectly to one or more issuers of crypto-assets or to one or more crypto-assets

¹<https://www.reuters.com/markets/currencies/australia-plans-update-regulatory-framework-payment-systems-2021-12-07/>

²<https://asia.nikkei.com/Spotlight/Cryptocurrencies/Stablecoins-to-face-new-restrictions-in-Japan>

³https://www.mondaq.com/india/fin-tech/1145012/cryptocurrency-bill-2021-the-road-ahead#_ftnref3

⁴https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1088774/O-S_Stablecoins_consultation_response.pdf

⁵<https://www.gov.uk/government/news/government-to-strengthen-rules-on-misleading-cryptocurrency-adverts>

⁶https://www.parlament.ch/de/services/news/Seiten/2019/20190320125259514194158159041_bsd093.aspx

⁷https://www.springerprofessional.de/kryptowaehrungen/vermoegensverwaltung/-mit-mica-wird-europa-zum-vorreiter-einer-token-oekonomie-/23402700?utm_medium=email&utm_source=SP-Newsletter_Redaktion&utm_campaign=SP-Business_IT_Informatik_Newsletter_SP-Newsletter_Redaktion&utm_content=2022-09-21_SP-Business_IT_Informatik_Newsletter#.YysbDC0LTQY.mailto

⁸<https://www.europarl.europa.eu/news/en/press-room/20220613IPR32840/cryptocurrencies-in-the-eu-deal-struck-between-parliament-and-council>

⁹<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593>, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020PC0593>

¹⁰From the English name – “Markets in Crypto-assets”

and which, if made public, would probably significantly influence the price of those crypto-assets, which¹leads us to conclude that the legal status of crypto-assets will be that of a financial instrument. Therefore, market surveillance will be carried out by financial supervisory authorities and the regime of protection against market abuse and ensuring market integrity will apply to it.²

Another novelty is that legal entities intending to provide crypto-asset services must be authorized to do so, and “for all natural persons involved in the management body of the applicant crypto-asset service provider, and for all natural persons who, directly or indirectly, hold 20% or more of the share capital or voting rights, proof of the absence of a criminal record in respect of infringements of national rules in the fields of commercial law, insolvency law, financial services law, anti-money laundering law, counter-terrorism legislation, and professional liability obligations”³.

IV. CONCLUSIONS

The Basel Committee on Financial supervision believes that the crypto-asset market is growing rapidly, while it remains small in relation to the size of the global financial system and “believes that the growth of crypto-assets and related services has the potential to raise financial stability concerns and increase risks faced by banks”⁴. It is assessed that these risks may be: “liquidity risk; credit risk; market risk; operational risk (including fraud and cyber risks); money laundering / terrorist financing risk; and legal and reputation risks”. Three sets of requirements are considered to apply to the crypto-asset market: prudential requirements, supervisory requirements and financial transparency requirements.

The general opinion is that adopting regulations for the crypto-asset market can create trust, both for investors and for companies operating in the market (making it easier for them to access financing), as well as to counteract the identified risks.

Looking at the legal regime in several jurisdictions, we can see that the concern of the rulers to regulate the crypto-asset market has several objectives, which must be harmonized, in the framework of the adoption of future normative acts:

- Protecting investors in these markets;
- Preventing and combating money laundering and terrorist financing;
- Ensuring financial stability;
- Regulating the advertising market to prevent misleading advertising;
- Protecting against cyber attacks;
- Establishing a tax regime for transactions with crypto-assets;
- Enabling the development of innovative technologies.

We point out that the supervision of the crypto-asset market will be made by the financial supervisory authorities (A.S.F. in the case of Romania), and the misuse, unauthorized disclosure of inside information and manipulation of the crypto-asset market will be considered market abuse.

¹Art. 3 – definitions, par. 27

²Regulation (EU) No 596/2014 of 16 April 2014 on market abuse (market abuse Regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Text with EEA relevance), published in: Official Journal L 173 of 12 June 2014

³Art. 54 of the MiCA Draft Regulation

⁴Basel Committee on Banking Supervision – “*Second consultation on the prudential treatment of crypto-asset exposures*”, <https://www.bis.org/bcbs/publ/d533.pdf>

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