

**CRYPTOCURRENCY REGULATION: A
COMPARATIVE ANALYSIS OF THE EUROPEAN
UNION AND THE UNITED STATES**

by Ihor Filimonov

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Supervisor: Prof. Tibor Tajti

Central European University – Private University

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AML	Anti-Money Laundering
DAO	Decentralized Autonomous Organization
ETH	Ethereum cryptocurrency
ETP	Exchange Traded Product
EU	European Union
MiCA	Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937
MiFID II	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
NFT	Non-Fungible Token
Securities Act	The Securities Act of 1933
Securities Exchange Act	The Securities Exchange Act of 1934
SEC	Securities Exchange Commission
UCC	Uniform Commercial Code
US	The United States of America

ABSTRACT

The global financial crisis in 2008 has undermined the trust in governments and the state-issued currencies, which, along with the emergence of new technologies, especially blockchain, was the main precondition for the emerge of cryptocurrencies. This prompted reactions from many states and international organizations (for instance, OECD, World Bank), and now, after 16 years, we can see how different states have established their exceptional regulatory environment for cryptocurrencies.

This thesis is aimed at comparing of the regulatory environments in the US and the EU. These jurisdictions have been chosen due to the fundamental difference in regulatory approaches. While there is a well-established and systematically structured regulatory framework for cryptocurrencies within the EU, covering both EU institutions level and the level of Member States, there are a lot of regulatory uncertainties in the United States. For instance, Bitcoin was authorized by the SEC only in January 2024¹.

This thesis provides a focused analysis of the regulatory environments influencing the bitcoin business in these main countries by focusing on one or two distinctions between the methods taken by the EU and the US. Besides, it shall also present an answer to the questions on development of cryptocurrency laws in the future, for instance, whether the cryptocurrencies will become an alternative method of payment.

As result, this thesis might be utilized by potential market players as well.

¹ Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. [Www.sec.gov. https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023](https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023).

INTRODUCTION

1.1. Why This Topic?

As states Simanta Sarmah, the first developments of the blockchain technology arose in 1976². According to the NASDAQ, the rise of cryptocurrencies is tightly related to the Global Financial Crisis in 2008, which was involved the largest international bank collapse³. As a result, potential investors were looking forward to establishing a currency that should have been independent from state. Nowadays, the cryptocurrencies demonstrate a significant increase of price, which makes them an attractive object for investment.

1.2. What is Happening Now?

However, the “crypto boom” has led to negative consequences as well. For instance, as summarized by Ramy El-Kady, the digital assets are commonly used for the purpose of the Darknet transactions, money laundering, and terrorism financing⁴. The result is that the need for proper government regulation has arisen.

At present, the United States and the European Union are the jurisdictions facing an essential demand for the digital assets, which contributes to the increase of the new marketplaces. Furthermore, as highlighted by Investopedia, some states decided to implement the Blockchain technology. According to the Investopedia, there is even such concept as CBDC

² S. Sh. Sarmah. (2018). Understanding Blockchain Technology. Computer Science and Engineering. 8(2): 23-29 DOI: 10.5923/j.computer.20180802.02, p. 23.

³ Bitcoin Was Built For The Banking Crisis. (2023, March 24). Nasdaq.com. <https://www.nasdaq.com/articles/bitcoin-was-built-for-the-banking-crisis>.

⁴ El-Kady, Ramy. (2023). The Use Of Cryptocurrencies On The Dark Web In Money Laundering And Terrorist Financing Operations. DOI: 10.13140/RG.2.2.11990.22084/1.

- digital currency issued by state central banks⁵. However, despite the popularity of cryptocurrencies, not every jurisdiction may offer a favorable regulatory crypto environment.

1.3. Methodology

This thesis shall analyze the legislative background, court practice, case studies, governmental reports, and conceptual frameworks related to the regulation of digital assets (cryptocurrencies).

Additionally, it shall include a detailed comparison of cryptocurrency regulatory framework between the European Union (EU) and the United States of America (US).

Finally, this thesis shall discover potential future opportunities within the digital assets regulatory landscape, such as the possibility of cryptocurrencies becoming an official alternative method of payment, according to the Estonian legislative framework. It shall also assess the development of a new regulatory environment in the United States.

1.4. Roadmap to the Thesis

The first part of this work shall examine the crypto regulation in the United States. It shall cover the regulatory uncertainties prevalent in the United States. Additionally, it shall evaluate the development of a new legal environment in the United States, considering recent acknowledgments of Bitcoin as a security.

The second part of this work shall demonstrate well-established and systematically structured crypto environment within the EU. The particular attention shall be paid to such Member States, as Lithuania, Estonia, Cyprus and Malta, which offer the most beneficial regulatory conditions for potential crypto businesses, with a special emphasis on Estonia, where cryptocurrency is recognized as an alternative method of payment.

⁵ Seth, S. (2021, August 25). Central Bank Digital Currency (CBDC). Investopedia. <https://www.investopedia.com/terms/c/central-bank-digital-currency-cbdc.asp>.

Consequently, the third part of this work shall be devoted to the discussion of the differences in the regulatory approaches.

The fourth part of this work shall consist of my considerations regarding potential future opportunities within the cryptocurrency regulatory environment (both in the EU and the US). The attention shall be also paid to the opportunity to become an alternative method of payment globally, based on Estonian model.

In conclusion, I am looking forward to presenting a regulatory overview, which shall become a basic guidance for potential market players while selecting an appropriate jurisdiction for the establishment of business.

CHAPTER I. CRYPTOCURRENCY REGULATION IN THE UNITED STATES OF AMERICA

1.1. Background

In the distant 2009, Satoshi Nakamoto has made public a concept of “...*electronic transactions without relying on trust. We started with the usual framework of coins made from digital signatures, which provides strong control of ownership, but is incomplete without a way to prevent double-spending*”⁶. Since then, much has changed in underlying technologies and capital markets. It is logical to assume that the “crypto boom” should have led to the establishment of “crypto friendly” regulatory environment in the US.

However, in reality the situation is quite different. Basically, the current legal status of cryptocurrencies in the United States can be described as “in the process of establishment”. Since the US is a common law country, to accurately determine the nature of the digital assets, I propose examining, *inter alia*, the case law arising from the interference of the Securities Exchange Commission (SEC).

1.2. General Legal Basis

Within this part of work, I am committed to enhancing the achievements of my predecessor Ms. Sonja Safro, namely examining the following acts:

- Securities Act as of 1933;
- Securities Exchange Act as of 1934;
- SEC v. W.J. Howey Co. case (*Howey* test);

⁶ Nakamoto, Satoshi. (2009). Bitcoin: A Peer-to-Peer Electronic Cash System. Cryptography Mailing list at https://www.ussec.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Emerging_Tech_Bitcoin_Crypto.pdf, p.1.

- SEC v. DAO case⁷;

Additionally, I will explore changes that have occurred over the last year.

1.2.1. Securities Act / Securities Exchange Act

Establishment of the definition for “security” plays a pivotal role in context of determination of the cryptocurrencies legal status. With this regard, it is worth addressing to the bedrock of the US federal securities legislation and splitting the term of “security” into the specific components.

According to J. Coffee et al., the Securities Act and Securities Exchange Act will assist us with this. Both of them define “security” in general and specific terms, while there is no single test specified. For instance, the list of such instruments covers “notes”, “stocks”, “bonds”, “debentures”, “security-based swaps”, “evidence of indebtedness”, “certificates of interest or participation in any profit-sharing agreement”, **“investment contract”**, and **“instruments commonly known as ‘security’”**. The authors outline that such listing “*creates some inevitable uncertainty*”⁸.

Determining whether cryptocurrencies fall under "investment contracts" is a pivotal role to all stakeholders. If such legal relationships arise, a specific regulatory regime shall apply, and the parties must ensure whether they are acting in compliance with rules of registration, offering, and investor rights protection. This aspect will be analyzed in more detail below from a practical perspective.

To conclude, the further investigation shall confirm or refute whether cryptocurrencies fall under the definition of “security”. Now that we have a general understanding of the research

⁷ Safro, S. (2023). Jurisdiction shopping in security token offerings: the United States vs. the European Union [Master's thesis]. <https://sierra.ceu.edu/record=b1447676>, pp. 18-24.

⁸ Coffee JC, Jr. et al., Securities regulation: cases and materials (14th edn, Thomson Reuters/Foundation Press 2021), pp. 273-274; *see also* Securities Act of 1933, 15 U.S.C. §§ 77a-77mm (1934) (US); Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq. (US).

direction, I deem it necessary to move on to the examination of regulatory statements and case law.

1.2.2. The *Howey Test*

Now we are proceeding to the *Howey test* in order to examine elements of the elements of the investment contract. This includes, inter alia, the following:

- Investment of money;
- Into common enterprise;
- With expectation profits to come predominantly from the efforts of others⁹.

In my point of view, cryptocurrencies do satisfy all these requirements.

With this respect (without referring to the para. 1.2.3 of this Capstone Thesis), I am guided by the concept of Satoshi Nakamoto, pursuant to which the main nature of cryptocurrencies lies mainly in investment of funds (traditional money/fiats) into the virtual coins with further gaining of expected profits / bearing losses. This model is based on trust with the main protection by technology system¹⁰.

Regarding the "investment of money" criterion, it is satisfied because potential investors make their contributions using their own funds in fiat currencies to purchase virtual currencies.

Regarding the "common enterprise" criterion, it is also satisfied since the issuer of cryptocurrencies is the corresponding company (e.g., Tether Holdings).

Regarding the "expectation of profits from the efforts of others" criterion, it is also likely satisfied since the value of cryptocurrencies is being adjusted on a regular basis while

⁹ SEC v W.J. Howey Co. [1946] 328 U.S. 293.

¹⁰ Nakamoto, Satoshi. (2009). Bitcoin: A Peer-to-Peer Electronic Cash System. Cryptography Mailing list at https://www.usssc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2018/Emerging_Tech_Bitcoin_Crypto.pdf, p.1.

generally showing a growth trend. However, the question remains open for stablecoins (for instance, USDT). But I tend to believe that stablecoins also meet this criterion, as their exchange rates, according to U. W. Chohan, are connected to fiats, oil, gas, non-stable cryptocurrencies, and other assets¹¹.

To conclude, typical transaction on cryptocurrency processing does meet the criteria fully meets the requirements of the *Howey test* and constitutes an investment contract, and thereby also it qualifies as a ‘security’ for US federal securities regulations.

1.2.3. The German *DAO* case

Previously, there may have been some reasons for discussion regarding the statement made in para. 1.2.2 of this Capstone Thesis. However, the US regulatory system has fully destroyed all the illusions in that regard.

Within the case *SEC v. DAO*, in 2017 the Securities Exchange Commission has adopted its decision regarding DAO (**note:** the SEC hereby determines DAO as a specific unincorporated organization *Slock.it*, which is only one example of various DAOs present on the market) Tokens and Ethereum, and it is now unmistakably clear that transactions like NFTs-cryptocurrencies exchange fall within the definition of “security” according to U.S. legislation¹². Here are some explanations why.

While applying the *Howey test*, the SEC has outlined:

- (i) **The core principle of the applicable securities legislation:** prohibition against offering to sell or buy without a filed registration statement (Section III-A of the Opinion)¹³;

¹¹ Chohan, U. W. (2019). Are stable coins stable? Social Science Research Network. <https://doi.org/10.2139/ssrn.3326823>, p. 2.

¹² Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017), available at <https://www.sec.gov/litigation/investreport/34-81207.pdf>, pp. 1-3.

¹³ *Ibid.*, p. 10.

- (ii) **What is the nature of DAO as common enterprise:** the SEC has examined the concept of virtual entity, where participants would send ETH (a virtual currency) to The DAO in exchange for DAO Tokens. These tokens would grant the participant voting rights and entitle them to receive "rewards." (Section II-B of the Opinion)¹⁴;
- (iii) **What was the participation scheme:** owing at least 1 one DAO Token and paying a deposit in the form of Ethereum coin (Section II-B of the Opinion)¹⁵;
- (iv) **What is the profits accrual model:** *“the various promotional materials disseminated by Slock.it and its co-founders informed investors that The DAO was a for-profit entity whose objective was to fund 12 projects in exchange for a return on investment”* (Section III-B of the Opinion)¹⁶.

As result, the Securities Exchange Commission has concluded that *Howey test* criteria were met, and the respective transactions involved the offer and sale of securities¹⁷.

Applying the analogy principle, I believe that the transactions on exchange of fiats to cryptocurrencies (and vice-versa) also constitute a contract on the sale of security, since the potential investor contributes their money into an asset issued by a specific organization, and expects profitability.

Besides, it is worth mentioning that the J. Coffee et al outline such case as *Reves v. Ernst and Young* regarding issue of “notes” as a security, which might be also useful. However, according to the authors, it shall apply when the examined financial instrument is not similar to any item from the list of securities specified by the Securities Act and Securities Exchange

¹⁴ Ibid., pp. 6-8, 11.

¹⁵ Ibid., pp. 4-7.

¹⁶ Ibid., pp. 11-12.

¹⁷ Ibid., p. 17.

Act¹⁸. Since we have established that the cryptocurrencies fall within the definition of “security” within the DAO case (through application of the Howey test to the alleged “investment contract”)¹⁹, there is no need to conduct an additional study for the *Reves v. Ernst and Young case*.

Considering the above, we know it for sure that the US regulatory system considers cryptocurrencies as “security” which employs the application of general regulatory framework for securities.

1.2.4. Registration as a Security and Approval of Bitcoin

Having identified that cryptocurrencies fall under the definition of “securities” under the US legal framework, we can establish that they are subject to the Securities Act as of 1933 and Securities Exchange Act as of 1934. Therefore, their sale without registration is not possible because “*It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is effective...*”²⁰

According to the Securities Exchange Act, the requirements for securities registration involve, inter alia, disclosure of such information as the issuer, its financial model, business nature, nature of the securities, key personnel, remuneration, management contracts, options, and financial statements from the past three fiscal years.²¹

¹⁸ Coffee JC, Jr. et al., *Securities regulation: cases and materials* (14th edn, Thomson Reuters/Foundation Press 2021), p. 337; *see also* *Reves v. Ernst & Young*, 494 U.S. 56 (1990).

¹⁹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017), available at <https://www.sec.gov/litigation/investreport/34-81207.pdf>, pp. 1-3.

²⁰ Securities Exchange Act of 1934, 15 U.S.C. § 78i et seq. (US).

²¹ *Ibid.*

Therefore, in order to be legally traded in the United States, **each cryptocurrency** has to undergo **the registration process with the Securities Exchange Commission**. On one hand, the intentions of the legislation fully align with the main goals of the securities law, namely investor rights protection and fraud prevention. On the other hand, this approach results in the excessive bureaucracy in the process of registration, which negatively affects the US investment climate. Overall, this is part of the broader discussion on the necessity of regulation versus deregulation, especially given general nature of the cryptocurrencies.

From the practical side, we can face the clear evidence that the US crypto environment will demonstrate some progress in the near future. In January 2024 the Securities Exchange Commission has adopted a decision regarding approval of spot Bitcoin exchange-traded products²². According to the G. Gensler, this leads, *inter alia*, to the following:

- Bitcoin ETPs sponsors are bound to provide full, fair, and truthful disclosure about the products;
- Bitcoin ETPs are allowed to be listed and traded on registered national securities exchanges. This shall apply anti-fraud and anti-manipulation rules, which should ensure compliance with general compliance of the securities market;
- The Securities Exchange Commission staff shall exercise the review of registration statements for 10 spot bitcoin ETPs simultaneously in order to promote fairness and competition.²³

Considering the above, the first cryptocurrency was finally recognized as a security. We can expect the similar decisions regarding the other currencies. This step clearly demonstrates that the previously unwavering US legislation is now following the “recent” (15 years old)

²² Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. Wwww.sec.gov. <https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023>.

²³ Ibid.

trends. But what happens, if the US one day prohibits cryptocurrencies in general? For instance, according to the Conghui Chen and Lanan Liu, despite the prohibition imposed by the Chinese government on Bitcoin trade, *“Bitcoin returns and trading volume are significantly interlinked with the attention of Chinese investors”*²⁴. Applying this for the US environment, I would like to conclude that the cryptocurrency market will continue to develop with or without the “greenlight” from the SEC. In order not to lose the benefits of transparent crypto-assets turnover, the US may follow this trend.

1.2.5. Conclusions

After 15+ years the first cryptocurrencies saw the world, the relevant regulatory environment in the US is still in its early stages of development. Until January 2024, the legal status of cryptocurrencies could only be generally explored through interpretation of the Securities Exchange Act, the Howey Test, and SEC v. DAO case. The Securities Exchange Commission had not any permissions for such investments, so this issue was completely unresolved. However, the Securities Exchange Commission has now recognized Bitcoin as a security allowed for trading²⁵, and we can expect similar cases for the other cryptocurrencies in the near future.

²⁴ Chen, C., & Liu, L. (2021). How effective is China’s cryptocurrency trading ban? Finance Research Letters, 46(B), 102429. <https://doi.org/10.1016/j.frl.2021.102429>, p. 6.

²⁵ Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. Wwww.sec.gov. <https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023>.

CHAPTER II. CRYPTOCURRENCY REGULATION IN THE EUROPEAN UNION

2.1. General Overview

According to the Regulation on markets in crypto-assets 2023/1114 “*The absence of an overall Union framework for markets in crypto-assets can lead to a lack of user confidence in those assets, which could significantly hinder the development of a market in those assets and lead to missed opportunities in terms of innovative digital services, alternative payment instruments or new funding sources for Union companies*”²⁶.

In comparison with the USA, there is a ground to consider that the EU has resolved this problem at least partially. Unlike the US system, the European regulatory environment for cryptocurrencies is completely different. It is crucial to divide into two levels: the EU level and the Member States level. Here below I provide an overview for both.

2.2. EU Level

The key legal framework regarding the status of cryptocurrencies at the EU level includes the following acts:

- 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 (“Directive 2014/65” or “MiFID II”)
- Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and

²⁶ Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets and amending Regulations (EU) No 1093/2010 and 4 (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/193, (2023). <https://eurlex.europa.eu/eli/reg/2023/1114/oj>.

(EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (“Regulation 2023/1114” or “MiCA”);

Besides, it is worth mentioning the “FinTech Action Plan: For a more competitive and innovative European financial sector” (“Fintech Action Plan”), which is more likely to be considered as soft law.

Below we will establish the general definition of “cryptocurrency” within the EU framework. This will be carried out from the general to the specific through analysis of each source mentioned above.

2.2.1. Fintech Action Plan

Firstly, it is worth determining what exactly the regulator aims to achieve. For this purpose, we primarily refer to the Fintech Action Plan, which will assist us with the teleological interpretation.

According to the Fintech Action Plan, with respect to the cryptocurrencies, the European Commission aims at the following:

- Assessing whether EU rules follow the recent technological trends;
- Promotion of blockchain technologies;
- Simplifying licensing rules for FinTech activities;
- Cyber safety increasing²⁷.

As we can see, a clear intention towards simplifying bureaucratic procedures can be identified here, which already stands out against the US approach by minimizing procedures

²⁷ FinTech action plan: For a more competitive and innovative European financial sector. (2018, February 28). Finance. https://finance.ec.europa.eu/publications/fintech-action-plan-morecompetitive-and-innovative-european-financial-sector_en.

and establishing a clear understanding of what is required to enter the market and maintain compliance. I appreciate the European Commission's decision, as a fair and transparent regulatory environment leads to business prosperity and economic growth.

Below we will assess the progress in regulating the cryptocurrencies at the EU level.

2.2.2. MiFID II

Before 2023 the EU did not have a clear framework since there was no clear definition to cryptocurrencies. However, besides the recent changes, I believe that we should also pay attention to MiFID II, and below I explain why.

According to the Article 4 (44) of the Directive 2014/65, transferable securities encompass the following instruments:

“

- (a) *shares in companies and other securities equivalent to shares in companies, partnerships or other entities, and depositary receipts in respect of shares;*
- (b) *bonds or other forms of securitised debt, including depositary receipts in respect of such securities*
- (c) ***any other securities** giving the right **to acquire or sell** any such transferable securities **or giving rise to a cash settlement** determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.”²⁸*

²⁸ Directive 2014/65/EU. 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. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0065>, Article 4.

The cryptocurrencies meanwhile are not directly mentioned in the Article 4 of the MiFID II²⁹. However, I believe that this provision may apply to them given their technical and financial nature. As result, the general regulatory framework for “securities” also applies to the cryptocurrencies as well, namely this shall be Regulation (EU) 2017/1129, which established (i) the definition of “security”³⁰, (ii) disclosure requirements for the securities offered (prospectus)³¹, (iii) the powers of regulatory authorities³², and (iv) sanctions for the violations³³.

This block represents the top tier of the hierarchy in the EU's crypto-regulation system. If cryptocurrencies are generally classified as "securities," then Regulation (EU) 2017/1129 and Directive 2014/65, to my view, serve as *lex generalis* in this system.

2.2.3. Regulation 2023/1114

Overall, with the general understanding that cryptocurrencies will be broadly considered as "securities," the next question arises: is MiFID II sufficient for their comprehensive regulation? If so, in my opinion, we may revert to the US approach, where only general rules exist that do not account for the unique nature of cryptocurrency transactions.

²⁹ Ibid.

³⁰ Regulation 2017/1129. Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC Text with EEA relevance. <http://data.europa.eu/eli/reg/2017/1129/oj>, Article 2 (a).

³¹ Ibid., Article 8.

³² Ibid., Articles 31-33.

³³ Ibid., Article 38.

This brings us to Regulation 2023/1114, which directly states that crypto regulation should be tailored to fit the digital age³⁴.

Pursuant to the para. 1(5) of the Article 3 of the Article of the Regulation 2023/1114, “‘crypto-asset’ means a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology”³⁵.

In addition, the Regulation 2023/1114 encompasses the following aspects, which are geared towards development of “crypto environment”. This includes, *inter alia*, the following:

- Requirements for trading admission to various kinds of crypto-assets;
- Standardized requirement for the crypto white-papers (for instance, issuer, offeror, rights and obligations, risks etc.) depending on the kind of crypto-asset offered;
- Liabilities;
- Requirements for financial stability of crypto-assets providers;
- Fraud and insider trading prevention;
- Powers of the competent authorities;
- December 30, 2024, is set as the starting date when MiCA shall apply ³⁶.

This serves as perfect evidence that the European Union aims at establishing a harmonized regulatory system for the cryptocurrencies regulation, which shall properly handle issues specified above, which arise from the general nature of cryptocurrencies. Consequently, potential market players will be able to determine the relevant requirements for market entrance

³⁴ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>.

³⁵ Ibid.

³⁶ Ibid.

and ongoing compliance (the legal certainty shall be ensured as much as possible). Finally, potential investors will be also ensured about that their assets and rights are being properly protected. Overall, within the aforementioned hierarchy, I classify the Regulation 2023/1114 as *lex specialis*.

To conclude, after recent changes in 2023, I assess that the European Union has achieved a significant progress in its efforts to regulate the status of cryptocurrencies.

2.3. Member States Level

For the purpose of this Chapter, we will examine the cryptocurrencies legislation with respect to those countries, which may offer the most attractive conditions for the potential market players and investors.

We will focus on the section concerning only *lex specialis*, as its presence allows us to draw conclusions about the progress in cryptocurrency regulation

2.3.1. Lithuania

According to the Ministry of Finance of Lithuania, “*The active role of Lithuanian public authorities and FINTECH companies has led to the rapid growth of the FINTECH sector in Lithuania over the last 6 years.*”³⁷ Indeed, from the legal perspective the situation is slightly different. As of 2022, Lietuvos Bankas (Central Bank of Lithuania) continues to distance itself

³⁷ Ministry of Finance of Lithuania. (2023, November 12). 2023 - 2028 THE FINTECH STRATEGY OF LITHUANIA. <https://finmin.lrv.lt/uploads/finmin/documents/files/Development%20of%20the%20Lithuanian%20Fintech%20sector%20for%202023-2028.pdf>.

from cryptocurrencies, advising banks and financial institutions to refrain from dealing with crypto assets³⁸.

As discovered by Marek Bočánek, crypto-activities in Lithuania are regulated through Anti-Money Laundering Legislation, namely Law as 9 June 1997 No VIII-275 (“AML Law of Lithuania”)³⁹. AML Law of Lithuania specified, *inter alia*, the following aspects:

- Cryptocurrencies are defined as “virtual currencies” (para. 22-1 of the Article 2);
- The legal status of crypto-operators is determined (para. 22-1 of the Article 2) with the assignment of various obligations to them;
- The law provides requirements for establishment of crypto-companies (shared capital, directors, economical substance) and ongoing compliance.⁴⁰

This allows a potential market player to clearly understand the requirements for entering the market and what needs to be demonstrated to the regulator for obtaining a license and ensuring ongoing compliance. In my view, the presence of these norms, even without adaptation to MiCA, already indicates that Lithuania can offer a favorable environment for the proper functioning of the crypto industry.

³⁸ Bank of Lithuania. (2022, January 27). Resolutions of the Board of the Bank of Lithuania. Retrieved June 15, 2024, from <https://www.lb.lt/en/news/resolutions-of-the-board-of-the-bank-of-lithuania-position-on-crypto-assets>, pp. 2-3.

³⁹ Marek Bočánek. (2023). Changes in the Regulation of Crypto Exchanges in Lithuania And Estonia. *Financial Law Review*, 29 (1), 8–20. <https://doi.org/10.4467/22996834flr.23.002.18144>, pp. 15-16.

⁴⁰ Republic of Lithuania Law on the Prevention of Money Laundering and Terrorist Financing (1997) (Lithuania). <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/2c647332ba5111eb91e294a1358e77e9?jfwid=twcznlk4w>.

Finally, the Ministry of Finance of Lithuania has designated adaptation of cryptocurrency regulation to the general requirements of the European Union (MiCA) until the end of 2025 in order to establish a harmonized approach⁴¹.

To conclude, considering the provisions outlined by AML Law of Lithuania, I believe that Lithuania has succeeded in regulating cryptocurrencies by determining their legal status and licensing / reporting requirements.

2.3.2. Cyprus

Basically, I consider Cyprus is one of the top-tier jurisdictions establishing a business in general. I believe, this is because the government creates attractive conditions for business maintenance, especially when it comes to the taxation.

The approach of Cyprus to regulating the status of cryptocurrencies is similar to that of Lithuania. The key legislative act in this context is the Prevention and Suppression of Money Laundering and Terrorist Financing Law of Cyprus, according to which:

- Cryptocurrencies are given a separate status (*“«Crypto Asset» means 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 persons as a means of exchange or investment and which can be transferred, stored, and traded electronically”*);

⁴¹ Ministry of Finance of The Republic of Lithuania. (2024, March 14). <https://finmin.lrv.lt/en/news/finansu-ministerija-issamesnis-kripto-rinkos-reguliavimas-didins-sektoriaus-skaidruma/>.

- The law provides requirements for establishment of crypto-companies (shared capital, directors, economical substance) and ongoing compliance.⁴²

Similarly to Lithuania, based on the relevant legislation, potential market players and investors are clearly informed about what to expect from the regulator at each step. This undoubtedly has a positive impact on the crypto regime in Cyprus. Finally, we should also await the adaptation of Cypriot cryptocurrency legislation to MiCA soon, as required by MiCA itself⁴³.

2.3.3. Malta

Malta is also known as a beneficial destination for establishing a business. In my point of view, the reasons are the same as those for Cyprus.

While Lithuania and Cyprus focused more on incorporating cryptocurrencies into AML legislation, Malta took a slightly different approach. Back in 2018, Malta enacted a special law regulating the status of Virtual Financial Assets (Virtual Financial Assets Act). The Virtual Financial Assets Act This act includes, but is not limited to, the following provisions:

- As mentioned, cryptocurrencies are defined as virtual financial assets (*“virtual financial asset” or “VFA” means any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value and that is not - (a) electronic money; (b) a financial instrument; or (c) a virtual token;”*);

⁴² The Prevention and Suppression of Money Laundering and Terrorist Financing Laws (2007) (Cyprus). <https://www.centralbank.cy/images/media/pdf/The-Prevention-and-Suppression-of-Money-Laundering-Laws-of-2007-2021-unofficial-consolidation.pdf>.

⁴³ Regulation (EU) 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>, Title VIII.

- Smart contracts in the blockchain sphere hold a special status;
- The law provides requirements for establishment of crypto-companies (shared capital, directors, economical substance) and ongoing compliance;
- The law also sets requirements for conducting transactions with cryptocurrencies, including offerings, also known as whitepapers.⁴⁴

It might be logical to presume that defining virtual financial assets may pose certain challenges in determining whether a particular asset falls under this definition. Unlike the United States, where the Howey test is usually applied, the Maltese regulator took a more creative approach to this issue a special Financial Instrument Test, which was designed as an XLSM scheme. Therefore, by running all the data about the asset through this specific algorithm, users can easily determine whether their investment falls under the Virtual Financial Assets Act⁴⁵.

When it comes to the impact of these provisions, several points stand out. In addition to what was mentioned earlier about Lithuania and Cyprus, Malta also exhibits quite favorable legislative conditions for potential market players and investors. Furthermore, I appreciate the official recognition of smart contracts, which provides additional preferences for the legal protection of relevant transactions. The most significant manifestation of this will be the possibility of enforcing such smart contracts, especially through the court (at least, in theory).

⁴⁴ Virtual Financial Assets Act (2018) (Malta). <https://legislation.mt/eli/cap/590/eng/pdf>.

⁴⁵ MFSA. (2024, May 15). *Virtual Financial Assets - MFSA*. <https://www.mfsa.mt/our-work/virtual-financial-assets/>.

The same as above, we should expect the adaptation of Maltese cryptocurrency legislation to MiCA in the near future, as required by MiCA itself⁴⁶.

2.3.4. Estonia

Here we smoothly moved to exploring the Estonian legislative approach. In my opinion, Estonia has made the most progress in regulating cryptocurrency matters. Below, the explanations why are outlined. Having accurately studied the work of Marek Bočánek, we now turn to Money Laundering and Terrorist Financing Prevention Act of Estonia⁴⁷.

With respect to cryptocurrency regulation, the Estonian Money Laundering and Terrorist Financing Prevention Act specifies, inter alia, the following:

- Definition of cryptocurrency as “virtual currency” (*“means a value represented in the digital form, which is digitally transferable, preservable or tradable and **which natural persons or legal persons accept as a payment instrument**, but that is not the legal tender of any country or funds for the purposes of Article 4(25) of Directive (EU) 2015/2366 of the European Parliament and of the Council 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 (OJ L 337, 23.12.2015, pp. 35–127) or a payment transaction for the purposes of points (k) and (l) of Article 3 of the same Directive”*);

⁴⁶ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>, Title VIII.

⁴⁷ Marek Bočánek. (2023). Changes in the Regulation of Crypto Exchanges in Lithuania And Estonia. Financial Law Review, 29 (1), 8–20. <https://doi.org/10.4467/22996834flr.23.002.18144>, pp. 10-12.

- The same as for Lithuania, Cyprus and Malta, the law provides requirements for establishment of crypto-companies (shared capital, directors, economical substance) and ongoing compliance.⁴⁸

Here, we will delve deeper into just one feature that distinguishes Estonia from other jurisdictions. This measure is quite progressive, considering the fact that businesses are provided with a wide additional opportunity to work with crypto assets if they are accepted as a method of payment. This is directly mentioned in MiCA several times⁴⁹ and it even exceeds the goals of the Fintech Action Plan (since it is not specified there at all)⁵⁰. With a broad market demand it can be expected that cryptocurrencies may become an accepted payment tool in other European jurisdictions as well. However, forecasting this aspect at the moment is quite challenging.

2.4. Conclusions

In conclusion, it is crucial to point out the following. At this stage, the regulatory environment for cryptocurrencies in the EU cannot be called ideal. Similarly to the US, we can describe as “still in the development phase”, and in the future as EU member states' legislation will be adapted to the requirements of MiCA⁵¹.

⁴⁸ Money Laundering and Terrorist Financing Prevention Act (2017) (Estonia). <https://www.riigiteataja.ee/en/eli/517112017003/consolide>.

⁴⁹ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>.

⁵⁰ FinTech action plan: For a more competitive and innovative European financial sector. (2018, February 28). Finance. https://finance.ec.europa.eu/publications/fintech-action-plan-morecompetitive-and-innovative-european-financial-sector_en.

⁵¹ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>, Title VIII.

At the European Union level, the adopted MiCA mentions cryptocurrencies as “digital assets” (legal certainty is directly established)⁵². This provides a basis for the broad application of general investment laws as well as the application of specific regulations related to licensing, whitepaper requirements, and ongoing compliance rules.

When it comes to the EU Member States Level, several jurisdictions have made significant progress in regulating cryptocurrencies, even ahead of the adoption of the updated MiCA. This, along with other advantages (such as tax regime, and favorable environments for businesses in general), makes them the most attractive states for establishing crypto businesses and investing in general. Additionally, Estonia was first to recognize cryptocurrencies as an alternative method of payment⁵³.

⁵² Ibid.

⁵³ Money Laundering and Terrorist Financing Prevention Act (2017) (Estonia). <https://www.riigiteataja.ee/en/eli/517112017003/consolide>.

CHAPTER III. COMPARATIVE ANALYSIS OF CRYPTOCURRENCIES

REGULATION BETWEEN US AND EU

3.1. General Overview

Within this chapter, we will primarily focus on the two key differences, namely on the (i) regulatory framework and (ii) legal status of the cryptocurrencies. Here below I provide a detailed snapshot for both.

3.2. Regulatory Framework

3.3.1. The US

As we can face, the US regulatory environment for cryptocurrencies is characterized by an absence of a unified approach and its fragmentation. According to D. McGill, B. Saute and B. Barnes, *“Instead of enacting significant legislation or regulatory frameworks to govern cryptocurrencies, the U.S. has instead pursued regulation through enforcement litigation. Actors in the cryptocurrency economy have so far been subject to rigorous enforcement of registration, disclosure, and anti-fraud rules handed down by an assortment of regulatory agencies that rely on the creative use of decades-old legal authorities”*⁵⁴.

I find it hard to disagree with this statement, and the proof lies in what is provided below. This should be so-called simplified roadmap for potential market players which are looking forward to expanding their currencies in the US market.

⁵⁴ McGill, D. H., Sauter, B. J. A., & Barnes, B. D. (2018). Cryptocurrency Is Borderless—but Still Within the Grip of U.S. Regulators. *International Law Practicum*, 31(1), 11–15. <http://www.maldonadoleon.com/web/publicaciones/2018IPV1.pdf#page=11>, p. 11.

- **Step 1.** To review the definition of the “investment contract” under the applicable securities law;
- **Step 2.** To run the potential cryptocurrency through all the elements of the *Howey* Test (investment of money, involvement in a shared enterprise, anticipating profits, primarily from others' efforts)⁵⁵, as well as insure this through reference to the *DAO case*.
- **Step 3.** To commence the registration process of the security in accordance with the Securities Exchange Act requirements.

Although the US operates under a common law system, with a strong reliance on case law over codified acts, where case law should define such matters (and which is still unusual for me as a lawyer from the civil law jurisdiction), I believe that the current situation does not fully adhere to the rule of law, particularly in terms of legal certainty. For this purpose, we can refer to the Venice Commission, which stipulates in that regard that *“the state must make the text of the law easily accessible. It has also a duty to respect and apply, in a foreseeable and consistent manner, the laws it has enacted. Foreseeability means that the law must where possible be proclaimed in advance of implementation and be foreseeable as to its effects: it has to be formulated with sufficient precision to enable the individual to regulate his or her conduct.”*⁵⁶.

Following the Securities Exchange Act and the established case law, we can conclude that each cryptocurrency shall obtain registration for each of them from the Securities Exchange Commission, in contrast to the approach in the EU (where a single license is issued

⁵⁵ SEC v W.J. Howey Co. [1946] 328 U.S. 293;

⁵⁶ Council of Europe Venice Commission. (2011). Report on the rule of law. https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=DE, p.10.

for trading all cryptocurrencies). Applying the example of the Securities Exchange Commission granting registration to Bitcoin only in 2024⁵⁷ (i.e., only in 16 years after release), from a practical standpoint, such a regulatory approach can be considered very poor. This practice does not create conducive conditions for the development of the crypto environment.

3.3.2. The EU

In my point of view, the regulation of cryptocurrencies in the EU is much better structured. The regulation of cryptocurrency legal status is divided into the EU level and Member States Level, so that potential market players and investors should pay attention to both. While we could allege discussions regarding the applicable legislation before 2023, and some states made breakthroughs, establishing very good frameworks that attracted businesses, the current scheme looks as follows:

- **EU Level:** Regulation (EU) 2023/1114, also known as MiCA, which determines a separate status upon cryptocurrencies among other securities and introduces a unified and harmonized approach for all EU Member States on the crypto-businesses licensing. It shall apply as of 30 December 2024⁵⁸.
- **EU Member States Level.** A number of legislative acts at the level of EU member states, in accordance with MiCA, must align with it as of 30 December 2024⁵⁹.

⁵⁷ Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. [www.sec.gov. https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023](https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023).

⁵⁸ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>.

⁵⁹ Ibid., Title VIII.

3.3. Legal Status

3.3.1. The US

To summarize, applying the *Howey Test* and the *SEC v. DAO* case, cryptocurrencies fall under the definition of "Security" according to the Securities Exchange Act⁶⁰. Consequently, cryptocurrencies are nothing but "investment contract" regulated by special securities legislation. It is worth noting that, as mentioned earlier, the only recognized cryptocurrency in the US is Bitcoin⁶¹.

3.3.2. The EU

Within the European Union, cryptocurrencies are granted a special status among other securities according to MiCA. This involves designating the crypto sector as a distinct category of financial services, with specific licensing and trading requirements⁶².

I also deem it necessary to point out an Estonian example, where cryptocurrencies have been recognized as an alternative method of payment under the Money Laundering and Terrorist Financing Prevention Act "*...means a value represented in the digital form, which is digitally transferable, preservable or tradable and **which natural persons or legal persons accept as a payment instrument**, but that is not the legal tender...*"⁶³

⁶⁰ SEC v W.J. Howey Co. [1946] 328 U.S. 293, *see also* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: The DAO (July 25, 2017), available at <https://www.sec.gov/litigation/investreport/34-81207.pdf>.

⁶¹ Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. [www.sec.gov. https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023](https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023).

⁶² Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>.

⁶³ Money Laundering and Terrorist Financing Prevention Act (2017) (Estonia). <https://www.riigiteataja.ee/en/eli/517112017003/consolide>, §3.

3.4. Conclusions

In conclusion, I would like to point out that while the regulatory framework in the US is more chaotic and fragmented, the EU's legislative approach is pretty well-structured and aimed at harmonization of the EU Member States legislation.

Regarding legal status of cryptocurrencies, the US applies general provisions for securities, while the EU pays especial attention to *lex specialis* with respect to the cryptocurrencies.

CHAPTER IV. FORECASTS ON CRYPTO-REGULATION

DEVELOPMENT

4.1. General Overview

According to the Global Treasurer, *“The cryptocurrency market has witnessed a remarkable trajectory of growth, with projections indicating a leap from \$51.5 billion in 2024 to \$71.7 billion by 2028. This represents a compound annual growth rate of 8.62%, showcasing the burgeoning interest and investment in digital currencies.”*⁶⁴.

This provides several grounds to believe that there will be numerous investment booms in the near future, which will make governments align with current FinTech trends. In case of the US, it is not beneficial to maintain the status quo or to impose a complete ban on cryptocurrencies. In my point of view, in second case, it would only increase interest in the "forbidden fruit", and the industry itself would move further into the shadows, leading to additional challenges for the government. As for me, the most appropriate response from the government seems to be the acceptance of the current growing demand for investments and the corresponding adaptation of the regulatory environment.

4.2. The US

The further development of US crypto regulation will be aimed at filling the existing legislation gaps. With that regards, it is crucial to mention the adopted amendments to the Uniform Commercial Code (“UCC”). Alleged Article 12 of the UUC defines controllable electronic records as *“a record stored in an electronic medium that can be subjected to control*

⁶⁴ The Global Treasurer. (2024, April 15). What does 2024 hold for cryptocurrency? <https://www.theglobaltreasurer.com/2024/04/15/what-does-2024-hold-for-cryptocurrency/>.

under Section 12-105. The term **does not include** a controllable account, a controllable payment intangible, a deposit account, an electronic copy of a record evidencing chattel paper, an electronic document of title, electronic money, investment property, or a transferable record”⁶⁵. Based on this, it may be somehow disputable whether cryptocurrencies will be covered by Article 12 since they may be considered either as “electronic money” or “investment property”. However, according to the American Law Institute and the National Conference of Commissioners on Uniform State Laws, the scope of the proposed Article 12 of the UCC shall cover “Article 12 that governs the transfer of property rights in certain intangible digital assets (“controllable electronic records”) that have been or may be created and may involve the use of new technologies. These assets include, for example, certain types of (non-fiat) virtual currency and nonfungible tokens (NFTs)”⁶⁶.

In this context, two aspects should be mentioned. First, the UCC is only a model law, meaning it still needs to be adopted by each state for changes to be fully effective as a hard law. Second, whether this works this way or not will only be determined by case law, which will arise after the UCC amendments are adopted and court practice are established.

Another crucial aspect of crypto-regulation development in the US is the registration (approval) of other cryptocurrencies by the Securities Exchange Commission. As it was mentioned, only Bitcoin has received a greenlight from Securities Exchange Commission⁶⁷. It is also known that the cryptocurrency market features a number of products (Ethereum,

⁶⁵ Uniform Law Commission and the American Law Institute. (2022). Uniform Commercial Code Amendments (2022). <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5ZXU5Zm50cnkiOiI0MjRjNDliZC1jNGRmLTQyMGVhYmYifQ%3D%3D>, pp. 235-236.

⁶⁶ Ibid, p.1.

⁶⁷ Gensler, G. (2024, January 10). SEC.gov | Statement on the Approval of Spot Bitcoin Exchange-Traded Products. Www.sec.gov. <https://www.sec.gov/news/statement/gensler-statement-spot-bitcoin-011023>.

Litecoin, Dogecoin, USDT, etc.). Given the large potential market in the US and its high purchasing power (especially considering the investment climate in the US), we can expect the registration of additional cryptocurrencies in the future.

To conclude, I would like to point out that the US legal system has started following trends in high technologies and blockchain development through implementing cryptocurrencies into its legal environment. However, as we can see, this process is quite slow, and we can not be sure about the timeframes. Consequently, uncertainty, fragmentation in regulation, and conflicts between the SEC and cryptocurrency issuers will persist for quite some time. Finally, there are any prospects for recognizing cryptocurrencies as an alternative method of payment.

4.3. The EU

According to the Ajdeli Hysenaj, implementation of the 2023 MiCA by the EU Member States will be the main focus in the context of crypto-environment development. The author also finds the MiCA transition period quite challenging given the different regulatory regimes among the EU Member States. Additionally, The Netherlands, France, Malta, Lithuania, Germany, and Austria are considered the jurisdictions that have significantly progressed in publishing draft decrees implementing the MiCA⁶⁸.

Anyway, my personal forecasts regarding MICA implementation process are generally positive. Given that my background is predominantly in civil law jurisdictions, I believe that the approach of the European Union will fully comply with the requirement of the rule of law in the context of legislative quality (foreseeability and accessibility), as previously established

⁶⁸ Hysenaj, A. (2023). The New EU Legal Architecture in Crypto-Assets: An Assessment of the Regulatory Strategies and Cross-Border Implications [Master's thesis]. <http://dspace.unive.it/handle/10579/26755>, pp. 85-87.

by the Venice Commission⁶⁹. As a result, the EU and the Member States shall achieve such goals as clearly determined a legal status of crypto-assets, requirements for crypto-business licensing and ongoing compliance, investor rights protection system etc.

Regarding the potential use of cryptocurrencies as an alternative method of payment, the following should be specified. Theoretically, MiCA allows this opportunity, namely “*When used as a means of payment, crypto-assets can present opportunities in terms of cheaper, faster and more efficient payments, in particular on a cross-border basis, by limiting the number of intermediaries*” or “*the absence of an overall Union framework for markets in crypto-assets can lead to a lack of user confidence in those assets, which could significantly hinder the development of a market in those assets and lead to missed opportunities in terms of innovative digital services, alternative payment instruments or new funding sources for Union companies*”⁷⁰.

However, from the practical prospective, this provision can be quite disputable. The widespread recognition of cryptocurrencies as an alternative method of payment may probably undermine the state monopoly on money issuance and erode trust in public financial institutions. We can not be sure whether the EU Member States will be ready to bear such a risk. Therefore, in my point of view, it is unlikely that cryptocurrencies will be widely recognized as an alternative method of payment, and that is why MiCA provides this possibility as optional.

⁶⁹ Council of Europe Venice Commission. (2011). Report on the rule of law. https://www.venice.coe.int/WebForms/pages/?p=02_Rule_of_law&lang=DE, p.10.

⁷⁰ Regulation 2023/1114. Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937. <https://eur-lex.europa.eu/eli/reg/2023/1114/oj>.

4.4. Conclusions

Overall, the US and the EU are on the way to achieving the common goal of establishing a favorable regulatory environment that clearly defines the status of cryptocurrencies, provides a clear order for disclosure, and effectively protects investor rights. However, with that regard, absolutely different approaches are being taken.

Concerning the American legal prospective, the US is attempting to fill legislative gaps regarding the status of cryptocurrencies through amendments to the UCC⁷¹. Furthermore, in the near future, we can expect several positive decisions from the Securities Exchange Commission regarding the registration of other cryptocurrencies (following the example of Bitcoin). Nevertheless, until the adoption of relevant case law, we cannot be sure about the effectiveness of these changes and whether they will overrule the existing legal uncertainty.

Concerning the European legal prospective, we can expect the further development in the crypto regulatory environment with the implementation of MiCA. Finally, I believe that for both jurisdictions, the issue of recognizing the status of smart contracts will be relevant. Sooner or later, this aspect will be regulated.

⁷¹ Uniform Law Commission and the American Law Institute. (2022). Uniform Commercial Code Amendments (2022). <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=1457c422-ddb7-40b0-8c76-39a1991651ac&LibraryFolderKey=&DefaultView=&5a583082-7c67-452b-9777-e4bdf7e1c729=eyJsaWJyYXJ5J5ZW50cnkiOiI0MjRjNDliZC1jNGRmLTQyMGEtYWJjOS0yNjgxZGZkNWVkJmYifQ%3D%3D>, pp. 235-236.

CONCLUSIONS

1. So, What is the Current Situation?

The main purpose of regulating cryptocurrencies was the need to bring them into the legal field, specifically to prevent the use of cryptocurrencies in the dark web, corruption, money laundering, and other illegal activities. It can be accurately stated that this goal, at least partially, has been achieved.

Indeed, the regulatory approach to cryptocurrencies in the US and the EU has a lot of differences.

Concerning the US, the legal status of crypto assets as a “security” shall be determined through the applying of case law, namely examining each element through the elements of the Howey test. If the criteria of “security” are met, registration within the Securities Exchange Commission is required. However, as we can identify, the Securities Exchange Commission cannot demonstrate a large number of registered cryptocurrencies.

Concerning the EU, we can see a two-level system that provides a special status to cryptocurrencies (digital assets / crypto-assets) within the system of securities. While several progress was previously seen mainly at the level of individual Member States (Lithuania, Estonia, Malta, Cyprus), the adoption and implementation of MiCA should unify and harmonize the approach across the overall EU. This established a positive environment for the development of crypto-businesses and the inflow of investments, which positively impacts the overall investment climate in Europe.

2. Alleged Prospects

The main driver of progress in the crypto-regulation will be further development of technologies, particularly Blockchain, as well as the increase in the value of cryptocurrencies, which will involve additional investments.

The pending legislation is aimed at filling existing legislative gaps by amending the UCC and acknowledgement of additional legal features of the cryptocurrencies. Additionally, we can expect the SEC to handle the registration process for numerous cryptocurrencies available on the market. However, there are grounds to believe that these issues may remain unresolved for a long period. Therefore, the issue of legal uncertainty is still actual.

European law, as mentioned before, is aimed at continuing to follow its roadmap for establishment of a unified crypto environment⁷². Additionally, there is still an issue of recognizing cryptocurrencies as an alternative method of payment.

⁷² FinTech action plan: For a more competitive and innovative European financial sector. (2018, February 28). Finance. https://finance.ec.europa.eu/publications/fintech-action-plan-morecompetitive-and-innovative-european-financial-sector_en.

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