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THE SUBSTANTIVE SCOPE OF THE MICA REGULATION**

Zakres przedmiotowy rozporządzenia MiCA

Kryptoaktywa stanowią obecnie jeden z najżywiej dyskutowanych w literaturze i praktyce tematów. Biorąc pod uwagę obecnie trwający światowy „regulacyjny wyścig zbrojeń” w odniesieniu do tej klasy aktywów, nie może dziwić, że również Unia Europejska postanowiła we wspomnianym wyścigu wziąć udział. Rozporządzenie Parlamentu Europejskiego i Rady w sprawie rynków kryptoaktywów i zmieniające dyrektywę (UE) 2019/1937 (dalej jako Rozporządzenia MiCA lub MiCA) ma za zadanie unormować nieuregulowaną część rynków kryptoaktywów. Nieco upraszczając, jeżeli pewne krypto-aktywa współcześnie wymykają się z zasięgu obecnych przepisów, to kiedy MiCA wejdzie w życie, najprawdopodobniej i co najmniej w pewnym stopniu takie kryptoaktywa znajdą się w regulacyjnym zasięgu tego rozporządzenia.

Celem niniejszego artykułu jest udzielenie odpowiedzi na następujące pytanie: kiedy w odniesieniu do określonego rodzaju finansowego aktywa cyfrowego zastosowanie znajdzie Rozporządzenia MiCA, a kiedy obecne i szeroko rozumiane regulacje finansowe.

Pojęcia kluczowe: kryptoaktywa, Rozporządzenie MiCA, MiCAR, tokeny, podkategorie kryptoaktywów

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I. Introduction

In recent years, crypto-assets have been very popular both in practice and in the literature.¹ That lead to *i.a.* two phenomena. First, the global trend regarding regulating them.² Second, an announcement by the Facebook that it will be engaged in the issuance of Libra stablecoin (later renamed as: Diem).³ It seems that mainly the mentioned lead the European Union (hereinafter: the EU) to the conclusion that it should regulate the crypto-assets markets.⁴ The EU was afraid of the fragmentation of the market⁵ and the fact that such a big player (Facebook) will be issuing his own “coin”.

The discussed in this paper EU regulation is not a lonely legislative Island. It was proposed as a part of the Digital Finance Package presented by the European Commission in September 2020.⁶

The mentioned package consisted of:

- 1) Two communications from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions:
 - a) One on a Digital Finance Strategy for the EU;⁷
 - b) Second on a Retail Payment Strategy for the EU.⁸
- 2) Three legislative proposals, *i.e.*:
 - a) the Proposal for a Regulation of the European Parliament and of the Council on digital operational resilience for the financial

¹ See for example: K. Górniak, *Prawo własności jednostek waluty kryptograficznej*, Kwartalnik Prawa Prywatnego 2019/3; R. Houben, A. Snyers, *Cryptocurrencies and blockchain. Legal context and implications for financial crime, money laundering and tax evasions*, Bruksela 2018, E Noble, *Crypto-assets – Overcoming impediments to scaling: A view from the EU*, 2020, <https://ssrn.com/abstract=3748343> [access: 23.12.2022], T. Tomczak, *Are cryptocurrencies the new “financial weapons of mass destruction”?* Bank i Kredyt 2019/5, D.A. Zetzsche *et. al.*, *The Markets in Crypto-Assets regulation (MiCA) and the EU digital finance strategy*, Capital Markets Law Journal 2021/16(2), ESMA, Advice-Initial Coin Offerings and Crypto-Assets, 9.01.2019, ESMA 50-157-1391, <https://www.esma.europa.eu/document/advice-initial-coin-offerings-and-crypto-assets> [access: 22.05.2022], T. Tomczak, *Crypto-assets and crypto-assets' subcategories under MiCA Regulation*, Capital Markets Law Journal 2022/3, P. Bains, A. Ismail, F. Melo, N. Sugimoto, *Regulating the Crypto Ecosystem. The Case of Stablecoins and Arrangements*, Fintech Notes (NOTE/2022/008), P. Bains, *Blockchain Consensus Mechanisms: A Primer For Supervisor*, Fintech Notes (NOTE/2022/003) and IMF, *IMF Policy Paper. Elements of Effective Policies for Crypto-assets*, February 2023 Washington.

² See: C. Buttigieg, S. Cuyler, *A Comparative Analysis of EU Homegrown Crypto-asset Regulatory Frameworks*, European Law Review, 2020/5.

³ D.A. Zetzsche *et. al.*, *The Markets...*, p. 203.

⁴ Compare: T. Tomczak, *Crypto-assets...*, p. 365-366.

⁵ See MiCA's Explanatory Memorandum, p. 1-2, available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0593> [access: 23.12.2022].

⁶ Available: https://finance.ec.europa.eu/publications/digital-finance-package_en [access: 23.12.2022].

⁷ Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0591> [access: 23.12.2022].

⁸ Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0592> [access: 23.12.2022].

sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2012, (EU) No 600/2014 and (EU) No 600/2014 and (EU) No 909/2014 (so-called DORA Regulation)⁹ – which, as the name suggests, refers to operational resilience;

- b) two proposals regarding crypto-assets:
 - Proposal for a Regulation of the European Parliament and of the Council on a pilot regime for market infrastructures based on distributed ledger technology (so-called DLT Pilot Regime);¹⁰
 - Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937.¹¹

The last of the mentioned is called MiCA Regulation (hereinafter: also as MiCA) and is discussed in this article. The main difference between DLT Pilot Regime and MiCA Regulation is that the first refers to those crypto-assets which are already governed by EU legislation, and the aim of MiCA is to regulate unregulated part of cryptoassets.¹²

What is important, the initial and above mentioned version of MiCA has been changed many times during the legislative procedure.¹³ However four versions of it can be important to better understand the scope of the MiCA, i.e.:

- 1) The above mentioned Commission version of MiCA (09.2020), hereinafter as: first version of MiCA;
- 2) The European Parliament version of MiCA (03.2022)¹⁴, hereinafter as: the second version of MiCA;

⁹ Available: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0595> [access: 23.12.2022].

¹⁰ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0594> [access: 23.12.2022]. Adopted version of DLT Pilot Regime can be found: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R0858> [access: 29.06.2023]. T. Tomczak, 'Advantages' of Distributed Ledger Technology and the DLT Pilot Regime, *Przegląd Ustawodawstwa Gospodarczego* (accepted for publication).

¹¹ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020PC0593> [access: 23.12.2022].

¹² Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Digital Finance Package (Communication)*, 24.09.2020, available at: https://finance.ec.europa.eu/publications/digital-finance-package_en and more about this import demarcation below. Noteworthy, in the previous versions of MiCA these two regulations were not totally separated since, for example, in the MiCA's glossary we were able to find definitions which made a reference to DLT Pilot Regime notions (See the definitions of distributed ledger technology, distributed ledger and consensus mechanism in Art. 3(1) no 1, 1b, 1c of the third version of MiCA). In the current version of MiCA there is no references to DLT Pilot Regime.

¹³ For example T. Tomczak wrote an article in which he elaborated how the definition of crypto-assets and crypto-assets subcategories in MiCA has changed over time. See: T. Tomczak, *Ewolucja definicji kryptoaktywów oraz trzech podkategorii kryptoaktywów w projekcie rozporządzenia MiCA*, *Przegląd Prawa Handlowego* 2023/3, p. 37-44.

¹⁴ See: https://www.europarl.europa.eu/doceo/document/A-9-2022-0052_EN.html [access: 23.12.2022].

- 3) The version of MiCA after interinstitutional negotiations¹⁵, hereinafter also as: the third version of MiCA;
- 4) The adopted version of MiCA, hereinafter also as: the current version of MiCA.¹⁶

MiCA is a very long regulation – the adopted version, without annexes, is 144 pages long. Therefore, it is impossible to cover it in one short article. Thus, this article focuses only on the substantive, not entity, scope of MiCA (as the title of this article suggests).¹⁷ It does not also refer to the territorial scope of MiCA.

II. Scope of the MiCA

II.1. ENTITY SCOPE

In the literature we often look at the scope of a legal act from an “entity” perspective and a “substantive” perspective. In practice such division may be seen as artificial since for a regulation to apply we must be within the entity and substantive scope of it. However, from the research perspective, this distinction makes sense because very often in one short article it is not possible to cover the entire scope of a complex legal act. For this very reason this paper focuses only on the substantive scope of MiCA.

Only shortly it may be indicated that the entity scope of MiCA can be found in art. 2 of MiCA. Art. 2(1) MiCA states that it applies to natural and legal persons and other undertakings.¹⁸ Art. 2(2) MiCA provides that it does not apply to certain entities and persons like, for example, the European Investment Bank and its subsidiaries.¹⁹ The indicated article contains certain entity exclusions where some

¹⁵ See: https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ECON/AG/2022/10-10/1264505EN.pdf [access: 23.12.2022].

¹⁶ See: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1114&qid=1688034301945> [access: 29.06.2023]. When this article refers to “MiCA” or “MiCA Regulation” without an indication of the version of it, it should be assumed that it refers to the current version of MiCA.

¹⁷ See art. 2(2) of MiCA which states that Regulation does not apply to the following entities and persons:

(a) persons who provide crypto-asset services exclusively for their parent companies, for their subsidiaries or for other subsidiaries of their parent companies; (b) a liquidator or an administrator acting in the course of an insolvency procedure, except for the purpose of Article 47; (c) the ECB, central banks of the Member States when acting in their capacity as monetary authorities, or other public authorities of the Member States; (d) the European Investment Bank and its subsidiaries; (e) the European Financial Stability Facility and the European Stability Mechanism; (f) public international organisations.

¹⁸ Such entities have to be engaged in certain activities. More about them below.

¹⁹ The exact wording of art. 2(2) MiCA was quoted in the footnote above.

of them are purely entity type exceptions²⁰ and some have mixed character (entity-substantive type).²¹

II.2. SUBSTANTIVE SCOPE - INTRODUCTION

The MiCA's title states that it is "on Markets in Crypto-assets". In MiCA we can find the definition of a crypto-asset where '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 (art. 3(1) no 5 MiCA). Thus, in essence whether something is on DLT²² or not will constitute one of the main demarcation lines separating MiCA from other legislation.²³

Juxtaposing MiCA's title with this very broad definition²⁴ we may have an impression that the substantive scope of MiCA is very broad. Simplifying, it would apply to something digital what is on DLT or on similar technology. However, we have to bear in mind that the discussed regulation:

- 1) Applies to only to certain activities regarding crypto-assets;
- 2) Provides important and broad exclusions from its scope.

II.2.1. Substantive scope – activities

According to art. 2(1) MiCA this regulation applies to persons/entities that:

- 1) are engaged in the issuance of crypto-assets;
- 2) are engaged in the offer to the public of crypto-assets;
- 3) are engaged in the admission to trading of crypto-assets;
- 4) provide services related to crypto-assets.

Noteworthy, only the offer to the public and crypto-asset service have been defined in the MiCA's glossary (art. 3 MiCA). It seems that complexity and variety of crypto-assets issuance processes caused that it to be impossible for the EU legislator to provide an uncontroversial definition. The admission to trading of crypto-assets means simply admission to trading platform for crypto-assets.²⁵ It

²⁰ See: art. 2(2) (d), (e) and (f) of MiCA.

²¹ I.e. entity requirements are mixed with some broadly understood „activity“ requirements. See: art. 2(2) (a), (b), (c) of MiCA.

²² Or on 'similar technology'. Critics regarding including the notion of 'similar technology' in the definition of 'crypto-assets' can be found in: T. Tomczak, *Crypto-assets...*, p. 367-369. The notion of 'similar technology' was included in the crypto-asset definition to make MiCA future-proof. See: MiCA Recital 16. In the third version of MiCA a Recital with the same content had a number 8.

²³ Whether we are inside MiCA regulatory regime or not.

²⁴ See: T. Tomczak, *Crypto-assets...*, p. 367-372.

²⁵ See art. 1 MiCA.

seems that the further clarification of these two notions will be left to the European Supervisory Authorities (ESAs) and the Court of Justice of the European Union.

Offer to the public means a communication to persons in any form, and by any means, presenting sufficient information on the terms of the offer and the crypto-assets to be offered so as to enable prospective holders to decide whether to purchase those crypto-assets (art. 3(1) no 12 MiCA). We can see that this definition is very similar to the one regarding 'offer of securities to the public' contained in art. 2(d) 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 (hereinafter: Prospectus Regulation).²⁶ Thus, any interpretation provided in reference to art. 2(d) of Prospectus Regulation may be useful in case of interpretation of art. 3(1) no 7 MiCA.²⁷

According to art. 3(1) no 16 MiCA crypto-asset service means any of the services and activities listed below relating to crypto-asset:

- a) providing custody and administration of crypto-assets on behalf of clients;
- b) operation of a trading platform for crypto-assets;
- c) exchange of crypto-assets for funds;
- d) exchange of crypto-assets for other crypto-assets;
- e) execution of orders for crypto-assets on behalf of clients;
- f) placing of crypto-assets;
- g) reception and transmission of orders for crypto-assets on behalf of clients;
- h) providing advice on crypto-assets;
- i) providing portfolio management on crypto-assets;
- j) providing transfer services for crypto-assets on behalf of clients.²⁸

All of the mentioned services and/or activities have been defined in the following MiCA's provisions (Art. 3(1) no 17-26 MiCA). Such an

²⁶ See art. 2(d) of the prospectus regulation which states 'offer of securities to the public' means a communication to persons in any form and by any means, presenting sufficient information on the terms of the offer and the securities to be offered, so as to enable an investor to decide to purchase or subscribe for those securities. This definition also applies to the placing of securities through financial intermediaries.

²⁷ However, having regard to the fact that underlying assets are different (securities v. MiCA's crypto-assets).

²⁸ In the third version of MiCA the definition of crypto-asset service was included in the art. 3(1) no 9 and looked just a bit different. However, it is worth to notice that definition of 'crypto-asset service' changed quite a lot between different versions of MiCA.

extensive list of services/activities and their broad definitions indicate that it will be impossible or at least very hard to be a professional ‘middleman’ in reference to crypto-assets and does not fall under the MiCA’s regime. As a rule such an intermediary needs to obtain an appropriate authorization or be a certain type of entity that is allowed to provide crypto-asset services.²⁹ A crypto-assets service provider is a person who provides such services on a professional basis.³⁰

To somewhat summarize the above, it may be stated that MiCA will not apply, for example, to a natural person who buys on his/her own behalf crypto-assets for investment purposes.³¹ Such person would not be obliged to obtain any authorization under MiCA. In other words and simplifying, we may say that MiCA is more “business oriented”. However, MiCA, by regulating intermediaries, protects “non-business” holders of crypto-assets. Safeguards provided by MiCA include, *i.a.* capital requirements, custody of assets, a mandatory complaint holder procedure available to investors, and rights of the investor against the issuer.³²

11.2.2. Substantive scope – exclusions

The next question which arises is whether in reference to above indicated activities MiCA regulates all assets that are based on DLT or similar technology? Such a question comes up since, as it was mentioned above, crypto-assets are defined very broadly under MiCA. Furthermore, crypto-assets may fulfill different functions (like payment-one or investment-one) what causes that some of them may be very similar to ‘traditional’ financial assets.³³ Thus, there is a problem of the demarcation line between current EU financial services legislation and MiCA Regulation. Indicated ‘conundrum’ is, at least to some level, solved by the art. 2(4) MiCA which excludes certain assets, even if they are based on DLT, from MiCA’s scope. These exclusions, saying quite imprecisely, refer to: financial instruments, deposits (including structured deposits), funds other than e-money tokens, securitization positions in the context of a securitization, insurance and reinsurance products, pensions products and schemes

²⁹ See art. 59 and following of MiCA.

³⁰ More precisely about a crypto-asset service provider see the definition contained in art. 3(1) no 15 MiCA.

³¹ Hoping that their value will grow in the future.

³² Directorate-General for Financial Stability, Financial Services and Capital Markets Union, *Digital...*

³³ See: T. Tomczak, *Are cryptocurrencies...*, p. 497-498.

and social security schemes.³⁴ Noteworthy, the discussed exclusions has changed quite a bit between the first version of MiCA, the second version of MiCA and the current version of MiCA.³⁵

Another very important exclusion can be found in the current version of MiCA.³⁶ The first version of MiCA did not even consider non-fungible tokens (NFTs). However, in the period between the first and the second version of MiCA the NFTs started to be more and more popular. In the second version of MiCA Recital 8a has been added³⁷ and it seems that its aim, i.a. was to indicate that NFTs are outside MiCA.³⁸ The third and current version of MiCA is more explicit since it directly states that MiCA does not apply to crypto-assets that are

³⁴ More precisely see art. 2(4) MiCA which states that MiCA does not apply to crypto-assets that qualify as one or more of the following:

- (a) financial instruments;
- (b) deposits, including structured deposits;
- (c) funds, except if they qualify as e-money tokens;;
- (d) securitisation positions in the context of a securitisation as defined in Article 2, point (1), of Regulation (EU) 2017/2402;
- (e) non-life or life insurance products falling within the classes of insurance listed in Annexes I and II to Directive 2009/138/EC of the European Parliament and of the Council (27) or reinsurance and retrocession contracts referred to in that Directive;
- (f) pension products that, under national law, are recognised as having the primary purpose of providing the investor with an income in retirement and that entitle the investor to certain benefits;
- (g) officially recognised occupational pension schemes falling within the scope of Directive (EU) 2016/2341 of the European Parliament and of the Council (28) or Directive 2009/138/EC;
- (h) individual pension products for which a financial contribution from the employer is required by national law and where the employer or the employee has no choice as to the pension product or provider;
- (i) a pan-European Personal Pension Product as defined in Article 2, point (2), of Regulation (EU) 2019/1238 of the European Parliament and of the Council;
- (j) social security schemes covered by Regulations (EC) No 883/2004 (30) and (EC) No 987/2009 of the European Parliament and of the Council.

³⁵ Compare art. 2(2) of the first version of MiCA with art. 2(2) of the second version of MiCA and with the article 2(3) of the third version of MiCA. As we can see, the article regarding discussed exclusions even changed the place in the MiCA Regulation. The changes between the third version and the current version are merely cosmetic.

³⁶ This exclusions was introduced by the third version of MiCA and the provision was numbered 2(2a) of the third version of MiCA.

³⁷ MiCA Recital 8a of the second version of MiCA read as follows: 'This Regulation should only apply to crypto-assets that are able to be transferred among holders without the issuer's permission. It should not apply to crypto-assets, that are not fractionable and are accepted only by the issuer, including merchant's loyalty schemes, that represent IP rights or guarantees, that certify authenticity of a unique physical asset, or that represent any other right not linked to the ones that financial instruments bear, and are not admitted to trading on a crypto-asset exchange. The fractional parts of a unique and non-fungible crypto-asset should not be considered unique and non-fungible. The sole attribution of a unique identifier to a crypto-asset is not sufficient to classify it as unique or non-fungible. Similarly, this Regulation should also not apply to crypto-assets representing services, digital or physical assets that are unique, indivisible and non-fungible, such as product guarantees, personalised products or services, or real estate. However, this Regulation should apply to non-fungible tokens that grant to its holders or its issuers specific rights linked to those of financial instruments, such as profit rights or other entitlements. In those cases, the tokens should be assessed and treated as security tokens, and be subject, together with the issuer, to various other requirements of Union financial services law...'

³⁸ See: T. Tomczak, *Crypto-assets...*, p. 379-380.

unique and not fungible with other crypto-assets (see new art. 2(3) of the current version of MiCA and art. 2(2a) of the third version of MiCA). MiCA Recital 8a was changed and shortened and now reads:

Digital assets that cannot be transferred to other holders do not fall within the definition of crypto-assets. Therefore, digital assets that are accepted only by the issuer or the offeror and that are technically impossible to transfer directly to other holders should be excluded from the scope of this Regulation. An example of such digital assets includes loyalty schemes where the loyalty points can be exchanged for benefits only with the issuer or offeror of those points (Recital 17 of MiCA).

Only as a side note it may be indicated that Recital 8b of the second version of MiCA indicated that it is necessary to consider whether a Union-wide bespoke regime should be proposed by the Commission. This Recital cannot be found in the current version of MiCA however, it cannot be ruled out that such a bespoke regime will be drafted in future.³⁹ Notably since art. 142 MiCA refers to report on latest developments on crypto-assets and in such future report should be included the information about *an assessment of the development of markets in unique and non-fungible crypto-assets and of the appropriate regulatory treatment of such crypto-assets, including an assessment of the necessity and feasibility of regulating offerors of unique and non-fungible crypto-assets as well as providers of services related to such crypto-assets* (art. 142(2)(d) MiCA). Thus, such a report can be an incentive for creating a bespoke NFT regime. It may be considered whether it was a mistake to not include NFTs at least in the MiCA's market abuse regime.⁴⁰

As it was above indicated, exclusions included in art. 2(4) MiCA are quite numerous. Further in this paper only two of them, in the opinion of the author the most important ones, will be elaborated more precisely, i.e. exclusions regarding financial instruments and funds other than e-money tokens.

II.2.2.1. MiCA and financial instruments

According to art. 2(4)(a) MiCA this Regulation does not apply to crypto-assets that qualify as financial instruments.⁴¹ To avoid any do-

³⁹ More about NFTs in MiCA see MiCA Recitals 6a-6c and art. 122b of the third version of MiCA (currently Article 142 of MiCA) and in the literature see for example: Q. Wang, QLiR. Wang and S. Chen, *Non-fungible Token (NFT): Overview, Evaluation, Opportunities and Challenges*, (2021) arXiv preprint arXiv: 2105.07447, available: <https://arxiv.org/abs/2105.07447> [access: 28.12.2022].

⁴⁰ See Title VI of MiCA. This question exceeds the scope of this article.

⁴¹ Financial instruments in MiCA are defined as financial instruments as defined in Article 4(1), point (15), of Directive 2014/65/EU (so-called: MiFID II) – see Article 3(1) point (49) MiCA.

ubts whether a financial instrument which is based on DLT is within MIFID II, art. 18 no (1) of the DLT Pilot Regime amends the definition of financial instrument included in MIFID II stating that Art. 4(1) point (15) MIFID II is replaced by the following:

(15) ‘financial instrument’ means those instruments specified in Section C of Annex I, including such instruments issued by means of distributed ledger technology’ [emphasis added].

Thus, if a financial instrument, *e.g.* a share, is based on DLT it would still be subject to the current EU financial service legislation, not regulated under MiCA.⁴²

However, the above does not mean that any delimitation problems will not arise. As it is already indicated in the literature in case of MIFID II we are dealing ‘only’ with a directive.⁴³ Different transposition of MIFID II could lead to MiCA regulatory arbitrage.⁴⁴ This problem was noticed by the European Parliament and art. 2(2a) was added in the second version of MiCA. The mentioned article looked as follows:

For the purpose of paragraph 2, crypto-assets shall qualify as financial instruments where they meet the criteria and conditions to be deemed equivalent in substance to any of the instruments referred to in Section C of Annex I to Directive 2014/65/EU, irrespective of their form.

ESMA shall develop draft regulatory technical standards outlining the criteria and conditions for establishing when a crypto-asset is to be considered to be equivalent in substance to a financial instrument irrespective of its form, as referred to in the first subparagraph.

ESMA shall submit those draft regulatory technical standards to the Commission by ... [12 months after the date of entry into force of this Regulation].

Power is delegated to the Commission to adopt the regulatory technical standards referred to in the second subparagraph in accordance with Articles 10 to 14 of Regulation (EU) No 1095/2010.

Thus, in essence, substantive over formal approach in reference to qualification of financial instruments was proposed⁴⁵ and the Commission was granted with the power, on the basis of the regulatory technical standards, to delimitate financial instruments based on DLT from MiCA’s crypto-assets.⁴⁶

⁴² See T. Tomczak, *Crypto-assets...*, p. 369.

⁴³ See T. Tomczak, *Crypto-assets...*, p. 370.

⁴⁴ Indicated problem was broadly described in: T. Tomczak, *Crypto-assets...*, p. 370-371 therefore, it will not be more precisely discussed in this paper.

⁴⁵ Thus the approach similar to the one adopted in the United States called “Howey test.” See: SEC v. W.J. Howey Co Supreme Court case of 1946.

⁴⁶ Compare: T. Tomczak, *Crypto-assets...*, p. 371.

The above cited provision cannot be found in the current version of MiCA. However, art. 2(5) MiCA states that by 30 December 2024, ESMA shall issue guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments.⁴⁷ Thus in future these guidelines should be helpful to delimitate financial instruments from MiCA's crypto-assets. Problematic issue is the fact that we will have to wait until 30 December 2024 for such guidelines.

Fortunately, competent authorities will be able to request opinions from ESAs on the classification of crypto-assets, including classifications that were proposed by the offerors or persons seeking admission to trading.⁴⁸ In delimitation problems art. 3(2) MiCA could also be helpful to solve them. This provision states that the Commission is empowered to adopt delegated acts in accordance with Article 139 to supplement MiCA by further specifying technical elements of the definitions laid down in paragraph 1 of this Article, and to adjust those definitions to market developments and technological developments. In those definitions there is a notion of 'crypto-assets'. Thus, mentioned adjustment of it may help to determine whether we are dealing with a crypto-asset within MiCA or a financial instrument.

To sum up, it may be said that DLT financial instruments are a different area of law than MiCA. However, to draw a precise line between these two areas of law will not be simple in practice.⁴⁹ Furthermore, it cannot be excluded that some potential overlaps between MiCA and MIFID II can be found.⁵⁰

II.2.2.2. MiCA and funds

In the first and second version of MiCA it was stated that this Regulation does not apply to electronic money as defined in Article 2, point (2), of Directive 2009/110/EC, except where they qualify as electronic money tokens under MiCA (art. 2(3)(b) MiCA – emphasis added).

In the third version of MiCA letter (b) was deleted and replaced by new letter (ca). In the current version of MiCA letter (ca) is letter (c) and states that MiCA does not apply to funds, except if

⁴⁷ Such guidelines should be issued in accordance with Article 16 of Regulation (EU) No 1095/2010. See art. 3(5) MiCA.

⁴⁸ See: MiCA's Recital 14.

⁴⁹ At least at the beginning of the MiCA's application, before the above-mentioned guidelines will be published.

⁵⁰ This issue deserves a separate paper.

they qualify as e-money tokens.⁵¹ Thus, the discussed exclusion has been broadened since electronic money falls under the definition of funds.⁵²

However, even more interesting is the part of the provision which in essence did not change, i.e. “except if they qualify as e-money tokens”. We should consider what this phrase means.

In essence, it means two-step model of analysis of MiCA’s applicability. Firstly, it should be considered whether a certain asset qualifies both as crypto-assets under MiCA and as funds. If yes, probably MiCA is not applicable and current regulations regarding funds will be applicable. However, to be sure of such a conclusion, the second step of the analysis has to be conducted. We have to consider whether we are not dealing with the MiCA’s subcategory of crypto-assets in the form of e-money token.⁵³ Since if we are dealing with funds which can be classified as e-money tokens, MiCA is applicable. MiCA defines e-money tokens as *a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency* (Art. 3(1) no 7 MiCA).⁵⁴

Looking at the above reasoning from the end, if an asset can be qualified as an e-money token, MiCA will be applicable and it is not important (from MiCA’s application perspective) that such an asset can also be qualified as funds. However, the question arises whether in this situation only MiCA is applicable?

It seems that in such a case MiCA does not derogate regulations regarding funds.⁵⁵ Thus, to e-money tokens both current regulations and MiCA are applicable. The problem may arise when the same issue will be regulated in different way by current regulations and MiCA.⁵⁶ The question would arise whether:

- 1) applicable is only MiCA as “(...) newer and more specialized legislation”⁵⁷;
- 2) applicable are the more stringent provisions; or
- 3) we are dealing with cumulative application of current regulations and MiCA.

⁵¹ ‘Funds’ means funds as defined in Article 4, point (25), of Directive (EU) 2015/2366.

⁵² See art. 4(25) of Directive 2015/2366/EU which states ‘funds’ means banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC.

⁵³ MiCA provides three subcategories of crypto-assets, i.e. assets-referenced tokens, e-money tokens and utility tokens. These three subcategories have been already elaborated in the literature therefore, it is enough to make a reference to such literature: T. Tomczak, *Crypto-assets...* and T. Tomczak, *Ewolucja...*

⁵⁴ Noteworthy the definition of e-money token has been changing between different versions of MiCA. See: T. Tomczak, *Ewolucja...*, p. 41.

⁵⁵ See: T. Tomczak, *Crypto-assets...*, p. 376 and arguments provided there.

⁵⁶ This problem has been noticed in: T. Tomczak, *Crypto-assets...*, p. 376.

⁵⁷ T. Tomczak, *Crypto-assets...*, p. 377.

In the opinion of the author the cumulative approach is the right one.⁵⁸ However, regardless whether we will choose approach no 2 (more stringent) or 3 (cumulative) the question of technological neutrality arises. This problem has already been indicated in the literature and it is difficult to understand, at least on the basis of MiCA wording, why in reference to “DLT money” we may be dealing with more cumbersome regulations.⁵⁹

Conclusions

Title of MiCA and very broad definition of crypto-assets may suggest that MiCA's scope of the application will be very broad. However, the aim of MiCA is only “to deal with the unregulated part of crypto-assets markets”⁶⁰ [emphasis added]. Notably, the reason behind MiCA was to regulate global stablecoins.⁶¹ Assets based on DLT which can be classified as ‘currently existing’ financial assets, e.g. financial instruments, will be regulated by existing laws, not MiCA.⁶² Thanks to such approach MiCA tries to respect the rules of ‘same activities, same risks, same rules’ and of technology neutrality.⁶³ However, the rule of technological neutrality may be questioned in reference to MiCA's e-money tokens which will probably, at least to some level, fall under ‘double-standard’.⁶⁴

In other words and metaphorically speaking we may say that MiCA will not so much replace puzzles in the existing financial regulatory puzzle as it will add a new puzzle to it. The question is whether it will be a matching puzzle? The time will show.

⁵⁸ However, this issue requires some further research and clarification from the ESAs. See MiCA Recital 44 which is not very clear and states (...) *Where the obligations applying to such credit institutions under this Regulation overlap with those of Directive 2013/36/EU, the credit institutions should comply with the more specific or stricter requirements, thereby ensuring compliance with both sets of rules* [emphasis added].

⁵⁹ See: T. Tomczak, *Crypto-assets...*, p. 377. However, in the literature it is indicated that ‘Authorities should also consider whether a technology neutral approach can continue delivering mandates when diverse new technologies deliver different outcomes and may consider a more proactive approach to supporting or restricting certain technologies’ (see P. Bains, *Blockchain...*, p. 2).

⁶⁰ See: T. Tomczak, *Crypto-assets...*, p. 365.

⁶¹ D.A. Zetsche *et al.*, *The Markets...*, p. 203-204. MiCA does not provide the definition of stablecoins, but asset-referenced tokens and e-money tokens may be seen as stablecoins. See: T. Tomczak, *Crypto-assets...*, p. 376. About the role of stablecoins in the future financial system and risks related to those types of assets see an extensive study of P. Bains, A. Ismail, F. Melo, N. Sugimoto, *Regulating...*

⁶² In MiCA's Recital 6 we can read: *Therefore, crypto-assets that fall under existing EU financial services legislation should remain regulated under the existing regulatory framework regardless of the technology used for their issuance or their transfer, rather than this Regulation*. See also: T. Tomczak, *Crypto-assets...*, p. 369-370.

⁶³ See MiCA Recital 9.

⁶⁴ See T. Tomczak, *Crypto-assets...*, p. 376-377 however, see also: P. Bains, *Blockchain...*, p. 2 who indicates that the technological neutral approach is maybe not a proper one.

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