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A word from the Editors

The moment we – the Programme and Scientific Council, the Editorial Committee of the journal *Safe Bank*, and myself as the editor of this special volume – commend to the Readers a thematic issue dedicated to crypto-assets is, given the topic, nothing short of special.

From a global perspective, the fundamental reason is the new approach of the U.S. federal administration to crypto-assets, particularly crypto-currencies. We are witnessing efforts – both declared and reflected by tangible legislative actions – to open the financial market to crypto-assets, accompanied by efforts to stop the work on central bank digital currency (CBDC), sometimes presented as a kind of alternative to crypto-currencies. The openness of the U.S. administration to crypto-assets also translates into the strategies of global financial institutions with their principal place of business in the United States of America, where they generate a significant part of their revenue: some institutions which have so far expressed scepticism towards crypto-assets and towards the engagement of financial institutions in this area of trade are now changing their stance in the new regulatory environment.

In the European Union, a new regulation has come into effect – Regulation on markets in crypto-assets (MiCAR¹), which aims to standardise and regulate the crypto-asset market, primarily to protect its participants.

From Poland's perspective, the proposal for a law aimed at adapting Polish law to MiCAR – including through the designation of a national authority competent to license and supervise crypto-asset service providers – is now a subject-matter

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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.

of parliamentary work. The proposal attracted a lot of interest from stakeholders already at the stage of the government's work, as reflected by numerous comments submitted during consultations and by the conclusions from consensus conferences.

At the same time, the Polish financial market shows clear interest in crypto-assets and related products, both on the part of clients (investors) and financial institutions. Studies among investors have shown that even up to approx. 3 million Polish citizens have had some experience with crypto-assets.² Even if the total amounts of the funds so engaged are not significant yet, the figure indicates that the society is highly interested in this type of assets. Financial institutions often claim that offering the possibility of acquiring crypto-assets or related products becomes necessary as this is something clients expect. Moreover, studies confirm that clients are interested in the option of gaining exposure to this category of assets through entities that enjoy special trust: in particular banks and investment firms.³ All these factors demonstrate the great responsibility public institutions and financial institutions themselves have for handling the crypto-asset market, which in turn leads to the question about the regulatory and supervisory policies regarding that market. This is also a matter of whether the crypto-asset market is part of the financial market, in particular capital market – and the answer may turn out non-trivial or nuanced due to the diversity and a different regulatory status of crypto-assets. I shall go back to this matter further in the introduction.

The papers selected for this issue of *Safe Bank* guide the Readers through various aspects of the functioning and regulation of the crypto-asset market.

The first three texts provide a general framework for a discussion on the crypto-asset market by addressing topics such as: social groups interested in crypto-assets, the relations between the crypto-asset market and the financial market, and the general question about the banks' appetite to engage in operations related to crypto-assets.

Firstly, the Readers can acquaint themselves with the results of empirical studies relating to the profile of investors interested in the crypto-asset market. The authors who conducted the studies assessed a series of parameters regarding human behaviour and decision-making which may be typical of individuals interested in buying crypto-assets. The findings from this kind of research are potentially of paramount importance both to the supervisory policy in this respect and to risk management at financial institutions. Meanwhile, the description of characteristics of this group in terms of communication channels that can be useful in reaching the group becomes particularly relevant in the context of financial education as well as effective formulating and positioning of messages addressed to potential participants in the crypto-asset market.

² The image of Poles as (non-)investors [Pol. *(Nie)inwestycyjny obraz Polaków*]. Accenture's study on Polish retail investors, March 2024, <https://jakinwestujapolacy.pl/raport.pdf>, p. 22.

³ Retail investor in Poland: self-portrait vs the industry's view (Pol. *Inwestor indywidualny w Polsce – autoportret vs spojrzenie branży*). Report prepared by Accenture and University of Warsaw, March 2025, <https://jakinwestujapolacy.pl/raport2025.pdf>, p. 31.

The second text explores the relationship between the crypto-asset market and the financial market. From the perspective of the regulatory and supervisory policy, the key is to assess the occurrence of any risk of contagion between the crypto-asset market and the market of traditional financial assets – shares, bonds, and other financial instruments. Those reflections may provide insights about potential economic functions of crypto-assets, particularly in the context of a hypothesis – albeit treated with scepticism – regarding the hedging function of crypto-assets based on their unproven countercyclical function in contrast to stock markets or markets of other goods. However, an important conclusion from a regulatory and supervisory point of view is that crisis scenarios involve an increase in the correlation between the crypto-asset market and other markets, which may indicate the existence of the risk of spill-over of the crisis from the crypto-asset market to the financial or commodity markets. Consequently, not only do crypto-assets fail to play the role of a stabiliser for financial or commodity markets but, on the contrary, in a stress scenario the impulses from the crypto-asset market may adversely affect the functioning of the capital or commodity markets by initiating, for example, the outflow of capital. Such a finding is important as it leads to the conclusion that even if the crypto-asset market were to be institutionally independent from the capital market, the functioning of the crypto-asset market cannot protect the financial market against negative effects of crisis scenarios in the crypto-asset market. In other words, any crisis or shock in the crypto-asset market might not remain confined within the limits of this market but rather spill over to traditional capital or commodity markets. This shows the scale of responsibility associated with redirecting material streams of funds to the crypto-currency market, which may become a risk factor for the financial market, even if the institutional links – stemming from, for example, the participation of financial institutions in the crypto-currency market – were relatively small.

Systemic thoughts are also at the heart of the next article, which explores the engagement of banks in the crypto-asset market. The author discusses possible forms of such engagement, considering both business aspects – in particular the risks and benefits generated by this type of business – and the regulatory approach of the EU legislator to banks engaging in those forms of business. On one hand, such business may enrich banks' offer and, from their perspective, provide an additional stream of revenue; on the other hand, though, it may create a new channel of contagion and transfer of risk from the undoubtedly more volatile and riskier crypto-asset market to a sector traditionally seen as the most conservative in terms of risk management: the banking sector.

The three opening papers in this issue create a context for the analyses presented in the next five articles: four of them are dedicated to detailed legal reflections on how MiCAR regulates selected crypto-asset services, and one assesses the effectiveness of MiCAR provisions that are to prevent manipulation.

The articles presented in the first part of the issue focus on selected aspects of a general reflection on the crypto-asset market or their relation to the traditional financial market, while the next group of articles deals with a legal analysis of issues arising from the regulatory framework adopted in MiCAR.

There are several reasons underlying the legal discussion presented in this volume.

First of all, the EU legislator has decided that crypto-assets – including those other than financial instruments as defined in Article 4(1)(15) of MiFID II⁴ – should fall under a regulation modelled on the regulation pertaining to the financial market, in particular the capital market. In several of its aspects, MiCAR refers to or is based on solutions provided for in regulations concerning the market in financial instruments, in particular MiFID II and MAR (e.g. to the extent related to inside information and manipulation).

At this point it should be emphasised that according to the assumptions of MiCAR, it does not apply to crypto-assets being financial instruments as defined in MiFID II (Article 2(4)(a) of MiCAR), which as such have already fallen within the scope of application of EU rules regarding financial instruments (cf. recital 3 of MiCAR). In other words, by decision of the European legislator, under MiCAR, rules modelled on and shaped similarly to the rules governing the financial market, in particular the capital market, have been applied to services related to objects (crypto-assets) other than financial instruments.

Such a solution has various implications. In the first place, it may raise questions about the adequacy of the implemented solutions in view of typical challenges witnessed in the market of crypto-assets other than financial instruments. The question about the effectiveness of solutions transferred to the crypto-asset market from the traditional financial instrument market may apply, i.a., to the rules on manipulation.

Furthermore, the adopted regulatory model creates an image of close affinity between the market in financial instruments and the market in crypto-assets other than financial instruments, which also has certain consequences, in particular it may lead to a scenario where the crypto-asset market would start to be regarded by the general public as a segment of the financial market. This thread may pose a particular challenge in the context of shaping the relevant supervisory and regulatory policies; I shall come back to it in the final part of the introduction.

Secondly, crypto-assets (as defined in Article 3(1)(5) of MiCAR) may turn out to be not only financial instruments as defined in MiFID II but also other objects falling – by virtue of EU law – under other sectoral regulations, in particular those pertaining to the financial market, e.g. funds as defined in the PSD2.⁵ In this respect, the conflict-of-laws rule which draws a line between the scopes of application of MiCAR and PSD2 is not that clear as in relation to crypto-assets being financial

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, p. 349).

⁵ Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC (OJ L 337, 23.12.2015, p. 35).

instruments: in fact, Article 2(4)(c) stipulates that MiCAR does not apply to crypto-assets being funds as defined in PSD2 (in this respect, PSD2 applies), unless such crypto-assets qualify as e-money tokens. The term ‘e-money token’ or an equivalent term ‘electronic money token’ (abbreviated to ‘EMT’) means a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency (Article 3(1)(7) of MiCAR). Even though under Article 2(4)(c) of MiCAR, the regulation does not apply to crypto-assets being funds but not EMT, the case of EMT compels an opposite conclusion: such crypto-assets fall under the scope of application of MiCAR. The question is, though, about the potential dual legal regime for EMT in a case where services related to EMT were to fall under both MiCAR and PSD2. This overlap of regulatory regimes for the crypto-asset market and the payment market has attracted interest not only from the market but also from EU institutions, which are taking actions to reduce the regulatory uncertainty and legal risk associated with a potential cumulative regime in regard to EMT. However, with the functional distinctions into more payment-related or more investment-related purposes of transactions, these matters are not entirely free from controversy. These topics are addressed in detail in two articles of this issue.

The closing paper of this issue addresses the topic of the qualification of digital goods – such as programmable central bank digital currency (PCBDC) in this case – seen from the perspective of the theory of money rather than any specific normative material. The author concludes that although the status of the CBDC as money seems to leave no doubt, the qualification of the programmable CBDC depends on the adopted theory of money. This may be one of the reasons why even the central banks engaged in the work on the CBDC are rather unforthcoming about the issuance of programmable money.

Now, having provided a brief overview of the topics explored in the articles published as part of this issue, I would like to go back to the topic of challenges stemming from MiCAR’s general approach to regulatory framework for the markets in crypto-assets other than financial instruments – a framework modelled on the regulations concerning the financial market, in particular capital market. This also begs the question about the relation of the crypto-asset market to the financial market, and the role and tasks of the financial supervisor and the regulatory and supervisory policy.

The starting point here should be the original purpose of financial market and financial market regulation and supervision. It is about building confidence in the financial market as an infrastructure which allows conversion of savings into investments and lending activity. Confidence is built, on one hand, by establishing prudential regulation and supervision to ensure the solvency of financial institutions which are subject to such supervision and, on the other hand, by ensuring an appropriate level of protection of market participants: customers of financial institutions and investors in the capital market, in the form of conduct-of-business rules and information disclosure requirements. Traditionally, bank supervision consisted mainly in prudential supervision, while capital market supervision focused on:

(i) ensuring appropriate conduct-of-business rules governing the relations with clients of investment firms, (ii) enforcing information disclosure requirements, and (iii) preventing manipulation and misuse of information privilege. With time, the supervisory convergence is progressing, which is reflected by a greater focus on the conduct-of-business in the area of bank supervision (e.g. product governance) on one hand, and on components of prudential supervision of capital market entities on the other hand. In any case, however, building confidence – both using the tools of prudential supervision and conduct-of-business supervision – is not only an end in itself. With this confidence, the financial market can effectively serve as a mechanism of transforming savings into investments – be it equity, debt, or credit. This is why the State engages its public authority – expressed for instance in an established public supervision of the financial market – to ensure that the society has confidence in the financial market and its institutions so that potential can be created for the financial market to efficiently perform its organic function of providing financial intermediation and financing the investment needs of the economy. Another element is ensuring a safe and effective payment mechanism to reduce the costs of transactions between counterparties, thus making the exchange more efficient. This is also the reason why in the long-term the objectives of financial supervision – in Poland, defined in Article 2 of the Act on financial supervision⁶ – have synergy with the efforts to promote the development of the financial market. The market develops properly only when individuals who – as depositors or investors in collective investment undertakings, or shareholders or bondholders who entrust their funds directly to specific issuers – entrust their funds to professional financial intermediaries, do it with a sense of confidence in the proper and fair functioning of the market and a sense that their funds are secure to the extent adequately correlated with the expected rate of return.

How relevant are these reflections in the context of crypto-assets? Since the ‘crypto-assets’ category treated as a whole is characterised by a high degree of inner diversification, it is worth taking a look at whether and how the crypto-asset market performs functions specific to the financial market and has the same organic features which have induced the State to assume the responsibility for establishing and enforcing financial regulations and for their functioning.⁷ It is also interesting to refer to the legislative intentions expressed in the preamble to MiCAR.

Recital 2 of MiCAR reads as follows: *‘Crypto-assets are digital representations of value or of rights that have the potential to bring significant benefits to market participants, including retail holders of crypto-assets. Representations of value include external, non-intrinsic value attributed to a crypto-asset by the parties concerned or by market participants, meaning the value is subjective and based only on the interest*

⁶ Act of 21 July 2006 on financial market supervision (Journal of Laws 2025, item 640).

⁷ Cf. The opening address: „Czy kryptoaktywa są elementem rynku finansowego?” [Are crypto-assets an element of the financial market?] and the related discussion held during the 28th Open Academic Session of the Commercial Law Chair of the Faculty of Law and Administration of the University of Warsaw on 7 April 202, <https://kph.wpia.uw.edu.pl/nagranie-z-xxvii-opn-z-udzialem-dr-hab-jacka-jastrzebskiego-ilm-berkeley-prof-uw/>

of the purchaser of the crypto-asset. By streamlining capital-raising processes and enhancing competition, offers of crypto-assets could allow for an innovative and inclusive way of financing, including for small and medium-sized enterprises (SMEs). When used as a means of payment, crypto-assets can present opportunities in terms of cheaper, faster and more efficient payments, in particular on a cross-border basis, by limiting the number of intermediaries.'

The mutual relationship of the statements in that part of MiCAR may require further analysis.

On one hand, the text expressly admits that crypto-assets 'include external, non-intrinsic value attributed to a crypto-asset by the parties concerned or by market participants, meaning the value is subjective and based only on the interest of the purchaser of the crypto-asset', which seems to be a veiled recognition of a purely speculative nature of those instruments, whose valuation is not based on any fundamental value.

On the other hand, it is stated that crypto-assets may streamline the capital-raising process and constitute an innovative and inclusive way of financing, particularly for small and medium-sized enterprises (SMEs). Such an approach would mean that in a way, crypto-assets perform an organic function of the capital market and – as a method of raising capital for business projects – they would in fact represent a certain fundamental value, which in turn would not be consistent with the preceding sentence. One may also ask: do crypto-assets for capital-raising purposes not fall under other EU regulations, for example MiFID II, whose application, as already mentioned, excludes the application of MiCAR?

Finally, from the third perspective, crypto-assets may also be used as a means of payment; in that case also, as it seems, their inherent value cannot be denied. Their regulatory status – and whether they fall under PSD2 only or under both MiCAR and PSD2 if they are to be identified as EMT (which, after all, is a questionable point – and probably subject to further discussion) – has already been mentioned.

The conclusions from recital 2 of MiCAR are therefore ambiguous. On one hand, they point to a speculative nature of crypto-assets, which are deprived of any inherent value whatsoever. On the other hand, the examples mentioned – capital raising, the function of a means of payment – suggest that crypto-assets have an underlying value expressed, for instance, in the valuation of a business project to be so financed.

The above observations are somewhat in line with the assumptions regarding the scope of application of MiCAR. A declaration in this regard can be found in recital 9 of MiCAR, which stipulates that: *'Union legislative acts on financial services should be guided by the principles of 'same activities, same risks, same rules' and of technology neutrality. Therefore, crypto-assets that fall under existing Union legislative acts on financial services should remain regulated under the existing regulatory framework, regardless of the technology used for their issuance or their transfer, rather than this Regulation.'* That declaration is mirrored – as already mentioned – by the conflict-

of-laws rules laid down in Article 2(4) of MiCAR, which exclude the application of MiCAR to crypto-assets being financial instruments (point (a)) and funds, which exception does not apply to EMT (point (c)).

One should ask then: what is the real scope of application of MiCAR to crypto-assets used by business entities for capital-raising purposes (which, as it may appear, will be treated in most cases as financial instruments) or as a means of payment (which in many cases are to qualify as funds)? One may have an impression that such scope of application is to cover mainly the EMTs for which regulatory dualism of PSD2 and MiCAR may occur, and perhaps the crypto-assets that are to be used by businesses to obtain financing, other than financial instruments (if the market creates such a category). Yet, such an observation considerably affects the understanding of recital 2, as it may follow from it that the definition of the scope of application of MiCAR may exclude a material part of crypto-assets used for the purposes stated therein. At the same time, it is hardly conceivable that the MiCAR regulation should be considered as a regulation giving access to the European financial markets to cryptocurrencies (as a part of a broader category of crypto-assets).

In this context, one should also note recital 5 of MiCAR, under which: *‘The absence of an overall Union framework for markets in crypto-assets can lead to a lack of user confidence in those assets, which could significantly hinder the development of a market in those assets and lead to missed opportunities in terms of innovative digital services, alternative payment instruments or new funding sources for Union companies.’* In general, funding sources for companies are regulated under EU regulations on the capital market, while payment instruments – in quite elaborate EU regulations on payment services. Now, a question arises: what is the area of crypto-assets – not regulated under other EU regulations on financial markets – for which the call for building *‘user confidence in those assets’* remains valid?

I believe this will be the key question determining the future approach of regulators and supervisors as well as the further supervisory policy on the application of MiCAR.

Any new crypto-assets emerging in the market and falling under MiCAR which pursue the natural purposes of the financial market – in particular alternative payment instruments or new forms of business funding not regulated by other rules – should be seen from the regulatory perspective as manifestations of the development of the financial market. Building confidence in such assets should be treated as a catalyst for such development. This could apply, in particular, to such forms of tokenisation of assets related to running a business which would slip out of financial instrument market regulation and pave the way for new methods of financing business which perhaps would be more appealing to new generations of investors.

To any other extent, in particular to the extent in which crypto-assets falling under MiCAR do not perform any of the natural functions of the financial market, especially being a *“representation of value”* with no intrinsic value, such description of those assets should also be taken into account in the relevant regulatory and supervisory

policies. Customer protection could then become a goal in itself because the efforts to build confidence in such asset categories and to develop the market in question would no longer serve any other legitimate purpose (other than maybe fiscal revenue), as the market does not perform the functions which organically justified the engagement of the State in building such confidence.

The final answer to the question to what extent the crypto-asset market may provide new tools for the financial market to fulfil its own goals and to what extent it will respond to other kinds of needs will come from the economic and technological development. Meanwhile, the responsibility of regulators and supervisors, who have been or will be tasked with protecting the proper functioning of the market, is to keep track of this development and to adapt the regulatory and supervisory policies accordingly.