The Development of Crypto Legislation in Europe

With a Special Focus on Consumer Protection

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Abstract

Experience with the issuance of crypto-assets and crypto-asset-related services over the last decade and a half shows that the diversity and complexity of services and, not least, the necessity to protect the interests of users, require regulation of both the creation (issuance) and the provision of services related to crypto-assets. In Europe, regulatory attempts have been made in several states, but the global usability of cryptoassets requires comprehensive, transnational regulatory solutions. Although such a global regulatory response is not yet in place, at least the foundations have been laid in the EU. EU regulation is an important step forward because it will at least allow the issuance of cryptoassets and the provision of cryptoasset services in all EU Member States to operate under the same rules. The creation of EU regulation could also serve as a global regulatory model. The protection of customers and consumers is a particularly essential element of the regulation, some elements of which are already covered by the EU MiCA Regulation, but the customer and consumer protection needs to be further strengthened.

Keywords: crypto legislation, consumer protection, MiCA Regulation, financial supervision, investor protection

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1. Introduction

The need, justification and possible approach to regulating cryptoassets was raised shortly after the creation of the first cryptoasset, Bitcoin, in 2009. While the need for regulation has long been a matter of debate, the experience of the past decade, the diversity and complexity of the services provided by cryptoassets and, not least, the protection of users' interests, have all led to the justification and need for regulation of both the creation (issuance) and the provision of services in relation to cryptoassets. Initially, some 'pioneering' States (*e.g.* Malta, Switzerland, Liechtenstein, Luxembourg, France, Germany) tried to find effective regulatory solutions, but these solutions varied widely in structure and content. At the same time, this diversity has also had a negative impact on regulatory effectiveness, as the assets in question are not, by their nature and technological background, tied to a specific geographical area or state, but can be used globally. Global usability would also require global regulatory responses. Such a global regulatory response is not yet in place, but it is an important step forward that the EU has at least managed to lay the foundations for such a response.

The EU regulation is a significant achievement because it will at least allow the issuance of cryptoassets and the provision of cryptoasset services to operate under the same regulatory framework in all EU Member States. The creation of EU regulation could also serve as a global regulatory model. However, after reviewing the details of the EU regulation, it can also be concluded that it is not yet a definitive and fully developed regulatory regime, but a first cross-country attempt to develop an effective regulatory structure. In my research for this paper, I have reviewed the main elements of traditional financial and capital market regulation, with a particular focus on customer and consumer protection regulation, and compared this regulatory framework with the new regulatory framework for crypto-assets. I have paid particular attention to the issue of customer and consumer protection, which is at the heart of the purpose and rationale for the whole regulatory framework.

2. Methodology

In the course of the preparation of the study, I mainly analysed the provisions of the existing EU and national legislation, and compared the relevant

elements of the traditional money and capital market regulation and the newly created crypto regulation using the comparative method. Given the novelty of crypto regulation, there is less literature available on the subject, and I was therefore less able to rely on such sources to the extent I usually do.

3. Basic Concepts

In this paper I use the term cryptoasset as a general term. For a long time, there was no consensus on the terminology used by organisations, institutions and legislation on the subject. Different sources used different terms: digital money, cryptomoney, cryptocurrency, digital asset, virtual asset, cryptoasset, *etc*.[1]

To date, tens of thousands of different cryptoassets[2] have been created, but this new type of 'asset' is not homogeneous, as there are several sub-types within this category, based on the different characteristics and specialisation of each one. The concept of cryptoassets is therefore a comprehensive category within which we can distinguish *(i)* utility tokens; *(ii)* asset/security/investment/equity tokens; *(iii)* payment tokens; and *(iv)* hybrid tokens.[3]

Utility tokens provide immediate or deferred access to a service (or product) and their value depends on the value of that right to access. They typically have no exchange function, do not confer ownership, but are transferable. Examples are Filecoin (token for decentralised file storage), Basic Attention Token (token for digital advertising), VET (token linked to the VeChain platform supporting supply chain management).

Asset/security tokens, as their name suggests, are analogous to traditional securities. As such, they digitally represent various rights or claims

1 *See* in details Zoltán Veres, 'Szempontok a kriptopénzek fogalmának és természetének megértéséhez', *Új Magyar Közigazgatás,* Vol. 16, Issue 1, 2023, pp. 19–26.

2 *Cf.* the database at coinmarketcap.com.

3 For the categorisation of tokens, *see* FIINMA (Switzerland) ICO Guidelines, Guidelines for enquiries regarding the regulatory framework for initial coin offerings (ICOs), at www.finma.ch/~/media/finma/dokumente/dokumentencenter/myfinma/1bewilligung/fintech/wegleitung-ico.pdf?sc_lang=en&hash=C9899ACF22747D56C800C6C41A7E28AB; Armin Varnaz *et al*., 'Rechtliche und finanzökonomische Grundlagen' *in* Sebastian Omlor & Mathias Link (eds.), *Kryptowährungen und Token*, Deutscher Fachverlag GmbH, Frankfurt am Main, 2021, p. 21; Matthias Steger, '*Bitcoin und andere Kryptowährungen (currency token) – Grundlagen der Besteuerung im Privat- und Betriebsvermögen*', Erich Schmidt Verlag, Berlin, 2020, pp. 53–54.

against the issuer or a third party, such as a share of profits or income, voting rights or the right to dispose of an asset. The market capitalisation of security tokens is estimated to be $32.5 billion[4] in the spring of 2024, half of which is represented by the token of the highest value (Enegra Group's EGX token).

Payment tokens – often referred to as cryptocurrency in the past – are used to pay for goods and services, and to make payments. They are essentially a medium of exchange, but in many cases they are also used as a back-up. They function as quasi-money, but are not yet suitable as a measure of value due to the high volatility of their exchange rate. The most common examples are Bitcoin, Litecoin and Monero.

Hybrid tokens are virtual instruments that embody several features of utility, payment and security tokens.

The definitions in the EU legislation under the MiCA Regulation[5] use the term 'cryptoasset' as a generic term. However, it does not distinguish within the asset category according to the way the tokens are used, but categorises them according to the stability of their value. The regulatory categories depend on the fact that tokens are subject to different requirements depending on the risks they pose, and this risk classification is based on whether the crypto-assets seek to stabilise their value by anchoring them to other assets. The MiCA Regulation regulates three types of tokens based on these criteria: *(i)* asset-based tokens; *(ii)* electronic money tokens; and *(iii)* other tokens.

In line with the definitions in the MiCA Regulation, I do not consider crypto-assets to include *(i)* digital assets that are not transferable to other holders; *(ii)* cryptoassets that are unique and not substitutable with other cryptoassets, *e.g.* digital works of art and collectibles (NFTs); *(iii)* crypto-assets that are financial instruments within the meaning of the MiFID Directive[6] (typically securities based on distributed ledger technology).

4 *See* at Security Token Market database (stomarket.com).

5 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

6 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU.

4. The Evolution of Crypto Legislation

Over the last 15 years, many European states have adopted measures to regulate cryptoassets. These states have followed different paths. Among the different European solutions, the Maltese, German, French, Luxembourg and Liechtenstein regulatory solutions are noteworthy.

In Hungary, neither cryptoassets per se nor the crypto markets have been regulated so far. Only the rules for the taxation of private individuals' income from cryptoassets has been laid down by amending the Personal Income Tax Act.[7] Contrary to the comprehensive regulatory solutions in other European states, the mere tax laws cannot be regarded as substantive legislation on any subject. The latest development is that at the end of February 2024, the Hungarian Government published and submitted for public consultation a draft law on the markets in crypto assets.[8] Once adopted, the law will serve as a key instrument for the implementation of EU legislation.

At EU level, the European Commission presented its Digital Finance Package, including crypto regulation, in autumn 2020, which, in addition to setting out a new digital finance strategy[9] and an EU retail payments strategy,[10] included the following legislative proposals: *(i)* a proposal for a regulation on markets in crypto assets (MiCA);[11] *(ii)* a proposal for a pilot regime for market infrastructures based on distributed ledger technology (DLT);[12] *(iii)* a proposal for a regulation on digital operational resilience for

7 *Cf.* Hungarian Act CXVII of 1995 on personal income tax, Section 67/C.

8 *See* at https://kormany.hu/publicapi/document-library/a-kriptoeszkozok-piacarol-szolo-torveny/download.

9 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Digital Finance Strategy for the EU, COM(2020) 591 final.

10 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU, COM(2020) 592 final.

11 Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final.

12 Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology, COM(2020) 594 final.

the financial sector;[13] *(iv)* a proposal to clarify or amend certain related EU legislation on financial services.[14]

As regards the operation of cryptoassets and the provision of services related to them, the MiCA proposal was the cornerstone of the package. Prior to the EU regulation, all that the EU financial regulators (ESMA, EBA, EIOPA) could do was to issue notices to consumers warning them of the risks involved.[15]

In the last 2 years, regulatory developments in the EU have also been accelerated. In 2022, the Regulation on a pilot scheme for market infrastructures based on distributed ledger technology (crypto exchanges) (the DLT Regulation) was adopted.[16] The adoption of the DLT Regulation was an important step in itself, but the most significant step forward was the adoption of the markets in crypto assets regulation (MiCA) in May 2023. In addition to the MiCA Regulation, the Regulation on information accompanying transfers of funds and certain crypto-assets (TFR) was also adopted.[17]

The adoption of the MiCA Regulation has made necessary the introduction of crypto legislation in those EU Member States that have not yet done so, and Hungary is also in the process of adopting basic crypto rules in line with the Regulation. In those states where regulations already exist, it is necessary to harmonise them with the MiCA regulation.

13 Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014 and (EU) No 909/2014, COM(2020) 595 final.

14 Proposal for a Directive of the European Parliament and of the Council amending Directives 2006/43/EC, 2009/65/EC, 2009/138/EU, 2011/61/EU, EU/2013/36, 2014/65/EU, (EU) 2015/2366 and EU/2016/2341, COM(2020) 596 final.

15 Most recent documents: EU financial regulators warn consumers on the risks of crypto-assets, ESA 2022 15, at www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf; ESMA Report on Trends, Risks and Vulnerabilities, No 1, 2021, pp. 53–59, at www.esma.europa.eu/sites/default/files/library/esma50-165-1524_trv_1_2021.pdf;

16 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU.

17 Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849.

In the field of customer and consumer protection, there is still no legislation in the EU or elsewhere that directly regulates this particular issue. In the United States, a bill to regulate consumer protection issues related to digital commodities was proposed to Congress in 2022, but has not been discussed and adopted yet.[18]

5. Key Elements of EU Legislation in the Crypto Markets and Traditional Money and Capital Markets

5.1 The Fundaments of the Legislation

The MiCA Regulation addresses three main types of cryptoassets: asset-referenced tokens, electronic money tokens and other tokens. For each of these three categories of assets, it sets out the basic issuance and issuer requirements, lays down the requirements for the authorisation of issuers and crypto service providers, sets out the regulatory regime for the supervision of crypto services and lays down basic rules in the area of consumer and customer protection, in particular as regards customer information, white paper, transparency requirements, insider dealing and market manipulation.

The DLT Regulation regulates the operation and supervision of distributed ledger-based market infrastructures (including trading and settlement systems) and extends the provisions of the traditional capital markets regulation (MIFID, MIFIR[19]) to distributed ledger technology-based markets.

The TFR Regulation lays down rules on the information on the payer and payee accompanying transfers of funds and on the information on the originator and beneficiary of cryptoassets accompanying transfers of cryptoassets.

The new basic elements of EU crypto legislation are similar in many aspects to the key provisions of traditional money and capital market regulation. Compared to crypto regulation, traditional money and capital market regulation definitely covers more areas and sets out a much more detailed set of conditions for the operation of these areas.

18 S.4760 – Digital Commodities Consumer Protection Act of 2022, at www.congress.gov/bill/117th-congress/senate-bill/4760.

19 Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012.

Among the similarities, we can emphasise the definition of services, the entry into the market and the subjection of institutional operations and services to supervisory authorisation, the supervision of the provision of services, certain prudential requirements (*e.g.* rules on capital requirements). The regulation of the issuance of cryptoassets, which can be equated with the issuance of securities in traditional markets, and the prevention of market abuse have a particular importance in crypto regulation, but the regulatory regime is not nearly as detailed as traditional capital market regulation[20] and the requirement to impose criminal sanctions for crypto market abuse is not yet reflected in EU regulation, unlike traditional capital market regulation.[21]

The existing EU legislation on financial and capital markets contains a detailed set of customer and consumer protection instruments, elements of which are obviously transposed into national rules in the Member States. The following regulatory issues should be underlined in this context: *(i)* definition and authorisation of financial and investment services; *(ii)* supervision of the money and capital markets; *(iii)* institutional protection and guarantee schemes (deposit insurance and investor protection); *(iv)* definition of the core content of consumer credit contracts; *(v)* requirement of written form of contracts (in the case of consumer credit contracts); *(vi)* the provision of the right of withdrawal for consumers (for consumer credit contracts); *(vii)* the requirement for adequate and effective dispute resolution mechanisms (in mortgage lending and payment services regulation); *(viii)* prohibition of collecting deposits for undertakings other than credit institutions; *(ix)* obligation to contract for the provision of payment account services and the basic account services; *(x)* special provisions on commercial communications (in the regulation of the money market and consumer credit contracts); *(xi)* rules on the sharing of liability in case of use of payment-instruments; *(xii)* obligation to inform customers in advance (in case of consumer credit contracts, payment services, investment services); *(xiii)* requirement for ex-ante information by the provider (in investment and consumer credit regulation – *e.g.* MiFID test, ability to repay test); *(xiv)* segregation of client assets (for investment and payment

20 Regulation (EU) No 596/2014 of the European Parliament and of the Council 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.

21 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive).

services); *(xv)* execution of the contract in the most favourable way for the client (for investment services); *(xvi)* requirement to prepare an information memorandum for public offerings of securities; *(xvii)* the requirement to ensure trading transparency in capital market trading; *(xviii)* the prohibition and criminalisation of insider dealing and market manipulation.

However, the EU legislation does not contain any provisions on the form of money and capital market contracts (no mandatory written form) and on the substantive requirements for unilateral contract modification, in particular the provision of reasonableness, the obligation to state reasons and the preparation period. On the other hand, however, EU legislation provides for an obligation to manage complaints in the area of financial services in the context of the payment services regulation,[22] while no such provision is found for other money and capital market services.

The customer and consumer protection provisions in EU legislation may in particular cases be complemented by additional national provisions. In addition to money and capital market regulation, there are also relevant financial consumer protection provisions in private laws (Civil Codes) of the Member States, such as the Hungarian Civil Code's provision on the invalidity of fiduciary credit guarantees in the case of securing claims against consumers.[23]

The MiCA and the DLT Regulation do not fully incorporate all the relevant elements of traditional money and capital market regulation, but they do lay the foundations for the protection of clients in a considerable range of areas. These include in particular: *(i)* definition and authorisation of financial and investment services; *(ii)* supervision of the money and capital markets; *(iii)* the requirement for publication and accessibility of the service providers' general terms and conditions, and definition of the content of certain contracts; *(iv)* the requirement for ensuring non-discriminatory access to the service (although the regulation does not impose any obligation to conclude a contract); *(v)* the obligation for service providers to put in place a complaints mechanims; *(vi)* requirement for *ex ante* collection of information (assessment of the risk-bearing capacity of the customer); *(vii)* segregation of client assets (for investment and payment services); *(viii)* execution of the contract in the most favourable way for the

22 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, Articles 99–102.

23 Hungarian Act V of 2013 on the Civil Code, Section 6:99.

client (for investment services); *(ix)* the provision of right of withdrawal for consumers; *(x)* requirement for a specific disclosure of risks; *(xi)* equirement for the preparation of a white paper in the case of a crypto-asset issuance; *(xii)* the requirement to ensure trading transparency; and *(xiii)* the prohibition of insider dealing and market manipulation.

A specific element of consumer rights is the right of withdrawal, which is essentially linked to distance contracts under the Consumer Rights Directive,[24] because, compared to contracts concluded face-to-face, the consumer is at a disadvantageous situation as he cannot see the product he wants to buy in person. However, in the case of cryptoassets, this issue of personal inspection is, by its very nature, a difficult problem to understand. Nevertheless, the MiCA Regulation grants this right to consumers for non-asset-referenced and non-electronic money tokens,[25] without any specific justification mentioned in the preamble, provided that these tokens are not introduced for trading on trading platforms. Accordingly, the right of withdrawal is limited to direct sales by the issuer (offeror) and indirect sales by the cryptoasset service provider.[26]

In addition to the above mentioned provisions on customer and consumer protection, which are considered to be very progressive, it has to be realised that this catalogue is not exhaustive. It lacks a number of important elements, which are discussed in the following sections, and which would be well worth including in the legislation.

5.2 Status of Crypotoassets in the Private Law

In the context of considering the private law status of cryptoassets, the primary question is whether these assets should be considered as a concept of property law (thing) or as a concept of contract law (obligation). The issue is of paramount importance not only from a purely private law perspective, but also from a tax law viewpoint, and the lack of an appropriate legal categorisation of these assets creates serious problems in accounting.

24 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, Article 9.

25 MiCA Regulation, Article 13.

26 Philipp Maume, 'Consumer Protection (4)' *in* Philipp Maume *et al.*, *The Law of Cripto Assets*, Verlag C. H. Beck, München, 2022, p. 118.

The civil law codes of several states do not define the concept of a property, but rather regulate what can be the subject of property rights (physical objects that can be taken into possession)[27] and apply the rules on property to, among other objects, money, securities and natural resources that can be used as property. Given that cryptoassets are not corporeal objects and can generally be considered neither money (disregarding the specific status of Bitcoin as legal tender in the Salvadorian legislation), nor securities, nor natural resources which can be used as property, they cannot be classified as property,[28] and therefore the rules on the protection of property and possession cannot be applied to cryptoassets. On the other hand, there may be arguments for placing cryptoassets in the sphere of property law, like intellectual property.[29]

In private law, the positioning of cryptoassets is conceivable not only in the law of property but also in the regime of contract law. Two elements of the obligations are of particular importance. The first is that the concept of an obligation generally presupposes at least two parties: a beneficiary and an obligor.[30] However, cryptoassets cannot be understood as an obligation in their own sense, since there is no obligor *vis-à-vis* the beneficiary. In contrast to a debt in the form of a claim on a bank account, which can be understood as a claim of the owner of the money as the beneficiary against the bank holding the account, in the case of cryptoassets there is in principle no account manager and no debtor. Technically it means that the holder (the owner) has access to a certain amount of cryptoassets, typically registered on a blockchain, and can dispose of them and transfer the right of access. The other fundamental contractual provision is the principle of freedom of the contractual relationship, whereby the parties are free to determine the content of the contract. Civil codes typically do not preclude the parties from stipulating the use of a foreign currency or any other

27 *Cf.* Bürgerliches Gesetzbuch (BGB – Germany), Section 90; Zivilgesetzbuch (ZGB – Switzerland), Section 641; Sachenrecht (SR – Liechtenstein), Sections 20 and 171; Act V of 2013 on the Civil Code (Hungary), Section 5:14.

28 Sebastian Omlor, 'Allgemeines Privatrecht' *in* Omlor & Link (eds.) 2021, pp. 286–287; Matthias Lehmann, 'Internationales Privat- und Zivilprozessrecht' *in* Omlor & Link (eds.) 2021, p. 211.

29 Daniel Carr, 'Cryptocurrencies as Property in Civilian and Mixed Legal Systems' *in* David Fox & Sarah Green (eds.), *Cryptocurrencies in Public and Private Law*, Oxford University Press, Oxford, 2019, pp. 179–190.

30 *Cf.* German Bürgerliches Gesetzbuch (BGB), Section 241; Hungarian Civil Code, Section 6:1.

form of consideration, including the transfer of a cryptocurrency, to settle a monetary debt.[31]

The Austrian Civil Code (ABGB[32]) defines property as anything that is not a person and serves their benefit.[33] The ABGB distinguishes according to their nature between tangible and non-tangible property, including certain property rights, for example. Accordingly, in light of the ABGB concept of things, virtual assets and crypto-values must clearly be regarded as *things*. In my opinion, a similarly clear statement cannot be made under the civil codes of many other states.

In general, we can conclude that the private law status of cryptoassets cannot be determined, apart from the Austrian fortuitous exception, within the existing legal framework, without supplementing the private law codes to this point.[34]

This ambiguous legal environment also has implications for the private law treatment of cryptoassets. The legal treatment of the transfer of assets is not straightforward either, as the rules on the transfer of ownership would apply if the assets were considered as a thing and the rules on assignment would apply if they were considered as a claim. Although the purchase and sale of coins and tokens is mentioned in common practice, the legal treatment of the situation is far from being as simple.

This situation concerns a number of legal transactions and services based on them, which are in many aspects similar to traditional private transactions, legal situations and financial services involving money or securities, and for which a proper legal basis would be essential. In particular: *(i)* the inheritance of cryptoassets; *(ii)* capital contributions to companies in crypto assets; *(iii)* lending and other financing transactions; *(iv)* transactions of a deposit collecting nature; *(v)* currency exchange/exchange transactions; and *(vi)* data protection issues.

31 Varnaz *et al.* 2021, p. 26; Lehmann 2021, pp. 213–215.

32 Section 285 of Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie, StF: JGS Nr. 946/1811.

33 Niklas Schmidt, *Kryptowährungen und Blockchains*, Linde, Wien, 2019, p. 118.

34 Zsolt Halász, 'Regulating the unregulateaable – Attempts in Crypto Regulation in Europe', *Hungarian Yearbook of International Law and European Law,* Vol. 10, 2022, p. 230.

5.3 Form of Legal Transactions

To ensure the integrity of legal transactions, it is of particular importance that they are recorded accurately. The requirement for contracts to be concluded in written form, in particular online or on another durable data carrier, would therefore be essential. In the case of traditional money and capital market transactions, the confirmation of verbal transactions is now one of the most basic requirements, but in the case of crypto transactions it is not yet a regulatory requirement.

5.4 Minimum Content of Legal Transactions and Limits on Unilateral Amendments

The Hungarian financial market regulations are clear about the minimum content of the terms and conditions of the business regulations of financial institutions and consumer credit contracts. In order to protect customers, it would be appropriate that the minimum mandatory content of the terms of business of all cryptoasset providers, and, in particular, of contracts for lending in cryptoassets and the use of cryptoasset collateral, should be laid down by law. Closely related to this point is the question of clarification of the precise conditions under which unilateral changes to the contract, to the detriment of the customer, may be made. In this context, cryptoasset providers currently enjoy almost complete autonomy, subject only to the requirements of the civil law codes of their place of establishment concerning general contractual terms and conditions.

5.5 Lending in Crypto Assets

Lending in cryptoassets has now become an activity carried out by several service providers.[35] The possibility of global access to these services entails considerable risks for borrowers, in particular due to adverse and sudden exchange rate volatility. Similar risks can be identified in the case of the use of cryptoasset as collateral. It would therefore be appropriate to define who and under which requirements can enter this market, as well as the specific client protection rules that should apply to clients in order to manage the risks involved.

35 Steger 2020, pp. 49, and 123.

5.6 Payment Services

A number of crypto service providers offer payment services similar to traditional payment services, but based on crypto. For customers, these services are deceptively similar to traditional payment services (*e.g.* issuing payment instruments in card format), but the underlying legal background is quite different. The fundamental difference is that, whereas in the case of traditional payment services, the PSD Directive[36] imposes strict liability on providers for, inter alia, technical errors, third party fraud and abuse, the business rules of crypto service providers exclude such liability entirely and there are no corresponding requirements for crypto service providers under existing legislation. Against this background, it would be highly appropriate to establish by law the liability of crypto service providers for any damage caused to their customers in connection with their activities, in particular their payment services. Several regulatory solutions to this could be envisaged, either by amending the PSD or the MiCA Regulation.[37]

5.7 Investor Protection

Within the framework of traditional capital market legislation, EU law[38] provides for an institutional guarantee scheme in all Member States to compensate customers up to a certain value of the investments and funds held in customer accounts managed by the service provider in the event of the provider's insolvency. These guarantee funds are financed by contributions of investment firms operating in each Member State. Many of the cryptoasset services specified in the MiCA Regulation are very similar to traditional investment services which are covered by the protection provided by the guarantee funds.

Such services include, in particular, the custody and administration of crypto-assets on behalf of clients, the execution of orders for crypto-assets on behalf of clients, the receipt and transmission of orders for cryptoassets on behalf of clients, and the portfolio management of cryptoassets.[39]

36 PSD Directive, Articles 71–74.

37 Louise Damkjær Christensen, 'Crypto payments–a danger to consumer protection?', *Law and Financial Markets Review*, Vol. 16, Issue 3, 2022, pp. 1–15.

38 Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes.

39 *Cf.* MiCA Regulation, Article 3(1), point 16.

The rationale for the investor protection guarantee provided in the context of traditional investment services suggests that an appropriate investor protection guarantee fund would be justified for the very similar crypto services. Until a mandatory crypto-investor protection regime is established, there will be unjustified discrimination between investors depending on whether they invest in crypto or non-crypto assets.

5.8 Obligation to Provide Information

One of the most important means of protecting consumers is to prevent consumers from making wrong decisions. This can be achieved by requiring the service provider to inform (educate) its customers about the content and risks of transactions that pose a material risk to them prior to the use of the service (Due to the lack of such prior information, many people in Hungary have suffered extreme difficulties in the past decade and a half in the so-called foreign currency lending). It is well known that the volatility of crypto assets' exchange rates entails serious risks. These risks are present in both investment and financing transactions. It would therefore be appropriate to require cryptoasset providers generally to inform their clients, in particular those who are consumers, in advance of the risks inherent in the transaction they intend to enter into and to ensure that the content and risks of the transaction are in line with the knowledge and risk-bearing capacity of the client.

5.9 Dispute Settlement

The use of appropriate and effective dispute resolution mechanisms is a key element of the security of legal transactions. The general terms and conditions of global crypto-asset providers contain a wide variety of clauses on the law applicable to their activities and on the exclusive jurisdiction of courts around the world, which in many cases may be arbitral courts. It is easy to recognise that a forum for recourse located at an immeasurable distance from a customer's domicile, but conveniently located for the service provider, in practice in most cases prevents these customers from taking

their potential disputes with service providers to court, with potentially serious financial consequences for the customers.[40]

This is compounded by the virtual absence of regulation of commercial communications about crypto services, which gives providers a significant marketing advantage in persuading less sophisticated customers.

6. Conclusion

Taking a brief look at recent crypto regulation in the EU, the adoption and entry into force of the MiCA and the DLT Regulation represent a clear step forward in the security of crypto issuance and services and the protection of customers. Rather than regulatory solutions in Member States with different content and depth, it was timely to move towards both regulatory convergence and regulation that would apply in Member States that have not previously regulated crypto services.

It can also be noted that this legislation is far from being ready and definitive. Comparing the regulatory frameworks for traditional money and capital markets with those for the crypto markets, the EU and national regulatory frameworks for the former are (unsurprisingly) much more detailed and provide much more stringent protection for clients in a number of areas.

In many senses, the legislation on services provided in traditional money and capital markets could be a possible benchmark for the creation of a crypto regulatory regime, although not all elements can be fully transposed. This has been recognised by actors in the EU legislative process, and EU crypto regulation incorporates many components of traditional money and capital markets regulation into its customer and consumer protection toolkit.

As much as the new regulatory framework analysed above can be seen as a step forward, the lack of a definition and categorisation of cryptoassets under private law (thing, right, claim or something else) remains a fundamental shortcoming at both EU and Member State level, which is closely linked to other regulatory issues such as *(i)* the definition of formal requirements for certain legal transactions involving cryptoassets; *(ii)* the

40 Aleksandr P. Aleksenko, 'Model Framework for Consumer Protection and Crypto-Exchanges Regulation', *Journal of Risk and Financial Management,* Vol. 16, Issue 7, 2023, p. 305.

regulation of crypto lending and crypto collateral; *(iii)* the content of the general terms and conditions; *(iv)* unilateral modification of the general terms and conditions to the detriment of the customer; *(v)* the legal definition of the liability rules of crypto service providers for damage caused to their customers in connection with their activities, in particular their payment services; *(vi)* the obligation to inform customers in advance and the obligation for service providers to be informed in advance; *(vii)* the use of appropriate and effective dispute resolution mechanisms.

In addition to defining the private law foundations and laying down many of the missing elements of customer protection, it would be appropriate to establish appropriate rules to ensure consistency with EU data protection legislation (in particular the right to be forgotten and rectification as laid down therein), to clarify the accounting treatment of these instruments and the application of the tax rules applicable on them.