cepInput

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Crypto assets

The regulatory treatment of cryptocurrencies in the EU – Status Quo

Philipp Eckhardt, Anne-Carine Pierrat and Bert Van Roosebeke

- The regulatory treatment of cryptocurrencies in the EU is currently unclear. This cep**Input** reviews whether and under what conditions cryptocurrencies may be covered by some of the most essential EU financial market provisions.
- A binding and general definition of cryptocurrencies is missing in the EU.
- It is unclear if and to which extent the EU's financial market provisions apply to cryptocurrencies. The result is a great deal of legal uncertainty.
- This legal uncertainty should be lifted. Hence, the EU-Commission's intention to put forward its ideas on the regulation of cryptocurrencies in the 3rd quarter of 2020 is to be welcomed.
- Any EU regulation should minimise risks to financial stability and consumer protection, while safeguarding innovation incentives and efficiency gains related to cryptocurrencies.

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1 Introduction

In December 2019, the Commission published a consultation document[1] titled "On an EU framework for markets in crypto assets" asking stakeholders about "their views on the best way to enable the development of a sustainable ecosystem for crypto assets while addressing the major risks they raise".[2] At the end of May 2020, the EU Commission released its updated work programme for the year 2020. The Commission now plans a legislative proposal on "crypto assets" in the 3rd quarter of 2020.[3]

The EU Commission defines crypto assets as "digital assets that may depend on cryptography[4] and exist on a distributed ledger[5]".[6] Three types of crypto assets can be distinguished:[7]

(1) payment tokens, in the following referred to as cryptocurrencies, are crypto assets that "may serve as a means of payment or exchange". They are used to buy or sell goods, for investment purposes or as a store of value;
(2) investment tokens are crypto assets with profit-rights attached to them. They serve as a means to raise capital, as businesses issue them in exchange for fiat money or other crypto assets. They can be compared to cryptographic stocks;
(3) utility tokens are crypto assets that "enable access to a specific product or service", such as tokens which give access to computing power or which function as vouchers.

This cep**Input** focuses on cryptocurrencies and on tokens that combine elements of payment and investment tokens that are not issued by central banks or public authorities. It provides an overview of the EU regulatory framework applicable to these crypto assets. In chapter 2, we illustrate the lack of a general definition of such assets under EU regulation. In chapter 3, we consider which EU regulatory provisions are applicable to crypto assets. Chapter 4 concludes the cep**Input.**

2 Crypto assets: lack of a binding and general EU definition

As of today, there is no generally valid definition of cryptocurrencies and investment tokens on EU level. However, both the European Banking Authority (EBA) and the EU legislator have provided definitions, non-binding or of a limited scope, regarding cryptocurrencies.

2.1 The European Banking Authority (EBA) on cryptocurrencies

The European Banking Authority (EBA) first intervened in the debate in 2014. In a non-binding opinion, it defined cryptocurrencies[8] as "digital representation of value that is neither issued by a central bank

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1 EU Commission (2019), On an EU framework for markets in crypto assets, Consultation document, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, December 2019.
2 Id. p. 5.
3 EU Commission (2020), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 440, Adjusted Commission work programme, 27.5.2020.
4 Cryptography is a „technique of protecting information by transforming it into unreadable format that can only be deciphered by someone who possesses a secret key" [European Parliament (2018), Cryptocurrencies and blockchain - Legal context and implications for financial crime, money laundering and tax evasion, July 2018, p. 20].
5 A distributed ledger is "a repeated digital copy of data available at multiple locations." [EU Commission (2019), p. 56].
6 EU Commission (2019), p. 3.
7 EU Commission (2019), pp. 3 and 57 and European Banking Authority (2019): Report with advice for the European Commission on crypto assets, 9.1.2019, p. 7.
8 In its opinion, the EBA uses the term "virtual currencies". For simplification reasons we use the term "cryptocurrencies" throughout the paper even though the concept of virtual currencies is slightly broader.

or public authority nor necessarily attached to a fiat currency, but is used by natural or legal persons as a means of exchange and can be transferred, stored or traded electronically".[9]

The opinion was addressed to the EU Council, the European Commission, the European Parliament and to national supervisory authorities and was aimed at identifying the requirements needed for regulating cryptocurrencies.[10] It is based on Art. 9 (2) of the EBA Regulation[11], which allows the EBA to "monitor new and existing financial activities and […] adopt guidelines and recommendations with a view to promoting the safety and soundness of markets and convergence of regulatory practice".[12] The EBA considered an opinion to be the appropriate tool to address the need for regulation of cryptocurrencies at the time because of the underdeveloped nature of their regulatory environment[13], but it retained the possibility to adopt guidelines or recommendations later on the topic based on this opinion, when a regulatory regime is to be developed at EU level.

The first part of the definition proposed by the EBA – "digital representation of value" – establishes that cryptocurrencies are "essentially represented in digital form".[14] The second part – "neither issued by a central bank or public authority" – tries to distinguish them from traditional money.[15] The third part – "nor necessarily attached to a fiat currency" – differentiates them from electronic money: while the latter is usually attached to a fiat currency and can be redeemed at par value, this is often not the case for cryptocurrencies. The fourth part – "used by natural or legal persons as a means of exchange" – simply states that cryptocurrencies can be used to pay for goods and services, when accepted by market actors. Finally, the last part of the definition – "can be transferred, stored or traded electronically" – makes clear that cryptocurrencies can be "transferred from one user to another via electronic means, […] stored on an electronic device or server and […] traded electronically".[16]

2.2 The Anti-Money-Laundering Directive on cryptocurrencies and investment tokens

The definition of cryptocurrencies[17] provided by the 5th Anti-Money-Laundering Directive [AMLD, 2015/849][18] is the first ever provided by the EU legislature on this topic. For the purpose of the AMLD, a cryptocurrency must be understood as "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal

9 European Banking Authority (2014a), EBA opinion on virtual currencies, EBA/Op/2014/08, 4.7.2014, p. 11.
10 European Banking Authority (2014b), Press release, EBA proposes potential regulatory regime for virtual currencies, but also advises that financial institutions should not buy, hold or sell them whilst no such regime is in place.
11 Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC [EBA Regulation].
12 Art. 9 (2) EBA Regulation.
13 Id., p. 45.
14 European Banking Authority (2014a), EBA opinion on virtual currencies, EBA/Op/2014/08, 4.7.2014, p. 11.
15 Fiat currency essentially refers to coins, banknotes and book money.
16 European Banking Authority (2014), EBA opinion on virtual currencies, EBA/Op/2014/08, 4.7.2014, p. 11 and 12.
17 For simplification reasons, we again use the term "cryptocurrencies" here, even though the AMLD uses the broader term "virtual currencies".
18 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, as amended by Directive (EU) 2018/843.

persons as a means of exchange and which can be transferred, stored and traded electronically".[19]

While the definition of the EU legislature resembles the one provided by the EBA, it is important to highlight (1) that it is not a general one but that it merely aims at defining what cryptocurrencies are for the purpose of the Directive and (2) that a few differences between the two definitions do exist.

Regarding such differences, first, the AMLD states that cryptocurrencies are not necessarily attached to legally established currencies and do not possess a legal status of currency and money, as opposed to EBA's version, stating that cryptocurrencies are not necessarily attached to a fiat currency. This change reflects the concerns expressed by the European Central Bank (ECB) in its opinion on the proposal, according to which "the euro is the single currency of the Union's economic and monetary union" and cryptocurrencies cannot thus be considered "currencies" from an EU regulatory perspective.[20]

Secondly, the AMLD also establishes that cryptocurrencies are not "guaranteed by a central bank or a public authority". This phrase, missing in the EBA definition, although not expressly demanded for by the ECB, is likely a result of a comment made by the ECB that "unlike the holders of legally established currencies[21], the holders of virtual currency [i.e. cryptocurrency] units typically have no guarantee that they will be able to exchange their units for […] legal currency in the future"[22].

Thirdly, the AMLD sees cryptocurrencies also as means of exchange and not only as means of payment. This goes back to the ECB's claim that, if cryptocurrencies are not considered a currency, they can be used for other purposes than payments[23]. This is uphold by recital 10 AMLD, claiming cryptocurrencies "can frequently be used as a means of payment, [but] could also be used for other purposes (…) such as means of exchange, investment, store-of-value products or use in online casinos".[24]

Finally, the AMLD expressly excludes that any of the following can be considered cryptocurrencies for the purpose of the Directive: (1) electronic money[25]; (2) funds[26]; (3) monetary value stored on instruments[27]; (4) in-games currencies[28]; and (5) local or complementary currencies[29,30].

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19 Art. 3 No. 18, 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).

20 European Central Bank (2016), Opinion of the European Central Bank of 12 October 2016 on a proposal for a directive of the European Parliament and of the Council 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 Directive 2009/101/EC, (CON/2016/49), 9.12.2016. point 1.1.3.

21 "The value of euro cash is guaranteed by the ECB and the national central banks of the euro area countries, which together form the Eurosystem" [European Central Bank (2017), Explainer, What is money, 20 June 2017.

22 European Central Bank (2016), point 1.1.2.

23 Id. point 1.1.3.

24 Recital 10, AMLD.

25 "Electronic money" as defined in Art. 2 point 2 of 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 (E-Money Directive).

26 "Funds" as defined in Art. 4 point 25 of 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 (Payment Services Directive).

27 "Monetary value stored on instruments" as exempted in Art. 3 points k and l of Payment Services Directive.

28 "In-games currencies" which can be used exclusively within a specific game environment.

29 "Local or complementary currencies" which are used in very limited networks such as a city or a region and among a small number of users.

30 Recital 10 and 11, AMLD.

3 The regulatory treatment of cryptocurrencies in the EU

As illustrated above, so far definitions of cryptocurrencies have only been provided by the EBA, although without any binding force, and by the AMLD, which only provides one for the scope of application of the Directive. The fact that no other secondary instrument of EU law expressly addresses the phenomenon of cryptocurrencies does not exclude that additional EU law is currently applicable to it. In this chapter, we will review the EU law provisions that are relevant in this regard.

3.1 Cryptocurrencies lacking the status of legal tender under EU law

From the perspective of EU law, cryptocurrencies do not qualify as "currencies" as – at least so far – they are not issued centrally by the ECB or EU central banks. The euro is the only legally established currency in the euro area.

The notion of "currency" is linked to the existence of a legal framework for the central issuance of banknotes and coins and is given the status of legal tender[31] under that legal framework.[32] According to the Treaty on the Functioning of the European Union (TFEU) and the Treaty on European Union (TEU), the euro is the single currency of the Economic and Monetary Union (EMU)[33], so that any reference to "currency" in the Treaties must be intended as a reference to the euro. The TFEU expressly provides that banknotes issued by the ECB and euro countries' central banks are the only ones having the status of legal tender in the Member States of the euro area.[34] The same applies to coins.[35] As a consequence, cryptocurrencies do not have to be accepted to make payments in the euro area.[36]

3.2 Cryptocurrencies and the E-Money Directive (EMD)

While cryptocurrencies cannot be regarded as currencies in legal terms, they may qualify as "electronic money" or "e-money" in the sense of the Electronic-Money Directive [EMD, 2009/110/EC][37].

According to the EMD, "electronic money" is defined as "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions […] and which is accepted by a natural or legal person other than the electronic money issuer*"*.

Two of these criteria are not generally met by cryptocurrencies: (1) They do not always represent a claim on the issuer as cryptocurrencies may lack a specific issuer and (2) they are usually not exchanged

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31 The European Commission defines a legal tender in the EU with three components: (a) a mandatory acceptance of euro banknotes and coins, (b) at full face value, and (c) with a power to discharge from payment obligations (Commission Recommendation 2010/191/EU on the scope and effects of legal tender of euro banknotes and coins, 22.03.2010).

32 International Monetary Fund, "Virtual Currencies and Beyond: Initial Considerations", Staff Discussion Note, January 2016, p.16.

33 Art. 3 (4), TEU and Art. 119 (2), TFEU.

34 Art. 128 (1), TFEU and Art. 10 and 11, Council Regulation on the introduction of the euro. Scriptural money in euro and electronic money in euro, even though they are not legal tender by law, are widely accepted "by choice" to make a payment in the EU. See ECB, "Virtual currency schemes – a further analysis", February 2015, p. 24.

35 Art. 11, Council Regulation (EC) No 974/98 of 3 May 1998 on the introduction of the euro, OJ L 139, 11.5.1998, p. 1.

36 EU law only covers the qualification of legal tender money for euro area countries. Regarding non-euro countries of the EU, this is specified in national law.

37 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.

for "funds", i.e. banknotes and coins, scriptural money or electronic money.[38,39] Indeed, while e-money is generally denominated in fiat currency and can be considered as "digital representation""[40] of it, cryptocurrencies are often not linked to a specific fiat currency and cannot be exchanged for funds. This is confirmed by the ECB, whose 2012 report on cryptocurrencies clarified that these "differ from electronic money schemes insofar as the currency being used as the unit of account has no physical counterpart with legal tender status".[41]

However, the European Banking Authority (EBA) has made clear that cryptocurrencies that do meet these criteria qualify as e-money. The EBA presented examples where a company that issues crypto-currencies in exchange for fiat currencies, and pegged to it, to allow for payments within a network of merchants and consumers can be seen as a company issuing e-money, if the company redeems the currency at any time so that the users have a claim against the company.[42] This scenario comes close to some stablecoins, i.e. to cryptocurrencies which are backed with fiat currencies like the euro or the dollar.[43] The Libra stablecoin[44] – a project announced in June 2019 by Facebook together with a group of companies – as a prominent example may hence meet the definition of e-money.[45,46] This is also the view expressed by the EU Commission, according to which, "depending on their particular features, stablecoins backed by a single fiat currency can qualify as e-money […]", if they offer a direct redemption right.[47]

The legal consequences of cryptocurrencies qualifying as e-money are manifold:

First, as only credit and e-money institutions may issue e-money, the issuers of cryptocurrencies need a licence as a credit or e-money institution.[48] Establishing an e-money institution is less burdensome, but still requires € 350,000 of initial capital.[49] Secondly, issuers have to hold additional own funds on a permanent basis.[50] Thirdly, e-money institutions are not allowed to issue electronic money through agents, and the issuance needs to be made at par value on the receipt of funds (i.e. one Euro for one

38 The term "funds" is defined in Art. 4 point 25 of Payment Services Directive.

39 Schembri, T. et al. (2018), "The legal status of cryptocurrencies in the European Union, p. 15; thinkBLOCKtank (2019), Position paper on the regulation of tokens in Europe (version 1.0), June 2019, p. 47 and 48; European Banking Authority (2014a), EBA opinion on virtual currencies, EBA/Op/2014/08, 4.7.2014. p. 11; Jünemann, M. / Wirtz, J. (2018), ICO: rechtliche Einordnung von Token : Teil 2, Zeitschrift für das gesamte Kreditwesen : Pflichtblatt der Frankfurter Wertpapierbörse. - Frankfurt, M.: Knapp, ISSN 0341-4019, ZDB-ID 5868-3. - Vol. 71.2018, 23 (1.12.), Dezember 2018, p. 7.

40 European Banking Authority (2014a), EBA opinion on virtual currencies, EBA/Op/2014/08, p. 11.

41 European Central Bank, "Virtual Currency Schemes", October 2012, p. 5. This was also mentioned by a court referring to the European Court of Justice for a preliminary ruling regarding the virtual currency Bitcoin: "Virtual currencies differ from electronic money […] in so far as, unlike that money, for virtual currencies the funds are not expressed in traditional accounting units, such as in euro, but in virtual accounting units, such as the bitcoin." (Judgment of 22 October 2015, Skatteverket v David Hedqvist, C-264/14, EU:C:2015:718, para. 12).

42 European Banking Authority (2019), Report with advice for the European Commission on crypto assets, 9.1.2019, p.12-14

43 Eckhardt, P. / Warhem, V.(2020), cepInput 4/2020, The money of tomorrow? Cryptocurrencies, stablecoins, central bank digital currencies, p. 11.

44 Whether Libra can be considered e-money is still under debate [see e.g. Rirsch, R. / Tomanek, S., "Facebook's Libra: A case for capital markets supervision?." Journal of Payments Strategy & Systems 13.3 (2019): 255-267; Dr. Hugo Gottschalk (2019), Ist Libra E-Geld?, Paytechlaw.com, 13.8.2019].

45 thinkBLOCKtank (2019), p. 11; Bullmann, D. / Klemm, J. / Pinna, A. (2019): In search for stability in crypto assets: Are stablecoins the solution?, ECB Occasional Paper, No. 230, p. 39.

46 As pointed out by the ECB, the company Circle obtained a license to issue e-money in the UK for its stablecoin [Bullmann, D. et al. (2019), p. 39].

47 European Commission (2020), Commission Staff Working Document, European Financial Stability and Integration Review (EFSIR), SWD(2020) 40 final, 3.3.2020, p. 40.

48 Art. 1 (1), EMD.

49 Art. 4, EMD.

50 Art. 5, EMD.

unit of e-money).[51,52] Finally, the issuer must keep the funds of holders of e-money strictly separated from other funds of other business activities it pursues.[53]

3.3 Cryptocurrencies and the Payment Services Directive (PSD)

The Payment Services Directive [PSD, (EU) 2015/2366][54] regulates payment services provided in the EU.[55] Payment services include the execution of payment transactions[56], the issuance of payment instruments, the acquiring of payment transactions and money remittance. The services mentioned involve the transfer, withdrawal and receipt of funds. Funds for the purpose of the PSD are defined as "banknotes and coins, scriptural money or electronic money"[57]. Cryptocurrencies that qualify as e-money are thus funds according to the PSD.[58] What follows from that classification?
Most of the PSD's provisions apply to providers of payment services and thus not to the issuers of cryptocurrencies. If at all, the providers of cryptocurrency exchanges and custodian wallet services are within the scope of application of the PSD.[59]

However, even this application may be limited:

- Parts of the PSD – Titles III[60] and IV[61] – only apply to transactions in the currency of a Member State.[62] As cryptocurrencies may qualify as e-money but are – at least not yet – no legal tender in any Member State (see 3.1.), the providers of cryptocurrency payment services are hence only subject to the provisions related to licensing, minimum capital requirements and requirements for the safeguarding of funds received by a payment institution.
- Not all cryptocurrency transactions are dealt with by PSD-regulated payment service providers; hence direct transactions between the payer and the payee on the blockchain[63] take place without application of the PSD.[64]
- The PSD does not cover "limited networks", i.e. "services based on specific payment instruments that can be used only in a limited way".[65] Given the limited acceptance of cryptocurrencies they could well qualify as limited networks.[66]

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51 Art. 3 (5), EMD.
52 Art. 11 (1), EMD.
53 Art. 7 (1), EMD.
54 Art. 4 point 25, 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.
55 Art. 2 (1), PSD.
56 "Payment transaction" is defined as an act, initiated by the payer or on his behalf or by the payee, of placing, transferring or withdrawing funds, irrespective of any underlying obligations between the payer and the payee [Art. 2 No. 15, Payment Services Directive].
57 Art. 4 point 25, PSD.
58 European Banking Authority (2019), Report with advice for the European Commission on crypto assets, 9.1.2019, p.14.
59 Providers of cryptocurrency exchanges are firms which arrange for exchanges between cryptocurrencies and fiat currencies or other cryptocurrencies; custodian wallet providers are firms that provide services to safeguard private cryptographic keys on behalf of its customers, or which hold, store and transfer cryptocurrencies (Art. 3 (19), AMLD).
60 Title III deals with transparency of conditions and information requirements for payment services.
61 Title IV deals with rights and obligations in relation to the provision and use of payment services.
62 Art. 2 (2), PSD.
63 The blockchain is a technology which allows to record and share data and is controlled by a distributed network of computer servers.
64 Gikay, A., "Regulating decentralized cryptocurrencies under payment services law: lessons from European Union law", Journal of Law, Technology and the Internet, Vol. 9, (2018), p. 23 et seq.
65 Art. 3 (k), PSD.
66 Valcke, P. / Vandezande, N. / Van de Velde, N., "The evolution of third party payment providers and cryptocurrencies under the EU's upcoming PSD2 and AMLD4", 2015, Swift Institute Working Paper No. 2015-001, p. 49 and 53.

3.4 Cryptocurrencies and the Funds Transfer Regulation (FTR)

"Funds" as defined in the PSD are also within the scope of the Funds Transfer Regulation [FTR, (EU) 2015/847][67]. Thus, cryptocurrencies qualifying as e-money and consequently as funds are covered by the FTR.

To combat money laundering and terrorist financing, the FTR "lays down rules on the information on payers and payees accompanying transfers of funds, in any currency, […], where at least one of the payment service providers[68] involved in the transfer of funds is established in the Union".[69]

Like the PSD, the FTR generally applies to payment service providers rather than to the issuers of cryptocurrencies. Under the FTR, such payment service providers must ensure that transfers of funds are accompanied by information such as the payer's and payee's names and payment account number.

In reality, the degree of application of the FTR to cryptocurrency payment providers is unclear:

- Like the PSD, the FTR does not apply when cryptocurrencies transactions take place directly, i.e. without involvement of an e-money service provider.
- The FTR applies to transfers of funds – thus including cryptocurrencies if they qualify as e-money – "in any currency". However, the FTR does not specify whether this concerns only official currencies (e.g. the euro or the dollar) or also cryptocurrencies. As this Regulation aims at ensuring transparency of the information accompanying the transfers of funds in order to fight money laundering, the application of this Regulation to cryptocurrencies would be in line with the other EU legislation regarding anti-money laundering, i.e. the AMLD.[70]
- Like the PSD, the FTR does not apply to payment instruments used in limited networks only.

3.5 Cryptocurrencies and the Markets in Financial Instruments Directive (MiFID)

The Market for Financial Instruments Directive [MiFID, 2014/65/EU][71] applies to "financial instruments" which include "transferable securities", "money market instruments", "units in collective undertakings" and several derivative instruments.[72] In the following, we elaborate on whether and to what extent cryptocurrencies could fall in any of the above categories and hence within the scope of the MIFID.[73]

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[67] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) No 1781/2006.

[68] "Payment service providers" are defined as the categories of payment service provider referred to in Article 1(1) of Directive 2007/64/EC, natural or legal persons benefiting from a waiver pursuant to Article 26 thereof and legal persons benefiting from a waiver pursuant to Article 9 of Directive 2009/110/EC of the European Parliament and of the Council (1), providing transfer of funds services. [Art. 3 No. 5, FTR].

[69] Art. 1, FTR.

[70] Art. 2 (1) (3) (g) and (h) of Directive (EU) 2015/849, as amended by AMLD5 [2018/843].

[71] 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.

[72] Art. 4 (1) (15) and Annex I Section C, 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 (MiFID).

[73] During the negotiations on the proposal for a Regulation of the European Parliament and of the Council on European Crowdfunding Service Providers (ECSP) for Business and amending Regulation (EU) No 2017/1129 [COM(2018) 113] Markus Ferber, a member of the European Parliament, proposed to classify virtual currencies as financial instrument in the MIFID sense. He thus requested a change to the MiFID Directive. The European Parliament followed his suggestion in its first reading position. The Council did not make any statement on this issue. At the end, the European Parliament could not assert itself in this discussion and the proposed amendment has been rejected in the trilogue negotiations.

3.5.1 Transferable securities

Transferable securities are securities "which are negotiable on the capital market, with the exception of instruments of payment". The MiFID provides for a non-exhaustive list of transferable securities, including shares in companies, bonds or other forms of securitised debt.[74]

Cryptocurrencies may qualify as transferable securities, if they are (1) transferable, (2) negotiable on capital markets, (3) not instruments of payments and (4) deemed securities.

The first criterion is often fulfilled since holders of cryptocurrencies can send units of them to other users of the currencies and can often sell them on cryptocurrency exchanges.[75] It is not fulfilled, however, when the transferability to third parties is restricted technically (not contractually).[76] Also, the transferability criterion presupposes some level of standardisation, which is a key condition for their fungibility or interchangeability.[77,78] As cryptocurrencies usually have a specific denomination their level of standardisation is usually enough to affirm their transferability.[79]

The second criterion is often fulfilled as well. Cryptocurrencies are often not traded on traditional marketplaces like regulated markets, multilateral trading facilities (MTF) or organised trading facilities (OTF) but rather on dedicated cryptocurrency exchanges. As the term "capital markets" is not defined in EU law[80], these exchanges may qualify as such. Cryptocurrencies are negotiable, i.e. their ownership can be transferred with ease, feasibility and capability[81], as illustrated by the "fact that tokens are traded on cryptocurrency platforms"[82]. Furthermore, the negotiability of cryptocurrencies is given, as their prices are not fixed.

Whether cryptocurrencies meet the third criterion is not always clear. Instruments of payment are not defined in the MiFID Directive, but according to the Commission this covers "securities which are used only for the purposes of payment and not for investment". This includes e.g. cheques and bills of exchanges.[83] The ECB also includes cards, credit transfers and direct debits.[84] Consequently, it is relevant whether cryptocurrencies are solely used for payment or also for other purposes.

In its Hedqvist decision, the European Court of Justice (ECJ) stated that the cryptocurrency bitcoin is

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74 Art. 4 (1) (44), MiFID.

75 Dinis Lucas, M. (2019) "Deciphering the European Financial Regulatory Framework of Cryptoassets.", chapter 2, section C, number 1.This holds true also when there are no certificates that register or document the existence of the units of the currency.

76 Schembri, T. et al. (2018) "The legal status of cryptocurrencies in the European Union.", p. 38 and 39; Veil, R. et al. (2011), eds. Europäisches Kapitalmarktrecht. Mohr Siebeck, p. 80.

77 Standardisation means that transferable cryptocurrencies should not be customised individually but share a common form.

78 The issue of standardisation is also relevant as the definition of transferable securities refers to "classes of securities which are negotiable on capital markets […]". Thus, for being a "class" they have to share a number of characteristics. [Hacker, P. / Thomale, C. (2018) "Crypto-securities regulation: ICOs, token sales and cryptocurrencies under EU financial law." European Company and Financial Law Review 15.4: 645-696, p. 667].

79 Id., p. 663 and 664.

80 The EU Commission only states that the term "capital markets" should be seen as "a broad one and is meant to include all contexts where buying and selling interests in securities meet" [EU Commission (2008) "Your questions on MiFID: Markets in Financial Instruments Directive 2004/39/EC and implementing measures" (Q&A, 31 October 2008)].

81 Dinis Lucas, M. (2019), chapter 2, section C, number 2.

82 Hacker, P. / Thomale, C. (2018) "Crypto-securities regulation: ICOs, token sales and cryptocurrencies under EU financial law." European Company and Financial Law Review 15.4, p. 665

83 EU Commission (2008) "Your questions on MiFID: Markets in Financial Instruments Directive 2004/39/EC and implementing measures" (Q&A, 31 October 2008).

84 European Central Bank at https://www.ecb.europa.eu/paym/pol/activ/instr/html/index.en.html.

"a contractual means of payment" and it is "neither a security conferring a property right nor a security of a comparable nature".[85] As instrument of payment, bitcoin would not qualify as transferable securities. However, this judgement cannot be generalised as it dealt with the VAT treatment of bitcoin and had no link to the regulation for securities. If a court deals with securities regulation it may well decide otherwise.[86] Nonetheless, it seems likely that pure currency tokens cannot be regarded as transferable securities because they are used first and foremost as means of payment and thus "resemble instruments of payment more than securities".[87]

However, often cryptocurrencies are not solely used for payment purposes but also or even solely for investment reasons. Yermack (2015), for instance, claims that "it is widely understood that most of [bitcoin] transactions involve transfers between speculative investors, and only a minority are used for purchases of goods and services"[88] and many argue that bitcoin "share more characteristics with investment assets than with currencies"[89].

Whether or not cryptocurrencies qualify as payment instruments and thus as transferable securities that are covered by the MiFID is thus not clear. Hacker and Thomale (2018) propose that those cryptocurrencies be deemed securities that offer participation in a future cash flow, e.g. by granting dividend rights.[90]. If, on the other hand, "return on investment can only be achieved by an appreciation in value, their regulation is best left to (a crypto) payment services law".[91] Hobza and Vondráčková (2019) argue that "in case the investment purpose prevails, such a token should be considered a security under the EU financial market regulation".[92]

This line of argument also answers the question on whether cryptocurrencies can be deemed securities (fourth criterion).

3.5.2 Money market instruments

The MiFID Directive also lists money market instruments as financial instruments. They are defined as "those classes of instruments which are normally dealt with on the money market, such as treasury bills, certificates of deposit and commercial papers and excluding instruments of payment".[93] Money market instruments usually have a maturity of less than a year. Furthermore, they "are generally instruments representing a financial claim on an issuer".[94] Cryptocurrencies do not fall in that category of financial instruments, as they are usually not dealt with on money markets.

3.5.3 Units in collective investment undertakings

The MiFID Directive also lists units in collective investment undertakings as financial instruments. Although there is no definition of collective investment undertakings in EU law, the European Securities Markets Authority (ESMA) clarified that such undertakings (1) pool together capital raised from their

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85 Judgment of 22 October 2015, Skatteverket v David Hedqvist, C-264/14, EU:C:2015:718, para. 42 and 55.
86 Dinis Lucas, M. (2019), chapter 2, section C, number 5.
87 Hacker, P. / Thomale, C. (2018), p. 680.
88 Yermack, D. (2015) "Is Bitcoin a real currency? An economic appraisal." Handbook of digital currency, p. 10.
89 Hacker, P. / Thomale, C. (2018), p. 685.
90 Dinis Lucas, M. (2019), chapter 2, section C, number 5.
91 Hacker, Philipp, and Chris Thomale (2018) p. 685 and 686.
92 Hobza, M. / Vondráčková, A. (2019) Cryptocurrencies from the Perspective of the EU Financial Market Regulation in Hulkó, G. / Vybíral, R.. "European financial law in times of crisis of the European Union." (2019), p. 173.
93 Art. 2 (1) (17), MiFID.
94 thinkBLOCKtank (2019), p. 21.

investors for the purpose of investment with a view to generating a pooled return and (2) must not have a general commercial or industrial purpose.[95]

It has been discussed whether the issuance of stablecoins[96] like Libra could be seen as offering units in collective investment undertakings as they seem to have a structure like funds. We can distinguish two types of funds: (1) alternative investment funds (AIF) and (2) undertakings for collective investment in securities (UCITS). Furthermore, there are money market funds (MMF) as a subgroup of AIF and UCITS.

3.5.3.1 Units in alternative investment funds (AIF)

AIFs are defined under the AIFM Directive as "collective investment undertakings (…) which raise capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors".[97]

The question whether stablecoins may qualify as units in alternative investment funds has been intensively debated.[98] The answer varies depending on the design of the cryptocurrency. According to the latest white paper of The Libra Association on the introduction of Libra[99], users acquire Libra coins with fiat money. The issuer of Libra then invests this fiat money in stable and low-risk assets such as cash and cash equivalents and very short-term government bonds.[100] These assets will make up the Libra Reserve which will back the issued Libra coins 1:1.[101] The Libra Reserve could thus be seen as an AIF as an issuer is raising capital from many investors to invest it in short term assets and the benefit for the investors is pursued as "value preserving reservoirs of liquidity".[102]

If stablecoins are considered units in an AIF, both the MiFID and the AIFM-Directive apply. Inter alia, this means that units may be marketed to non-professional investors only if national legislation explicitly allows so.[103]

3.5.3.2 Undertakings for collective investment in securities (UCITS)

UCITS are defined as "an undertaking with the sole object of collective investment in transferable securities or in other liquid financial assets [i.e. money market instruments] of capital raised from the

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[95] European Securities and Markets Authority (2013), Guidelines on key concepts of the AIFMD, 13.08.2013, ESMA/2013/611; Commercial purpose includes running predominantly a commercial activity, involving the purchase, sale, and/or exchange of goods or commodities and/or the supply of non-financial services. Industrial purpose includes industrial activities, involving the production of goods or construction of properties.

[96] Stablecoins can be seen as a subcategory of cryptocurrencies; see also Eckhardt, P. / Warhem, V.(2020), cepInput 4/2020, The money of tomorrow? Cryptocurrencies, stablecoins, central bank digital currencies, p. 8.

[97] Art. 4 (1), Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 [AIFMD].

[98] See i.e. Rirsch, R. / Tomanek, S. "Facebook's Libra: A case for capital markets supervision?" Journal of Payments Strategy & Systems 13.3 (2019): 255-267; Adams, D. / Overall, J. (2019) Stablecoins: A global overview of regulatory requirements in Asia Pacific, Europe, the UAE and the USA, Clifford Chance LLP; Uiterwijk, S. / Hillen, L. (2019) Facebook's Libra a look at the regulatory law aspects, NautaDutilh Blockchain & Tokens Group.

[99] The Libra Association (White Paper v2.0).

[100] It is planned that the Libra Reserve consists of 80% very short-term (up to three months) government bonds with very low credit risk and 20% cash. [The Libra Association (White Paper v2.0, p. 12].

[101] It is planned that Libra will support single-currency stablecoins and a multi-currency stablecoin, the latter being a "composite of 1:1-backed single-currency stablecoins". The multi-currency stablecoin will be composed of fixed amounts of single-currency stablecoins. [The Libra Association (White Paper v2.0, p. 5 and 11].

[102] See i.e. Rirsch, R. / Tomanek, S. "Facebook's Libra: A case for capital markets supervision?" Journal of Payments Strategy & Systems 13.3 (2019), p. 261 and 262.

[103] Art. 40 (17) and Art. 43 AIFMD.

public […] and with units which are, at the request of holders, repurchased or redeemed, directly or indirectly, out of those undertakings' assets. Action taken by a UCITS to ensure that the stock exchange value of its units does not significantly vary from their net asset value shall be regarded as equivalent to such repurchase or redemption".[104]

Thus, for a stablecoin to qualify as UCITS, it must be possible to redeem or repurchase the assets – i.e. to have a claim against the issuer of the stablecoin. Whether or not this applies depends on the exact design of the stablecoin under analysis. In the case of Libra, it is unclear whether a user possesses a claim against the issuer.[105] The ECB, however, argues – not specifically referring to Libra – that even without a formal promise of a claim, a statement by the issuer "indicating" that coins are fully backed "creates a legitimate expectation" that coin holders will have a claim.[106] Furthermore, it has been argued that the fact that "Libra's value relies directly and exclusively on the value of the reserve" could be regarded as stabilising actions taken and Libra consequently be regarded as UCITS.[107]

If stablecoins are considered units in an UCITS, both the MiFID and the UCITS Directive [2011/61/EU] are applicable. The latter lays down, inter alia, rules on investor information via a standardised summary information document and on a genuine European passport for UCITS management companies.[108]

3.5.3.3 Money market funds (MMF)

Money Market Funds (MMFs) are highly liquid investment funds which invest their investors' capital in short-term financial instruments with a residual maturity not exceeding two years. In the EU[109] they are operated as UCITS investment funds or as alternative investment funds (AIF).[110] Thus, if a stablecoin is classified as UCITS investment fund or AIF and the capital raised is only invested in financial assets with less than two years of residual maturity, it may also be categorised as MMF. In this case, not only the MiFID and the UCITS Directive respectively the AIFM Directive apply to such stablecoins, but also the MMF Regulation.[111] This Regulation, inter alia, covers prudential requirements, governance rules and transparency requirements for managers of MMFs.[112] As the stablecoin Libra invests capital raised mostly in short-term assets, the Libra Reserve may qualify as an MMF.[113]

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[104] Art. 1 (2) Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

[105] It is only stated that "Libra Coin holders should have a high a degree of assurance they can convert their Libra Coins into local currency" [The Libra Association White Paper v2.0, p. 12].

[106] Adachi, M. et al. (2020) "A regulatory and financial stability perspective on global stablecoins.", ECB Macroprudential Bulletin 10 (2020).

[107] See i.e. Rirsch, R. / Tomanek, S. "Facebook's Libra: A case for capital markets supervision?" Journal of Payments Strategy & Systems 13.3 (2019), p. 261.

[108] Directive 2009/65/EC.

[109] Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds

[110] Van Roosebeke, B. / Kiesow, A. and Baran A.K. (2014), Money Market funds (MMFs), cepPolicyBrief No. 2014-43.

[111] Adachi, M. et al. (2020) "A regulatory and financial stability perspective on global stablecoins.", ECB Macroprudential Bulletin 10 (2020).

[112] Regulation (EU) 2017/1131.

[113] Adachi, M. et al. (2020) "A regulatory and financial stability perspective on global stablecoins.", ECB Macroprudential Bulletin 10 (2020).

3.5.4 Derivatives

The MiFID Directive also lists a number of different derivatives instruments as financial instruments. Derivatives are finance contracts whose value is derived from an underlying instrument.[114] Cryptocurrencies may be used as underlying assets of derivatives. Without going into detail in this section, cryptocurrency contracts for difference[115], for instance, may qualify as financial instruments as there is no provision on the type or form of underlying.[116] The Autorité des Marchés Financiers (AMF) concluded in a comprehensive analysis that provisions applicable to the marketing of financial instruments apply to cryptocurrency derivatives as "a cash settled derivative whose underlying is a cryptocurrency can be considered a financial contract".[117]

3.5.5 Consequences for cryptocurrencies that are MiFID financial instruments

In case cryptocurrencies classify as MiFID financial instruments, a wide range of legal provisions from various EU Directives and Regulations become applicable. These are, besides the MiFID itself, i.a. the Prospectus Regulation[118], the Transparency Directive[119], the Market Abuse Regulation[120] and the Short Selling Regulation.[121] Regarding the MiFID, for instance, companies that wish to perform investment services that involve financial instruments need to be authorised as investment firms. And the Prospectus Regulation only allows – with exemptions – the "offer of securities [, which includes transferable securities,] to the public or the admission to trading of such securities on a regulated market situated or operated within a Member State".[122]

3.6 Cryptocurrencies and the Capital Requirements Directive (CRD) and Regulation (CRR)

An entity that issues a stablecoin in exchange for fiat money, could also be regarded as pursuing the business of taking in deposits from the public. This business is generally pursued by banks and regulated by the Capital Requirements Directive (CRD)[123] and Regulation (CRR)[124]. While the term "deposit" is defined neither in the CRD nor in the CRR, the European Banking Authority (EBA) stipulates that deposits are "a sum of money, repayable on demand or at a contractually agreed point in time […] and

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[114] Annex I Section C, Directive 2014/65/EU.

[115] "Contracts for difference" as defined in Annex I Section C point 9, Directive 2014/65/EU are "agreements between a buyer and a seller to exchange the difference between the current price of an underlying asset (shares, currencies, commodities, indices, etc.) and its price when the contract is closed" [ESMA and EBA (2013), Contracts for difference (CFDs), Investor warning, 28 February 2013.

[116] Hobza, M. / Vondráčková, A. (2019) Cryptocurrencies from the Perspective of the EU Financial Market Regulation, p. 171.

[117] French law uses the term "financial contract" instead of derivative. Autorité des Marchés Financiers (AMF) (2018), Analysis of the legal qualification of cryptocurrency derivatives, 23 March 2018; notably, the analysis by the AMF refers not specifically to EU law but to French law.

[118] Regulation (EU) 2017/1129.

[119] Directive 2013/50/EU.

[120] Regulation (EU) No 596/2014.

[121] Regulation (EU) No 236/2012.

[122] ESMA (2019), Advice - Initial Coin Offerings and Crypto-Assets, ESMA 50-157-1391, January 2019 with an in-depth overview of the consequences of classifying a crypto asset as financial instrument.

[123] 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.

[124] Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC.

with or without interest or a premium[125], received from third parties".[126] Thus, if a stablecoin user has some sort of claim against its issuer and the latter ensures redeemability, the collecting of fiat money in the process of issuing a stablecoin could qualify as deposit taking. In this case, the issuing party may need to obtain a banking licence. However, this is only necessary if it pursues the business of granting credit for its own account[127] as well.[128]

3.7 Cryptocurrencies and the Packaged Retail Investment and Insurance-based Products Regulation (PRIIP)

Cryptocurrencies may be considered as packaged retail investment products (PRIPs) as defined in the PRIIP Regulation.[129] A PRIP is "an investment […], where, regardless of the legal form of the investment, the amount repayable to the retail investor is subject to fluctuations because of exposure to reference values or to the performance of one or more assets which are not directly purchased by the retail investor".[130] The PRIIP Regulation applies to "all products, regardless of their form or construction".[131]

Libra may qualify as PRIP as it is (not solely but also) addressed to retail investors, its value fluctuates based on the value of the Libra Reserve and the reserves' assets are only indirectly bought by the investors. However, as pointed out in previous sections, it is still unclear whether Libra users will possess a claim against the Libra Association. If this is the case, the invested amount would be repayable as demanded by the definition for PRIP in the PRIIP Regulation. Thus, Libra – and cryptocurrencies with analogous characteristics – could be classified as PRIP forcing its manufacturers to i.a. publish key information documents on the investment product that enable retail investors to understand and compare the key features and risks of PRIP.[132]

4 Conclusion

The regulatory treatment of cryptocurrencies in the EU is currently characterised by a great deal of uncertainty. Not only is a binding and general definition of cryptocurrencies missing in the EU. Moreover, it is unclear, if and to which extent some of the EU's most essential financial Regulations apply to cryptocurrencies. This legal uncertainty should be lifted. Hence, the EU-Commission's intention to put forward its ideas on the regulation of cryptoassets and -currencies in the 3rd quarter of 2020 is to be welcomed. When considering regulation, the EU-legislator should attempt to minimise risks to financial stability and consumer protection, while safeguarding innovation incentives and efficiency gains related to cryptocurrencies.

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[125] It is planned that holders of Libra coins are not entitled to any return from the Libra Reserve [The Libra Association White Paper v2.0, p. 13].

[126] EBA (2014), Report to the European Commission on the perimeter of credit institutions established in the Member States, EBA Report, 27 November 2014, p. 7.

[127] According to the Libra Association custodian banks that hold assets on behalf of the Libra Reserve will not be allowed to use them for lending activities [The Libra Association White Paper v2.0, p. 13].

[128] Art. 4 (1), Regulation (EU) No 575/2013; See Rirsch, R. / Tomanek, S. "Facebook's Libra: A case for capital markets supervision?" Journal of Payments Strategy & Systems 13.3 (2019), p. 262

[129] Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIP).

[130] Art. 4 (1), PRIIP Regulation.

[131] Recital 6, PRIIP Regulation.

[132] Art. 1, PRIIP Regulation.

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Authors:

The authors work at the cep Financial Market Department.