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REFLECTIONS ON THE POSSIBLE APPLICATION OF THE ROME I REGULATION TO OBLIGATIONS RELATED TO CRYPTO-ASSETS

REFLEKSJE NAD MOŻLIWYM ZASTOSOWANIEM ROZPORZĄDZENIA RZYM I DO ZOBOWIĄZAŃ ZWIĄZANYCH Z KRYPTOAKTYWAMI

Regulation No. 2023/1114 of the European Parliament and Council of 31 May 2023 on crypto-asset markets is a crucial component of financial market regulation that has significantly contributed to increasing the legal security of its participants. This study does not aim to analyse the basic rules of crypto-asset trading or make an assessment of their legal status but rather seeks to determine how the law applicable to obligations related to crypto-assets could be determined. Linking a given transaction to more than one legal area is one of the essential features of modern global financial markets. Given the above, this paper analyses possible subsidiary application of the Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I to crypto-assets). The primary research method employed is the dogmatic-legal method, supplemented by the theoretical-legal method. The most important goals of these research methods are to identify the scope of validity of given norms, analyse their practical application, and draw conclusions. Both methods were used to determine whether the scope of the Rome I regulations allows the application of its provisions to obligations related to crypto-assets. Therefore, this article seeks to address whether the rules related to contractual obligations can also be applied to crypto-assets. The arguments presented in this work do not exclude such a possibility. However, the author notes that the level of regulation of financial markets in terms of conflicts of laws cannot be considered sufficient and completed.

Keywords: crypto-assets; financial market; capital market; applicable law; contractual obligation

Rozporządzenie Parlamentu Europejskiego i Rady nr 2023/1114 z 31 maja 2023 r. w sprawie rynków kryptoaktywów stanowi istotny element regulacji rynku finansowego, który przyczynił się do zwiększenia szeroko rozumianego bezpieczeństwa prawnego jego uczestników. Przesłankami do napisania niniejszego opracowania nie była próba analizy podstawowych zasad obrotu kryptoaktywami i ocena ich prawnej kwalifikacji, lecz weryfikacja, w jaki sposób mogłoby być wyznaczane prawo właściwe dla zobowiązań wynikających z kryptoaktywów. Powiązanie danej transakcji z więcej niż jednym obszarem prawnym stanowi jedną z zasadniczych cech współczesnych globalnych rynków finansowych. Z uwagi na powyższe w ramach niniejszego artykułu au-

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tor poddaje pod rozwagę kontrowersyjną tezę o możliwym subsydiarnym zastosowaniu do kryptoaktywów rozporządzenia nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). Jako metodę badawczą zastosowano przede wszystkim metodę dogmatycznoprawną, posiłkując się subsydiarnie także metodą teoretycznoprawną. Do najważniejszych celów zastosowanej metody badawczej należy poszukiwanie odpowiedzi na pytanie o zakres obowiązywania danych norm, praktykę ich stosowania oraz formułowanie wniosków. Obie metody zastosowano w celu ustalenia, czy zakres rozporządzenia Rzym I umożliwia zastosowanie zasad w nim zawartych również do zobowiązań z krypto aktywów. Tym samym celem przedmiotowego artykułu jest odpowiedź na pytanie, czy zasady wyznaczania prawa właściwego dla zobowiązań umownych mogą znaleźć zastosowanie również w stosunku do kryptoaktywów. Przytoczone w ramach niniejszej pracy argumenty nie wykluczają takiej możliwości. Tym samym autor dostrzega, iż poziomu regulacji rynków finansowych w wymiarze kolizyjnym nie można uznać za zadowalający i ukończony.

Słowa kluczowe: kryptoaktywa; rynek finansowy; rynek kapitałowy; prawo właściwe; zobowiązanie umowne

I. INTRODUCTION

The regulation of financial markets is an indispensable process accompanying socio-economic transformations at the national and supranational levels. However, this process was, and still is, often related to technological development, which the market adapts to quickly but is taken into account by the legislator in a significantly longer perspective.

The regulation of financial markets is more difficult due to their cross-border nature, understood as the connection of a given legal relationship with more than one legal area. In this context and in this specific legal environment, the concept of regulation should be understood much more broadly than just the regulation of the freedom to conduct a business.

As part of the reflection on financial market regulation, it should be noted that the result of this process should be the formation of a well-functioning legal environment open to national and international competition (Lemonnier, 2016, p. 41). Since financial markets constitute environments in which both public and private law norms coexist (Fedorowicz, 2020, p. 113), their regulation seems very challenging for the legislator, especially at the supranational level, because it requires instruments of both public and private law.

In this regard, Regulation No 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets (MiCA) seems to be one of the examples where the EU legislator is trying to organize a certain niche of the market.[1] The above-mentioned act has introduced a very important regulatory framework (Lee & L'heureux, 2020, pp. 423–424) to the crypto-assets market, previously called virtual currencies. Apart from the ter-

[1] Regulation No. 2023/1114 of the European Parliament and of the Council of 31 May 2023 on cryptocurrency markets and amending Regulations (EU) No. 1093/2010 and (EU) No. 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937.

minological order, the MiCA Regulation were intended to organize the crypto-assets trade in such a way as to ensure a certain minimum level of security and stability of the market and to protect its participants (Mazurkiewicz et al., 2023, pp. 67–68). In this study, the author will focus on selected cross-border aspects of the regulation of crypto-assets in order to determine whether the provisions of the MiCA Regulation in this matter can be supported in a subsidiary way by the provisions of the Regulation No. 593/2008 on the law applicable to contractual obligations of 17 June 2008 (Rome I).

The possible interaction between MiCA and Rome I is not obvious, as the former Regulation has a rather public law nature, while the latter is a typical private law act. However, the author would like to underline that financial market law is a specific legal environment where public and private law regulations intersect, entailing that Ulpian's traditional division between public law and private law is losing importance. This intersection highlights how the classification of crypto-assets adopted in the MiCA Regulation will affect the qualification under private law instruments and the contracts related to such assets. Moreover, the author's approach is also based on the fact that the Europeanization of private international law not only brings further harmonization but concomitantly adds new objectives that may be unfamiliar to classical private international law, thereby resulting in a conflict of legal methodology in Europe. It has already been seen in the doctrine that some important elements of European law suddenly entered the realm of private international law, and in this way, the instrumentalization of private international law in Europe has been introduced in some areas (Kiestra, 2013, pp. 26–27).

The assets being traded on financial markets often have a cross-border nature, which means they are subject to multiple legal jurisdictions. This can lead to conflicts of legal provisions, which can make it difficult to determine which law applies to a given transaction[2]. Consequently, the cross-border nature of crypto-assets determines not only the way the financial market functions but also affects the effectiveness of its regulation, which should be carried out primarily at the supranational level.

The Rome I Regulation, which is directly used by the EU Member States, replaced the previously applicable Convention on Applicable Law for contractual obligations opened for signature in Rome on 19 June 1980. One of the fundamental principles of the Rome I Regulation is the freedom to choose the applicable law, a concept that reiterates the core idea of the Rome Convention (Lerman-Balsaux, 2022, pp. 19). Autonomy of will regarding contractual obligations is now recognized by most legal systems and is included among the general principles of law adopted by EU Member States. The principle of autonomy of will in private international law allows individuals to choose the applicable law, which is known as the subjective connector. The choice of law by the parties is widely recognized as the primary method of determining the

[2] In this context, the expressions private international law and conflict-of-law rules are very often used alternatively depending on the specialization and nationality of the author; for more, see Stewart (2011, pp. 607–608).

law applicable to contractual relationships in almost all modern legal systems (Pazdan, 2008, pp. 139–140).

The proper functioning of the internal market regarding the scope of the Rome I Regulation and the compatibility of the rules applicable in the Member States could also be enhanced through a clear mechanism for determining the law applicable to crypto-asset contracts. One key element of this response is to clarify whether or not the rules specific to contractual obligations and contracts can be applied to crypto-assets.

The current study focuses on selected cross-border aspects of the regulation of crypto-assets to determine whether the regulations of MiCA can be supported by the Rome I provisions. It is worth noting that the cross-border nature of financial markets is related to linking a given transaction with more than one legal jurisdiction. Consequently, their cross-border nature determines not only the way the financial markets function but also affects the effectiveness of their regulation, which should primarily be addressed at the supranational level (Mariański, 2020, pp. 305). For this reason, the research method employed was primarily the dogmatic-legal method, with additional use of the theoretical-legal method, to analyse the content of the legal regulation and its interpretations. The theoretical-legal method was used to determine how and whether the scope of the Rome I Regulation allows the application of the rules contained therein to obligations related to crypto-assets.

Due to the above, to assess how cross-border aspects of crypto-assets contracts may be governed, this paper first analyses the MiCA Regulation in this aspect and then evaluates whether the provisions of the Rome I Regulation can also be applied.

II. THE CROSS-BORDER NATURE OF CRYPTO-ASSETS

The lack of uniform status for cryptocurrencies has generated many discrepancies regarding their legal qualification. The desire to ensure a high level of legal security in the financial market served as the impetus for initiating work at the EU level on the regulation of this type of asset. The MiCA Regulation were, therefore, an attempt to solve the above-mentioned issues, as information and communication technology and digital resilience are elements of operational risks that need to be addressed by the EU regulatory environment.

The preamble of the MiCA Regulation states that its purpose is to enhance the compatibility of EU legislative acts on financial services with the digital age. It aims to support the development of an economy that is future-proof and relies on innovative technologies (Schär, 2021, pp. 153–154). Among these technologies, distributed ledger technology (DLT) plays an important role, including blockchain technology (Srokosz, 2021, pp. 149), upon which crypto-assets are based. In the past, the term 'virtual currencies' was commonly used to refer to crypto-assets. These assets were considered to be legally constructed

representations of value or rights (Zacharzewski, 2014, p. 1132) and were often equated with financial instruments that could store certain property rights or values (Mariański, 2015, p. 94). Eventually, the EU legislator introduced numerous exclusions from the scope of application of the regulation, including, in particular, the exclusion of financial instruments based on distributed ledger technology and other subjective exclusions outside the scope of EU legislative acts on financial services. However, there is no exclusion of the Rome I Regulation related to the law applicable to contractual obligations.

As for the conflict of laws rules included in MiCA Regulation, there are numerous provisions, but they are mostly general and do not directly suggest how to determine the law applicable in this case. For example, point eight of the preamble states that markets in crypto-assets have a global and, thus, inherently cross-border nature, involving more than one legal system.[3] Regarding the cross-border nature of markets in crypto-assets, there is also a recommendation that in this field, the competent authorities should cooperate to detect and deter any infringements of these regulations.

Another indirect reference to the conflict of laws and rules can be found in Article 59(7) of MiCA Regulation, where as a part of an authorization procedure, the crypto-asset service providers that ensure crypto-asset services on a cross-border basis are not required to have a physical presence in the territory of a host Member State. This Regulation is complemented by the provisions of Article 65(1) related to the cross-border regulation of crypto-asset services, which stipulates that a crypto-asset service provider intending to provide services in more than one Member State must provide the competent authority of the home Member State with certain information documents to facilitate the management and supervision of such cross-border activities. These documents include, in particular, the list of Member States in which the crypto-asset service provider intends to provide its services – which is important information from the conflict of law rules and potentially indicative of the country with which the provider has the closest relationship (Wojewoda, 2007, pp. 38–39). Additionally, according to Article 65(2), within ten business days of receiving the above-mentioned information, the competent authority of the home Member State must transmit it to the single contact points of the host Member States, ESMA and EBA – thereby reducing the risks associated with the lack of control over cross-border entities at the EU level.

In another part of the MiCA Regulation (i.e. Article 75), which concerns the contractual provision of custody and the administration of crypto-assets on behalf of clients, the legislator states that such a contractual provision should include, among others, issues related to applicable law (Article 75(1g)). Unfortunately, the legislator did not specify the principles or conflict-of-law

[3] As a consequence, according to MiCA Regulation, the EU should continue to support international efforts to promote convergence in the treatment of crypto-assets and crypto-asset services through international organizations or bodies such as the Financial Stability Board, the Basel Committee on Banking Supervision and the Financial Action Task Force.

rules for determining such applicable law.[4] Similarly, in another part of the regulation (Articles 92 and 93) we find provisions related to conflict-of-law rules concerning the prevention and detection of market abuse where coordination procedures between the relevant competent authorities are described as necessary.

Moreover, Article 105 of the MiCA Regulation states that a competent authority shall only take measures related to regulatory requirements under applicable EU law for the crypto-asset or crypto-asset service, but once again, without detailing the term 'applicable law'. This is compatible with Article 112(2), where, in terms of the imposition of penalties, the competent authorities shall cooperate in order to avoid duplication and overlaps when exercising their supervisory and investigative powers or imposing administrative penalties in cross-border cases.

The conflict of legal provisions can also be found in the annexes to the MiCA Regulation. For example, in Part G related to the information on the rights and obligations attached to the crypto-assets, point 10 requires (among a wide variety of information) the provision of the name of the competent court and the law applicable to the crypto-assets. In Part B, related to the information about the asset-referenced token, information must also be provided in terms of the law applicable to the offer to the public of the asset-referenced token, as well as the competent court. However, as with other parts of the regulation, there are no specific rules provided to precisely determine the law applicable in this field.

In the author's opinion, the analysis given above opens the possibility of considering the Rome I Regulation as a subsidiary means of determining the law applicable to contracts related to crypto-assets in a more detailed way.

III. CRYPTO-ASSETS AS A FORM OF CONTRACTUAL OBLIGATION

The inclusion of the concept of contractual obligation in the Rome I Regulation is linked to the emergence of the contractualization of legal relationships. This is particularly relevant in modern financial markets, where cryptocurrencies first appeared. This process involves the increasingly frequent reference to (or subsidiary application of) the principles of civil law, particularly the law of obligations, to the analysis and legal qualification of emerging phenomena in the financial markets (Mariański 2017, p. 479). In the Rome I Regulation, the concept of contractual obligation appears in Article 1(1), where the EU legislator states that these regulations shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

[4] Similar provisions are present in Article 82 where the provision of crypto-asset transfer services on behalf of clients, should also include issues relating to applicable law as an element of such an agreement.

In the discussed scope, the contractualization of legal regulations relating to financial markets should lead to a decision on whether the concept of a contractual obligation covers at least some of the transactions concluded on this market. The first difficulty that can be noted is that a contractual obligation is an extremely general concept that is not present in all legal systems, even within the European Union. This concept, which has its roots in German legal science, requires the interpretation of contractual obligations as a set of interrelated promises and obligations, the violation of which would result in civil liability, as well as free agreements of the parties, giving rise to obligations that can be pursued legally (Wojewoda, 2007, pp. 21–22). Historically, the concept of contractual obligation comes from the German term *vertragliches Schuldverhältnis*. In its purest form, it was not fully adopted into the legal orders of states based on the Roman legal tradition (Kamarad, 2009, p. 50).

The Rome I Regulation take a comprehensive approach to different types of civil concepts. This approach aims to cover all aspects of a given contract within the scope of its regulation. The regulation covers areas such as the contract's existence and validity, its form, interpretation, and expiration. It is also worth noting that many legal systems (e.g. Polish law) do not have a legal definition of the concept of contractual obligation. That is why the Rome I Regulation uses the concepts of contract and contractual obligation interchangeably in many articles. Recognizing a given transaction based on crypto-assets as a contract and, more broadly, a contractual obligation should not be based on determining the appropriate form or legal basis but on a certain obligation relationship arising from a given contract (Wojewoda, 2007, pp. 19–20).

Therefore, it seems that if we adopt the contractual concept of transactions related to crypto-assets, then, applying a functional interpretation, the author sees no *a priori* obstacles to the application of the provisions of Rome I to transactions in the financial market, understood as a set of relations linked together by an appropriate contractual context and taking the form of various types of assets based on DLT technology. It is also important from the point of view of the financial market, which has a cross-border and supranational nature that the potential application of the Rome I Regulation would not result in a limitation of the characteristics of this market, as the parties would be allowed to choose any national legal system, without *a priori* limiting this choice to, for example, the law of EU countries.

In order to have a complete discussion about the possible application of Rome I Regulation to contracts based on crypto-assets, it is also necessary to analyse the exclusions from the scope of this act. The issues that are excluded from the scope of analysed regulation are listed in Article 1(2)(a–j). From the point of view of the matter under consideration, the exclusion listed in Article 1(2)(d) requires particular attention, as it is related to some constructions that are part of the financial markets. This article states that obligations arising from bills of exchange, cheques, promissory notes, and other negotiable instruments shall be excluded to the extent that such obligations arise from their negotiable character.

In order to decide if the exclusions described in Article 1(2)(d) may be applied to crypto-assets, it should be noted that crypto-assets are not a homogeneous category. The general definition from Article 3(1)(5) of MiCA is technologically neutral and states that a crypto-asset means a digital representation of a value or a right that is able to be transferred and stored electronically, using distributed ledger technology or similar technology (like a blockchain). From this, we can observe that the proposed definition of crypto-assets is very broad, evidenced by the expression 'similar technology', and in consequence leading to the doctrinal conceptions that, in fact, crypto-assets are a type of digital asset using cryptography for security reasons (Tomczak, 2022, p. 369). It is partly assumed that the relationship between the participants in a blockchain network establishes a contractual obligation within the meaning of Article 1, section 1 of the Rome I Regulation (Krysa, 2023, p. 172). However, it should be noted that the category of crypto-assets consists of three different subcategories: asset-referenced tokens,[5] e-money tokens,[6] and utility tokens.[7]

Moreover, the interpretation of Article 1(2)(d) of the Rome I Regulation cannot, in the author's opinion, allow for an automatic reference to all contracts having crypto-assets as their subject matter. Such contracts cannot be considered *a priori* as obligations arising under other negotiable instruments (Krysa, 2023, p. 179). Of course, we should pay attention to the fact that in the case of crypto-assets without an issuer (previously designated as cryptocurrencies), created in public and distributed networks and for which the issuer cannot be indicated, the link to contractual obligation may not be evident. However, we should also notice that, for example, in the French doctrine, such a link was not excluded long before the MICA Regulation came into force (Mariański, 2015, p. 100).

Furthermore, in French law, market operations are defined as actions consisting of concordant declarations of intent made within the market in order to conclude or bring about the conclusion of a given transaction. In addition to its contractual origin, the financial operation is characterized by a distinctly transferable nature, which links it to the concept of transferable title referred to in the context of placing orders and searching for a counterparty (Lemonnier, 2011, p. 211).

Another argument in this discussion about the scope of the application of the Rome I provisions should be related to an extended or limited interpretation of the exclusions. In the author's opinion, all exclusions arising from Article 1 section 2 are of an enumerative nature and, in accordance with the preamble of the Regulation, should be analysed in a strict and restrictive manner.

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[5] According to Article 3(1)(6) of MiCA, '"asset-referenced token" means a type of crypto-asset that is not an electronic money token, and that purports to maintain a stable value by referencing another value or right or a combination thereof, including one or more official currencies.'

[6] According to Article 3(1)(7) of MiCA, '"electronic money token" or "e-money token" means a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency.'

[7] According to Article 3(1)(9) of MiCA, '"utility token" means a type of crypto-asset that is only intended to provide access to a good or a service supplied by its issuer.'

In consequence, excluding some types of financial instruments, such as bills of exchange and checks, should not be the basis for excluding other objects of trade on the financial markets. This is because the rules for determining the law applicable to these classic securities have already been regulated in a way that accounts for the non-dematerialized nature of these documents. Furthermore, in some countries, the bills of exchange and checks are not considered part of modern financial market institutions (Lemonnier, 2011, pp. 49–50).

Considering the above assumptions, it is important to indicate the moment and basis for creating liabilities from securities and financial assets within an evolutionary approach. Namely, the creation and emission theories initially played a dominant role, but under the influence of the dematerialization of trade and technological revolution (Jastrzębski, 2009, pp. 75–76), they slowly began to give way to the contractual theory of financial instruments. In this regard, the legal basis of financial assets is related to contractual obligations between the parties, and in today's economy it would be difficult to find relationships without any basis of an obligational nature (Lemonnier et al., 2011, pp. 43–44).

As a part of the response to the question of whether crypto-assets-based contracts can be considered as some sort of contractual obligation, it is worth analysing the scope of the Rome I Regulation. Specifically, the scope of Rome I is based on the following three concepts: contractual obligation, reference to the situation constituting the source of the conflict of rights, and the transnational nature of this conflict. However, it appears that the most crucial concept for its possible application to financial market instruments is the contractual obligation. If contracts related to trading in crypto-assets fall within the scope of the concept of contractual obligation, then there are no obstacles to the further application of the Rome I Regulation. The author of this work assumes that the contractual nature of financial assets may be considered a sufficient factor to determine the law applicable to these titles, as it was already stated in the case of financial instruments and other securities (Mariański, 2014, p. 245).

To sum up, the concept of contractual obligations can also encompass the legal relations associated with crypto-assets if this concept is analysed from a functional perspective. Within the framework of functional interpretation, one should mostly concentrate on teleological interpretation that requires referring to the purpose of legal regulation (Zieliński, 2010, p. 76). The sources that determine the functional purpose of the regulation include the text of the provisions of legal acts itself, as well as external materials – such as preparatory materials (Wróblewski, 1998, pp. 142–143). In this case, the purpose of the Rome I Regulation, as stated in Article 2, is to ensure their universal application, where any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

A contractual obligation should be treated as the contract itself, including all its aspects and any related obligations. In the context of reference to contractual transactions on financial assets, such an approach would allow all relations arising from this legal event to be subordinated to one conflict-of-law

regulation and one substantive law. A significant problem related to applying this logic in the field of crypto-assets is a hypothetical situation in which a given contract will be classified as such an asset in light of the provisions of the MiCA Regulation. At the same time, the law indicated as applicable by the parties in this respect (non-EU legal system) will not qualify a given instrument as a crypto-asset.

The qualification of an instrument involved in a transaction on a financial market as a crypto-asset-based contractual obligation will, therefore, mean that the law applicable to such a contract would have a harmonized conflict-of-law framework under the Rome I Regulation. Therefore, all obligation relations arising from such a qualified cross-border operation in the financial market would be governed by a single set of regulations on conflict-of-law rules and, consequently, could be subject to a unified substantive law.

At the end of this part of the present publication, it will be examined whether the definition of crypto-assets provided in Article 3 of the MiCA Regulation is not an obstacle to the qualification of these instruments as part of the category of contractual obligations in terms of private international legal purposes. Specifically, point 5 of the above-mentioned article defines a crypto-asset as a digital representation of a value or right that can be transferred and stored electronically using distributed ledger technology or similar technology. In the author's opinion, mentioning the representation of a value or a right allows for the possibility of including crypto-assets within the scope of contractual obligations. Of course, this statement is general, and given the fact that the category of crypto-assets consists of three different subcategories (asset-referenced tokens, e-money tokens and utility tokens), each case should be considered individually. The author's opinion is also supported by the fact that according to Article 3(2) of the MiCA Regulation, a distributed ledger means an information repository that keeps records of transactions shared and synchronized across a set of DLT network nodes using a consensus mechanism, where the consensus mechanism refers to the rules by which an agreement is reached.

IV. THE LAW APPLICABLE TO CRYPTO-ASSET CONTRACTS ACCORDING TO THE ROME I REGULATION

Even if we ultimately agree to classify at least some contracts involving crypto-assets within the broader framework of contractual obligations, it is also worth analysing the provisions that determine the law applicable to such obligations in order to determine if these rules align with the unique nature of crypto-assets.

The main rule that determines the law applicable to contractual obligations is described in Article 3 of the Rome I Regulation and completed by Article 4 of this act.

According to Article 3(1), the first step in determining the law applicable to the contractual obligation is related to the law chosen by the parties. This

choice can be explicitly expressed or inferred from the terms of the contract or the circumstances of the case.[8] The second step, according to Article 3(2) allows the parties to subject (at any time) the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this article or pursuant to other provisions of the Regulation. However, this possible change made after the contract's conclusion must not undermine its formal validity or adversely affect the rights of third parties (Lerman-Balsaux, 2022, p. 168).

Of particular importance for the legal security of the crypto-assets market are the supplementary provisions of Article 3(3), which regulate situations where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen. In such cases, the choice of law cannot override the mandatory provisions of the other country's law. This safeguard is particularly important from the point of view of the supervisory authorities of the financial markets, as it supports cross-border administrative cooperation between competent national authorities and European authorities such as the EBA and ESMA, thereby promoting supervisory convergence (Fedorowicz, 2018, pp. 155–156).

Another provision that may be considered as a limitation of the concept of freedom of choice and some kind of stability protection tool is described in Article 3(4) of the Rome I Regulation (Lerman-Balsaux, 2022, p. 371). In this article, the EU legislator outlines a situation where all other elements relevant to the situation at the time of the choice are located in one or more Member States. In such cases, the choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate, as implemented in the Member State of the forum, which cannot be derogated from by agreement. This relates to a well-known concept in private international law: regulations that enforce their application originally called *lois d'application nécessaire* or *lois d'application immediate* (Fuchs, 2013, pp. 69–70). However, from the point of view of financial market control, the lack of one objective link in this respect and the dependence essentially on the will of the contracting parties may constitute a significant threat to trading security and reduce the regulatory potential of supervisory authorities.

Regarding the above, from a supervisory and regulatory point of view, it is important to analyse Article 4 of the Rome I Regulation, which describes a situation in which the parties to a given cross-border legal relationship have not exercised the option of choosing the applicable law. As mentioned, the law applicable in the absence of such a choice by the parties is regulated, in particular, by Article 4 of the Rome I Regulation (Pazdan, 2009, p. 16). This article provides a general framework for determining the jurisdiction of law in contractual obligations. At the same time, certain specific types of contracts are regulated separately in subsequent provisions, including transport contracts

[8] What is important is that the parties can select the law applicable to the whole or to only a part of the contract.

(Article 5), consumer contracts (Article 6), insurance contracts (Article 7), and employment contracts (Article 8). Due to the scope of this study, individual types of contracts described in Articles 5 to 8 will not be analysed.

Among the various provisions of Article 4, particular attention should be paid to two specific points that can be applied to crypto-asset-based transactions. The first, contained in Article 4(1)(b), states that a contract for providing services shall be governed by the law of the country where the service provider has their habitual residence (Rogerson, 2000, p. 86). The second, specified in Article 4(1)(h), relates to contracts concluded within a multilateral system that brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments. In such cases, the applicable law shall be determined in accordance with non-discretionary rules and governed by a single law. For the heterogeneous category of crypto-assets, every contract should always be examined on a case-by-case basis. Nevertheless, it seems that the application of this article of Rome I should not be preliminarily excluded. In recent international publications, it has also been suggested that if a crypto-asset can be classified as a financial instrument and the respective crypto exchange can be a multilateral system within the meaning of the MiFID II Directive, the law applicable to crypto-asset contracts might be determined by the law to which the crypto exchange is subject if the further requirements of Article 4(1)(h) of the Rome I Regulation are fulfilled (Krysa, 2023, p. 187). The general reference to Rome I provisions has also not been excluded in recent international reports (Zetzsche et al., 2023, p. 118).

An important rule that may be useful in terms of crypto-assets-based transactions is found in Article 4(2). This provision applies when a given contractual obligation is not covered by paragraph 1 or when the elements of this obligation would be covered by more than one of points (a) to (h) of paragraph 1. In such cases, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has their habitual residence. Therefore, the characteristic performance of a given relationship is the action that determines its essence and *de facto* describes the entire transaction (Zachariasiewicz, 2009, pp. 4–5). It should be noted that, for legal persons, habitual residence is considered to be the headquarters of their main management body. Finally, the provisions introduced in this part of the regulation increase the security and certainty of transactions on the financial market. In cases where professional participants in financial assets trade or financial services are present during the conclusion of contracts, the transactions will be subject to a single applicable law, regardless of the nature of the provision.

The next step in determining the applicable law, when the parties have not made a choice, is described in Article 4(3). Here, the applicable law is that of the country most closely connected with the legal relationship in question. Similar wording was also used in Article 4(4), which specifies that if the applicable law cannot be determined in accordance with paragraph 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected. However, the vague nature of the term 'closest connection'

may introduce an additional variable that could affect certainty regarding the applicable law, particularly with contracts based on crypto-assets. An average investor may find it challenging to identify the closest connection in a cross-border financial operation, especially since the assessment may (theoretically) also consider circumstances disclosed only after the conclusion of the contract.

The stages described in Article 4 of the Rome I Regulation are a cascade of connectors and refer to the concept of the closest connection. This mechanism acts as a safeguard that ultimately ensures each legal relationship is assigned to the applicable legal system. This legal system must be more closely related (i.e. clearly and unequivocally) to the contract in question. In the legal doctrine, the factors influencing the above-mentioned relationship include, in particular, the place of habitual residence or registered office of both parties to the contract, the place of performance of the contract, the place of location of the subject of the contract, or the headquarters of the stock exchange or intermediary institution that handled the transaction (Pazdan et al., 2013, p. 231).

V. CONCLUSIONS

The EU regulations on crypto-asset markets unify their status and legal qualification, but they do not directly indicate how to determine, in a detailed way, the law applicable to transactions involving such instruments. Linking a given transaction to more than one legal jurisdiction is one of the main characteristics of today's financial markets. This fact is taken into account by the MiCA Regulation, albeit in a very general manner. Consequently, the author analysed the possible application of the principles expressed in the previously existing Regulation No. 593/2008 on the law applicable to contractual obligations (Rome I).

The analysis of the Rome I Regulation as a subsidiary legal basis for determining the law applicable for transactions based on crypto-assets focused on two fundamental issues.

The first issue concerned the potential inclusion of transactions related to crypto-assets within the scope of the concept of contractual obligations. In the author's opinion, the part of the official definition of crypto-assets that refers to the representation of a value or a right opens the possibility of considering at least some of these heterogeneous instruments as a form of contractual obligation.

The second issue involved analysing the rules for determining whether the laws applicable to contractual obligations are compatible with the nature of the assets that can be transferred and stored electronically using distributed ledger technology or similar technologies. This nature is evolving; for instance, with regard to the term 'similar technology' we can recall that blockchain was initially proposed as a method for validating the ownership of crypto-assets such as Bitcoin but has since developed into a form of record-keeping that offers advantages in terms of cost, speed, and data integrity, and this led to it

being adopted in a wide range of business areas (Pereira Coelho & Quelhas Poças, 2024, p. 9).

The analysis of the provisions of Articles 3 and 4 of Rome I – which not only present solutions for the choice of the applicable law but also solutions in cases where no such choice is made – showed that, theoretically, their application is not contrary to the nature of transactions involving crypto-assets or technologies like distributed ledger technology. This analysis contributes to the broader discussion on whether MICA provides a sufficiently solid foundation for the future of the emerging crypto industry (Zetzsche et al., 2024, p. 208), as the regulation contains numerous private and public law elements and aspects that require clarification, as highlighted in the international doctrine (Çağlayan, 2023, pp. 185–186).

In the first step of the process, the parties involved in a contract (or contractual obligation) have the option to choose the applicable law under certain conditions. However, this freedom of choice is limited by specific provisions of the Rome I Regulation, which are analysed in this article. One such limitations is the reference to legal regulations that cannot be overridden by agreement, such as the law of the country related to the performance of the contract or the law of the country that is clearly more closely connected to the contract. This limitation is crucial for ensuring legal certainty and stability in the crypto-assets market, especially from the perspective of regulatory authorities.

It should also be noted that in the science of international private law, some general rules and constructions can strengthen legal certainty in a given field. One such instrument is the public order clause, understood as a way of protecting a given legal order against the interference of foreign legal solutions if the effects of this interference are irreconcilable with the fundamental legal principles of that legal system (Çağlayan, 2023, pp. 185–186). This clause may be activated to protect participants in the financial services market (Lijowska, 2006, p. 699), and, by extension, the parties of crypto-assets transactions. Finally, the role of public order clauses in increasing the legal security and stability of financial market transactions may be significant, especially since the doctrine has already noted such a possibility in reference to financial instruments and other securities (Mariański, 2020, p. 184).

In the author's view, despite the potentially negative influence of the freedom of choice regarding the law applicable to contractual obligations on the overall security of crypto-assets transactions, the supplementary provisions contained in Articles 3 and 4 of the Rome I Regulation, and the application of a public order clause, may positively impact the legal certainty of transactions in this respect. This is particularly important for financial supervisory authorities, for whom a stable legal framework for the field of crypto-assets is one of the key elements for ensuring effective oversight. In this context, the Rome I Regulation, as discussed, may apply to the broader category of contractual obligations involving various types of crypto-assets, extending beyond the simple contracts directly concerning crypto-assets.

It is worth noting that the MiCA Regulation does not explicitly refer to the Rome I Regulation, but on the other hand, due to the character of this act, we should also question if this fact eliminates the subsidiary application of Rome I provisions. In the author's opinion, as Ulpian's division between public and private law in the field of financial market is losing importance, the interconnection between MiCA and Rome I may be seen as controversial but should not be dismissed as impossible. Moreover, it is important to recognize that the category of crypto-assets consists of three different subcategories (asset-referenced tokens, e-money tokens and utility tokens) and due to this fact, it is necessary to differentiate between contracts involving crypto-assets (that may fall under the scope of the Rome I Regulation), and other types of relationships, such as tokenized rights and individual tokens, where the applicability is not clear. However, due to the limited scope of this work, the author concentrated mostly on general conclusions concerning the possible subsidiary application of Rome I Regulation. The conclusions presented in this paper pave the way for further in-depth studies related to specific types of crypto-assets, highlighting the possibility that they may fall under the law applicable to contractual obligations.

To summarize, this paper analysed cross-border aspects of new forms of financial market transactions related to crypto-assets contracts and demonstrated that the conflict of legal rules in this field has left some aspects insufficiently regulated. Additionally, the MiCA act regulates this cross-border aspect in a very general manner and, in the author's opinion, rather insufficiently. This may stem from the fact that MiCA was designed as a typical public law act; however, it could at least have indicated the potential applicability of existing private law regulations, such as Rome I, in areas where it addresses the question of applicable law. This study highlights the potential application of other EU regulations on contractual obligations, particularly in contracts involving crypto-assets. Finally, it was indicated that it is possible to apply the rules set out in the Rome I Regulation to contracts based on or related to crypto-assets, albeit with certain limitations and challenges.

The lack of clarity in MiCA Regulation regarding conflict-of-law rules underscores the need for further development of EU private international law to fill these gaps. One solution is the subsidiary application of existing regulations, such as Rome I. However, the author does not make a definitive claim that the subsidiary application of the provisions of Rome I to at least some contracts related to crypto-assets would be a sufficient solution, as the creation of special conflict-of-law rules for crypto-assets may also be a future possibility.

The issue, therefore, remains open for further analysis and research on the law applicable to contracts based on or related to crypto-assets. Consequently, in the author's opinion, it should be noted that even though the European legislator was aware of the key cross-border nature of the crypto-assets market, it did not go beyond a certain regulatory minimum in this respect, leaving many uncertainties that may be clarified by referring, for example, to contractual obligations.

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