Regulating the Unregulateable

Attempts at Crypto Regulation in Europe

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Abstract

The regulation of virtual assets has been on the legislative agenda for many years. The elaboration of a user-friendly regulatory system, in particular, on a global (or at least in Europe) scale, is more than likely over the next few years. Virtual assets are a special, unprecedented category of assets, and their emergence and proliferation pose new regulatory challenges in several areas, such as their issuance, the supervision of operations and transactions related to them (e.g. stock exchange services, lending, and other financial activities), furthermore, important issues arise in the field of taxation, accounting, and securities law with the emergence of the blockchain and distributed ledger technology-based securities. In recent years, at the state level, one could also witness comprehensive regulatory efforts and innovative regulatory attempts in certain European countries in various related areas, particularly in Malta, France, Germany, Liechtenstein, and Switzerland. This study presents the key elements, objectives, and characteristics of regulatory solutions in selected European countries. In September 2020, the European Commission presented a six-element regulatory package for the uniform regulation of virtual assets and markets at EU level. Accordingly, this paper pays particular attention to the European Commission's regulatory package, reviewing and evaluating its solutions, main elements, and regulatory methods. Last but not least, I present some related issues that may be considered regulatory gaps that have been left unregulated in both national legislations and the European Commission's proposal.

Keywords: virtual assets, blockchain, tokens, financial services, securities.

1. Introduction

When examining the regulation of virtual assets, it is firstly necessary to answer the question what, and for which purpose the legislator intends to regulate. Once these questions have been answered, a further question may arise as to the details surrounding the operation of the specific regulation chosen by the legislator. The topic of virtual assets is still a very new subject of legislation, which, coupled with the rapid development of the sector and the outstanding interest in it, also raises

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the need for regulation – even though it is its unregulated character which makes it so attractive for many potential users. At the moment, this area is still searching for its rightful place in the legal system,[1] and both the various regulatory solutions and their shortcomings show that when it comes to virtual assets, neither the exact scope, nor the method of regulation is fully developed.

2. Potential Scope of Regulation of Virtual Assets

There is a number of potential regulatory issues that may arise in the context of virtual assets. The most important question is whether it is necessary or appropriate to regulate virtual assets themselves, or does it suffice to merely regulate the various services associated with them.

If one compares the virtual assets with the fiat money issued by traditional central banks by analogy, it is apparent that laws do not regulate money in general, but the events, services, transactions and situations related to money (*e.g.* legal relations, contracts) instead. The concept of money is a subject of economics, left undefined by law. Law defines the concept of official currency or the requirements for providing financial services but *does not define what money is*. Therefore, it seems more expedient to approach the topic from this direction and examine the legal relationships and situations in which the emergence and spread of virtual assets require the supplementing and, in some cases, reform of existing regulatory frameworks.

It is also important to pay attention to fact that virtual assets are not a homogeneous conglomeration. Within this category, we can distinguish *(i) utility tokens,* that provide access to certain products or services; *(ii) payment tokens*, also known as virtual money (cryptocurrencies), which are intended for us as alternative means of payment; *(iii) security tokens*, which embody a membership right or a contractual claim, and are very similar in this regard to traditional equity or debt securities; and *(iv) hybrid tokens*, that show the combined features of utility and payment tokens.[2]

This brief categorization is the simplest portrayal of the complex picture that is today (in July 2022) made up of more than 23,300 different assets, with a total value of USD 1.05 trillion.[3] In terms of substance, it is clear that there are huge differences between even the best-known virtual assets (cryptocurrencies). This diversity poses a particular challenge for the legislator if it wants to develop an appropriate regulatory response to all relevant issues that may arise.

Keeping all of these in mind, if one tries to take stock of the topics that require a regulatory response, one will find a rather comprehensive list. The following may arise as relevant *regulatory topics: (i)* in the field of financial services: currency exchange (both in fiat/virtual and virtual/virtual pairs), deposit transactions, financing clients (P2P lending, collateral transactions), payment

1 Zoltán Nagy, 'A kriptopénzek helye és szerepe a pénzügyi rendszerben', *Miskolci Jogi Szemle*, 2019/2, p. 10.

2 Niklas Schmidt, *Kryptowährungen und Blockchains*, Linde, Wien, 2019, p. 61.

3 *See* at www.coinmarketcap.com.

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transactions; *(ii)* in the ambit of investment services: commercial transactions (operation of cryptomarkets), depository transactions, portfolio management, placement, issuance (initial coin offerings, ICOs, STOs); *(iii)* tax regulation (both in turnover, income and wealth taxation, and the possible authorization of the payment of taxes by virtual assets, tax procedure issues); *(iv)* the issues surrounding the proper categorization of virtual assets in accounting matters; *(v)* consumer protection, investor protection regulation, and related institutional issues; *(vi)* money laundering regulations; *(vii)* supplementing certain labor law rules (in particular: allowing for the payment of wages and other remuneration in a virtual asset); *(viii)* corporate and bankruptcy law issues (equity rules: virtual asset contribution for the equity, liquidation of assets, disposal of assets); *(ix)* certain securities law issues (issuance of blockchain-based securities); *(x)* data protection (GDPR[4] *versus* blockchain: data transfer, enforcement of the right to be forgotten); and the *(xi)* legal and technical feasibility of state coercive measures and enforcement actions.

This list could be continued and expanded. However, it is also important to point out that the basic purpose of the relevant regulation should be the clarification of what is to be considered a virtual asset, in particular, from the perspective of private law.

In the following sections, I present certain examples of European regulatory solutions that have already been adopted and had entered into force, which can serve, at least in some of their elements, as models for a comprehensive and harmonized set of global rules.

3. Complementing the Traditional System of Money and Capital Market Rules: the German Example

The German legislature laid down the foundations for the regulation of virtual assets by supplementing the national banking law [the *Kreditwesengesetz (KWG)*].[5] The KWG regulates both money and capital market service providers and the services they are permitted to provide. According to the law, credit institutions *(Kreditinstitute)* provide banking services, while the investment service providers *(Finanzdienstleistungsinstitute)* offer investment services *(Finanzdienstleistungen)* on a commercial basis. In the context of virtual assets, the law regulates two types of services: *(i)* the crypto-custody service (*Kryptoverwahrgeschäft*), and *(ii)* the crypto-securities register management (*Kryptowertpapierregisterführung*).

The KWG defines the assets that may be the subject of an investment service: these are financial instruments (*Finanzinstrumente*), which include in

4 *Cf.* Article 17 of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (GDPR), on the right to erasure (right to be forgotten).

5 Gesetz über das Kreditwesen – Kreditwesengesetz in der Fassung der Bekanntmachung vom 9 September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 90 des Gesetzes vom 10 August 2021 (BGBl. I S. 3436) geändert worden ist.

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addition to traditional transferable securities, money market instruments, and also derivatives of the crypto-values (*Kryptowerte*). According to the KWG's definition, crypto-values are digital representations of value that are not issued or guaranteed by any central bank or government agency and do not have the legal status of currency or money, but are accepted by agreement or practice as means of exchange or payment instruments by natural or legal persons. Crypto-values can be used for investment purposes and they can be transmitted, stored, and distributed electronically. However, the law emphasizes that electronic money (which is subject to separate EU legislation) should not be considered a crypto/ virtual asset.

It is clear from this regulatory solution that the German legislator has placed crypto-custody services *among investment services* and cryptocurrencies (virtual assets) as the financial instrument within the traditional money and capital market regulations. Furthermore, it introduced a new type of investment service (the crypto-securities register management) into the framework of the 2021 securities law reform.

Based on the KWG's supplemented regulatory framework, it should be emphasized that not all services related to crypto/virtual assets, but just the above-mentioned services forming the technical basis for crypto-services have come under the supervision of the German Financial Supervisory Authority (BaFin). Consequently, among others, rules on the acquisition of service providers, their reporting obligations to the supervisory authority, anti-money laundering and counter-terrorist financing laws have become applicable to entities providing regulated crypto-services. Their commercial market activities, just like those of other financial and investment service providers, have become subject to supervisory authorization and may be subject to supervisory action in case of an infringement of applicable laws.

At the same time, they have been exempted from certain requirements under the capital market regulation: they do not have to apply the EU's prudential rules (CRR[6]) or KWG's provisions on own funds, capital buffers, large exposures, internal credit and the establishment of a branch office as well as the cross-border services rules.

4. Is a Virtual Asset a Property or a Claim? – Answers from Austria, Germany, Switzerland and Liechtenstein

Defining and categorizing virtual assets – crypto-values – within the system of the private law is not an easy mission. A fundamental question is whether these instruments are to *be placed in property law or in the law of obligations*. Owing to the differences between virtual assets and traditional forms of property and claims, the private law definition and categorization may be solved by amending and/or supplementing the relevant rules of existing civil codes, which must be

6 Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012.

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preceded by a legislative decision on the legal treatment of these assets (whether they should be treated as property or claims). This question is of paramount importance, not only from a private law point of view, but also from an accounting and taxation aspect. There are some arguments in favor of considering virtual assets as receivables, namely, receivables without maturity. The complete lack of legal categorization of these assets poses serious difficulties also in the field of accounting.

Article 285 of the Austrian Civil Code (ABGB[7]) defines property in a legal sense as anything that is not a person and serves their benefit.[8] 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 Hungarian Civil Code[9] (Ptk.) or under the civil codes of many other countries.]

Contrary to the concept of property under the Austrian ABGB, as a general rule, Section 90 of the German Civil Code (BGB[10]) regards only physical objects as property. However, the new Act on Electronic Securities[11] (eWpG) adopted in 2021 states that *electronic securities must be regarded as property* within the meaning of Section 90 BGB. The eWpG regulates two types of electronic securities: centrally registered – traditional – electronic securities and crypto-securities, which are registered in a separate crypto-security register. In respect of both types of electronic securities, the law clearly states that they must be regarded as property under Section 90 BGB.

The Swiss Civil Code (ZGB[12]) does not define the concept of property, however, it sets out the powers of the owner in Section 641, according to which "the owner of an object is free to dispose of it as he or she sees fit within the limits of the law". The ZGB distinguishes between ownership of immovable properties and ownership of chattel properties. The objects of chattel property are, by their nature, movable physical objects and forces of nature which may be the subject of legal rights, and do not form part of any immovable property (Section 713). The rules stipulated in Articles 20 and 171 of the Liechtenstein Law of Property (SR[13]) are almost identical to those applicable in Switzerland. Finally, according to the conceptual framework of Swiss private law, it is *difficult to extend the concept of things to virtual assets*.

7 Allgemeines bürgerliches Gesetzbuch für die gesamten deutschen Erbländer der Oesterreichischen Monarchie StF: JGS Nr. 946/1811.
8 Schmidt 2019, p. 118.
9 Hungarian Act V of 2013 on the Civil Code.
10 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2 Januar 2002 (BGBl. I S. 42, 2909; 2003 I S. 738), most recently amended by Section 2 of Act of 21 Dezember 2021 (BGBl. I S. 5252).
11 Gesetz über elektronische Wertpapiere vom 3 Juni 2021 (BGBl. I S. 1423)
12 Schweizerisches Zivilgesetzbuch vom 10 Dezember 1907 (as of 1 January 2022).
13 Sachenrecht (SR) 1922 vom 31 Dezember 1922, Liechtensteinisches Landesgesetzblatt, Jahrgang 1923 Nr. 4.

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5. Introduction of Dedicated Legislation in Malta and France

5.1 The Maltese Regulatory System

In 2018 Malta adopted three foundational laws underpinning the regulatory system for virtual assets, based on the National Blockchain Strategy: the Virtual Financial Assets Act[14] (VFA Act), the Innovative Technology Arrangements and Services Act[15] (ITAS Act), and the Malta Digital Innovation Authority Act[16] (MDIA Act). These statutory provisions are supplemented by guidelines of the Malta Financial Services Authority.

The provisions of the VFA Act shall apply to services, activities and institutions that arise out of, or are provided as services related to, a virtual financial instrument. According to the provision of the VFA Act, virtual financial asset or VFA means any form of digital medium recording that is used as a digital medium of exchange, a unit of account, or store of value and that is not *(i)* electronic money; *(ii)* a financial instrument; or *(iii)* a virtual token.

Electronic money is defined by the directive on electronic money institutions,[17] while financial instruments are listed in the MIFID2 directive.[18] Virtual token means a form of digital medium recording whose utility, value or application is restricted solely to the acquisition of goods or services, either solely within the DLT platform in relation to which it was issued, or within a limited network of DLT platforms (excluded DLT exchanges).

According to the VFA Act, activities related to virtual financial assets may be carried out under official supervision exercised by the Financial Services Authority of Malta. The VFA Act concerns the following activities related to virtual financial assets: *(i)* the initial virtual financial asset offering (a method for raising funds whereby an issuer issues virtual financial assets and offers them in exchange for funds); *(ii)* providing services related to virtual financial assets (VFA services).

The provision of VFA services is subject to the possession of a license to be granted under the VFA Act. These services are the following, when provided in relation to a virtual financial asset: *(i)* reception and transmission of orders; *(ii)* execution of orders on behalf of other persons; *(iii)* dealing on own account; *(iv)* portfolio management; *(v)* custodian services; *(vi)* investment advice; *(vii)* placement of virtual financial assets; *(viii)* operation of a VFA exchange; *(ix)* transfer of virtual financial assets.

14 Act XXX of 2018 as amended by Legal Notice 106 of 2021 and Act XLVI of 2021. (Virtual Financial Assets Act).

15 Act XXXIII of 2018 as amended by Legal Notice 389 of 2020 (Innovative Technology Arrangements and Services Act).

16 Act XXXI of 2018 (Malta Digital Innovation Authority Act).

17 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC.

18 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.

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The basic requirements for issuing virtual financial assets are the preparation of a "White Paper" for introducing the issuer and the asset to be issued, its registration with the Financial Services Authority of Malta, and the appointment of a VFA agent for professional matters. The law stipulates the issuer's responsibility for misstatements in whitepapers, advertisements, and websites.

A VFA agent must be appointed in case someone either intends to issue virtual financial assets or provides a service related to these. A VFA agent is an individual advocate, accountant or auditor (or a relevant firm), registered with the supervisory authority, holding authorizations, qualifications, and/or experience deemed by the supervisory authority as possessing suitable expertise to exercise the tasks related to virtual financial assets issuance, or virtual financial asset related services). The role of the VFA Agent is to provide the appropriate professional background for VFA issuers and service providers. In addition to services related to virtual financial assets, the VFA Act also sets out rules for the prevention of market abuse.

Overall, as far as the regulation of the virtual financial assets in the Maltese legal system is concerned, there is *a regulatory framework similar to traditional capital market regulation*, where *(i)* the activities related to the issuance of virtual financial assets and the provision of related services must be authorized and supervised; *(ii)* similarly to investment services, the regulatory framework defines in an exhaustive manner which services must be considered virtual financial services; *(iii)* subject of the regulation are virtual financial assets, which are special financial instruments considered to be virtual financial services; *(iv)* the publication of a prospectus registered with the supervisory authority is mandatory when issuing virtual financial assets; *(v)* the regulation of prevention of market abuse is also a part of the regulatory system.

5.2 A Comprehensive Legal Framework of Virtual Assets and the Utilization of the Shared Electronic Recording System in France

In France, the very first step of the crypto-legislation was the application of anti-money laundering law in 2016, when cryptocurrency trading platforms and brokers became subject to the anti-money laundering legislation.[19]

One of the most significant parts of the French crypto-legislation is the legal framework related to the Action Plan for Business Growth and Transformation (PACTE), which allows for the use of blockchain for the registration of unlisted securities, crowdfunding and ICOs. The core element of the French crypto-legislation is the PACTE Act,[20] a dedicated legal framework, which aims at facilitating the growth of enterprises through several legislative measures,

19 Ordinance No. 2016-1635 of 1 December 2016, modifying Article L. 561-2 of the Code monétaire et financier (Monetary and Financial Code).

20 Act No. 2019-486 of 22 May 2019 on the growth and transformation of enterprises (PACTE: Plan d'Action pour la Croissance et la Transformation des Entreprises); Hubert de Vauplane & Victor Charpiat, 'The Virtual Currency Regulation Review: France', *in* Michael S. Sackheim & Nathan A. Howell (eds.), *The Virtual Currency Regulation Review,* 4th Edition, 2021, at https://thelawreviews.co.uk/title/the-virtual-currency-regulation-review/france.

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including rules governing ICOs and also intermediaries dealing with virtual assets. These rules were adopted by amending the existing *Code monétaire et financier* (Monetary and Financial Code) at several points.

The creation of a dedicated framework for the financing of SMEs through crowd-lending platforms in 2016 was the first appearance of blockchain in French law.[21] According to the relevant provisions, financial securities, issued on French territory and subject to French legislation, are registered either in a security account held by the issuer or by one of the intermediaries, or in a shared electronic recording system.[22] The French law makes it possible to use a distributed ledger (a shared electronic recording system) for the issuance, registration, and transfer of unlisted securities (securities which are not admitted to the operations of a central depository).[23] The shared electronic recording system must guarantee the identification of the owners of the securities, as well as the nature and number of securities held.[24]

These securities issued, registered, and transferred by using a distributed ledger must not be confused with security tokens, since according to the Monetary and Financial Code, tokens issued under ICOs cannot be regarded as securities.[25]

Distributed ledgers (including public and private blockchains) can be used for the registration of securities, if *(i)* they are conceived and implemented in a way that preserves the integrity of the information recorded; *(ii)* they directly or indirectly allow the identification of the securities owners and the nature and number of securities held; *(iii)* they include a business continuity plan; and *(iv)* the owners of the securities registered on them are able to access their statements of transactions.[26]

The French legal framework became a viable background for the issuance of bonds, covered bonds, and shares on the Ethereum blockchain. In France, the Central Bank (*Banque de France*, BdF) started working on developing a *central bank digital currency* (CBDC), to ensure the safe development of tokenized financial markets and to improve cross-border and cross-currency payments, in line with ECB's project on digital euro issuance.

As one of the first occasions of using a CBDC in practice, in April 2021, the European Investment Bank (EIB), in collaboration with commercial banks, launched a digital bond issue, intending to use distributed ledger technology for the registration and settlement of digital bond securities.[27] The issuance was settled with a CBDC issued by the BdF on the blockchain. According to the Monetary and Financial Code, a token is an intangible asset representing, in digital form, one or more rights that can be issued, registered, retained or

21 Ordonnance n° 2016-520 du 28 avril 2016 relative aux bons de caisse.

22 Article L. 211-3 of the Code monétaire et financier.

23 Articles L. 211-3, L. 211-7, L. 211-15 and L. 211-17 of the Code monétaire et financier.

24 Article R. 211-9-7 of the Code monétaire et financier.

25 Article L. 552-1 of the Code monétaire et financier.

26 Vauplane & Charpiat 2021.

27 *See* at www.eib.org/en/press/all/2021-141-european-investment-bank-eib-issues-its-first-ever-digital-bond-on-a-public-blockchain.

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transferred through a shared electronic recording system that identifies, directly or indirectly, the owner of said property.[28]

ICOs are explicitly separated from securities offerings. The French supervisory authority of financial markets (*Autorité des Marchés Financiers,* AMF) supervises and authorizes the initial coin offerings (ICOs) and grants approval to those ICOs that comply with the requirements set out by the Monetary and Financial Code. Any issuer who makes a public offering of tokens (ICOs) may request authorization from the AMF. Nevertheless, obtaining the AMF's approval is optional for all token issuers.[29] ICOs without formal approval are subject to marketing restrictions only, by contrast, the AMF's approval serves as a sort of quality seal. For approval, ICO issuers must file an information document (white paper) containing various details of the offer and the issuer.[30]

French legislation also regulates the digital asset service providers (DASPs), who are entities providing services related to digital assets. Digital assets include: *(i)* the tokens defined in the ICO framework, except those qualifying as financial instruments; *(ii)* any digital representation of value which is not issued or guaranteed by a central bank or by a public authority, which is not necessarily attached to a currency having legal tender nature and which does not have the legal status of a currency, but which is accepted by natural or legal persons as means of exchange and which can be transferred, stored or exchanged (traded) electronically.[31]

The legal framework and definition of digital asset services is based on traditional investment services: *(i)* the custody service of digital assets or access to digital assets (private cryptographic keys) on behalf of third parties; *(ii)* buying or selling digital assets for fiat money (legal tender); *(iii)* exchanging digital assets for other digital assets; *(iv)* the operation of a digital asset trading platform; *(v)* various other investment-type services, such as the reception and transmission of orders on digital assets on behalf of third parties, portfolio management of digital assets on behalf of third parties, advice to subscribers of digital assets, underwriting of digital assets, placement of digital assets.[32]

For service providers established in France or providing these services in France, who are custodians of digital assets, providers of the service of purchase or sale of digital assets against legal currency and other digital assets, and those operating a digital asset trading platform, a registration with the AMF is mandatory before starting their activity. For any other service provider, registration is optional.[33]

28 Article L. 552-2 of the Code monétaire et financier.
29 Article L. 552-4 of the Code monétaire et financier.
30 Article L. 552-4 of the Code monétaire et financier.
31 Article L54-10-1 of the Code monétaire et financier.
32 Article L54-10-2 of the Code monétaire et financier.
33 Article L54-10-4 of the Code monétaire et financier.

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6. A Possible Precursor to an EU Regulatory Proposal: the Liechtenstein Example

The regulatory system for virtual assets was conceived in the Principality of Liechtenstein in 2019: the Act on Token and TT Service Providers (TTTL[34]) and the Regulation on Token and TT-Service Providers (TTTR[35]). The TTTL sets out the legal framework for trusted technology (hereinafter: TT) based transaction systems, regulating in particular: *(i)* the principles of private law governing tokens, the representation of rights by tokens and their transfer; *(ii)* the rules governing the supervision of trusted technology providers and TTP's rights and obligations.

The Act doesn't specify trusted technologies (consequently, it is exclusively applicable to distributed ledger technology and blockchain). It considers those technologies to be trusted technology that ensure the integrity of tokens, the clear assignment of tokens to TT IDs, and the availability of tokens. The law defines *token as a piece of information* on a TT system that: *(i)* may represent a claim or rights of membership against a person, a right to property or any other absolute or relative right; and *(ii)* is assigned to one or more TT IDs.

The law does not specify whether to treat tokens as property or a claim. However, from a private law perspective, it regulates the owners of the tokens and considers the owner of a token to be the person who possesses the access keys (TT keys) to a token. Access to the token creates the possibility of disposing of the right embodied by the token.

TT services include token issuance, token creation, TT key and token custody, TT token commission service, token/money exchange service, token alienation verification service, price information service, ownership adequacy/verification service, TT agency services (intermediation of foreign services).

In the case of domestic services, the condition for the operation of TT service providers is registration with the Liechtenstein Financial Market Authority (*Finanzmarkt Aufsicht* – FMA), which also supervises the operation of TT service providers (similarly to other traditional financial institutions). In its supervisory competence, the FMA carries out *(i)* the registration of TT service providers; *(ii)* provides information on the applicability of the TVTG and other legislation on trusted technologies; *(iii)* keeps the register of TT service providers; *(iv)* prosecutes violations of the law, inspects TT services and service providers, and applies the measures specified by law where necessary.

The service is considered to be subject to Liechtenstein law if the service provider or token issuer has headquarters or a place of residence in Liechtenstein, or parties declare its provisions to expressly apply in a legal transaction over tokens. The condition for registration is that the applicant is *(i)* has legal capacity; *(ii)* reliable; *(iii)* technically suitable; and has *(iv)* its headquarters or place of

34 Gesetz vom 3 Oktober 2019 über Token und VT-Dienstleister (TVTG), Liechtensteinisches Landesgesetzblatt Jahrgang 2019, Nr. 301.

35 Verordnung vom 10 Dezember 2019 über Token und VT-Dienstleister (TVTV), Liechtensteinisches Landesgesetzblatt, Jahrgang 2019, Nr. 349.

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residence in Liechtenstein; *(v)* the necessary minimum capital (depending on the service provided) is between CHF 30,000 and 250,000; *(vi)* suitable organizational structure with defined areas of responsibility and a procedure to deal with conflicts of interest; *(vii)* written internal proceedings and control mechanisms that are appropriate in terms of the type, scope, complexity, and risks of the TT Services provided, including ensuring sufficient documentation of these mechanisms; *(viii)* special internal control mechanisms, where appropriate; *(ix)* authorization pursuant to the Trustees Act if they intend to act as a TT Protector; and *(x)* if they intend to conduct activity that is subject to an additional authorization obligation according to the Financial Market Supervision Act, for which the corresponding authorization is available.

A characteristic feature of Liechtenstein legislation is that it allows TT services not only to be provided by companies, since private individuals may also carry out this activity. Overall, the Liechtenstein regulation differs in many aspects from the legislative solutions presented above. It is not constructed simply by analogy to traditional money and capital market regulations. Instead it defines – in the view of the specificities of the regulated technological innovation – the relevant concepts and the tasks, rights, and obligations of the issuers, service providers, and supervisory authorities. For this reason, it is appropriate to use it as a model for developing a future common European, and possibly global regulatory system.

7. EU Legislation: Proposal for a Regulation on Markets in Crypto-Assets (MICA)

In September 2020 the European Commission published its proposal for a regulation on markets in crypto-assets[36] (MICA proposal), which seeks to fill a long-standing regulatory gap. Until now, relevant provisions in the EU legislation can almost exclusively be found among the provisions combatting money laundering,[37] and there are no specific rules on this topic in other areas of the EU law.

The scope of the EU's Anti-Money Laundering Directive[38] (AMLD) was extended in 2018 by an amendment[39] (Fifth Money Laundering Directive) to

36 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 (MICA proposal).

37 Péter Bálint Király, 'A kriptovaluták pénzügyi fogyasztóvédelmi aspektusai', *Iustum Aequum Salutare*, Vol. 16, Issue 4, 2020, p. 50.

38 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.

39 Directive (EU) 2018/843 of the European Parliament and of 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.

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include virtual currency and fiat money exchange services providers and custodian wallet providers for which the amendment made their registration compulsory. This amendment was the first legislative act, where EU law defined the concept of virtual currency:

> "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."

By preparing and presenting a proposal for a MICA regulation the Commission acknowledges the regulatory shortcomings outlined above. The proposal attempts to regulate the at EU level hitherto unregulated crypto-assets and the relevant service providers by defining the requirements for issuing and trading different types of crypto asset tokens and providing services with them.

The proposal is part of the *Digital Finance Package*, which sets out a new digital financial services strategy[40] for the EU's financial sector, as well as a proposal for the regulation of a pilot regime for market infrastructures based on distributed ledger technology (DLT),[41] a proposal for an EU regulatory framework on digital operational resilience[42] ("DORA"), as well as a proposal to clarify or amend certain related EU rules on financial services.[43]

The main rules of MICA cover *(i)* the transparency and disclosure requirements for the issuance and admission to trading of crypto-assets; *(ii)* the authorization and supervision of crypto-asset service providers and token issuers; *(iii)* the operation, organization and governance of token issuers and crypto-asset service providers; *(iv)* consumer protection rules for the issuance, trading, exchange, and custody of crypto-assets; *(v)* measures to prevent market abuse in order to ensure the integrity of crypto-asset markets.

This Regulation applies to persons that *(i)* are engaged in the issuance of crypto-assets or *(ii)* provide services related to crypto-assets in the EU (such services include custody and administration of crypto-assets on behalf of third parties, the operation of a trading platform, the exchange of services for fiat currencies or other crypto-assets, the execution of orders on behalf of third

40 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.

41 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.

42 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.

43 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.

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parties, placing of crypto-assets, the reception and transmission of orders on behalf of third parties, providing advice).

According to the proposal, separate rules will apply to asset and electronic money-based tokens as well as other tokens (non-stable coins) that do not fit in these categories. One can discover many similarities in the proposed regulatory system with the solutions of traditional money and capital market regulation.

By analogy with securities law, the draft identifies the drafting, notification, and publication of the *White Paper* (like a *prospectus*) as the essential requirement for the issuance of a cryptocurrency, which, in addition to identifying the issuer and presenting the project to be financed, also details the risks and technological requirements involved. Similarly to securities legislation, the draft prescribes a supervisory license requirement as a precondition for the issuance of asset referenced and electronic money-based tokens. The definition of the obligations and responsibilities of the issuer, the requirement to ensure the consumer's right of withdrawal , and the definition of the rules on market abuse are of paramount importance for the protection of customers and consumers.

The proposal requires cryptocurrency service providers to be licensed to enter the market, to operate in line with certain prudential rules and the detailed rules for services, and to operate a complaint handling system. The regulation sets out the tasks, powers, and possible actions of the competent supervisory authorities and the *European Banking Authority* (EBA).

The Commission proposal contains a number of elements that are justified in the regulatory framework of the new instruments, however, there are several issues that are not covered by the proposal, even though appropriate regulation in these areas would be more than justified and necessary. Examples for such 'missing' elements include: *(i)* the private law categorization of crypto assets (defined as property or claim); *(ii)* the regulation of crypto asset loans and the use of crypto assets as credit collaterals by creating the private law foundations of these activities, as well as the collection of crypto-asset deposits; *(iii)* the extension of the scope of the proposed regulation to existing instruments (which raises several questions, should this be the case, but also in case this regulatory solution is not pursued); *(iv)* the establishment of institutions similar to traditional deposit insurance and investor-protection funds, the definition of the services and damages they cover, and the extent and method of compensation for claims incurred; *(v)* regulating the application of state coercive measures (enforcement, seizure of assets in the framework of an official procedure) to be able to take enforcement action or other action in respect of crypto-assets; *(vi)* adaptation of company law in the field of rules on equity (definition of the rules for the contribution of cryptocurrencies as equity); *(vii)* harmonization of the proposal with the requirements of the *General Data Protection Regulation*[44] (GDPR) in particular, with the technological characteristics of distributed ledger technology (in particular, data transfer, the right to forgotten and the right to privacy).

44 Articles 16, 17, and 18 GDPR.

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8. Summary

Looking at the regulatory solutions of certain European countries, it is apparent at first glance that European countries use different regulatory solutions (stand-alone, separate regulation vs incorporating new rules into traditional money and capital market laws), yet the relevant laws put in place do not differ greatly. EU legislation is currently lagging far behind the regulatory progress of individual Member States; only the relevant provisions of the Anti-Money Laundering Directive are in force, but a more comprehensive regulation is yet to be adopted.

In general, the obligation to register (license) for the issuance of virtual assets appears everywhere (both in the already adopted national regulations and in the proposal of the European Commission). The concept of services related to virtual assets is very similar to the concept of investment services, the provision of services falls under financial supervision and the operation of service providers is subject to rules similar to those for money and capital market institutions.

In addition to regulatory similarities, regulatory gaps cover nearly identical areas. Except for the Austrian example (which may be considered a random exception), *the private law definition of virtual assets* (the definition of assets as property or claim) *does not appear in any legislation*. A deficiency is, that in addition to services similar to traditional investment services, the rules applicable to services such as financial services (lending, deposit-taking, money substitutes, *i.e.* the issuance of cards) do not appear in the regulation, although these services are becoming more and more widespread. There is also a *lack of an institutional protection system* (*e.g.* investor protection) similar to the relevant institutions in traditional money and capital markets. Finally, among these shortcomings, one must also highlight the *lack of a system of legal and technological requirements for the enforceability of state coercive measures*.

All in all, a long-needed legislative process has begun in many countries and also in the EU, with elements that seem fruitful and promising. However, due to the technological possibilities, it would be expedient to regulate this topic – or at least its basic elements – at global level, and the establishment of this regulatory framework should take place as soon as possible. Contrary to the endeavors of several states and the EU, there are more and more countries around the globe, that are not in favor of the proliferation of crypto-assets and consequently, a user-friendly legislation to govern them.

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