

The Polish Financial Supervision Authority's new approach to cryptocurrency exchanges

At the beginning of this year, the Polish Financial Supervision Authority entered Conquista and Bitclude, which operate cryptocurrency, into the register of small payment institutions. Does this mean a breakthrough in the relationship between the Polish Financial Supervision Authority and companies operating cryptocurrencies exchanges?

Discussion on the legality of cryptocurrency trading

The qualification of cryptocurrency trading activities (as well as the status of cryptocurrencies themselves) has been the subject of fierce debate for some time now. Since mid-2017 we can observe an increase in the activity of supervisory institutions on the subject of cryptocurrencies. In July 2017, the Polish Financial Supervision Authority (further, the "PFSA") and the National Bank of Poland published a joint statement, clarifying that investing in cryptocurrencies is associated with certain risks, such as: the possibility of losing funds (virtual currency) due to theft, the lack of a money-back guarantee from the Bank Guarantee Fund, the high volatility of the price of cryptocurrencies, and the creation of Ponzi schemes relying on the popularity of cryptocurrencies. However, from the very beginning, the PFSA has emphasized that trading in cryptocurrencies does not violate national or EU law in and of itself, and that the operation of cryptocurrency exchanges and markets is legal.

Entry on the list of public warnings maintained by the Polish Financial Supervision Authority

Notwithstanding the above, in February 2018, the PFSA entered the BitBay and Abucoins cryptocurrency exchanges onto their list of public warnings (the so-called PFSA black list). Both BitBay and Abucoins were added to the above list due to being suspected of violating Article 150 paragraph 1 of the Payment Services Act of 19 August 2011 (further, the "Act"). The alleged violation was providing payment services without the required authorization. Since then further cryptocurrency exchanges, such as BitMarket21, BM24, Coinroom, and Ticket, among others, have been blacklisted by the PFSA.

Can the register of small payment institutions be a life-line for cryptocurrency exchanges?

In June 2018, the PFSA published another statement explaining that doing business through cryptocurrency exchanges and markets may involve activities covered by the regulations governing the activities of entities on the financial market, and thus trigger the obligation to obtain the relevant PFSA permits, e.g. permits to provide payment services related to maintaining payment accounts (so-called "virtual purses") and performing those payment transactions specified in the Act.

At the same time, those entities that operate cryptocurrency exchanges or markets, as well as anyone who makes cryptocurrency portfolios available, have become subject to a number of new obligations related to the AML/CFT (anti-money laundering and anti-terrorist financing) and KYC ("know your customer") procedures, including transaction monitoring, and the detection of suspicious transactions and reporting them to the GIIF (the Polish General Inspector of Financial Information) - these changes result from the implementation of the AML IV directive in the Polish legal system.

In order to clarify further doubts with regards to cryptocurrency trading, the PFSA established the Innovation Hub Programme, under which it has since been possible to determine, with input from the PFSA, the legal and organisational framework for such activities.

In January of this year, the PFSA made a breakthrough in its approach to cryptocurrency exchanges – the PFSA entered Conquista and Bitclude, both being companies which operate cryptocurrency exchanges, onto the register of small payment institutions provided for by the Act. Compared to domestic payment institutions, small payment institutions are much easier to set up, and require less expenditure, in financial, organizational and legal terms.

By being entered onto the register of small payment institutions, cryptocurrency exchanges may therefore accept cash deposits and make payments to the benefit of their customers, but cannot store more than EUR 2,000 on a given user's payment accounts at any given time, and the value of a given cryptocurrency exchange's transactions may not exceed EUR 1.5 million per month. Such action by the PFSA seems to be a positive response to the numerous legal doubts related to the operation of cryptocurrency exchanges and markets.

Cryptocurrency derivatives

The PFSA continues, however, to pay close attention to the risks and uncertainties related to investing in cryptocurrency derivatives. In May 2019, a representative of the PFSA, in a statement given to the Polish Press Agency (PAP) on Bitcoin and its derivatives, underlined that the cryptocurrency market is not regulated and supervised like the market in securities, or even financial instruments more broadly. In his statement, the PFSA's representative also pointed out that cryptocurrencies, unlike e-money, do not have a fixed cash value, and that their value is not guaranteed by any entity obliged by law to repurchase cryptocurrencies.

It is worth mentioning that, although cryptocurrencies themselves are not financial instruments, a derivative instrument (such as an option or futures contract), whose price depends on the value of a given cryptocurrency or cryptocurrency index, is a financial instrument (a derivative), as understood by the Polish Act on Trading in Financial Instruments. Therefore, it would be subject to those restrictions related to the offering or trading of financial instruments, including restrictions related to the distribution of contracts for difference to retail clients. In particular, accepting or executing orders to sell or buy derivative instruments based on cryptocurrencies constitutes a regulated brokerage activity, and thus the entity performing such activities - an investment firm - is, among others, an obligation to inform the client about the nature of a given financial instrument and the risks associated with investing in that instrument.

What's next?

Although the limits imposed on small payment institutions (in terms of the amounts held on account or the value of transactions) may prove to be too low for many cryptocurrency exchanges, in the long run, likely leading some of them to apply for a national payment institution license, the recent entry of a number of cryptocurrency exchanges onto the PFSA-maintained register constitutes a form of approval of their activities by the PFSA, and are undoubtedly a step in the right direction.

However, taking into account the statements issued by the PFSA, both in 2017 and May of this year, and also the need to maintain the market's financial security, it is possible that this is the last we will hear from the PFSA on the subject of cryptocurrencies.

If you would like to receive more information about the proposed changes, please contact us.



Agata Szczepańczyk-Piwek
 attorney-at-law, counsel
agata.szczepanczyk-piwek@wkb.pl



Monika Obiegło
 lawyer
monika.obieglo@wkb.pl