Safe Bank 2(99) 2025

DOI: 10.26354/bb.13.2.99.2025

Adrian Rycerski*
ORCID: 0000-0002-4673-0450
arycerski@swps.edu.pl

Protection of Clients Receiving Advice on Crypto-Assets (MiCAR) – Comparative Remarks in the Context of the MiFID II Regulatory Package

Abstract

Crypto-assets are the subject of considerable controversy, both in terms of their valuation (valuation methods) and the numerous risks they pose to investors. The crypto-asset market is unfortunately known for speculation, high price volatility, manipulation, and sophisticated marketing techniques. Providing advice under such conditions therefore entails significant and multifaceted risk. For this reason, the service of crypto-asset advisory may and should attract attention – particularly in relation to the mechanisms for protecting clients using this service and the potential civil liability of entities providing it.

The Regulation on Markets in Crypto-Assets (MiCAR) introduces a legal framework for the provision of crypto-asset advisory services. As a rule, the provision of this service requires authorization from the Polish Financial Supervision Authority (KNF), after first convincing the supervisory authority that the legal requirements – especially those aimed at client protection – are met. These requirements, along with the specific nature of the advisory subject (i.e., crypto-assets), call for deeper reflection on the proposed, expected, theoretical, and practical dimensions of this service.

However, in order to have a meaningful and informed discussion about crypto-asset advisory services, it is necessary to compare this service with investment advisory services as defined in Directive 2014/65/EU (MiFID II). Investment advice under MiFID II has a long-standing tradition – one that not only should, but must, be drawn upon. This comparison will help illustrate the specific nature of crypto-asset advisory and lead to the identification of the key obligations associated with its provision. Highlighting the key issues in crypto-asset advisory should help us understand what lies ahead for financial market participants in just a few months.

* Adrian Rycerski – PhD, Assistant Professor at SWPS University, an advocate, Certified Cryptoasset Anti-Financial Crime Specialist (ACAMS), Certificate of Advisor in MTF holder (no. 18/2015).

Keywords: advice, cryptoassets, MiCAR, MiFID II

JEL codes: K22

Introduction

Regulation 2023/1114 on markets in crypto-assets (hereinafter: 'MiCAR')[1] created a legal framework for, among other things, the service of providing advice on crypto-assets. Ever since the date of application of MiCAR, the provision of that service has been subject to authorisation by the competent supervisory authority[2] granted after a prior demonstration of compliance with a number of requirements, including organisational, regulatory and personnel ones, all with the aim of ensuring that clients are adequately protected. These requirements and the complex, and sometimes even controversial, specificity of the subject matter of providing advice (on crypto-currency) prompt a deeper reflection on the postulated, expected, theoretical and practical dimensions of this service. This article discusses the provisions of MiCAR relating to providing advice on crypto-assets by comparing them with the MiFID II[3] regulatory package, which has been in force for several years now and which foresees the service of investment advice. It is therefore necessary to compare both types of services on the basis of MiCAR and MiFID II[4], whereby the provisions of the latter have been implemented into the Polish legal system and are found in FITA[5]. The provision of investment advice as defined in MiFID II already has a long-standing tradition, of which it is worthwhile, if not imperative, to take advantage. This will allow an overview of the specificity of crypto-asset advice and lead to an indication of the key responsibilities involved in its provision.

1. MiFID II Regulatory Package as a source of inspiration for the European legislator

The MiFID II regulatory package comprises: MiFID II Directive, as a legislative act of EU law, and a number of delegated and implementing acts within the meaning of Articles 290–291 of TFUE[6], i.e. primarily the Commission Delegated Regulation

1 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ L 150, 9.6.2023, pp. 40–205 as amended) ('MiCAR').

2 With certain exceptions specified in Article 59 of MiCAR and Article 143(3) of MiCAR.

3 The term 'the MiFID II regulatory package' shall mean the provisions of MiFID II (see footnote 5 below), together with the non-legislative (implementing and delegated) acts to that Directive and the provisions of Polish law that implemented those provisions of EU law.

4 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 L 173, 12.6.2014, pp. 349–496 as amended) ('MiFID II').

5 Financial Instrument Trading Act of 29 July 2005 (Official Journal of Laws of the Republic of Poland Dz.U.2024.722, as amended) ('FITA').

6 Treaty on the Functioning of the European Union of 25 March 1957 (*Official Journal of Laws of the Republic of Poland* Dz.U. of 2004 No. 90, item 864).

(EU) 2017/565[7], which sets out the rules of conduct for investment firms with regard to, *inter alia*, the provision of service of investment advice and defines that service (Article 9 of Regulation 2017/565). Guidelines and recommendations from supervisory authorities[8] also play a vital role here.

MiFID II established a legal framework setting out the operating conditions for the provision of investment advice, i.e. advice concerning also financial instruments[9]. The MiFID II regulatory package, therefore, focuses on activities that relate to financial instruments and, consequently, their occurrence in the given de facto state is a necessary and sufficient condition for the application of this legal framework. Furthermore, the precedence of the legal framework for financial instruments is also confirmed by Article 2(4)(a) of MiCAR.

MiFID II sets out organisational requirements for the performance by investment firms of investment services (brokerage services, in the country nomenclature), requirements and conditions of the functioning of the financial instrument trading venue, data reporting services providers; reporting requirements in respect of transactions in financial instruments; position limits and position management controls in commodity derivatives; transparency requirements in respect of transactions in financial instruments.

2. Investment advice

The definition of investment advice, at the level of the EU legislative act, is found in Article 4(1)(4) of MiFID II and states that it is the provision of personal recommendations to a client, either upon its request or at the initiative of the investment firm, in respect of one or more transactions relating to financial instruments[10].

This definition is complemented by Article 9 of Regulation 2017/565, which provides that a 'personal recommendation' shall be considered a recommendation that is made to a person in his capacity as an investor or potential investor, or in his capacity as an agent for an investor or potential investor. That recommendation shall be presented as suitable for that person, or shall be based on a consideration of the circumstances of that person, and shall constitute a recommendation to take one of the following sets of steps: (i) to buy, sell, subscribe for, exchange, redeem, hold

[7] Commission Delegated Regulation of 25 April 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive (OJ L 87, 31.3.2017, pp. 1–83 as amended).

[8] Cf. G. Włodarczyk, *Obowiązki firm inwestycyjnych i banków w systemie MiFID II. Stanowiska i wytyczne organów nadzoru*, Warsaw 2022, in particular Chapter VI.1-4, Chapter VII.2–3. 9–11.

[9] Defined in Article 4(1)(15) of MiFID II by reference to Section C of Annex I.

[10] Cf. T. Sójka, *Umowa o doradztwo inwestycyjne w obrocie instrumentami finansowymi – zagadnienia podstawowe*, Przegląd Prawa Handlowego, No. 4/2014, pp. 39–45; W. Kapica, T. Sójka in: T. Sójka (ed.), *Obrót instrumentami finansowymi. Komentarz*, Warsaw 2022, pp. 494–497; G. Włodarczyk, *Obowiązki…*, p. 111 et seq.

or underwrite a particular financial instrument; (ii) to exercise or not to exercise any right conferred by a particular financial instrument to buy, sell, subscribe for, exchange, or redeem a financial instrument. A recommendation shall not be considered a personal recommendation if it is issued exclusively to the public.

The Polish legislator referred to the construction of investment advice in Article 76(1) of FITA, indicating that it consists in the preparation, on the initiative of the investment firm or at the request of the client, and the provision to the client, as defined in Article 9 of Regulation 2017/565, in a written, oral or other form, in particular an electronic one, meeting the requirement of a durable medium, of a recommendation, prepared on the basis of the client's needs and situation and concerning the purchase or sale of one or more financial instruments, or the performance of another activity producing equivalent effects, the subject matter of which are financial instruments, or a recommendation concerning refraining from the performance of such an activity.

The provision of a service that fulfils the aforementioned criteria constitutes the performance of a brokerage activity (Article 69(2)(5) of FITA), in principle requiring a brokerage authorisation[11].

There are two regulations clarifying the statutory requirements that are relevant from the perspective of the provision of brokerage services. These are: the Regulation of the Minister of Finance of 24 September 2024 on detailed technical and organisational conditions for investment firms, state banks conducting brokerage activities, banks referred to in Article 70 (2) of the Financial Instrument Trading Act, and custodian banks[12] and the Regulation of the Minister of Finance of 12 November 2024 on the procedure and conditions for the conduct of investment firms, state banks conducting brokerage activities, banks referred to in Article 70(2) of the Financial Instrument Trading Act, and custodian banks[13]. As for the investment advice, of particular relevance is §145 of the latter regulation, which sets out the obligations regarding the report to be provided to the client.

3. Advice on crypto-assets

According to Article 3(1)(24) of MiCAR, 'providing advice on crypto-assets' means offering, giving or agreeing to give personalised recommendations to a client, either at the client's request or on the initiative of the crypto-asset service provider providing the advice, in respect of one or more transactions relating to crypto-assets, or the use of crypto-asset services.

It might seem that – as with most other crypto-asset services that show similarities to brokerage activities – providing advice on crypto-assets covers the same elements

[11] Cf. exception concerning e.g. banks carrying out brokerage activities pursuant to Article 70(2) of FITA. Such activities do not constitute brokerage activities (Article 70(3) of FITA).

[12] *Official Journal of Laws of the Republic of Poland* Dz.U.2024.1423.

[13] *Official Journal of Laws of the Republic of Poland* Dz.U.2024.1735.

as the performance of the service of investment advice. However, even a cursory reading of the above definition allows a conclusion that the scope of advice on crypto advice is broader and does not include only a personal recommendation concerning a transaction relating to crypto-assets, but also the ' use of crypto-asset services'. This is also confirmed by the English language version of Article 3(1)(24) of MiCAR.

The foregoing means that a service of advice on crypto-assets can take two forms. The first form consists in the provision of a personalised recommendation in respect of one or more transactions relating to crypto-assets. In that case, the client asks the crypto-asset service provider ('CASP') for a personal recommendation on the 'transaction'. The second form consists in giving a personal recommendation on the use of crypto-asset services. In that case, the client, in turn, requests CASP for a recommendation in respect of the crypto-asset services. These can be any of the services listed in Article 3(1)(16) of MiCAR. It should be assumed that, as a result of the provision of this variant of the service of advice on crypto-assets, the client may receive a recommendation to refrain from using such services, to use a specifically indicated service, e.g. custody and administration of crypto-assets on behalf of the client, portfolio management on crypto-assets and, perhaps surprisingly, also provision of advice on crypto-assets (in the first variant). As regards the variant of provision of advice on crypto-assets, of decisive significance shall be the intention of the client, who may be determined to acquire crypto-assets on his own and wants a recommendation on which digital assets to choose (if any, given his individual situation) or may be considering various options for 'entering' the market of crypto-assets but need assistance in making the choice (e.g. acquisition by the client himself vs. portfolio management of crypto-assets, custody of crypto-assets by the client himself vs. custodial services and administration). In contrast, it should be strongly emphasised that the advice on crypto-assets in variant two, is not, as it were, a prelude to the provision of all other services, as long as the client takes the initiative to use a specific crypto-asset service (e.g. portfolio management of crypto-assets). In that case, the legal framework provided for the specific crypto-asset service should be applied.

In the context of providing advice on crypto-assets, of significance becomes the question of how detailed a personalised recommendation is to be. As regards investment advice, it is assumed that its criteria are not satisfied by '(...) a recommendation concerning only a certain category of financial instruments, e.g. Polish government bonds in general, Polish corporate bonds, or shares of companies of a certain region[14]. Even more so, a recommendation indicating the advantage of investing in one class of financial instruments (e.g. shares) over another class of financial instruments (e.g. government bonds) is not investment advice'[15]. However, the proviso that '(...) a recommendation concerning shares included in a specific stock market index (e.g. WIG 20) will be investment advice'[16] will be reasonable. In case of crypto-assets, the equivalent of a stock market index grouping issuers of

[14] T. Sójka, *Umowa o doradztwo...*, p. 42 et seq.
[15] *Ibidem.*
[16] Ibidem, pp. 42–43.

financial instruments may be classes (types) of crypto-assets representing common characteristics and performing the same functions, where the differences between the selection of a particular digital asset are not of conclusive significance. The client will be able to make a decision based on the recommendation of crypto-assets of a certain type, function and applications, because he will conclude that each digital asset included in the given group is suitable for him. In that case, it seems that a recommendation under the crypto-asset advice service may identify certain categories of crypto-assets[17].

4. Instruments for the protection of clients using the advice on crypto-assets

4.1. Introductory remarks

Providing advice on crypto-assets requires authorisation by the competent supervisory authority (Article 59 of MiCAR). In Article 59(1) of MiCAR, the legislator referred to two categories of entities and, although it used the word 'authorisation' for both, there is no authorisation procedure in the case of the entities referred to in paragraph 1(b) (Article 60 of MiCAR), while there is one in the case of the entities referred to in paragraph 1(a) (Article 63 of MiCAR). This fact is confirmed by Article 59(1) of MiCAR, according to which the right to provide crypto-asset services '(…) shall be revoked upon the withdrawal of the relevant authorisation that enabled the respective entity to provide the crypto-asset services without being required to obtain an authorisation pursuant to Article 59'.

The conditions to be met while providing that service are laid down mainly in Article 81 of MiCAR, but also in the provisions of Chapter 2 in Title V of MiCAR ('Obligations for all crypto-asset service providers'), applicable to all crypto-asset service providers, in particular Article 66 of MiCAR establishing an obligation to act honestly, fairly and professionally in accordance with the best interests of the clients. These provisions correspond to the obligations provided in FITA with regard to entities providing brokerage services, including the investment advice service.

Of paramount importance are the final ESMA guidelines clarifying some of MiCAR's requirements concerning the investor protection[18]. ESMA explicitly states in the Guidelines that the basis for the formulation of the same were ESMA Guidelines on MiFID II suitability assessment ('ESMA has taken the ESMA Guidelines on certain aspects of the MiFID II suitability requirements (…) as a basis for the draft guidelines')[19]. This is made following a reasonable assumption that the suitability

[17] Cf. the following comments in paragraph 5.5. concerning. the 'sufficient range' of crypto-assets taken into consideration when providing the advice on crypto-assets.

[18] Final Report – Guidelines specifying certain requirements of the Markets in Crypto Assets Regulation (MiCA) on investor protection – third package, 17 December 2024 (ESMA35-1872330276-1936) ('Guidelines').

[19] Guidelines, p. 7, nb. 7.

assessment of investment advice and the suitability assessment of advice on crypto-asset are based on the same principles and are very similar to each other[20]. Clients should therefore benefit from the same level of protection whether they invest in financial instruments (MiFID II regulatory package) or in crypto-assets that are not financial instruments (MiCAR)[21]. The vast majority of respondents agreed at the Guidelines consultation stage with ESMA's approach to ensuring consistency between the guidelines on the suitability assessment in accordance with the MiFID II regulatory package and the Guidelines (MiCAR)[22]. However, it should be emphasised that the legal framework set by the MiFID II regulatory package and the legal framework set by MiCAR are not identical, as can be seen, for example, in the categorisation of clients, which is one of the main elements of the protection regime for investors taking advantage of brokerage services, but which is absent from the protection regime for investors using the crypto-asset services. As is rightly pointed out by ESMA, although MiCAR does not provide for such an obligation, there is nothing to prevent crypto-asset service providers from having their own, internal rules regarding the client categorisation, provided that they can always ensure compliance with MiCAR suitability requirements[23].

4.2. Suitability assessment for the needs of providing the advice on crypto-assets

The primary obligation of crypto-asset advice service providers is to conduct a suitability assessment, i.e. to assess whether the crypto-asset services or crypto-assets are suitable for their clients or prospective clients, taking into consideration their knowledge and experience in investing in crypto-assets, their investment objectives, including risk tolerance, and their financial situation including their ability to bear losses (Article 81(1) of MiCAR). For the purposes of the suitability assessment, crypto-asset service providers providing advice on crypto-assets obtain from their clients or prospective clients the necessary information regarding their knowledge of, and experience in, investing, including in crypto-assets, their investment objectives, including risk tolerance, their financial situation including their ability to bear losses, and their basic understanding of the risks involved in purchasing crypto-assets, so as to enable crypto-asset service providers to recommend to clients or prospective clients whether or not the crypto-assets are suitable for them and, in particular, are in accordance with their risk tolerance and ability to bear losses (Article 81(8) of MiCAR).

Suitability assessments for the needs of providing investment advice and advice on crypto-assets are very similar to each other, as confirmed by the Guidelines. First and foremost, the suitability assessment is a prerequisite for providing the advice on

[20] *Ibidem.*
[21] Guidelines, p. 7, nb. 8.
[22] Guidelines, p. 9, nb. 21.
[23] Guidelines, p. 13, nb. 41.

crypto-assets. It should be assumed that no response from the client or potential client results in the inability to provide the advice both in variant one and in variant two, the latter consisting in providing a personal recommendation of crypto-asset services (cf. comments above concerning the structure of the crypto-asset advice service).

Where clients do not provide the information required for the suitability assessment, or where crypto-asset service providers providing advice on crypto-assets consider that the crypto-asset services or crypto-assets are not suitable for their clients, the service providers do not recommend such crypto-asset services or crypto-assets, nor begin the provision of portfolio management of such crypto-assets. (Article 81(11) of MiCAR). An analogous regulation is contained in Article 83g of FITA.

Common features of suitability assessments for investment advice and advice on crypto-assets undoubtedly include: avoidance of such a formulation of the assessment questionnaire which may lead to a self-assessment of the client or potential client[24], adjustment of the level of details and the scope of questions to the situation of certain persons ('Crypto-asset service providers should also take into account the nature of the client'), for example older people[25], avoidance of introduction of yes/no answers into the questionnaire[26], emphasising the relevance of the suitability assessment and its importance for the service provided[27], the obligation to put in place mechanisms to catch discrepancies in answers[28], and the approach to carrying out suitability assessments of legal persons and organisational units referred to in Article 33^1 of the Civil Code[29]. and natural persons represented by an attorney-in-fact[30].

The suitability assessment for the needs of providing advice on crypto-assets also generates new problems. First of all, the crypto-asset service provider should ensure that the suitability assessment also includes an analysis of the client's knowledge of technological aspects and risks involved, including the Distributed Ledger Technology (DLT)[31]. An extremely interesting theme is the assessment in terms of the ESG (environmental, social, governance) factors, which is not a mandatory element in case of markets in crypto-assets , which distinguishes this legal framework from the MiFID II regulatory package (cf. Article 54(2)(a) and (5) of Regulation 2017/565). Nevertheless, in the Guidelines, ESMA, despite emphasising several times the absence of any such obligation ('while not mandatory', 'though they are not required') has identified this element of assessment as a good practice, highlighting its beneficial impact on clients who may be interested in crypto-assets

[24] Guidelines, p. 58, nb. 48.
[25] Guidelines, p. 57, nb. 43.
[26] Guidelines, p. 59, nb. 49.
[27] Guidelines, p. 49, nb. 13–14.
[28] Guidelines, p. 60, nb. 54.
[29] the Act of 23 April 1964 – the Civil Code (consolidated text in the *Official Journal of the Republic of Poland* Dz.U.2024.1061) ('the Civil Code').
[30] Guidelines, p. 62, nb. 64.
[31] Guidelines, p. 11, nb. 31–32 and pp. 54–55, nb. 34.

more consistent with the ESG factors[32]. This aspect can be problematic since, on the one hand, there is an emphasise of no obligation to analyse the ESG factor-related issues, while, on the other hand, it is incumbent on the crypto-asset service provider to obtain the information necessary to assess the client's individual situation, including, for example, his investment objectives, which may be co-determined by the ESG factors.

The purpose of the suitability assessment is to enable the crypto-asset service providers to '… recommend to clients or prospective clients whether or not the crypto-assets are suitable for them and, in particular, are in accordance with their risk tolerance and ability to bear losses.' (Article 81(8) *in fine* of MiCAR). It would appear that this purpose has been limited solely to assessing the suitability of crypto-assets ('whether or not crypto-assets are suitable for them'), and thus to the exclusion of 'crypto-asset services'. However, the phrase 'whether or not crypto-assets are suitable for them' should be understood as inclusive of the crypto asset services. This conclusion is confirmed by Article 81(8) of MiCAR read in conjunction with Article 81(1) and (11) of MiCAR, which refer to both the suitability of crypto-assets themselves and the crypto-asset services. In Article 81(11) of MiCAR, the EU legislator has explicitly indicated that if clients do not provide the information required pursuant to paragraph 8, or if crypto-asset service providers consider that 'the crypto-asset services or crypto-assets' are not suitable for their clients, they shall not recommend such crypto-asset services or crypto-assets, nor begin the provision of portfolio management of such crypto-assets.

Crypto-asset service providers providing advice on crypto-assets (and also the portfolio management of crypto-assets) shall establish, maintain and implement policies and procedures to enable them to collect and assess all information necessary to conduct the suitability assessment for each client and shall take all reasonable steps to ensure that the information collected about their clients or prospective clients is reliable (Article 81(10) of MiCAR). A review of the suitability assessment for each client must be carried out at least every two years (Article 81(12) of MiCAR)[33]. The frequency of verification of information obtained from clients should take into account the client's risk profile and the crypto-assets that are the subject matter of the recommendation[34]. This means that it will generally be inappropriate to set the same frequency of verification for all customers.

4.3. Reporting obligation to clients

Once the suitability assessment or its review has been performed, crypto-asset service providers providing advice on crypto-assets is obliged to draw up and provide clients with (in an electronic form) a 'report on suitability' (Article 81(13) MiCAR)

[32] Guidelines, pp. 11–12, nb. 33–34.
[33] Guidelines, p. 61, nb. 59.
[34] Guidelines, p. 61, nb. 58.

specifying the advice given and how that advice meets the preferences, objectives and other characteristics of clients. That report shall, as a minimum: (i) include an updated information on the assessment; and (ii) provide an outline of the advice given. The report should make clear that the advice is based on the client's knowledge and experience in investing in crypto-assets, the client's investment objectives, risk tolerance, financial situation and ability to bear losses.

4.4. Advice on crypto-assets provided on an independent and dependent basis

Under Directive 2009/39 (MiFID I)[35] one of the biggest problems related to the protection of non-professional investors was the lack of independence of the advisor providing personalised recommendations[36]. The MiFID II regulatory package therefore emphasises the issue of independent and dependent provision of investment advice, including so-called incentives. The relevant provisions on these issues, in relation to investment advice, are thus to be found in Article 24(4) and (7) of MiFID II and then, as a result of their implementation, in Article 83c(5) to (6) of FITA. In turn, Article 76(2) of FITA determines that an investment firm may provide investment advice on a dependent or independent basis. It is therefore not surprising that the EU legislator applied a similar solution in MiCAR.

The obligations concerning the provision of advice on crypto-asset on an independent and dependent basis may be divided into general ones, irrespective of the manner in which the service is provided (on an independent or dependent basis), and specific ones, which update when the service is provided on an independent basis.

Article 81(2) of MiCAR imposes an obligation on crypto-asset service providers providing advice on crypto-assets to inform, in good time before providing advice on crypto-assets, the prospective clients whether the advice is: (i) provided on an independent basis; (ii) based on a broad or on a more restricted analysis of different crypto-assets, including whether the advice is limited to crypto-assets issued or offered by entities having close links with the crypto-asset service provider or any other legal or economic relationships, such as contractual relationships, that risk impairing the independence of the advice provided. The implementation of this obligation is an instrument for the protection of investors, as it increases their awareness of conflicts of interest and the range of crypto-assets that will be taken into account when making a personalised recommendation. This provision replicates the provisions of Article 24(4)(a)(i)–(ii).

[35] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, pp. 1–44).

[36] T. Sójka in: T. Sójka (ed.), Cywilnoprawna ochrona inwestorów korzystających z usług maklerskich na rynku kapitałowym, Warsaw 2016, p. 218; N. Moloney, EU Securities and Financial Markets Regulation, Oxford 2014, p. 802 et seq.

In turn, Article 81(3) of MiCAR sets out the rules for the provision of advice on crypto-assets when provided on an independent basis. The provision of this service on an independent basis, i.e. in the manner that is most beneficial for clients, entails certain obligations, including regarding the 'thoroughness' of the analysis carried out by the crypto-asset service providers providing advice on crypto-assets and a ban on the acceptance of the so-called inducements. This provision replicates the content of Article 24(7) of MiFID II.

The wording of Article 81(2)(b) and (3)(a) of MiCAR prejudges that, in the case of service provision on an independent basis, the client may not obtain, in fulfilment of the obligation referred to in paragraph (2)(a), information with content other than indicating that the provision of advice on crypto-assets is not limited to the crypto-assets indicated therein. This follows directly from paragraph 3(a), according to which, in the case of advice provided on an independent basis, the service provider must not be limited to crypto-assets issued or provided by: (i) that same crypto-asset service provider; (ii) entities having close links with that same crypto-asset service provider; or (iii) other entities with which that same crypto-asset service provider has such close legal or economic relationships, as to pose a risk of impairing the independent basis of the advice provided. The provision of advice on crypto-assets on an independent basis may not occur be accompanied by information provided to the prospective client under Article 81(2)(b) of MiCAR that the advice is limited to crypto-assets issued or provided by entities having close links with the crypto-asset service provider.

As per Article 81(3)(a) of MiCAR, when the service is provided on an independent basis, the analysis of crypto-assets may include those issued or provided by entities with close links to the same provider. Indeed, the provision stipulates that the analysis must not be limited to the crypto-assets, so, consequently, they must not be the only crypto-assets taken into consideration when providing advice. One should, nevertheless, unambiguously opt for a situation when such crypto-assets constitute a significant minority since in each case they undermine the protection of clients using the crypto-asset advice. This also follows from the obligation to assess the 'sufficient range' of crypto-assets available on the market, which must be 'sufficiently diverse', and the general obligation to exercise due care with regard the interests of the client (Article 66 of MiCAR). In this case, it is possible to make an alternative reference to Article 53(1) of Regulation 2017/565, which sets out elements of the financial instrument selection process to assess and compare a sufficient range of financial instruments available on the market.

4.5. Problems of creating obligations with the use of vague concepts – 'sufficient range' and 'sufficiently diverse' range of crypto-assets

Both MiCAR and MiFID II use the terms: 'sufficient range' and 'sufficiently diverse' – in relation to the assets analysed (crypt-assets and financial instruments, respectively). These are elements that seem to generate the highest risk on the

service providers providing investment advice and advice on crypto-assets, due to their vague character. One cannot rule out that clients will question the range and diversity of crypto-assets taken into consideration when providing crypto-asset advice, especially as crypto-assets are to a larger extent more cross-border and at the same time subject to fewer access barriers. It is therefore the responsibility of the service providers to structure, and then document, their crypto-asset selection and analysis processes in such a way as to be able to demonstrate that the analysis was sufficiently thorough, while maintaining an appropriate level of rationality. On the one hand, a service provider providing advice on crypto-assets does not need to assess all crypto-assets available on the market, but, on the other hand, one cannot exclude a situation in which the assessment is made taking into consideration only a few classes (types) of crypto-assets representing specific characteristics, replicated by other crypto-assets, thus acting as a kind of representative of the given 'type', i.e. a broader group of digital assets with the same characteristics.

4.6. Inducements

Another prerequisite for the provision of advice on crypto-assets on an independent basis is the ban on the use of inducements (Article 81(3)(b)). A crypto-asset service provider may not accept and retain fees, commissions or any monetary or non-monetary benefits paid or provided by any third party or a person acting on behalf of a third party in relation to the provision of the service to clients. This provision has its counterpart, albeit slightly modified, in Article 83d of FITA. It should be pointed out that, for example, the exception provided for in Article 83d(1)(3) of FITA differs from the one provided in the second paragraph of Article 81(3) of MiCAR, since MiCAR exceptionally allows in this respect the acceptance only of non-monetary benefits, while Article 83d(1)(3) of FITA allows, under certain conditions, the acceptance of both non-monetary and monetary benefits. This discrepancy is interesting since Article 24(7)(b) of MiFID II uses the same working that was used in MiCAR, both in the Polish and in the English version ('*Minor non-monetary benefits*'). This means that on the basis of Article 81(3) of MiCAR the ban on the acceptance of monetary benefits is definitive and there are no exceptions to it. However, it must be assumed that the exceptions set out in Article 83d(1)(1) and (2) of FITA, which have no counterpart in Article 81(3) of MiCAR, would be redundant. The ban on acceptance of inducements may not be understood as prohibiting the acceptance of benefits, for example, from a person acting on behalf of a client (let alone from the client himself). An analogous assessment should be applied with regard to the performance of a monetary benefit by a third party (Article 356 § 2 of the Civil Code). Consequently, it should be considered acceptable for a provider of advice on crypto-assets provided on an independent basis to accept a monetary benefit from any person, as long as it is the main or ancillary benefit resulting from the primary contractual relationship between the provider and the client. Furthermore, it is exclusively prohibited to 'accept and retain' (*shall not accept and retain*) inducements but it is not prohibited to 'transfer' the same, as was set out in Article 83d of FITA.

5. Civil liability of service providers providing advice on crypto-assets

The same rules of civil liability that apply to the provision of investment advice apply of course to the provision of advice on crypto-assets[37]. A service provider may be held liable for an improper performance of the agreement on the provision of advice on crypto-assets under Article 471 et seq. of the Civil Code. However, it should be emphasised that the crypto-asset service provider is not a guarantor of the client's financial success and, consequently, not every damage to the client's assets incurred in connection with the implementation of a recommendation will lead to his civil liability[38]. Therefore, the service providers should not be perceived as entities that in any way, through their status, raise expectations concerning investments in crypto-assets, or enhance the credibility of such investments, or even of the crypto-assets themselves. The crypto-asset advice service provider must, however, ensure that its operations comply with the obligations imposed on it by the EU legislator and which to a certain extent have been outlined in this article. In this respect, it will be crucial to at least establish appropriate rules and criteria regarding suitability assessment to ensure that crypto-assets, that in many cases are highly speculative, should not be recommended to people who are not ready for the risks associated with them. It seems that an analysis of crypto-assets, including the problem of 'sufficient range' and 'sufficiently diverse' range will constitute a particular difficulty and, at the same time, a threat to the crypto-asset advice service providers, which results from the fact that as regards these, still new, digital assets, we do not have at hand such proven methods of analysis as those available in case of the market in financial instruments. Interestingly, the existence of a fundamental value of crypto-assets is also often questioned, while it is that method of analysis that is considered the most scientific and giving greater certainty as to market predictions[39]. It would appears that for at least some crypto-assets, the behavioural analysis will be of crucial significance[40].

Summary

The provision of advice on crypto-assets is essentially very similar to the provision of investment advice. This fact should not come as a surprise as it was the legal framework for the investment advice that provided a source of inspiration for the EU legislator when creating MiCAR. The provision of advice on crypto-assets also demonstrates certain, quite significant, differences, which poses additional

[37] Cf. T. Sójka, in: T. Sójka (ed.), *Cywilnoprawna ochrona…*, pp. 221–225.

[38] Cf. *ibidem*, p. 221.

[39] See a review of literature on valuation methods, including fundamental analysis in: A. Rycerski, *Test racjonalnego inwestora w unijnym prawie rynku kapitałowego*, Warsaw 2022, pp. 87–105.

[40] Cf. A. Szyszka, *Finanse behawioralne. Nowe podejście do inwestowania na rynku kapitałowym*, Poznan University of Economics and Business, Poznań 2009.

challenges in both the practical and theoretical spheres. The obligations associated with the provision of these services, in the market in financial instruments and the market in crypto-assets, are formulated so as to ensure the protection of clients, including those most exposed to the risks associated with a participation in these markets – non-professional clients. Of key importance is the suitability assessment, which, if inadequately designed, may not serve its purpose. The crypto-asset service providers are charged with a difficult task, On the one hand, in order to address the market expectations they must update their service offering by opening up to crypto-assets, while, on the other hand, the crypto-assets (with some exceptions) are extremely difficult to fit into a rational analytical and investment framework, which is, after all, the basis for the preparation of a personalised recommendation. The civil liability of service providers providing advice on crypto-assets, if any, may not, however, be derived from the failure of the crypto-asset investment itself. The guarantees of such a provider are limited to the application of organisational and procedural safeguards that protect clients from distortions in the process of preparing a personalised recommendation or from mismatches between crypto-assets and crypto-asset services and the individual needs of clients.

Bibliography

Kapica W., Sójka T. (2022). In: T. Sójka (ed.), *Obrót instrumentami finansowymi. Komentarz*, Warszawa.

Moloney N. (2014). *EU Securities and Financial Markets Regulation*, Oxford.

Regulation (MiCA) on investor protection – third package, 17 December 2024 (ESMA35-1872330276-1936).

Rycerski A. (2022). *Test racjonalnego inwestora w unijnym prawie rynku kapitałowego*, Warszawa.

Sójka T. (2016). In: T. Sójka (ed.), *Cywilnoprawna ochrona inwestorów korzystających z usług maklerskich na rynku kapitałowym*, Warszawa.

Sójka T. (2014). *Umowa o doradztwo inwestycyjne w obrocie instrumentami finansowymi – zagadnienia podstawowe*, Przegląd Prawa Handlowego, nr 4.

Szyszka A. (2009). *Finanse behawioralne. Nowe podejście do inwestowania na rynku kapitałowym*, Uniwersytet Ekonomiczny w Poznaniu, Poznań.

Włodarczyk G. (2022). *Obowiązki firm inwestycyjnych i banków w systemie MiFID II. Stanowiska i wytyczne organów nadzoru*, Warszawa.