

# Regulation of Cryptocurrencies and Initial Coin Offerings in Poland—Ambivalence at Its Best

By Joanna Diane Caytas

## I. Overview

No cryptocurrency-specific legislation or regulation whatsoever exists in Poland to date.<sup>1</sup> But much like in many other countries, the legal and regulatory situation in this country of 40 million with regard to cryptocurrencies and ICOs is rife with skepticism, euphoria, crime, popular fascination, investor interest,<sup>2</sup> and dire warnings by the financial establishment; in short, a feverish climate of uncertainty, mass greed,<sup>3</sup> and political, legislative and regulatory factionalism. Torn between resentment for unprecedented and superficially irrational creation of wealth by stellar returns, recognition of powerlessness of any nation state to quash or at least regulate runaway technology, and the even greater fear of embarrassment that would follow coming down on the wrong side of history<sup>4</sup> against a potential wave of the future, reactions of the Polish government *de facto* run the gamut of positions taken anywhere, while clandestine attempts were made to prepare for a “death knell campaign” in the event cryptocurrencies were to exhibit exploitable vulnerabilities such as a sustained drop in prices or the discovery of major fraud and market manipulation. As in many other countries, memories of the Dutch Tulip Mania<sup>5</sup> were invoked.<sup>6</sup> To no avail: to date, Poland ranks as the eighth-largest marketplace for cryptocurrencies and ICOs around the world.<sup>7</sup> Clarity existed pretty much from the outset only with regard to taxation of any ICO- or cryptocurrency-trading related income,<sup>8</sup> although technicalities about accounting and reporting were initially unclear.<sup>9</sup> In any event, long-standing calls for regulation become increasingly louder<sup>10</sup> as the government clearly hopes to join effective international, or at least EU-wide, action.

## II. Regulatory Structure

### A. Regulators

The Ministry of Finance (Ministerstwo Finansów) provided an informal policy directive in a public statement of its spokesperson Szymon Wozniak, who stated on December 18, 2013 at a conference at the Warsaw School of Economics that the Ministry of Finance did not consider bitcoin illegal and also did not wish to hinder its development. That notwithstanding, it did not deem bitcoin legal tender or “electronic money” within the meaning of EU directives.<sup>11</sup>

#### 1. National Bank of Poland—Narodowy Bank Polski (NBP)

The central bank regulates and refinances licensed financial institutions, but while the payment-services aspect of cryptofinance overlaps with banks, a banking

license is not required in Poland for either mining, trading or brokering cryptocurrencies. It is, however, its considerable interpretive leeway that is not shackled to *stare decisis* that permits NBP to assert jurisdiction in more ways than just by advising caution and discouraging investment.<sup>12</sup>

It may be expected that NBP, like many institutional actors, will emphasize the point that blockchain technology does not need bitcoin, or any cryptocurrency, for that matter, to build efficient and secure transaction systems and platforms, while currency-related implementations are just a few practical applications of its use.<sup>13</sup>



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On July 7, 2017, NBP and the Financial Supervision Authority (KNF) issued a joint comment on virtual “currencies,”<sup>14</sup> stating that virtual currencies: (1) are not issued or guaranteed by the central bank, (2) are not money, i.e., they are neither legal tender nor currency, (3) cannot be used to pay tax liabilities, (4) do not meet the criterion of universal acceptability in shopping and service points, (5) are not electronic money, (6) are not payment services (in legal terms), (7) are not financial instruments (in legal terms). They also noted that trading virtual currencies in Poland does not violate national or EU law; however, ownership of virtual “currencies” involves many risks: (i) risk related to the possibility of loss of funds due to theft, (ii) risk related to lack of guarantee, (iii) risk of lack of universal acceptability, (iv) potential fraud risk, (v) risk of price volatility. Due to these risks, NBP and KNF caution against investment in virtual currencies. NBP and KNF recognize that purchase, ownership and sale of virtual currencies by entities supervised by KNF (such as banks) would be burdened with high risk and would not ensure a stable and prudential management of the financial institution. Financial institutions should therefore be cautious about engaging and cooperating with entities trading in virtual currency.<sup>15</sup> NBP apparently remains ambivalent about the European Central Bank’s view that traditional financial sector regulation does not apply to cryptocurrencies, since they do not involve traditional financial actors.<sup>16</sup> Legislative and executive opinions in the EU have differed sharply from

that position relatively early on<sup>17</sup> and, with the benefit of hindsight, rightfully so.

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## **2. Financial Supervision Authority—Komisja Nadzoru Finansowego (KNF)**

Established by the Financial Markets Supervision Act,<sup>18</sup> the Authority (Commission) consists of a chairman (appointed by the Prime Minister for a five-year term), two deputy chairpersons (appointed by the Prime Minister at the chairman’s request) and five members (the Minister of Finance or his representative, the Minister for the Economy or his representative, the Minister responsible for social security or his representative, the President of the NBP or a board member delegated by him, and a representative of the President of the Republic). The Commission is tasked with the supervision of banks, insurance companies, capital markets, pension schemes and electronic money transmitters.

## **3. General Inspector of Financial Information (GIFI)—Generalny Inspektorat Informacji Finansowej (GIIF)**

Operating since June 23, 2001 under the Ministry of Finance, GIFI is the Financial Intelligence Unit (FIU) of Poland and a member of the global Egmont Group and of MONEYVAL.<sup>19</sup> Its tasks include investigations to combat financial crimes including money laundering and terrorism finance.<sup>20</sup>

## **4. Ministry of Digital Affairs—Ministerstwo Cyfryzacji**

The Ministry of Digital Affairs was established in 2015<sup>21</sup> and is tasked with the development of broadband infrastructure, support for the development of online content and electronic services, and promotion of digital awareness.

## **5. Office of Competition and Consumer Protection—Urząd Ochrony Konkurencji i Konsumentów (UOKiK)**

The Office was established through a 2007 statute.<sup>22</sup> It is constituted by decree of the Council of Ministers<sup>23</sup> and tasked with antitrust enforcement and consumer protection matters. Misleading advertising and consumer fraud would come under the agency’s jurisdiction.

## **B. Regulations**

The subject matter of cryptocurrencies is governed by EU law as well as by Polish national law (which must not conflict with minimum standards set by the former, although it may impose supplementary requirements and legislate in matters not addressed by EU law).

### **1. Money Laundering Standards**

#### **a. 4th Money Laundering Directive (MLD4)<sup>24</sup>**

Significantly, the scope of MLD4 was extended to include digital currencies and provides for close observation of beneficial owners of business entities with a view to tax evasion, further subjecting them to severe penalties and fines for non-compliance. It forms part of the EC’s action plan for combating terrorist financing. MLD4 brings digital currency exchange platforms and custodian wallet providers within the scope of AML and CTF regulation, requiring them to perform customer due diligence and report suspicious transactions.<sup>25</sup>

#### **b. Payment Services Directive (PSD)**

The Payment Services Directive created new regulated activities in the payment ecosphere, such as issuing and acquiring payment instruments, money remittance and providing IT-based payment consent mechanisms applicable to electronic and mobile payment service providers.<sup>26</sup> But especially as technology evolves at a dizzying pace, it becomes increasingly difficult to tell whether an activity is subject to regulation or outside its scope. For example, BNP and KNF consider tokens/coins structured as utility tokens outside the scope of payment services regulations.

#### **c. Electronic Money Institutions Directive**

E-money was further regulated by a targeted directive that builds on the foundation of PSD.<sup>27</sup> It allows e-money institutions to engage in a wider range of payment-related activities to better compete with payment institutions and banks on payments. But e-money institutions, such as payment institutions, must safeguard funds received in exchange for e-money. More detailed rules were created on the terms and conditions applicable to e-money, such as issuance, redemption and interest (if and when that aspect should ever become a consideration again).<sup>28</sup>

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#### **d. Securities Law and Regulation**

To the extent that coins/tokens are considered securities, trading thereof will be deemed regulated trading. Where tokens express or represent regulated assets, trading of such assets may eventually be deemed regulated

activity subject to licensing or other regulatory requirements. As of February 2017, Poland officially recognized the trading and mining of virtual currencies as “official economic activity,” according to the Central Statistical Office of Poland (Główny Urząd Statystyczny, GUS).<sup>29</sup>

Poland does not have a statutory or jurisprudential equivalent to the *Howey*<sup>30</sup> doctrine with a comparably sweeping definition (“a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party”<sup>31</sup>) that captures pretty much everything involving other people’s money as an “investment” and thus subjects it to securities regulation and registration. The Polish Securities and Exchange Commission (formerly Komisja Papierów Wartociowych i Gield) was merged into KNF in 2006.

Self-regulation of the crypto industry, as it starts to emerge in Japan,<sup>32</sup> has not shown indications of developing in Poland yet.

#### e. Crowdfunding

Crowdfunding is currently not regulated in Poland. So far, KNF has issued favorable opinions regarding crowdfunding projects, subject to observance of certain minimum standards.<sup>33</sup>

#### f. Taxation

Somewhat unsurprisingly, although the legal status of bitcoin remained quite shaky, Poland has always sought to tax bitcoin profits.<sup>34</sup> But virtual currencies had to be treated differently by different tax regimes, depending on whether the decision concerns sales tax (VAT) or income tax.<sup>35</sup>

The Polish VAT Act<sup>36</sup> provides in art. 5(1)(1) that paid delivery of goods or of paid services within Polish territory forms the basis of value-added taxation of sales. Thus, payment for taxable activity is a condition of taxation. Trading in cryptocurrencies involves exchange of conventional currency against virtual currency units. There, the taxable amount equals the differential between the intermediary’s purchase price and its sales price received from customers. But the VAT Act’s art. 43(1)(7) provides that transactions, including intermediation, in currencies, bank notes and coins used as legal tender are exempt from VAT. Therefore, the question arose whether virtual currencies—to date not regulated by law and neither issued nor supervised by any government body—could be considered as “means of payment” within the meaning of the VAT Act. If so, cryptocurrency transactions would be exempt from VAT.

Cryptocurrencies have already been the subject of consideration by the European Union bodies. The VAT exemption for currency transactions was introduced in Poland by way of implementation of the EU’s VAT directive.<sup>37</sup> In its *Hedqvist* decision,<sup>38</sup> the ECJ ruled that bitcoin

“cannot be characterised as ‘tangible property’ within the meaning of Article 14 of the VAT Directive, given that ... that virtual currency has no purpose other than to be a means of payment.” The Court found that it would be unacceptable to restrict the provision of the Directive to transactions in traditional currencies, as this would partially deprive the directive of effectiveness. Thus, transactions involving the exchange of traditional currency against bitcoin units (also, of course, *per analogiam*, other cryptocurrencies) and *vice versa* are exempt from tax within the meaning of the EU VAT directive.

In light of controlling ECJ jurisprudence presented in applications for individual interpretation (equivalent to an advance ruling), the Director of National Tax Information in Poland found the positions taken by the applicants to be correct.<sup>39</sup> In the cases in question, the sole purpose of virtual currencies was the function of payment means, and therefore cryptocurrency trading is exempt from VAT. This position appeared in three tax interpretations of October 3, 2017 concerning bitcoin, litecoin and ether. In this scenario, virtual currency units are similar in function to non-cash money. Furthermore, value is solely determined by supply and demand on virtual exchange websites that establish their exchange rate in relation to traditional currencies. At the same time, cryptocurrencies are increasingly used to pay for goods and services, accepted in stores and, in some countries, even by government agencies.<sup>40</sup> Therefore, exchange of virtual into traditional currencies and *vice versa* involves the same kind of spread between purchase and sale price as a forex transaction. Both are exempt from taxation of sale of goods and services in Poland, and thus from VAT.

However, different tax issues are presented by the creation or generation of the original cryptocurrency, which is done by “mining.” Because virtual currency units are generated in this fashion “out of thin air” and then marketed and sold for a price determined by the seller as part of its business strategy, then, as a judgment of the Łódz Provincial Administrative Court has held, this activity should be deemed to be providing a service—which would render it taxable under the VAT Act. Poland’s Supreme Administrative Court<sup>41</sup> has held that, while the introduction of virtual currency units to the market does not constitute delivery of goods within the meaning of the VAT Act, it is a paid service, because the seller receives a specific price from the buyer. Thus, the basic difference between the two situations is how cryptocurrency is used. In the case of trading existing units, VAT Act art. 43(1)(7) applies,<sup>42</sup> because in such transactions they act as a carrier of money. But if freshly “mined” currency units are first “issued” into the primary market, this transaction is treated as providing a paid service that is taxable under the VAT Act without regard to exemptions otherwise available if currency units are sold for consideration in trading as opposed to issuance transactions.<sup>43</sup> One may or may not find the notion persuasive that min-



ing constitutes a service but brokerage does not, but the economic purpose is to avoid taxing the circulation of even quasi-currency, thus forcing its value to evaporate over time.

In another decision, the Supreme Administrative Court held that, as for income taxation, it is undisputed that both income derived from mining as well as from trading is subject to regular income tax.<sup>44</sup> Relatively strict and complex demands apply to documentation under the Personal Income Tax Act (PIT Act), art. 10(1)(3) and (7).<sup>45</sup> Thus, bitcoin trading profits may be taxed as income at a rate of up to 32 percent.<sup>46</sup>

### III. Management by Rumor

One phenomenon observed in Central and Eastern Europe quite frequently also played a role in the cryptocurrency arena: management by rumor and denial. For example, several Polish media outlets recently reported on an alleged project of a national cryptocurrency<sup>47</sup> (similar to Estonia or Venezuela<sup>48</sup>) that could supplement or, in due course, even supplant the zloty. The dPLN, “digital zloty,” to be pegged one-to-one to the national currency in an effort to retain the security of blockchain technology without volatility risks inherent in unregulated cryptocurrencies, was a brainchild of the Polish Accelerator of Blockchain Technology (Polski Akcelerator Technologii Blockchain) under the patronage of the Ministry of Digital Affairs.<sup>49</sup> After the accelerator’s announcement of its successful creation in principle of this cryptocurrency made international and domestic news, the Ministry of Digital Affairs promptly disavowed the project, withdrew its patronage, and issued a statement that financial instruments and currencies, including cryptocurrencies, lay outside the jurisdiction of the Ministry of Digital Affairs.<sup>50</sup>

While the vision of a national cryptocurrency would dovetail with plans probably welcomed by almost all regulators worldwide to gradually eliminate cash,<sup>51</sup> and blockchain-based payment platforms such as Ripple offering payments in zloty are indeed about to be launched imminently in Poland by Banco Santander, Europe’s largest bank,<sup>52</sup> and while the potential value of blockchain technology for purposes other than finance is widely recognized in Poland,<sup>53</sup> sensationalist media buzz is deliberately generated from time to time, even in instances where the outcome is entirely obvious to finance professionals. Especially statements likely to be noted abroad are still frequently made primarily for the consumption of a domestic audience.<sup>54</sup> Regulators have promptly and repeatedly denied plans for a national cryptocurrency.<sup>55</sup>

Other rumors about Poland’s involvement in a national cryptocurrency were spread by Venezuelan Minister of Oil and Mining, Vielma Mora, claiming that Poland would somehow endorse Venezuela’s crude-oil-backed petro,<sup>56</sup> the world’s first state cryptocurrency. These rumors were emphatically denied as well.<sup>57</sup> Not

least in consideration of U.S. opposition to the regime of Nicolás Maduro and of a range of strict sanctions in force that ultimately resulted in President Trump banning U.S. persons from transacting the petro by executive order<sup>58</sup> (and Russia promptly announcing its convertibility into rubles the same day<sup>59</sup>), the petro had already been refuted by Poland one month earlier,<sup>60</sup> although it turns out that reasons for this step were considerably more complex and well-founded.<sup>61</sup>

#### A. Technology’s Thus Far Unfulfilled Hope for an Anti-Defamation League

We are reminded of Lord Bacon’s classic transliteration of Plutarch: *[a]judacter calumniare, semper aliquid haeret*—slander boldly, something always sticks.<sup>62</sup> Nobody knows this better than leading officials of the financial establishment: following the example of extensive diatribes by JPMorgan Chase Chairman Jamie Dimon,<sup>63</sup> KNF Chairman Marek Chrzanowski compared Bitcoin to the Dutch Tulip Mania of 1637<sup>64</sup> and Prime Minister Mateusz Morawiecki compared it to a 2012 local shadow banking pyramid scheme named Amber Gold<sup>65</sup> that may have caused some U.S. \$40 million in losses, a rather insignificant amount that nonetheless created great publicity.

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Independence from government control of purportedly independent central banks and monetary policy was among the key motivating factors driving early investment in cryptocurrency technology. It also explains covert action to recapture control by discrediting private, disintermediated currencies that might threaten government control of payment methods. Since President Nixon’s 1971 abandonment of the Bretton Woods gold standard, the argument that cryptocurrencies are not backed by anything other than market participants’ willingness to pay has lost any persuasive power since the very same can be said about fiat money, except that major governments’ and central banks’ capacity to create emergency liquidity still by far outranks cryptocurrencies’ ability to generate emergency liquidity, as global management of the 2008 financial crisis has demonstrated. But this diagnosis presents only a temporary snapshot, and shows only a gradual difference. By its very structure and nature, sovereign fiat money is no more “covered”

or “backed” by intrinsic value than cryptocurrencies are: if bitcoin is a “fraud,” then so is the U.S. dollar, the euro, the yen, the renminbi, the Swiss franc, the ruble, not to speak of other, less internationalized currencies. Since international law had to abandon the fiction that a sovereign debtor cannot, by definition, become insolvent, and since a Chairman of the Joint Chiefs of Staff, Admiral Mike Mullen, publicly identified debt as “the biggest threat to U.S. national security”<sup>66</sup> while OECD found the European public debt situation to pose even greater risks to the global economy than current U.S. debt levels,<sup>67</sup> the biggest remaining issue is the inability of governments to sanction, freeze and block crypto payments which, after all, do not rely on SWIFT or dollarization.<sup>68</sup>

Poland has seen a barrage of commonplace but unsubstantiated grumblings about potential risks involving hypothetical risks that we know also from regulatory comments in other countries, mostly focused on perceived threat scenarios arising out of anonymity,<sup>69</sup> lack of traceability, downside potential, and the general risks of hype that arises out of the lemming psychology of “dumb money”: when homemakers, retirees and celebrities flock to an asset and laypeople start pledging their homes and cars to “get in on this wave of the future,” it is usually the last safe moment to exit a bubbly market.<sup>70</sup> And certainly, regulatory skepticism around the world is not without merit as new products and markets generally tend to be rife with crime until regulation and enforcement catch up in due course.<sup>71</sup>

Also familiar among the tools for expressing establishment disapproval is the cancellation of account relationships by major banks for companies active in the cryptocurrencies market.<sup>72</sup>

Another classic, however, is the creation of the appearance of sovereign political risk targeted to destroy the market: repeated ruminations by the Polish government about the “possibility” of a unilateral ban of cryptocurrencies in Poland<sup>73</sup> stand almost no chance of successful implementation in a relatively small country with open borders and convertible currency that is surrounded by neighbors who show no inclination to join such a ban.

#### **B. NBP’s Excursion into Fiction**

A truly unique cock-and-bull story right out of slapstick, however, is the street ballad of NBP’s commissioning and funding out of taxpayer money to the tune of 90,000 zloty (~U.S. \$27,000)<sup>74</sup> a piece of defamatory “fake news” against bitcoin promoted by Facebook and Google advertising—and then getting caught<sup>75</sup> and having to admit it.<sup>76</sup>

NBP commissioned a Polish youtuber, Marcin Dubiel, to produce a video titled *Straciłem wszystkie pieniądze?! [I Lost All the Money?!]*.<sup>77</sup> It shows a young man investing all his worldly possessions into cryptocurrency, only to

be embarrassed at a dinner date when he finds himself unable to settle the restaurant bill using cryptocurrency. The woman leaves, highly annoyed, after settling the bill in cash. The video ends with the young man learning that his money has disappeared into a fraud scheme while an evil Dubiel, in Scrooge McDuck pose, laughingly counts his illicit profits—in legal tender, nothing crypto about his loot.

Polish law requires disclosure of sponsored content. That did not happen in this video. Polish law does not prohibit investment of funds of lawful origin in cryptocurrencies. NBP had therefore no basis or justification to sponsor defamatory content against cryptocurrencies in general in the first place.<sup>78</sup> No public explanation has been provided by NBP to date. Circumstances of the publication did not even leave NBP the expectable argument that the video had been commissioned “for the shelf,” to be released as a public warning in the event of a market crash in cryptocurrencies, since no such event had taken place prior to its release on December 8, 2017—or since. The odd commentator has voiced understanding for NBP acting under some sort of *parens patriae* theory to warn against sudden egregious fluctuations in value.<sup>79</sup>

This narrative is all the more bizarre since it was the same NBP that registered a slew of trademarks with relevance to the cryptocurrency market, such as *PL coin*, *Poland coin*, *Pol coin* and *Pola coin*.<sup>80</sup> One might call it a classical hedge.

### **IV. Regulatory Developments**

Few doubt that a wave of fairly comprehensive regulation of cryptocurrencies and ICOs is imminent in Poland,<sup>81</sup> independent of, and supplementary to, any EU-wide standards.<sup>82</sup> Of course, as in the vast majority of other countries, and aside from basics such as extension of anti-money-laundering standards and securities laws, considerable uncertainty continues to exist about specifics of future crypto-related regulation.<sup>83</sup> Definitional issues—what constitutes currency?, what is cryptocurrency?—required some debate<sup>84</sup> but have largely been answered.

Recently, the Sejm enacted a legislative update to anti-money-laundering standards<sup>85</sup> which now also apply to crypto-platforms of all stripes, pretty much in lockstep with contemporaneous SEC enforcement action in the U.S.<sup>86</sup>

#### **A. Act on Counteracting Money Laundering and Terrorism Financing**

The Act,<sup>87</sup> adopted with near-unanimity,<sup>88</sup> was intended supersede existing legislation dating back to 2000 in order to increase the effectiveness of Polish anti-money laundering provisions and to implement the EU’s MLD4.<sup>89</sup> It also presented the first statutory definition of a virtual or digital currency.

The Act does not mention cryptocurrencies specifically but defines in art. 2 (12) “obligated institutions” as

entities conducting economic activity consisting in the provision of services in the scope of:

- (a) exchanges between virtual currencies and legal tender
- (b) exchanges between virtual currencies
- (c) brokering services referred to in (a) or (b)
- (d) keeping accounts enumerated in art. 2 (17) (e).

Accounts referenced in (d) are further defined in art. 2 (17) (e) as “an electronic collection of identification data that provide authorized individuals the possibility of using virtual currency units, including transactions to exchange them.” The Act also defines “virtual currency” in art. 2 (26) and characterizes it in art. 2 (27) as one of the variants of “property value.” Virtual currency is understood to be a “digital mapping of values” that “is exchangeable in the course of trade for legal means of payment and accepted as a medium of exchange, and may also be electronically stored or transferred, or may be subject to electronic commerce.”

“Virtual currency” is a digital representation of value that is not legal tender issued by the NBP, foreign central banks or other public administration bodies; or an international settlement unit established by an international organization and accepted by individual countries belonging to or cooperating with this organization; or electronic money within the meaning of the Act of August 19, 2011 on Payment Services; or a financial instrument within the meaning of the Act of July 29, 2005 on Trading in Financial Instruments; or a bill of exchange or a check. Furthermore, “virtual currency” also needs to be exchangeable in the course of trade for legal tender and accepted as a medium of exchange and may also be electronically stored or transferred or may be subject to electronic commerce.

The Act extends the status of obligated institutions also to “entities conducting business activity consisting in the provision of virtual currency exchange services.” This means that obligated institutions, including virtual currency exchanges and entities that maintain portfolios of these currencies, must apply financial security measures to their clients in accordance with the Act to enable monitoring with a view to detection and reporting of suspicious transactions potentially related to money laundering and terrorist financing. Obligated institutions may use “enhanced security measures” in cases of “greater risk of money laundering or terrorist financing.” Greater risk is indicated by symptoms that include “the customer’s use of products or services conducive to anonymity or impeding identification.” The application of these provisions is subject to verification by GIFl.

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Besides that, the Act sets tasks for the Financial Security Committee, establishes mechanisms to prepare a national risk assessment for money laundering and terrorist financing, defines duties of obligated institutions including implementation of financial security measures, creates and sets an operational framework of a Beneficial Ownership Central Registry,<sup>90</sup> establishes rules for GIFl governing information gathering, information sharing and data protection as needed to fulfill its statutory obligations, and it regulates cooperation between GIFl, foreign FIUs and Europol. It also contains provisions on enforcement action, specifically on suspension of transactions and blocking of accounts, on restrictive measures against individuals, groups and entities, as well as on control of obligated institutions and a set of administrative sanctions to be imposed on obligated institutions that fail to comply with obligations imposed by the Act.

## B. Act on Payment Services

This Act<sup>91</sup> provides in art. 150 for penalties in case of unauthorized provision of payment services or of “electronic money.” A violation carries fines of up to 5 million zloty (~U.S. \$1.5 million) or up to two years imprisonment or both. The same penalty faces whosoever advertises or offers to act without a license as “payment services,” “issuing electronic money,” “payment institution,” “payment services office,” an “electronic money institution” or being “a branch of a foreign payment institution.”

To date, Poland knows no ban on conducting business, including intermediary services for trading, in cryptocurrencies. Transacting or holding virtual currencies is not a violation of Polish or EU law. However, cryptocurrency exchanges that are not themselves licensed to perform payment services must cooperate with one or more financial institutions regulated and supervised by KNF. Virtual stock exchanges must register, typically as LLCs or corporations recorded in the National Court Register (Krajowy Rejestr S dowy, KRS), or, if they represent other organizational structures, in the Commercial Activity Register (Evidencja Działalności Gospodarczej, EDG).

According to the Act’s art. 6, cryptocurrency exchanges do not come under its purview. The services they provide also do not come under the provisions of the Act on Trading in Financial Instruments.<sup>92</sup> But the growing popularity of cryptocurrency ownership creates competitive pressures on traditional banks and they could adversely affect profitability for the entire banking sector over time.<sup>93</sup> Thus, and because of potential risks for statutory



deposit insurance, it remains doubtful whether crypto markets will receive support from government institutions with regard to exercise of discretion or statutory interpretation or policy adaptations, not to mention potential bailouts in the event of a dramatic market downturn, with or without regard to their systemic relevance.

On January 9, 2018, the Council of Ministers adopted draft legislation by the Minister of Finance on amending the Act on Payment Services<sup>94</sup> that represents a fundamental overhaul in light of the new Act on Counteracting Money Laundering and Terrorism Financing.

## V. Conclusion

Legal treatment of cryptocurrencies in Poland follows a familiar pattern of distanced observation, popular enthusiasm, threat perception by the establishment, embarrassing fumbles and hedges, followed by vigorous and rigorous regulation and, ultimately, triumphant taxation. We know that an idea or product has reached maturity when the tax man has turned into a stakeholder, rooting for it.

As for regulatory treatment, the parameters are more complex: Poland has turned into one of the world's crypto markets without having significant regulatory weight independent of the EU. The objective of AML legislation is primarily to avoid U.S. and EU pressure while its market of 40 million is too large to define itself as a niche player like Estonia. Poland has substantial human resources in the digital sphere, and not insignificant entrepreneurial potential, even if it has not left important marks in innovation technology yet. But just as the Warsaw Stock Exchange remains one of the world's fastest-growing and most successful, the largest in CEE, with investors as international as issuers, the same is likely to be true of its virtual exchanges where Poland punches well above its weight in cryptocurrencies. Consequently, and absent a major systemic meltdown in the crypto market, regulatory emphasis will have to be on providing a supportive operating environment while maintaining European standards of policing market integrity. The pace of regulation will likely continue to increase throughout 2018 and beyond, as international standards emerge and blockchain fintech business models evolve further.

**EDITOR'S NOTE:** because of the unique character set required to accurately render the native citations in this article, the version of the article appearing in this issue may not completely reflect the citation in the original article. For additional information or clarification, please contact the article's author, Diane Caytas, at joanna.caytas@srz.com.

## Endnotes

1. *Introduction to ICO*, SCHÖNHERR (2018), <http://knowledge.schoenherr.eu/pg/initial-coin-offering/>; Rocky Mui, Peter Chapman & Allein Sabel, *Initial Coin Offerings—Focus on Key Jurisdictions*, CLIFFORD CHANCE TALKINGTECH (Dec. 5, 2017), <https://talkingtech.cliffordchance.com/en/fintech/initial-coin-offerings.html>; Tony Anderson & Luke Scanlon, *Bitcoin, Blockchain & Initial Coin Offerings. A Global Review*, PINSENT MASON (Nov. 2017), <https://www.pinsentmasons.com/en/media/publications/bitcoin-blockchain-and-ico/>.
2. Warsaw even hosted a major cryptocurrency fair: *Warsaw Summit 2017*, CRYPTOCURRENCY WORLD EXPO (Dec. 1-2, 2017), <https://cryptocurrencyworldexpo.com/warsaw-summit-2017/>; Lana Smiley, *Poland is Moving Towards Embracing Bitcoin and Blockchain Technologies*, COINIDOL (June 12, 2017), <https://coinidol.com/poland-is-embracing-bitcoin-and-blockchain-technologies/>.
3. *"Bitcoin i Blockchain w Polsce. 'Blockchain wszedł na salony i ma sie całkiem dobrze"*—Tomasz Kibil" [*Bitcoin and Blockchain in Poland. "Blockchain Entered the Salons and Is Doing Quite Well"*—Tomasz Kibil], KRYPTOPOMOCNIK (Jan. 26, 2017), <https://kryptopomocnik.pl/bitcoin-i-blockchain-w-polsce/>.
4. One widely remembered hilarious example was German Kaiser Wilhelm II who remarked in 1886 at the cradle of the combustion engine: "I do believe in the horse. The automobile is no more than a transitory phenomenon." Tom Chesshyre, *Stuttgart's Mercedes-Benz Museum*, TIMES (London), June 20, 2009, <http://www.thetimes.co.uk/tto/travel/destinations/germany/article1735441.ece#>. Alas, disruptive technology is never "transitory"—until its own obsolescence.
5. One of the numerous problems with historical analogies is that this narrative of the 1637 events in the Netherlands has by itself been proven incorrect, the product of heavy spin and revisionism. See Anne Goldgar, *Tulip Mania: The Classic Story of a Dutch Financial Bubble Is Mostly Wrong*, THE CONVERSATION (Feb. 12, 2018), <http://theconversation.com/tulip-mania-the-classic-story-of-a-dutch-financial-bubble-is-mostly-wrong-91413>.
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