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SALE OF CRYPTO-ASSETS AS AN ALTERNATIVE FORM OF FINANCING BUSINESS COMPANIES*

ABSTRACT

The transformation of the economy into a digital economy is a highly topical issue, bringing new challenges such as the need for legal regulation of digital assets. Among the most prominent digital assets are crypto-assets, which are currently regulated at the EU level by the MiCA regulation. In the presented article, the authors explore the issue of issuing crypto-assets as a source of alternative financing for business companies. Crypto-assets, such as cryptocurrencies or tokens issued through Initial Coin Offerings (ICO) or Security Token Offerings (STO), provide businesses with innovative options for raising capital, independent of traditional financial institutions. The introductory part of the article provides a general definition of traditional and alternative sources of capital acquisition for business companies. In the subsequent section, the authors also briefly address the process of Initial Coin Offerings. Their aim is to highlight the advantages, disadvantages, and other associated risks linked to this form of capital acquisition. Finally, the authors focus in more detail on defining crypto-assets and their specific classification. Special attention is given to tokens and coins, that are not subject to legal regulation. In this context, the article seeks to answer whether, under the current regulatory framework, a business company can offer crypto-assets freely, that is, outside the regulatory scope of the MiCA regulation or other legal provisions, if such tokens serve as a means of rising capital.

Keywords: crypto-assets, tokens, cryptocurrencies, initial coin offerings, utility token

1. INTRODUCTION

The modern world requires modern solutions for modern problems. The development of digital technologies brings with it a significantly challenging task

the creation of balanced legal regulations that, on one hand, provide sufficient protection and, on the other hand, do not hinder the advancement of new technologies. One such example is the emergence of cryptocurrencies and crypto-assets, which have enjoyed considerable popularity for more than a decade. Gradually, processes have been developed that allow various projects to be financed through the creation and sale of crypto-assets. From the perspective of traditional notions of business financing, this type of financing (along with a range of other new and innovative methods) is considered to be so-called alternative form of financing. However, it is important to point out that although alternative forms of financing may be seen positively as they usually leverage the possibilities of modern technologies their legal regulation is often lacking, or legislators attempt to subject these new methods to existing legal frameworks. Nevertheless, these legal frameworks are frequently insufficient. In this article, the authors provide a closer analysis of the relatively new legal regulation concerning crypto-assets and their public offering, as set out in 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) 2019/1937.¹ The authors focus on explaining the ICO process, the categorization of tokens under MiCA, and the regulatory obligations that MiCA imposes on issuers within the ICO framework.

2. TRADITIONAL FORMS OF FINANCING BUSINESS COMPANIES

The realization of business activities inevitably brings the need to allocate a certain amount of capital. There are multiple ways to acquire this capital and they can be categorized according to various criteria. At first glance, one might assume that the necessary funds primarily come from the entrepreneur themselves, meaning from their own resources. However, the realities of implementing business plans, as well as conducting business activities, often disprove this assumption. Although there are some exceptions, in many cases self-allocated funds are insufficient and

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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, OJ L 150, 09/06/2023 (hereinafter: MiCA).

this method of financing also carries a significant risk of loss due to potential failure.²

The financing of business companies represents a complex structure of relationships that goes beyond the scope of corporate law.³ The choice of a specific method, or a combination of methods, also depends on other aspects (e.g., tax-related considerations) that an entrepreneur should consider. In academic literature, business financing sources are traditionally divided into so-called equity (own) and debt (external) financing sources. Equity financing sources include, for example, share capital and partners' contributions, their additional payments and deposits, reserve funds and other funds, retained earnings after taxation, and so on.⁴ Debt financing sources, on the other hand, include loans, credits, and non-repayable financial aid provided from the state budget, and others.⁵ Alternative financing methods for business companies (hereinafter: AFM) are increasingly coming to the forefront. These include, for example, venture capital, factoring and forfaiting, mezzanine capital, crowdfunding, project financing, and others. In academic literature, AFM is typically considered a newer, more innovative form of financing, which is less familiar to entrepreneurs compared to traditional financing methods, such as bank loans.⁶ AFM is characterized by lower rigidity, greater flexibility, and in today's business environment, it plays a significant role in the development of business companies and the support of innovations. In the presented article, we focus on a specific type of AFM, namely the sale of crypto-assets.

3. INITIAL COIN OFFERINGS – A BRIEF SUMMARY

Initial Coin Offerings (hereinafter: ICO) represent one of the new methods of raising capital by business companies (particularly for projects in the field of cryptocurrencies or within the blockchain sector) and are primarily used in the early stages of their existence (startups). In academic literature, several definitions of ICOs can be identified.⁷ However, from these definitions, it is possible to

² Ovečková, O.; Csach, K.; Žitňanská, L., *Obchodné právo 2. Obchodné spoločnosti a družstvo*, Wolters Kluwer SR, Bratislava 2020, p. 361.

³ *Ibid.*, p. 355.

⁴ Dolný, J., *Financovanie obchodnej spoločnosti a družstva*, In: Patakyová, M.; Ďurica, M.; Husár, J., *Aplikované parvo obchodných spoločností a družstva – ťažiskové inštitúty*. 1. Vydanie, Wolters Kluwer SR, Bratislava 2021, p. 474.

⁵ *Ibid.*, p. 474-475.

⁶ *Ibid.*, p. 505.

⁷ Jiasun, L.; Mann, W., *Initial Coin Offering and Platform Building*, January 31, 2018, p. 2, <https://finance-conference.wpcarey.asu.edu/sites/default/files/imported/initial-coin-offering.pdf>, 21 February, 2025.

abstract a few fundamental characteristics that describe ICOs more closely. In general, an ICO is understood as a process of raising capital by an entrepreneur, which consists of creating so-called coins or tokens, which are subsequently sold to the public investors typically in exchange for other cryptocurrencies (quite often Ethereum or Bitcoin), or for fiat currencies. According to some sources, tokens can also be exchanged for the right to use a product or service that the entrepreneur conducting the ICO is developing.⁸ This means that these tokens may later be used either to access the entrepreneur's future services or they may be traded on cryptocurrency exchanges (some investors expect a rapid increase in the value of these tokens with the prospect of selling them later at a profit).

One of the most significant projects that utilized an ICO is Ethereum. It is important to note that while Ethereum is commonly perceived as one of the best-known cryptocurrencies, it is often overlooked that the essence of Ethereum also lies in the creation of a platform that has applications in decentralized finance, enables the creation of smart contracts and the development of decentralized applications (aka dApps), and more.⁹ The Ethereum project raised approximately 17 million dollars in 2014 through an ICO in exchange for Bitcoin.¹⁰

As mentioned earlier, ICOs are predominantly used in the blockchain environment. Naturally, this raises the question of what the term blockchain means. It is important to point out that crypto-assets are transferred and stored through Distributed Ledger Technologies (DLT), with blockchain representing just one type of DLT.¹¹ Simply put, blockchain is a digital transaction database distributed across a network of computers. New transactions are called "blocks" and are organized into a chronological chain — a blockchain.¹² For completeness, it should be noted that DLT is also defined by MiCA in Art. 3 sec. 1 num. 1 as:

or see National Bank of Slovakia, Crypto-Assets and Initial Coin Offerings (ICOs) - <https://nbs.sk/en/financial-market-supervision1/fintech/crypto-assets-and-initial-coin-offerings-icos/>, 21 February, 2025.

⁸ Jiasun, L.; Mann, W., Initial Coin Offering and Platform Building, January 31, 2018, p. 2, <https://finance-conference.wpcarey.asu.edu/sites/default/files/imported/initial-coin-offering.pdf>, 21 February, 2025.

⁹ See Ethereum, <https://ethereum.org/en/what-is-ethereum/>, 21 February, 2025.

¹⁰ See Ethereum and the ICO Boom - <https://www.gemini.com/cryptopedia/initial-coin-offering-explained-ethereum-ico#section-ethereums-role-in-the-ico-boom>, 21 February, 2025.

¹¹ Putera, M., *Kryptoaktíva, ich zdaňovanie a exekúcia. 1. vydanie.*, C. H. Beck, Bratislava 2024, p. 29.

¹² Hayes, A., Blockchain Facts: What Is It, How It Works, and How It Can Be Used, 16 September, 2024, <https://www.investopedia.com/terms/b/blockchain.asp>, 21 February, 2025.

"distributed ledger technology or DLT means a technology that enables the operation and use of distributed ledgers".¹³

Based on the basic principle of ICOs described above, ICOs are often compared to Initial Public Offerings (IPOs), in which business companies enter the stock market and sell shares.¹⁴ However, even though these processes may seem similar, there are certain differences. ICOs are primarily used in the early stages of a business company's existence, while IPOs can also be used for the expansion of an already established business company. From the investor's perspective, the difference also lies in the fact that while in an IPO the investor acquires shares, often with voting rights or ownership participation in the business company, in an ICO the investor acquires tokens/cryptocurrencies, which may have various uses they may be associated with rights to access services or products of the business company, or they may be sold later, but they usually do not grant ownership rights in the business company. Another important difference is legal regulation. ICOs have long been unregulated, and even today, regulation is only in its early stages. In contrast, IPOs are subject to strict legal regulations. This also relates to another key aspect associated risks. It can be stated that, in comparison (also due to long-term legal regulation), ICOs are a much riskier investment than IPOs, with a significantly more uncertain outcome.

4. REGULATION OF THE ICO IN THE EU

The method of raising capital through ICOs has been in use for over a decade. However, with the arrival of this innovative form of financing, several risks emerged. The first and natural risk was that ICOs were initially not subject to any regulatory frameworks. The seriousness of this absence of legal regulation must also be viewed in the context of the period when ICOs began to emerge. It is important to recall that with the arrival of the cryptocurrency phenomenon and promises of extreme returns, people began investing money in various projects without fully understanding the entire process. The success and rapid value increase of certain cryptocurrencies (such as Bitcoin) may have created the false impression that the launch of every new cryptocurrency would automatically lead to a significant appreciation of the initial investment. This perception often led to the belief that one must invest as soon as possible, while the price is still low.

¹³ Art. 1 sec. 1 num. 1 MiCA. See also Putera, M., *Kryptoaktíva, ich zdaňovanie a exekúcia. I. vydanie.*, C. H. Beck, Bratislava 2024, p. 29.

¹⁴ Delivorias, A., Understanding initial coin offerings. A new means of raising funds based on blockchain, July 2021, p. 3, [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696167/EPRS_BRI\(2021\)696167_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/696167/EPRS_BRI(2021)696167_EN.pdf), 21 February, 2025.

These circumstances created wide space for various types of fraud, including ICO scams without a real business objective or concrete vision. A natural consequence of these risks was the gradual erosion of investor trust.

Over time, however, various regulatory approaches to ICOs have been developed, including the creation of regulatory sandboxes or, in some countries, the complete prohibition of ICOs.¹⁵ A significant milestone in this field at the EU level was the adoption of the MiCA Regulation, which aims to mitigate the mentioned risks and harmonize the legal framework across EU Member States. The importance of this regulation is reflected in Art. 1 sec. 1 of MiCA, which states: "This Regulation lays down uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets other than asset-referenced tokens and e-money tokens, of asset-referenced tokens and of e-money tokens, as well as requirements for crypto-asset service providers."¹⁶ MiCA also establishes rules for the issuance, offering, and trading of crypto-assets.¹⁷

But what does MiCA regulation mean for ICOs? Probably the most significant contribution of MiCA in the field of ICOs is investor protection, which is ensured through the imposition of multiple obligations. The level of protection, or rather the extent of these obligations, depends on the type of tokens involved. The following tokens fall under the scope of MiCA:

- ART Tokens (Asset-Referenced Tokens)
- E-Money Tokens (EMTs)
- Tokens other than ART or EMTs

The classification of individual crypto-assets and the related obligations that increase the level of investor protection are examined in more detail in the following sections.

5. CLASSIFICATION OF CRYPTO-ASSETS

First, it is important to say that not every kind of digital coins or tokens fall within the scope of MiCA. From the perspective of digital coins and tokens, MiCA's scope is limited to crypto-assets that matches its definitions. If we consider digital tokens or coins as an alternative form of financing for a business company - as a source of capital, then we need to work with presumption that such business company acts as an issuer. For this reason, such tokens would not be automatically excluded from MiCA solely on the basis that they are provided in a completely

¹⁵ *Ibid.*, p. 5.

¹⁶ Art. 1 sec. 1 MiCA.

¹⁷ Art. 1 sec. 2 MiCA.

decentralized manner. Even partial centralization of processes means that the MiCA regulation should apply.¹⁸

In accordance with baseline definition of crypto-assets in Art. 3, sec. 5 of MiCA, crypto-assets is defined as a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology. This definition is crucial for assessing intangible digital token as crypto-asset governed by MiCA. From a functional perspective, a crypto-asset must be capable of being transferred from one owner to another and must be storable on distributed ledger technology or similar technology. For this reason, assessing a token as a crypto-asset is inherently linked to the technology that enables its operation. From that point of view, it is important to emphasize that MiCA rules are primarily designed to protect investors and consumers, ensure market integrity and financial stability and the operation of payment systems.¹⁹ These regulatory goals are essential for interpreting why some types of crypto-assets should be regulated and to what extent. Respecting these various regulatory goals, there are different rules for different types of crypto-assets. This approach is clearly stated in Recital 18 of MiCA: *"MiCA Regulation classifies crypto-assets into three types, which should be distinguished from one another and subject to different requirements depending on the risks they entail. The classification is based on whether the crypto-assets seek to stabilise their value by reference to other assets."* From this perspective, it is clear that one of the MiCA's regulatory approaches is based on assumption that tokens can have different functions, which are inevitably connected to specific risks.

Classification of crypto-assets is therefor based on three main groups. *"The first type consists of crypto-assets that aim to stabilise their value by referencing only one official currency. The function of such crypto-assets is very similar to the function of electronic money as defined in Directive 2009/110/EC. Like electronic money, such crypto-assets are electronic surrogates for coins and banknotes and are likely to be used for making payments."* These are so called E-money tokens (hereinafter as EMTs). MiCA approach to this category of token emphasizes, that they must be treated the same as electronic money and may only be issued by electronic money institution and credit institutions. MiCA's regulatory requirements just supplement existing regulation of electronic money and crypto-asset rules do not affect existing e-money regulation. To prevent regulatory circumvention, MiCA provides a broad definition of e-money tokens in order to capture all type of crypto-assets referencing to single fiat currency.²⁰ If a crypto-

¹⁸ MiCA, recital 22.

¹⁹ See MiCA recitals 4, 12, 27.

²⁰ MiCA, recital 19.

assets value is referenced on more than single fiat currency, it is treated differently. *"The second type of crypto-assets concerns 'asset-referenced tokens', which aim to stabilise their value by referencing another value or right, or combination thereof, including one or several official currencies. That second type covers all other crypto-assets, other than e-money tokens, whose value is backed by assets, to avoid circumvention and to make this regulation future-proof."* These are so called Asset-referenced tokens (hereinafter as "ART Tokens"). As is evident from the definition of these tokens, their value is tied to the value of another asset (tangible or intangible), including multiple fiat currencies. Such tokens resemble commodity derivative contracts, and due to the risk of adoption by its holders as means of exchange, issuers of such crypto-assets are subject to stricter requirements than issuers of other crypto-assets.²¹

"Finally, the third type consists of crypto-assets other than asset-referenced tokens and e-money tokens, and covers a wide variety of crypto-assets, including utility tokens." This kind of tokens are so called other than Asset-referenced tokens (hereinafter as Other than ART Tokens). But it is rather a residual category for crypto-assets, then homogenous designation of tokens with special characteristics like at the case of EMTs and ART Tokens.

The functional approach is legislatively materialized in follow-up definition in Art. 3, sec. 6, 7 of MiCA. MiCA in sec. 9 defines so called "utility tokens" intended to provide access to goods or services supplied by its issuer, which are completely exempted from Title II of MiCA, provided that these goods or services already exist. If they do not yet exist, the duration of the offer to the public as described in the crypto-asset white paper shall not exceed 12 months from the date of the publication of the crypto-asset white paper.

The basic concept of crypto-asset classification is further elaborated in ESMA Guidelines.²² The principle that "one size does not fit all" is also emphasized in the ESMA report in several answers to the questions. The prevailing principle for assessing nature of tokens is "substance over form".²³ Such approach must be considered not only when assessing nature of token as ART Token, EMTs, or other, but also when evaluating whether crypto-assets meet the characteristics of other financial instruments. This is particularly important in the context of recognizing financial instruments. The regulatory goal is to avoid regulatory overlap between MiCA and dedicated regulation of capital and financial market that already exists.

²¹ MiCA, recital 40.

²² Final Report. Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments. 17 December 2024. ESMA75453128700-1323. See ESMA Guidelines sec. 61. to 64.

²³ ESMA Guidelines, sec. 31 – 34.

Basic differences between various obligations from the point of issuer at the point of the token issuance, should be illustrated by following table:

Tokens Obligation	ART Tokens (Asset-Referenced Tokens)	E-Money Tokens (EMTs)	Tokens Other Than ART (e.g., Utility Tokens)
Authorization for Issuance	Yes, the issuer must obtain authorization from the regulator or be a credit institution. (Article 16 MiCA)	Yes, the issuer must be authorized as a credit institution or an e-money institution (Article 48 MiCA)	No (e.g. Article 4 sec. 3 MiCA), but registration may be required in certain cases.
Whitepaper	Mandatory, Scope of information according to Article 51 MiCA.	Mandatory, Scope of information according to Article 19 MiCA. Disclaimer that white paper was not approved	Mandatory with exemptions. Scope of information according to Article 8 and 9 MiCA. Is not part of authorization. Disclaimer that white paper was not approved. (Exemptions e.g. Article 4 sec. 3 MiCA),
Capital Requirements	Yes, minimum own funds (either €350,000, 2% of reserves, or another set amount) (Article 35 MiCA)	Yes, follows the same rules as e-money institutions	No, but some requirements apply to platform operators in case of “person seeking admission to trading”
Regulatory Supervision	Issuer is supervised by regulatory body	Issuer is supervised by regulatory body for e-money institutions	Regulation mainly focuses on platform operators (not issuers)
Use for Payments	Possible, but not the primary purpose	Primarily intended as a means of payment	Not primarily intended for payments. Payments only for issuers goods and services (not third parties) are permitted under certain circumstances.

According to MiCA art. 4, sec. 2, offers of crypto-assets Other than ART are not subject of duties of drawn of crypto-assets whitepaper, notified it to national

authority, publish white paper and marketing communication in accordance with MiCA art. 9. Such exemptions are very similar to exemptions from Prospectus regulation on public offer of securities²⁴, providing fact that (i) such offer is dedicated for maximum 149 persons in each member state, (ii) the total consideration of an offer to the public of a crypto-asset in the Union does not exceed EUR 1 000 000, (iii) offer is limited solely to qualified investors within the meaning of MIFID II.

6. MICA EXMPTED TOKENS

6.1. Exemptions due to other regulation

Another issue is exemption of tokens or coins that should fall under specific regulation of financial and capital market, mainly as financial instruments regulated under MIFID II²⁵. ESMA has prepared specific guidelines to assist with the correct classification of tokens. This task is especially challenging when assessing nature of ART Tokens and financial instruments. ESMA has developed the following updated guidelines. (5) Guidelines on the classification of crypto-assets as financial instruments, in the form of general guidelines (Guideline 1) and in particular in relation to classification of crypto-assets as transferable securities (5.1 - Guideline 2) Classification as other types of financial instruments (5.2), which include money-market instruments (Guideline 3), units in collective investments (Guideline 4), derivative contracts (Guideline 5), emission allowances (Guideline 6). According to these guidelines, if crypto-assets match the definition of any of the financial instruments regulated under capital market law, they should be treated under this regulation.²⁶ Guidelines 1 to 6 aim to explain the key differences between crypto-assets and recognized financial instruments and clarify the extent of which MiFID II concepts apply to the assessment of crypto-assets.

Problems arise in case of so called "hybrid nature" of some crypto-assets. According to ESMA, it is necessary to consider whether a hybrid token has

²⁴ Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC, OJ L 168, 30/06/2017.

²⁵ 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, 12/06/2014. For other relevant capital and financial market regulation see ESMA Guideline, p. 6.

features of financial instrument, in which case such a nature should take precedence in its classification. According to Guideline 9, only when criteria of financial instruments are not met, tokens should be classified as utility token.²⁷ The crucial factor is the inherent characteristics of crypto-assets, rather than the labels given to them by issuers.²⁸ In this light, if a token has the prevailing features of a financial instrument, the specific regulation of financial and capital markets applies, including rules on issuance (e.g. Prospectus regulation).

6.2. Purely decentralized tokens and other crypto-assets

As stated earlier, MiCA does not cover tokens or coins that are provided in a completely decentralized manner; however, partial centralization is sufficient for classifying a coin or token as crypto-assets.²⁹ Such partial centralization should consist of the connection of a specific right or value to a certain market participant (e.g. voting right or right to profit). The absence of an issuer does not prevent from assessing the factual behaviour of persons involved as regulated service providers or platform operator. However, interpretation of decentralized crypto-assets is outside of the scope of ESMA Guidelines.

The connection of a specific right to token or coin (including right to profit) is not sufficient on its own to classify such token under MIFID II. What is crucial is whether the ownership of such a token or coin is transferable to third parties. The mere fact that such token is accepted by the issuer or offeror does not lead to the fact, that this token falls under MiCA. If the purpose of token or coin is to raise capital for crypto project, and if investors, in return, receive a share in profit of that projects, and as long as crypto projects have general industrial or non-financial purpose, such tokens should fall under MiCA rather than collective investments regulation.³⁰ If the reward for coin-owner is non-financial (e.g. right to pre-order final products of crypto project) such tokens could be considered as utility token and fall outside of MiCA. From this perspective it is also important to follow ESMA Guidelines on key concepts of AIFMD³¹ to avoid classification under collective investment regulation. If the purpose of a utility token is to finance cash flow in exchange of ownership of products or services that do not yet exist (at the time of its white paper publication), the public offer of such tokens must not exceed 12 months. According to art. 6, sec. 5, let. d) MiCA, it is acceptable that

²⁷ ESMA Guidelines, sec. 74.

²⁸ ESMA Guidelines, sec.75.

²⁹ MiCA, recital 22.

³⁰ ESMA Guideline, sec. 43.

³¹ Guidelines on key concepts of the AIFMD, 13 August 2013, ESMA/2013/611.

such tokens may not be exchangeable in the case of a failed crypto-project. However, such information must be clearly stated in its white paper.

Moreover, Title II of MiCA is not applicable if tokens Other Than ART and e-money are offered for free (MiCA, art. 4, sec. 3, let. a), or if tokens are created automatically as a reward for operating distributed ledger technology or validating transactions (MiCA, art. 4, sec. 3, let. b), tokens are providing access to existing good and services (MiCA, art. 4, sec. 3, let. c), use of tokens is limited only in specific network of merchants with contractual arrangements with the offeror (MiCA, art. 4, sec. 3, let. d).

6.3. Non-fungible and unique tokens

Non-fungible tokens (commonly known as NFTs) represent a specific category of tokens that typically serve as a crypto alternative to traditional art collections, such as paintings or other artworks. From the MiCA perspective, such tokens may be exempt from regulation if they meet the criteria of non-fungibility and uniqueness. According to ESMA Guideline 8, the concept of non-fungible and unique assets should be interpreted regardless of its pure technical uniqueness (e. g. unique identifier or the use of specific technical standards or features).³² Concept of non-fungibility and uniqueness must be based on the assessment of (i) intrinsic value and rarity (in comparison with other crypto-assets), (ii) utility and functionality and (iii) ownership of assets and associated rights. This assessment is not dependent on the asset's transferability on secondary market, which is acceptable. Fractional NFT (e.g. one unique picture is divided into a lot of smaller parts) should be partially considered as failing to meet the criteria of uniqueness and non-fungibility, even though original picture may be unique.³³

7. CONCLUSION

In the presented article, we have addressed the issue of categorizing crypto-assets under the MiCA Regulation and its impact on the financing process of business companies through ICOs. The findings indicate that ICOs may represent a highly innovative way of raising capital for entrepreneurial projects. On the other hand, the long-standing absence of adequate legal regulation of this process has resulted in fraud and a partial loss of investor confidence. For these reasons, the adoption of the MiCA Regulation can be considered a positive step. However, it remains questionable whether the regulation contained in MiCA will be able to eliminate

³² ESMA Guidelines, sec. 68.

³³ ESMA Guidelines, sec. 70.

the associated risks, whether it will not create an unnecessary obstacle to the development of this process, and whether it will actually lead to the growth of ICO-based financing.

Based on a deeper analysis of MiCA's provisions, we have concluded that not every ICO necessary fall under the scope of MiCA regulation - it depends on the nature of the particular token. MiCA applies only if the token meets the definition and criteria of a crypto-asset. Even though MiCA has already entered into force, it will still be possible to issue tokens or coins that qualify as crypto-assets but fall outside MiCA's regulatory regime. However, they cannot be used as a means of raising capital other than through selling of already existing goods and services. Utility tokens for non-existing goods and services may only be offered for a maximum period of 12 months from the date of whitepaper publication. Furthermore, MiCA provides certain exemptions from specific obligations, which simplify the ICO process for crypto-assets other than Asset-Referenced Tokens (ARTs) or e-money tokens. These exemptions apply if: (i) the offer is addressed to a maximum of 149 persons per Member State, (ii) the total consideration of the public offer of a crypto-asset in the Union does not exceed EUR 1,000,000, (iii) the offer is made solely to qualified investors within the meaning of MiFID II. Finally, if a token has the prevailing characteristics of a financial instrument, it should be regulated under the specific financial and capital markets regulatory framework.

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