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## Digital Currencies Trading under Polish and EU Public Law

### Introduction

Digital currencies (also called virtual currencies or crypto currencies) are a worldwide phenomenon gaining increasing interest in the media and among investors, economists and legal scholars. They are based on an electronic transactions system which uses cryptographic algorithms. The transactions on digital currencies are transparent and publicly available, and can be concluded directly between owners of such currencies or through multilateral platforms which resemble traditional trading facilities. Digital currencies are based on block chain technology – a decentralized peer-to-peer network, which allows each and every transaction to be checked and verified by every other user.<sup>1</sup> Furthermore, publicly available information includes details of every digital currency transaction, but the exact identities of the parties concluding a particular transaction are not disclosed. Although in practice the complete anonymity of the parties concluding a transaction is not guaranteed, digital currency trading may be classified as at least partly anonymous.<sup>2</sup>

In practice digital currencies are used mainly as a new means of exchange which allows certain goods to be acquired, usually by the Internet, without the necessity of using traditional money. Furthermore, digital currencies are gaining increasing interest as a new way of investing funds, since the value of digital currency can drastically increase (or decrease) in a very short period of time. However, mainly due to the anonymity that they provide, digital currencies are also used for criminal activities, such as money laundering, financing terrorism or drug trafficking.<sup>3</sup>

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1 P. Dudek, *Waluta Bitcoin, glosa do wyroku Trybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14 Skatteverket przeciwko Davidowi Hedqvistowi*, in: „Glosa” 2016 no. 6, p. 39.

2 S. Shcherback, *How Should Bitcoin Be Regulated?*, in: “European Journal of Legal Studies” 2014, vol. 7, no. 1, p. 50.

3 Idem, p. 46.

Up to this point the legal status of digital currencies has not been clearly established under either Polish or EU law. This is especially evident from the regulatory perspective, since on the basis of private law digital currencies may be at least compared, and up to a certain point treated as alternative, already established institutions of private law.<sup>4</sup> Such an ongoing state of legal uncertainty should be clarified as soon as possible, since the lack of a legal definition of digital currencies may have severe consequences for penal law, tax law and administrative law. Those consequences mainly include a lack of a common practice for applying the law by both public authorities and the courts regarding digital currencies<sup>5</sup> and a lack of a necessary protection for both natural and legal persons investing in digital currencies. It may be even observed that since a constantly growing number of people are considering investing in digital currencies, in many jurisdictions financial authorities are warning about the potential risks associated with this activity, as a sort of answer to a legislative procrastination regarding this matter<sup>6</sup>. Although currently there are no proposals for complex regulations concerning digital currencies under either EU or Polish law, we can observe the first attempts to create their legal definitions.<sup>7</sup>

The main goal of this paper is to analyze the legal status of digital currencies under both Polish and EU public law, provide an attempt to apply already existing public law regulations to digital currency trading, and finally to propose a direction for future regulations that will deal with this matter.

The main areas of the analysis include a comparison of digital currencies with traditional currencies and electronic money, a comparison of digital currencies with financial instruments, and an assessment of the idea of applying regulations on financial instrument trading to digital currency trading, with an emphasis on the potential difficulties associated with creating administrative supervision over such trading. The paper also

4 K. Zacharzewski, *Obrót walutami cyfrowymi w reżimie obrotu instrumentami finansowymi*, in: „Przegląd Sądowy” 2017, no. 11–12, p. 144.

5 Idem, p.141.

6 National Bank of Poland and the Polish Financial Supervisory Authority has issued an alert on digital currencies trading risks on 7 July 2017, [https://www.knf.gov.pl/knf/pl/komponenty/img/Komunikat\\_NBP\\_KNF\\_w\\_sprawie\\_walut\\_wirtualnych\\_7\\_07\\_2017\\_57361.pdf](https://www.knf.gov.pl/knf/pl/komponenty/img/Komunikat_NBP_KNF_w_sprawie_walut_wirtualnych_7_07_2017_57361.pdf) [access: 31.01.2018]; the German Federal Financial Supervisory Authority consumer warning dated 9 November 2017, [https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Meldung/2017/meldung\\_171109\\_ICOs\\_en.html;jsessionid=8E3D0CFC0D890E08CC77FF542BDBBE5D.2\\_cid298](https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Meldung/2017/meldung_171109_ICOs_en.html;jsessionid=8E3D0CFC0D890E08CC77FF542BDBBE5D.2_cid298) [access: 31.01.2018].

7 The Draft of the Act on counter measuring money laundering and terrorism financing dated 15 January 2017, <http://legislacja.rcl.gov.pl/docs//2/12298001/12431428/12431429/dokument326696.pdf> [access: 31.01.2018], (hereinafter: the Draft); Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC, 2016/0208 (COD), [http://ec.europa.eu/justice/criminal/document/files/aml-directive\\_en.pdf](http://ec.europa.eu/justice/criminal/document/files/aml-directive_en.pdf) [access: 31.01.2018], (hereinafter: the Proposal).

contains an analysis of the first attempt to create a legal definition of digital currencies under Polish and EU public law, as well as an analysis of the possibility of applying existing public law regulations to digital currency trading.

## Digital Currencies v. Regular Currencies and Electronic Money

Currently there are numerous discussions in the Polish legal doctrine regarding the status of digital currencies, and especially over whether they may be treated as regular money. In economic studies, money is characterized by its main functions, which include *inter alia* being: a means of exchange, a measure, a value, or a means of payment.<sup>8</sup> According to some scholars, digital currencies have similar functions to regular money and therefore may be used in order to release a party from a pecuniary obligation<sup>9</sup>. Therefore digital currencies would be treated as a measure of value other than money on the grounds of Article 3581 § 2 of the Polish Civil Code<sup>10</sup>.

According to other scholars, digital currencies may not be treated as a measure of value and therefore they may not be used to release a party from either public or private obligation. Following this assumption, a party may be released from an obligation by using digital currencies only if the other party consents to it. Therefore in this view an agreement in which one party trades a particular good for an agreed amount of a digital currency would resemble an exchange contract rather than a sales contract. The difference between a regular exchange contract and a contract in which one party trades digital currencies would be that a digital currency should not be treated as a good but rather as a property right.<sup>11</sup>

It should be noted that there are several differences between digital currencies and traditional currencies. First of all digital currencies are fully dematerialized and therefore they do not have a physical form which distinguishes them from a regular currency which also occurs in a form of coins and banknotes. Secondly, digital currencies have no interest rate, which makes it more difficult to value them. The value of a digital currency is mostly dependent on the demand, therefore the bigger the demand is for a particular digital currency, the bigger its value is. Furthermore, unlike regular currencies, digital currencies are not regulated and they are not issued or supervised by any public institution<sup>12</sup>. Finally, they

8 P. Dudek, op. cit., p. 38–39.

9 K. Zacharzewski, op. cit., p. 140.

10 Dz. U. 2017 of 459 as amended.

11 A. Roszyk, Świat przyjmuje walutę *bitcoin*, in: „Prawo i Podatki” 2015, no. 11, p. 3.

12 Individual tax interpretation no. IPPB5/423–397/14–4/MW dated 10 July 2014 issued by the Director of the Tax Chamber in Warsaw.

do not constitute an official means of payment in any country, and therefore for example under Polish law they may not be treated as a foreign currency.<sup>13</sup>

In my opinion, digital currencies should not be treated as a regular currency or as a common means of exchange. Given their nature and how they may be obtained, they resemble financial instrument more than a currency. However, from the perspective of a private law, digital currencies undoubtedly may be used as a way of fulfilling an obligation if the other party consents to it. Unfortunately, a detailed analysis of a role of digital currencies as a part of contract law falls outside a scope of this article.

Furthermore, under Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions,<sup>14</sup> digital currencies do not fall under the definition of electronic money. Article 2 sec. 2 of the Electronic Money Directive defines electronic money as electronically (including magnetically) stored monetary value, as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions, and which is accepted by a natural or legal person other than the electronic money issuer.

Although digital currencies meet the criteria of electronic storage and the purpose of making transactions accepted by a natural or a legal person, they do not meet the criteria of issuance on receipt of funds<sup>15</sup>. According to the European Central Bank report, while the link between the electronic money and traditional money is preserved because the stored funds are expressed in the same unit of account such as, for example, USD, EUR or PLN, in digital currencies the unit of account is expressed in a virtual one such as, for example, Bitcoins or Linden dollars.<sup>16</sup> This approach was further confirmed by the Court of Justice of the European Union in the case concerning applying VAT to services for exchanging Bitcoins to regular currencies.<sup>17</sup> Therefore, from this perspective digital currencies may be considered as unregulated digital money, which cannot be classified either as a regular currency, electronic money or a legal means of payment.<sup>18</sup>

13 The only current exception is Japan, which recognized Bitcoin, the most popular digital currency, as a legal mean of payment.

14 Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions, Amending Directives 2005/60/EC and 2006/48/EC and Repealing Directive 2000/46/EC, OJ 2009 L 267/7 (hereinafter: The Electronic Money Directive).

15 The Law Library of Congress, *Regulation of Bitcoin in Selected Jurisdictions*, 2014 no. 1, p. 9 <https://www.loc.gov/law/help/bitcoin-survey/regulation-of-bitcoin.pdf> [access: 31 January 2018].

16 European Central Bank, *Virtual Currency Schemes*, October 2012, p. 16 <http://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf> [access: 31 January 2018].

17 C-264/14 *Skatteverket vs. David Hedqvist*; R. Bernet, *Zwolnienie z VAT waluty wirtualnej Bitcoin*, in: „Glosa” 2017 no. 1, p. 110.

18 R. Bernet, op. cit., p. 113.

## Digital Currencies as a Financial Instrument

Legal norms that regulate the trading of financial instrument are a matter regulated by the norms of public law, although a regulation and defining of particular financial instruments like for instance securities is usually a subject to private law regulations.<sup>19</sup> The difference can be illustrated well through the example of the relation of EU law on the trading of financial instruments to the Member States' regulations. Generally instruments classified as financial instruments under EU law, such as for instance securities or derivatives, are also classified as such under each of the Member States' law. However, EU law does not define particular instruments that fall within the category of financial instruments, so, as a result, although a derivative contract relating to securities will be classified as a financial instrument in two different Member States, they may each have a different legal definition of it in. This can be clearly illustrated by using the example of securities which in different Member States have different nomenclature, legal construction and status, although the laws applicable to their trading are similar.<sup>20</sup>

On the EU level, 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<sup>21</sup> is a basic regulation that regulates the trading of financial instruments. MIFiD II does not contain an open catalogue of financial instruments but instead it lists specific instruments that fall within its scope, in Annex 1 Section C. The list includes *inter alia* transferable securities, money-market instruments, emission allowances or derivative contracts relating to securities, currencies or other derivative instruments. Therefore since the list does not contain digital currencies, they fall outside the scope of MIFiD II. Similarly, the Polish Act on financial instruments trading, dated 29 July 2005<sup>22</sup>, lists financial instruments in Article 2, but it does not include digital currencies.

It may be observed that although the particular instruments qualified as financial instruments under MIFiD II and the Trading Act are very different, they do have some mutual features. First of all they are dematerialized, so as a general rule the right that is incorporated in them is not related to any material device such as a document. Secondly, their trade is a subject to administrative supervision.<sup>23</sup> Introducing the state's supervision over financial instruments trading is the main reason for regulating them by public law. Through administrative supervision the legislator aims to increase the effectiveness of

19 K. Zacharzewski, op. cit., p. 142.

20 Ibidem, p. 142.

21 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, OJ 2014 L 173/346 (hereinafter: MIFiD II).

22 Dz. U. 2017 item 1768 as amended (hereinafter: the Trading Act).

23 K. Zacharzewski, op. cit., p. 144.

resource allocation, increase the level of investor protection, protect fair trading mechanisms and protect the market infrastructure<sup>24</sup>.

It seems that since digital currencies are dematerialized, tradable instruments which are gaining in popularity as a form of investment, they can potentially be included in a scope of financial instruments under MiFID II and the Trading Act. Similarly, carbon dioxide emission allowances have been included within the scope of financial instruments under MiFID II, although there are several material differences between them and other financial instruments such as securities.<sup>25</sup>

Furthermore, it should be noted that some of the authorities among the Member States explicitly stated that digital currencies may be considered as financial instruments. For example the German national financial authority – Federal Financial Supervisory Authority and German Federal Ministry of Finance argued that under German banking law Bitcoin may be classified as a financial instrument, and in particular as a security.<sup>26</sup>

### **Practical Difficulties with Classifying Digital Currencies as Financial Instruments**

Although in my opinion digital currencies may and will be classified as financial instruments under EU law in the future, there are several difficulties that may be associated with such a classification.

When it comes to digital currencies, it is impossible to specify a digital currency issuer and therefore there is no legal relation between the issuer of the financial instruments and its owner, which is a typical feature common to the majority of financial instruments.<sup>27</sup> A digital currency is created through a special algorithm using the Internet, and therefore as such it does not have, and does not operate through, an issuer.<sup>28</sup> Therefore although every digital currency has some sort of creator, such a creator may not be confused with the institution of an issuer on the grounds of the regulations of financial instruments.

It should be noted that there is no legal norm that would unconditionally bind a financial instrument with the institution of an issuer. Therefore, on purely legal grounds it is possible to classify a particular instrument as a financial instrument even if it does not

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24 M. Spyra, *Cele prawa instrumentów finansowych oraz system narzędzi ich realizacji*, in: *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016, pp. 38–43.

25 K. Gorzelak, *Zbywalne instrumenty związane z redukcją emisji zanieczyszczeń*, in: *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016, p. 721.

26 S. Shcherback, *op. cit.*, p. 74.

27 K. Zacharzewski, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, in: „Monitor Prawniczy” 2015, no. 4, p. 193.

28 R. Biernat, *op. cit.*, p. 109.

have an issuer. Furthermore, according to some scholars, the significance of the institution of an issuer on the financial market is decreasing and it is beginning to be of secondary importance.<sup>29</sup> This is due to the gradual shift from the classical issuer based theory of securities to a more modern contract-based theory.<sup>30</sup> As a result of these reasons, scholars claim that a financial instrument without an issuer is just the next, natural step in the evolution of the concept of an issuer and, as a result, of financial instruments as such.<sup>31</sup> In my view, including instruments such as digital currencies that do not have an issuer within the scope of financial instruments will be the next step in the process of modernizing financial markets.

However, it should be borne in mind that the existing regulations on the trading of financial instruments are based on the current centralized market structure which relies on the concept of an issuer. As a result, the public law norms which relied heavily on existence of an issuer may not be adequate for the efficient regulation of digital currency trading. Therefore, creating of an effective and adequate legal framework for the regulation of digital currency trading that does not rely on the concept of an issuer will be a significant challenge for both international and national legislators.

In my opinion, due to the lack of there being a central entity of the issuer for trading in digital currencies, the supervisory powers of administrative authorities may be limited in the initial process of creating a new digital currency<sup>32</sup>. In the first stage the law should regulate information obligations regarding the risks associated with investing in digital currencies and the technical standards ensuring a high degree of trading security. The scope of supervision should therefore be wider in the secondary market where administrative authorities could exercise their power through supervising digital currency trading between investors, and supervising the multilateral facilities that enable their trade.<sup>33</sup> It should be noted that usually the creation of a digital currency is conducted through a process of a so-called Initial Coin Offering – which in a way resembles a well-known institution of an Initial Public Offering<sup>34</sup>. In my opinion, the biggest emphasis of the future regulation should be put on regulating the conduct of those multilateral facilities by classifying them as either Organized Trading Facilities<sup>35</sup> or Multilateral Trading Facilities<sup>36</sup> under MIFiD II. Furthermore, more specific regulations creating

29 M. Mariański, *Pozycja emitenta na rynku finansowym – ewolucja oraz kierunki przemian*, in: „Przegląd Prawa Handlowego” 2017 no. 8, p. 37.

30 Ibidem, p. 37–38.

31 Ibidem, p. 40.

32 G. Sobiecki, *Regulowanie krypto walut w Polsce i na świecie na przykładzie Bitcoina – status prawny i interpretacja ekonomiczna*, in: „Problemy Zarządzania” 2015 vol. 13 no. 3, p. 156.

33 K. Zacharzewski, op. cit., p. 195.

34 I. Barsan, *Legal Challenges of Initial Coin Offerings (ICO)*, in: “Colloque” 2017 no. 3, p. 55.

35 Hereinafter: OTF.

36 Hereinafter: MTF.



a minimum level of cyber safety should be introduced since digital currency traders are often the victims of cyber attacks.<sup>37</sup>

## Defining Digital Currencies Under Public Law

As stated in the previous section, MIFiD II does not define particular instruments included in the scope of financial instruments and, similarly, defining particular instruments under the Polish legal regime is generally reserved for private law regulations.

However, on 19 January 2018 the Polish Minister of Development and Finances presented a Draft on a new act on the counter measuring of money laundering and terrorism financing, which contains the first attempt at creating a legal definition for digital currency in Poland. Furthermore, the European Commission introduced a Proposal for a new directive amending the Directive on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.<sup>38</sup>

According to Article 1 sec. 2 of the Proposal, virtual currencies are a digital representation of value that is neither issued by a central bank nor a public authority, nor necessarily attached to a fiat currency, but is accepted by natural or legal persons as a means of payment and can be transferred, stored or traded electronically. Save for the remarks concerning acceptability as a means of payment raised for the Polish attempt at defining digital currencies below, the definition proposed by the European Commission seems to be broad and clear enough to accurately cover all digital currencies. Since the Polish attempt at defining digital currencies raises many more questions, this section will focus on the analysis of the Polish definition.

According to Article 2 sec. 2 item 26 of the Draft, the digital currency is a digital representation of value which is not a legal means of payment, international unit of account, electronic money, financial instrument, bill of exchange (Polish: *weksel*), nor a pay check. Furthermore, it specifies that a digital currency should be transferable in a business course for a legal means of payment, acceptable as a means of exchange, can be electronically stored or transferred, or can be subject to electronic trade.

At first, it should be noted that the definition clarifies that a digital currency is not *inter alia* a legal means of payment or a financial instrument. However, in my opinion it does not preclude that in the future, especially under the influence of EU law, digital

37 P. Opiatek, *Kryptowaluty jako przedmiot zabezpieczenia i poręczenia majątkowego*, in: „Prokuratura i Prawo” 2017 no. 6, p. 29.

38 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141/73.



currency will be classified as either a legal means of payment or a financial instrument. Secondly, the definition contains the prerequisites for classifying a “digital representation of value” as a digital currency. Although the basic prerequisites of transferability and the possibility of digital storage are clear and undoubtedly they are met by any digital currency, the remaining prerequisites seem to be at least questionable.

In my opinion, the prerequisite of transferability to a legal means of payment and acceptability as a means of exchange can potentially rule out the majority of digital currencies from the scope of the definition. Firstly, it should be noted that not all of digital currencies may be directly transferred to a legal means of payment. Although in theory it is possible, in practice only the most popular digital currencies such as BitCoin or Ethereum may be directly sold for a regular currency. In order to be transferred to a legal means of payment, other digital currencies should first be transferred to one of another abovementioned digital currency that is directly transferable to money. In my view the fact that the definition directly states that digital currencies are not a legal means of payment, results in excluding those digital currencies that may be traded only for other digital currencies from the scope of the definition. This flaw may, however, be easily repaired by amending the prerequisite by clarifying that digital currencies should be directly or indirectly transferable to legal means of payment.

The second prerequisite of acceptability as a means of exchange may also potentially exclude the majority of digital currencies from the scope of the definition. The Draft does not specify what the scope of acceptability is. It is therefore unclear whether the particular digital currency should be a commonly acceptable means of exchange in order to fall within the scope of the definition. If that was a case then, again, only the most popular digital currencies would fulfil this criteria, since in practice services that offer the purchase of goods only accept very few digital currencies in exchange for them.

In my opinion, although the definition of digital currencies proposed in the Draft is potentially too narrow, as it would include only the most popular digital currencies, it is a good first step towards the regulation of digital currencies. Although some authors postulate that digital currencies can be well described by using existing civil law institutions,<sup>39</sup> there are material differences in the legal doctrine concerning their application. Therefore given the practical importance of digital currency trading for other areas of law such as penal or tax law, it seems that the creation of a legal definition of digital currencies would unify the jurisprudence and practice of authorities. In my view, it will also decrease the level of legal uncertainty and at the same time will form a strong basis for further regulations.

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39 K. Zacharzewski, *Obrót...*, p. 145; Idem, *Bitcoin jako przedmiot stosunków prawa prywatnego*, in: „Monitor Prawniczy” 2014 no. 21, p. 1132, Idem, *Praktyczne...*, pp. 187–192.

## Examples of Applying Existing Public Law Regulations to Digital Currencies

Although the status of digital currencies is still not clearly established by the public law regime, there are certain examples of existing regulations that may be applicable to digital currency trading. The following examples do not form an exhaustive list of regulations that may potentially concern digital currencies. The chosen examples demonstrate mainly how existing regulations on capital and financial markets can to some extent cover digital currencies trading.

Digital currency trading may be subject to the disclosure obligations of public companies under Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse.<sup>40</sup> Under article 17 of MAR, a public company (or other entity falling within the scope of MAR) is obliged to immediately disclose inside information that directly concerns it. Article 7 of MAR defines inside information as information of a precise nature, which has not been made public, relating, directly or indirectly, to one or more issuers or to one or more financial instruments, and which, if it were made public, would be likely to have a significant effect on the prices of those financial instruments or on the price of related derivative financial instruments. The acquisition or disposal of a large volume of a digital currency by such an entity clearly meets the definition of inside information and therefore should be immediately disclosed.<sup>41</sup>

Furthermore, legal entities raising capital from a number of investors, with a view to investing it in accordance with a defined investment policy for the benefit of those investors may be considered as alternative investment funds under Directive no. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers<sup>42</sup>, and the Polish Act on investment funds and alternative investment funds managers of 27 May 2004<sup>43</sup>, or as an alternative investing company under the Investment Funds Act. As neither the Alternative Investment Funds Directive nor the Investment Funds Act limit or list the scope of the term “investments” conducted by such companies or funds, it should be assumed that if such entities invest their clients’ capital in digital currencies, this may fall within the scope of those regulations.

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40 Regulation no. 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ 2014 L 173/1 (hereinafter: MAR).

41 K. Zacharzewski, *Praktyczne...*, p. 193.

42 Directive no. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ 2011 L 174/1 (hereinafter: the Alternative Investment Funds Directive).

43 Dz. U. 2018 item 58 (hereinafter: the Investment Funds Act).

According to some scholars, some of the trading facilities used to trade digital currencies may be regulated under MiFID II and therefore be classified as an OTF.<sup>44</sup> An OTF is a multilateral system which is not a regulated market or an MTF, in which multiple third-party buying and selling interests in bonds, structured finance products, emission allowances or derivatives are able to interact in the system in a way that results in a contract in accordance with Title II of MiFID II. According to this definition, a multilateral system has to offer *inter alia* the possibility to trade financial instruments in order to be classified as an OTF. As was previously established, digital currencies cannot be considered as financial instruments. However some authors claim that although a digital currency is not a itself a financial instrument, a derivative contract of which the basic instrument is a digital currency may be considered as such financial instrument. According to Annex I section C item 10 of MiFID II, derivative contracts relating to assets, rights, obligations, indices and measures (...), which have the characteristics of other derivative financial instruments, having regard to whether, *inter alia*, they are traded on a regulated market, OTF, or an MTF, are considered as financial instruments. The scope of this definition is broad enough to include derivative contracts relating to digital currencies, as digital currencies may be treated as a right. Therefore, with multilateral platforms that offer trading in digital currencies and digital currency derivatives, such trading may be considered as an ,OTF under MiFID II and therefore be a subject to its regulations.

## Conclusions

The technological progress of the modern world raises numerous challenges which must be faced by legislators across the globe. The growing popularity of digital currencies provides new possibilities of investing and concluding transactions, but at the same time is associated with significant risks for investors, public safety and financial markets as a whole. Although currently there are no proposals for complex regulations regarding the status of digital currencies and their trading in either the EU or Poland, some first attempts to regulate this issue are being created. Nevertheless, some of the already existing regulations concerning financial markets may be indirectly applied to digital currencies. Undoubtedly, creating complex regulation for digital currencies, most probably at the EU level, is necessary. Such regulation would allow the creation of effective supervision over the digital currencies market. However, creation of such a regulation will be a challenge for legislators due to the nature of digital currencies and the differences between them and other financial instruments, it could increase the level of public trust towards digital currencies, and as a result increase their popularity.<sup>45</sup>

44 K. Zacharzewski, *Obrót...*, pp. 149–151.

45 E. Chojna-Duch, *Rynek kryptowalut – regulacje i ryzyko*, in: „Puls Biznesu” 2018 no. 11, p. 20.

## Literature

- Barsan I., *Legal Challenges of Initial Coin Offerings (ICO)*, "Colloque" 2017 no. 3.
- Bernet R., *Zwolnienie z VAT waluty wirtualnej Bitcoin*, „Glosa” 2017 no. 1.
- Chojna-Duch E., *Rynek kryptowalut – regulacje i ryzyko*, „Puls Biznesu” 2018 no. 11.
- Dudek P., *Waluta Bitcoin, glosa do wyroku Tybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14 Skatteverket przeciwko Davidowi Hedqvistowi*, „Glosa” 2016 no. 6.
- Gorzela K., *Zbywalne instrumenty związane z redukcją emisji zanieczyszczeń*, *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016.
- Mariański M., *Pozycja emitenta na rynku finansowym – ewolucja oraz kierunki przemian*, „Przegląd Prawa Handlowego” 2017 no. 8.
- Opiatek P., *Kryptowaluty jako przedmiot zabezpieczenia i poręczenia majątkowego*, „Prokuratura i Prawo” 2017 no. 6.
- Roszyk A., *Świat przyjmuje walutę bitcoin*, „Prawo i Podatki” 2015, no. 11.
- Shcherback S., *How Should Bitcoin Be Regulated?*, “European Journal of Legal Studies” 2014, vol. 7, no. 1.
- Sobiecki G., *Regulowanie krypto walut w Polsce i na świecie na przykładzie Bitcoina – status prawny i interpretacja ekonomiczna*, “Problemy Zarządzania” 2015, vol. 13, no. 3.
- Spyra M., *Cele prawa instrumentów finansowych oraz system narzędzi ich realizacji*, *Prawo Instrumentów Finansowych*, ed. M. Stec, Warszawa 2016.
- The Law Library of Congress, *Regulation of Bitcoin in Selected Jurisdictions*, 2014, no. 1.
- Zacharzewski K., *Bitcoin jako przedmiot stosunków prawa prywatnego*, “Monitor Prawniczy” 2014, no. 21.
- Idem, *Obrót walutami cyfrowymi w reżimie obrotu instrumentami finansowymi*, “Przegląd Sądowy” 2017, no. 11–12.
- Idem, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, “Monitor Prawniczy” 2015, no. 4.
- C-264/14 *Skatteverket vs. David Hedqvist*.
- Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions, Amending Directives 2005/60/EC and 2006/48/EC and Repealing Directive 2000/46/EC, OJ 2009 L 267/7.
- Directive no. 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010, OJ 2011 L 174/1 (hereinafter: the Alternative Investment Funds Directive).
- 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, OJ 2014 L 173/346.

Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, OJ 2015 L 141/73.

Regulation No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, OJ 2014 L 173/1.

The Civil Law Code of 23 April 1964, Dz. U. 2017, pos. 459 as amended.

The Act on Investment Funds and Alternative Investment Funds Managers of 27 May 2005, Dz. U. 2018 item 58.

The Act on Financial Instruments Trading of 29 July 2005, Dz. U. 2017 item 1768.

#### SUMMARY

### **Digital Currencies Trading under Polish and EU Public Law**

Digital currencies are a worldwide phenomenon gaining an increasing interest among investors, economists and legal scholars. They are used mainly as a new mean of exchange and as a new way of investing funds, since the rapid changes in their value allow to gain extraordinary profits. Up to this point the legal status of digital currencies has not been clearly established under neither Polish nor EU public law, although some of the existing regulations may be indirectly applied to them. Under current regulations digital currencies cannot be treated as a legal mean of payment, as an electronic money nor a financial instrument. Creation of a complex regulation regarding digital currencies and granting administrative authorities supervisory powers over their trade seems to be necessary. Because of the evolution of financial markets, classifying digital currencies as financial instruments is a possible way of regulating their trade.

Keywords: Digital currency, trading, financial instruments, money, regulation

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