



Crypto Assets as a Sustainable Investment and Its Future Potential for Fund Investing

Matej Smalik¹ 
Maroš Katkovčín² 

Received: August 28, 2024
Accepted: December 16, 2024
Published: April 5, 2025

Keywords:

Crypto assets;
MiCA regulation;
Funds;
Regulation of financial market



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Abstract: *The authors discuss the nature of crypto assets and their functioning after the adoption of the European Union MiCA regulation also concerning its sustainability. This paper tries to capture all aspects and intricacies of the functioning of the crypto assets market and address the potential problems related to sustainability. The paper also addresses the issue of crypto assets from the point of view of the inclusion of crypto assets in collective investment funds and the possibility of pooling crypto assets in funds. The authors look for a dividing line between the legitimate collection of crypto assets and the provision of services in this area and the unauthorized business of a “black” fund.*

1. INTRODUCTION

Crypto assets represent the widespread and very popular means of investment that is connected to new technological inventions (particularly distributed ledger technology, blockchain, machine learning and artificial intelligence usage). Crypto assets and their legal nature in various legal systems are addressed in several scientific articles (Štrkolec, 2022). The stability of value of crypto assets varies significantly depending on the type of the crypto asset, the credibility of the issuer of the crypto asset and general acknowledgment and acceptance of the crypto asset based on (or in some cases not) their inner economic value. Therefore, pursuing business in crypto assets raised serious questions on the side of legislative bodies and institutions responsible for securing the stability of the financial market in the European Union (hereinafter referred to as the “EU”) (Bočánek, 2021). The Slovak Republic is not an exemption. The Slovak Republic adopted its unilateral legal regulation that covers some parts of business activities that relate to crypto assets. Based on the fact that the significance of crypto assets can be a potential systematic risk for the stability of financial market at the level of the EU, the EU also adopted an original legal regulation of crypto assets and institutions providing services related to crypto assets in a form of 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 (hereinafter referred to as “MiCA regulation”). MiCA regulation is entering into force to its full extent on 30 December 2024. Hence Member States of the EU must ensure that their legal orders (regardless of whether the Member State adopted unilateral legislation of crypto assets before MiCA regulation or not) are prepared to apply MiCA regulation in order to achieve the goals as set out in MiCA regulation, mainly security and stability of the financial system and trust in the financial system that acknowledges and sets legal framework for investing in crypto assets.³

¹ Comenius University in Bratislava, Faculty of Law, Šafárikovo nám. č. 6, P.O.BOX 313, 810 00 Bratislava, the Slovak Republic

² Comenius University in Bratislava, Faculty of Law, Šafárikovo nám. č. 6, P.O.BOX 313, 810 00 Bratislava, the Slovak Republic

³ Recitals of MiCA regulation, particularly point 5 -6.

Moreover, with the growth of interest of the regular people in investments and the increasing number of regulatory requirements for entities operating on the financial market, there is also an increase in the number of entities that carry out their business activities without the appropriate authorization, i.e. without the license obtained by the respective regulatory authority. The motivation of these entities (in our case mostly the entities pooling the crypto assets into the mutual fund) is to take advantage of the interest of financial consumers to invest in the products offered by these entities and at the same time to avoid the regulatory burden borne by regulated entities licensed by the respective regulatory authority. These include regulation in the entity's necessary professional competence, the entity's capital requirements, the procedures for offering products to consumers, risk management, the prohibition of the sale of certain financial products to a certain range of clients, and the required IT infrastructure.

The respective regulatory authority within the legal framework of the Slovak Republic is the National Bank of Slovakia (hereinafter referred to as "NBS"). In addition to evaluation of the potential unauthorized entrepreneurship, NBS also assesses, within the framework of its supervision, cases that have the character of a financial-legal innovation (like crypto assets), where the performance of the activity in question has either not yet been legally defined and is therefore not regulated or requires a legal assessment and subsequent legal subsumption under the existing legal situation (like MiCA regulation).

Within the framework of the article, it is possible to identify the analytical-synthetic method as the basic research method, where the authors worked with the synthetic method of information processing and with the analytical method in the study of relevant legislation and case law and the method of comparison. The main aim of the article is to provide a comprehensive approach to the interaction of MiCA regulation with particularly legal order of the Slovak Republic and to point out at current regulatory approach of NBS towards financial technologies, particularly fund investing and crypto assets.

2 LEGAL REGULATION OF CRYPTO ASSETS – CURRENT STATE AND EXPECTATIONS IN CONNECTION TO THE SLOVAK REPUBLIC

The Slovak Republic is the EU Member State that, even before the adoption of MiCA regulation, applied a national form of legal regulation of certain types of services related to crypto assets. The provision of these services must be in accordance with the Slovak Act No. 455/1991 Coll., on trade (Trade Act), as amended, (hereinafter referred to as the "Trade Act").

Under the relevant provisions of the Trade Act, it is necessary to dispose of the so-called regulated trades (i.e. a type of trade license for the issuance of which it is necessary to fulfill, in addition to the general prerequisites for the performance of any free trade, also special conditions of professional competence for the operation of a given trade), namely:

- provision of virtual currency⁴ exchange services (i.e. carrying out trades with crypto assets in the form of sale and purchase of crypto assets for euros or foreign currency), and
- provision of virtual currency wallet services (i.e. provision of services in connection with the wallet for storage, holding and transfer of crypto assets).

⁴ Authors point out that the Slovak legal system terminologically incorrectly instead of term crypto asset uses in various acts (particularly covering tax related matters) term "*virtual currency*". This terminological incorrectness then evokes that the usage of virtual currency is anyhow connected with the official monetary policy of the Slovak Republic and the monetary authority itself – the central bank (i.e. NBS). This approach is also criticized in the scientific works of various authors that lean towards usage of the term crypto asset instead of virtual currency (Štrkolec, 2022, p. 113.).

Despite the fact that both trades are, in terms of the legislation of the Trade Act, regulated trades with the necessity of demonstrating professional competence for the possibility of operating them, the professional competence for these regulated trades is set elementary to the person of the responsible representative, who will guarantee the expertise of running the activities in question, who must prove to the relevant district office, that he/she completed a complete secondary general education or a completed secondary vocational education (i.e. basically completed secondary school with a matriculation exam with no connection to investing or experience with financial services provision).

The current professional qualification for operating these regulated trades can be considered only formal, without any relevant link to activities, the subject of which is the practical investment of temporarily free funds on the financial market through a specific instrument – crypto assets. Moreover, it is necessary to add the fact that in the Slovak Republic, the Trade Act expressly designates 2 types of activity that are expressly regulated, any consulting and intermediary activities with crypto assets remain unregulated or are regulated in the least strict way in the Slovak Republic, i.e. within the framework of free trades according to the Trade Act. Hence it can be concluded that the existing legal regulation of the field of crypto assets and the provision of crypto asset services in the Slovak Republic does not provide a relevant distinguishing element for possible fraudulent models of the provision of services associated with crypto assets.

In accordance with Article 143 par. 3 of MiCA regulation, entities that have a trade license in the scope of the above-mentioned regulated trades according to the Trade Act will be able to provide these services until 1 July 2026, if they have not been granted or refused a permit under MiCA regulation by then, if the relevant Member State of the EU does not reserve the shortening of the transitional regime in question until 30 June 2024 (as of the date of submission of this article, the Slovak Republic did not apply this reservation to shorten the transitional regime). In this sense, the legal conditions will inevitably create a two-track regulation of the provision of crypto asset services in the Slovak Republic in the period from 30 December 2024 to 1 July 2026 (the operation of entities with a permit under MiCA regulation regime and at the same time entities with regulated trades licences according to the Trade Act allowing them to pursue the business in the scope of the regulated trades exclusively in the Slovak Republic).

From the point of view of the existing regulation of the provision of services related to crypto assets in the Slovak Republic in the form of the Trade Act, i.e. provision of virtual currency exchange services and the provision of virtual currency wallet services, both these activities are fully covered by the regulation in MiCA regulation within the legal definitions of crypto asset services, and therefore all of the current entities possessing the related trades licences in question in the Slovak Republic will have to apply to the relevant regulatory authority for permission to provide crypto asset services according to MiCA regulation. Furthermore, if these entities do not comply with the regulation of crypto assets introduced by MiCA regulation in the transitional regime (i.e. the entities will not obtain the relevant authorization for the provision of one or more crypto asset services in accordance with MiCA regulation), after the transition period, their regulated trade licenses will automatically expire *ex lege* and they will have to stop carrying out these business activities; otherwise, they could commit an administrative offense, possibly depending on the scope and seriousness of the action, up to the criminal offense of unauthorized business.

MiCA regulation also brings a new challenge to the Member States of the EU to harmonize the national legislation and national regulations of crypto assets and provision of services related to

crypto assets covered by MiCA regulation. The Slovak Republic reacted by preparing and starting a legislative process No. LP/2024/86 the outcome of which should be adoption of a draft Act on some obligations and rights in area of crypto assets and on amendments to certain laws (hereinafter referred to as the “Draft Act”). The adoption of the national legislation in certain areas is predicted by MiCA regulation explicitly (i.e. naming the supervisory and regulatory authority in the area of crypto assets covered by MiCA regulation) and is also a necessity since various Member States of the EU have chosen different regulatory approaches to crypto assets before adoption of MiCA regulation.

The Draft Act particularly regulates and amends the following areas of the Slovak legislation in the area of crypto assets and crypto asset services providers:

- NBS is going to be the relevant supervisory and regulatory authority in the Slovak Republic covering the agenda of MiCA regulation;
- terminology of crypto assets is going to be finally aligned and the term virtual currency will be replaced with the term crypto asset in all relevant Slovak laws;
- the regulated trades provision of virtual currency exchange services and provision of virtual currency wallet services are going to automatically expire *ex lege* on 1 July 2026 (i.e. these regulated trades will be deleted from the Trade Act and no subject will be able to apply for these regulated trades and also no subject will be able to continue to operate the regulated trades if the regulated trade licenses were issued before the MiCA regulation effective date).

The Draft Act has not been adopted yet, but it is anticipated the Draft Act will be passed in the wording as it was proposed. After the adoption of the Draft Act it can be concluded that the Slovak legal order should be in full conformity with MiCA regulation and therefore the regulation of crypto assets and provision of services related to crypto assets should be fully applicable in the Slovak Republic.

3. GREY FUNDS AND CRYPTO ASSETS

Within the framework of financial market supervision, NBS encounters entities that show signs of unauthorized business on the financial market. The most frequent activity appears to be the unauthorized business in the field of collective investment (Čunderlík, 2019, p. 45) in the form of so-called “grey funds” that violate the legislative framework. In some cases (Decision of the National Bank of Slovakia, No.: 100-000-254-206, NBS1-000-048-225 dated October 8, 2020, and Decision of the National Bank of Slovakia, No.: 100-000-654-175, NBS1-000-064-255 dated February 12, 2024), NBS already performed sanction proceedings against such. For example, in a recent case, NBS, as a supervisory authority decided to impose a fine for the violation of the Slovak Collective Investments Act in the form of a continuing offence by the entity that unlawfully carried out the activity of collective investment. The entity collected financial means from the investors/members of the cooperative (as an entity) in the form of membership deposits in various investment strategies⁵ based on the investors’ instructions and for the benefit of these investors/members, the return on the funds so collected and the profit of the investors/members depended on the value and yield of the assets in the investment strategies that were acquired with the funds collected. The most common form of activity of grey funds and their offer consists of active offering to the general public the possibility of investing funds in various investment projects, from which the investor is then supposed to profit according to the performance and profitability of the project. Projects tend to vary in nature, including crypto assets (Čunderlík, 2017, p. 122).

⁵ One of the strategies presented publicly by the entity was the crypto assets for those that were willing to invest in crypto assets.

It should be noted that NBS, within the framework of its supervision, also considers cases that are of the nature of a financial-legal innovation or a start-up, where the performance of the activity in question has not yet been legally defined, and is therefore not regulated, or requires legal assessment and subsequent legal subsumption under the existing legal status (so-called “*fintech*”). Such innovations are not considered by NBS at the time of the absence of regulation and the impossibility of subsumption under the unauthorized status as an entity carrying out unauthorized entrepreneurship. They are awarded such status only if they violate the applicable financial market regulations that are valid and enforceable.

A similar issue in relation to fintech was the regulation of crypto assets.

In 2018, NBS, in relation to the issuance and trading of virtual currencies that use cryptography/ encryption operations, so-called crypto currencies (e.g. Bitcoin, Ethereum, IOTA, Ripple), stated that this activity is not regulated and supervised by NBS. It also stated that virtual currencies are not national currencies and therefore do not fall under national regulation and European legislation, including Slovak legislation, did not regulate and define virtual currency activities. The authorization to carry out regulated activities, whether a foreign exchange license, a payment services license, an electronic money license or other authorization issued by NBS, is not related to the issuance and trading of cryptocurrencies, even if cryptocurrencies are bought or sold for euro or foreign currency. The purchase or sale of cryptocurrencies for euro or foreign currency was not authorized at this time by any entity supervised by NBS as part of its authorized activities. NBS also pointed out that virtual currencies do not have a physical counterpart in the form of legal tender and participation in such a virtual currency scheme is at the own risk of the parties involved (investors). Exchanges or purchases of virtual currencies represent the investors’ own business risk and investors’ money is not protected by anything (NBS, 2018).

In 2024, the issue regarding crypto-assets is completely different, as NBS has supervised crypto-asset service providers (CASPs) since 30 December 2024 and asset-linked token issuers and issuers of electronic money tokens from 30 June 2024. In addition to the obligations imposed on all commercial companies under common law, tax, accounting and other regulations, supervised entities must comply with regulatory requirements under MiCA regulation, e.g. comply with minimum own funds requirements, comply with prescribed corporate governance requirements, ensure the security of client funds and crypto-assets, comply with regulatory requirements under the DORA (effective from 17 January 2025), e.g. they must have in place ICT business continuity policies and plans to ensure that in the event of an interruption to their systems and processes, data and functions are preserved and that they continue to carry out their activities or allow for timely recovery, they must also report serious ICT-related incidents, comply with the obligations set out in the TFR, e.g. to send data on the sender and receiver of crypto-assets, comply with the rules on the protection against money laundering and the financing of terrorism, and comply with the financial consumer protection rules (NBS, 2024).

4. FUTURE RESEARCH DIRECTIONS

The adoption of MiCA regulation and steps by the Member States of the EU to ensure that their legal orders comply with MiCA regulation poses a significant area for further scientific research, particularly in order to assess the legislative changes in all the Member States of the EU that adoption of MiCA regulation brought to analyze whether there a potential for regulatory arbitration is created and thus one of the main goals of MiCA regulation within the EU could threaten to be achieved effectively.

Furthermore, it could be interesting to analyze how market participants (particularly financial consumers and institutional investors) and other jurisdictions react to MiCA regulation application, particularly whether MiCA regulation will serve as a milestone and the template of the regulatory approach in the area of crypto assets also for example for the USA and their regulatory approach.

Time will show whether the step the EU has taken with MiCA regulation adoption will promote or demote investors (including institutional investors) to invest in crypto assets or further increase business activity in the crypto assets area. Early stages of full applicability of MiCA regulation can be a decisive further research determinant that will allow making relevant conclusions about whether crypto assets regulation was needed in the EU or there should be any significant revisions of crypto assets regulation introduced by MiCA regulation since the legal regulation in the financial market is always a step back in comparison to economic reality and technological trends (i.e. whether the time lag between adoption of MiCA regulation and entering into force resulted in the ineffectiveness of the legal regulation or a need for its revision).

5. CONCLUSION

The authors focused on the analysis of crypto assets as a means of investment with regards to its sustainability also in connection with new MiCA regulation focusing particularly on the EU level and specific legal and economic conditions of the financial market in the Slovak Republic and activities of NBS as a competent regulatory and supervisory authority in this area.

In the first part of the article, the authors pointed out the main aspects of MiCA regulation also in connection to existing regimes of regulation of crypto assets and provision services connected to crypto assets, focusing on the Slovak Republic as a use case model. The authors expect that the reaction of investors and crypto assets services providers in the early stages of MiCA regulation full applicability could determine whether MiCA regulation has the potential to become a template for crypto assets regulation also in other jurisdictions or the regulation approach introduced by MiCA regulation at the EU level will need a significant revision.

The authors further discussed several aspects of business in the financial market. The key objective was to delineate and distinguish between unauthorized capital market entrepreneurship versus new fintech solutions, which are seen as a step forward and should not be and cannot be confused. In the absence of regulation, these fintech solutions are not considered by NBS to be an unauthorized financial market business model. However, the opposite is the case for unauthorized business, for which regulation exists and is enforced by NBS.

The authors have also looked at both the activities indicative of unauthorized financial market business and financial innovation in the financial market from the perspective of the fine line between authorized business, unauthorized business and the possible perception of this business as a kind of grey area in relation to crypto assets.

The label “*fintech*” is sometimes used by the entities as the cover for the fact that they do not need to be regulated when in reality they are not fintech solutions in these cases. As we have seen from the above, NBS does not prevent fintechs or startups from developing, as we have seen from past attitudes towards crypto assets, but monitors the financial market for unauthorized business.

Acknowledgment

This research was supported by the grant VEGA (in Slovak *Vedecká grantová agentúra*) - Scientific Grant Agency of the Ministry of Education, Science, Research and Sport of the Slovak Republic named “*VEGA 1/0212/23 Financial innovations as a determinant of current and anticipated regulation on the financial market (challenges and risks)*”.

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