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Initial Coin Offerings and the Jurisdictional Challenges under European Union Procedural Law

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Summary:

Initial Coin Offerings (ICOs) are relatively new means to arrange crowdfunding projects powered by distributed ledger technology. ICOs generate multidimensional questions regarding jurisdiction of national courts due to them operating fully digitally on blockchains and the uncertain status of crypto-assets. Observations of jurisdictional issues and potential solutions are made by studying Regulation Brussels I bis and MiCa Regulation and related case-law. The perspective is European Union procedural law focused.

The study results were achieved by conducting a qualitative study of which sources mainly consisted of legal documents and case-law but also benefitted from scholarly works. By utilizing systematic literature review and interdisciplinary research, it was possible to draw conclusions of the current legal state of ICOs.

As result, it was found that MiCa Regulation may ease establishing jurisdiction in courts of Member States under certain circumstances. MiCa Regulation sets obligations to all actors on crypto-asset markets, some of which require crypto-asset providers to have a registered office in the Union and to concentrate administration in the Union. The thesis also gave an insight into two special connecting factors for jurisdiction: the place of performance of a contractual obligation and consumer contracts. With respect to the place of performance, it was found justifiable that the place of performance can be the Member State from which the investor engages in the crowdfunding project and token subscription. As for consumer contracts, it was established that interpretation of consumer status remains immutable even though investors may be acquainted with ICO investments in general.

Key words: jurisdiction, Brussels I bis, Initial Coin Offerings, MiCa Regulation, European procedural law

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Abbreviations

Brussels I bis – Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

DAO – Decentralized Autonomous Organization

the ECJ – the European Court of Justice

ICO – Initial Coin Offering

MiCa Regulation – Regulation (EU) No 2023/1114 on markets in crypto-assets

TEU – Treaty of the European Union

TFEU - Treaty of the Functioning of the European Union

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1 Introduction

1.1 Purpose and scope of the study

ICOs are an application of distributed ledger technology and are published to the public through blockchains. ICOs stand for initial coin offerings which are a digital, semi-decentralized method to arrange crowdfunding, the aim of which can vary. In simplicity, ICOs give a means to raise funds for the purpose of a start-up and as remuneration the investors will receive crypto-assets, the functions of which can be different. Although Bitcoin has existed since 2008 and different altcoins have been presented to the markets ever since, it seems that these blockchain powered applications can have unforeseeable implications which also call for specification of interpretation of legal rules. Since its generation in 2013, ICOs have received backlash from wide-scale scams which are prone to discredit them as a means for raising funds. E.g. Onecoin was one of the greatest ICO-based scams managing to steal 50 million USD from investors.¹ The large-scale risk of falling victim to possible scams motivates us to establish clear and distinct rules for jurisdiction in all Member States of the European Union. However, the more profound underlying factor to conduct this study is the vague status of crypto-assets and how they are perceived in contractual disputes. Access to justice is one of the key principles of Regulation (EU) No 1215/2012 and overall, the Union, so it is reasonable to locate the main issues arising from civil disputes with a relation to ICO investment agreements.

The purpose of this study is to answer the inherent question of what kinds of jurisdictional issues are stemming from the current form of ICOs and the future advancements to come. Further, this study aims to provide solutions which could be applied to tackle the jurisdictional issues recognized. The scope of the analysis is limited to observation of the general basis for jurisdiction as set out in Article 4 of Regulation (EU) No 1215/2012 (Brussels I bis) and special grounds for jurisdiction as set out in Article 7 and 17 of Regulation (EU) No 1215/2012.

Considering the long-standing absence of jurisdiction with respect to crypto-assets, the establishment of rules for interpretation as to ICOs can benefit from the newly accepted and verified Regulation (EU) No 2023/1114, the Regulation on markets in crypto-assets (MiCa Regulation). For the purpose of providing solutions to jurisdictional issues found, the possible

¹ Tomasicchio, Amelia, 5 Notorious Cryptocurrency Scams. Referred 18.5.2026.
<https://bitcoinchaser.com/top-5-cryptocurrency-scams>

implications of MiCa Regulation will be investigated and applied with the issues presented. Overall, the study will view the European Union regime and its current state with regard to ICOs.

1.2 Materials

To serve the purpose of the study it was crucial to locate and collect suitable and relevant sources of information from which the analysis could be conducted and conclusions drawn from. Given the purpose to conduct a judiciary study, the main source of information had to be the European Union official sources including two regulations and their preparatory work: Regulation (EU) No 1215/2012 and Regulation (EU) No 2023/1114. As the Union legislation is objective oriented it has implications for the interpretation of the aforementioned regulations. The teleological interpretation can be found in preliminary rulings given by the European Court of Justice. The applicable preliminary rulings with opinions of Advocate Generals create the majority of interpretational data and core to the conclusions drawn by the systematic literature review. The preliminary rulings employed for this purpose in this study are too many in number to be listed here but will be namely referred to in body text.

The emphasis of sources utilized in this study is on the official sources and legal documents. However, to conclude a sensible qualitative judiciary study it is necessary to expand the study to scholarly works and existing studies that have laid down some groundwork for the topic being studied. The criteria for the scholarly works to be included in this study was to provide a perspective and insight into either the functionalities of ICOs and generally crypto-assets or the legal field of crypto-assets within and outside the Union. Given the fast-paced nature of technological development the scholarly works were also inspected from the perspective of newness, giving value to the release dates when making a risk assessment to avoid biased outcomes.

1.3 Methodology

This judiciary study employs qualitative research methodology e.g. by utilizing systematic literature review to analyze existing case-law, proposals for Union frameworks, and relevant studies. The study follows the steps of systematic literature review starting from the determination of the study question and priori specification of subgroup hypotheses, followed

by the collection and extraction of relevant data with the risk analysis of biased outcomes, and eventually leading up to drawing conclusions.²

The approach on the study subject is interdisciplinary for the purpose of deepening the understanding of the technologies involved in the jurisdictional issues showcased here, and to be able to address such issues from the perspective of technological development. To fulfill the cause, different studies from the technological field were collected and in order to draw neutral conclusions, different types of perspectives were sought so that the divergence between the scholars' study results could be studied to draw critical conclusions.

Although this juridical study focuses on the European Union regime, it also aims to create a review of the current field of crypto-assets by utilizing comparative law analysis in a small-scale manner. This is for the purpose of recognizing the differences of treatment regarding crypto-assets.

The analysis method on the research data respects the teleological approach to the Union laws and regulations meaning that a provision is studied in the light of the purposes and objectives of the Union. The Union principles and objectives are vital with respect to teleological interpretation and are referred to in situations in which the ambiguity calls for broadening of interpretation from the legal wording.

1.4 Initial coin offerings (ICO) – terra incognita

1.4.1 ICOs as an application of distributed ledger technology

This chapter will cover the technical aspects of initial coin offerings, and more specifically the question of how the characterization of ICOs may impact their legal analysis. Legally speaking, the underlying issue with ICOs is twofold: Foremost, characterizing them is not unambiguous due to their virtuality and their differing aims. Secondly, ICOs pose a notable challenge to the relevant regulatory rules and their flexibility because ICOs are not bound to any territorial or geographical boundaries due to operating on public blockchains.

² *Brignardello-Petersen et al*, Systematic reviews of the literature: an introduction to current methods.” American Journal of Epidemiology, 536.

ICOs have been characterized by various studies.³ Some of them highlight the nature of tokens which are offered to subscribers as a crowdfunding method, and others are tackling with the question of the nature of transactions taking place: Can there be an investment if the goods are not exchanged against fiat currencies, or are the transactions only barter?

Simply explained, initial coin offerings or shortened ICOs are an application powered by distributed ledger technologies. ICOs use *white paper* as a prospectus for potential subscribers and typically *smart contract* as a transaction protocol to automatically execute and monitor the project taking place. According to *Ortolani*, the term white paper refers to the outlines of technical solutions and terms which enable development of the project and proceedings towards the main aim. Ortolani asserts that white paper is an inherent tendency towards judicialization as blockchains rarely depend on central authority but on a peer-to-peer based community.⁴ Smart contracts, on the other hand, can be defined as codified programs implemented in blockchains and can have differing functionalities. The most relevant common trait in the eyes of ICOs are automated transactions which take place when a contract is fulfilled as agreed.⁵

In practice, an investor subscribes to a certain number of tokens which can have monetary features or security-like features – the rights given to an investor are laid down in the *white paper*. By subscribing to a certain number of tokens, the investor's digital wallet sends the amount of the requested digital currency to the smart contract address. The smart contract monitors the number of subscribed tokens, and if the minimum number of tokens, which is determined beforehand in the white paper, is met, the smart contract automatically sends the collected digital currency to the issuer of ICO and registers the tokens into the account of investors. There are two differing main aims for ICOs: the first one is to carry out a new cryptocurrency into circulation, and the second is to allocate the collected funds to project

³ See e.g. *Zetzsche et al.* The ICO Gold Rush: It's a scam, it's a bubble, it's a super challenge for regulators, 6–7. *Zetzsche et al.* recognize the many forms of ICOs, and tokens may exhibit varying rights granted to participants. See also *Barsan*, Legal Challenges of Initial Coin Offerings (ICO), 56. *Barsan* emphasizes that the divergence of characterizations is because some regulators approach ICOs as movable property and some as commodities to extend the existing regulations to ICOs.

⁴ See *Ortolani*, The impact of blockchain technologies and smart contracts on dispute resolution: arbitration and court litigation at crossroads, 431.

⁵ See also *Kaisto et al.*, Lohkoketjujuridiikan perusteet, 41–42; Interestingly, a smart contract may not only rely on information it receives on blockchain but it can also gather information from an outsiders which are typically called oracles.

financing.⁶ Therefore, ICOs can be allocated effectively to raise funds for developing projects or applications on a blockchain.

As mentioned, tokens offered in ICOs represent a right of some sort. *Zetzsche et al.* recognize at least three main types of tokens: usage tokens, community tokens, and financial assets. The latter can be furthermore divided into currency tokens and equity tokens.⁷ Barsan has on the other hand approached the issue from the point of view of whether the token at hand incorporates more monetary features and is used as contractual money, or if it holds security-like features.⁸ *Kaisto et al.* review ICOs firmly in their study by asserting that tokens used in ICO can be original cryptocurrencies, such as Ether or Bitcoin but not necessarily. They further assess the possibility of having a token which holds no substantial value in the real world but is merely used for payments as a tender. They also differentiate contractual and blockchain bound tenders from tokens which are meant to represent a known value or right, e.g. a certain number of tokens representing the right to a certain amount of money in fiat currency.⁹ Considering the aim of this study, it will be assessed how the characteristics of a token may affect the legal analysis of jurisdiction when the object is not bound to state boundaries.

The significance of token characterization relates to determining the set of applicable provisions and norms, and once they have been established, it is reasonable to tackle the jurisdictional issues. The forementioned financial assets, and more specifically currency tokens upbring the question of whether they are considered money in the legal sense of the term. It is laid down in art. 3 (4) TEU that the Union (EU) establishes an economic and monetary union whose currency is the euro. Therefore, in certain countries, the law imposes the accepted fiat currency within the given market and requires the prices to be labelled in the accepted fiat currency with regard to consumers. In her study, Barsan argues that cryptocurrencies cannot be inferred as money – at least in the strict legal sense. Barsan continues by stating that regardless of volatility of cryptocurrencies and limited acceptance as a medium of exchange, it cannot be ignored that cryptocurrency does not have any other function other than serve as a means of payment.¹⁰

⁶ *Barsan*, Legal Challenges of Initial Coin Offerings (ICO), 54–55.

⁷ *Zetzsche et al.*, The ICO Gold Rush: It's a scam, it's a bubble, it's a super challenge for regulators, 7-8.

⁸ *Barsan*, Legal Challenges of Initial Coin Offerings (ICO), 56.

⁹ *Kaisto et al.*, Lohkoketjujuridiikan perusteet, 50. See also p. 51, where the author represents the commonly used foundation for tokens. Usually, the issuing party uses *Ethereum* to carry out ICO as this platform holds a variety of applicable Token standards which can be included in smart contracts.

¹⁰ See also *Barsan*, Legal Challenges of Initial Coin Offerings (ICO), 57: The author compares the exchange of cryptocurrencies to original barter. As conclusion, Barsan states that the exchanged goods can be used for themselves in barter transactions. The same cannot be said about cryptocurrency transactions.

Having presented the versatility of tokens that are exchanged through ICOs, it is yet to be assessed if the term *money* makes a difference in jurisdictional assessment. It must be noted that tokens which hold monetary value in a fiat currency give the holder of the token, e.g. investor, a claim against the issuer of ICO. Tokens, given they hold monetary value that can be determined, can also contain a right to be redeemed after a certain period. These two preceding conditions make the idea of making investments in ICOs possible. If the token used for exchange against other cryptocurrency is not inferred as money, the exchange is not an investment but only a barter. If the token was regarded as a transferable security or more expansively a financial instrument, the person or persons carrying out the ICO would be deemed as issuers of securities.¹¹ It is also worth mentioning that many types of tokens fall under the provisions of the *Regulation (EU) 2023/1114* alias Markets in Crypto-Assets Regulation, which contributes to the discussion of consumer rights in civil disputes. Consumer rights amongst other contractual disputes will be discussed in the following chapters in this study.

1.4.2 The challenges posed to litigation and jurisdiction by ICOs

In the previous chapter, it was shortly covered how ICOs work in practice and how tokens offered through them can be characterized. The emphasis is turning to the question of defining how jurisdictional issues can arise from ICOs. As covered, ICOs are powered by distributed ledger technologies and are usually being carried out on blockchains which are a form of distributed ledgers. Most of ICOs have been executed on Ethereum which enables e.g. the creation of smart contracts, launching new crypto-assets, and distributed applications.¹² Blockchains can be characterized not only as databases but also as technology with digital trust. Allegedly, the term was proposed for the first time in 1982 but blockchains truly emerged to the public in the year 2008 with the deployment of the first digital currency – bitcoin.¹³ Simply put, blockchain can be understood as a virtual space relying on a peer-to-peer based community securing the transactions taking place there and having no central authority to store data or control transactions. Instead, every node participating in a blockchain has an immutable

¹¹ See *Kaisto et al.*, Lohkoketjuriidikaan perusteet, 59–60. The authors argue that determining the nature of tokens and the responsibilities arising from providing them can be problematic. Firstly, it is not unambiguous whether a token is deemed to be a transferable security or some other type of financial instrument. Secondly, EU member states have already differed legislations regarding financial instruments.

¹² See for reference *Kaisto et al.*, Lohkoketjuriidikaan perusteet, 51. The authors argue that Ethereum is the most common platform for creating new tokens and there has been invented several different ‘Token standards’ to enable to support different intended functionalities.

¹³ *Paul et al.*, Blockchain technology and its types – a short review, 3.

copy of the data in that sense that altering or tampering information stored in the blocks of the blockchain is challenging. *Paul et al.* have presented a more elaborate definition of blockchain in their study: Blockchain's main use is carrying and transferring transactions or exchanging information through a secure network. Regardless of the type of blockchain, it consists of a cluster of nodes working on the peer-to-peer network system, and each of them have a timely updated copy of the data stored in the shared ledger. Therefore, the nodes initiate, receive, and verify all the transactions and can follow them up.¹⁴

ICOs can be carried out on public blockchains which implies the nature of the network being open and decentralized. The participants can be therefore spread out across the globe, which will result in permanent conflict of laws and jurisdictions let alone the fact that both issuers of an ICO and subscribers can be located anywhere. The 'launching pad' i.e. blockchain does not have any territorial or geographical limits or boundaries.

Regulation No 1215/2012 alias *Brussels I bis*¹⁵ contains the most relevant provisions for determining jurisdiction in transnational civil disputes from the European perspective. In these transnational disputes, Regulation Brussels I bis recognizes both contractual and extracontractual disputes, which means there are also connecting factors for both contractual matters and tortious matters in the regulation. The general rule for jurisdiction is that persons domiciled in a Member State can be sued in that Member State regardless of their nationality as has been set out in Art. 4 (1). If a person is not domiciled in a Member State, "the jurisdiction of the courts of each Member State shall - - be determined by the law of that Member State." This means in practice that the defendant's domicile must be known in civil disputes to sue.

The domicile of the defendant may become a demanding obstacle by virtue of the nature of the ICO launching process. ICOs can be decentralized or pseudonymous by nature if they are carried out by anonymous teams or DAOs. DAO is short for *Decentralized Autonomous Organization* meaning that there is a blockchain-based entity governed by smart contracts and collective decision-making instead of having actual centralized leadership. In order to determine the domicile of a party by the rules of Brussels I bis, the provisions set out in Article 63 shall be followed. The domicile of a legal person shall be defined autonomously so as to

¹⁴ See also *Paul et al.*, Blockchain technology and its types – a short review, 4. Blockchain technology is commonly classified into: public blockchain, private blockchain, and hybrid blockchain.

¹⁵ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

make common rules more transparent and avoid conflicts of jurisdiction.¹⁶ For the purposes of Regulation Brussels I bis, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat; central administration; or principal place of business (Art. 63). A legal person is considered domiciled in a Member State if any of the three criteria are met.

Due to the objective of this study, it is reasonable to lay out the potential obstacles which arise from the definition of the domicile of a legal person. First, opaque situations arise when the issuer is e.g. a decentralized DAO. This is due to the lack of harmonization of the legal status of DAOs. For example, the state of Wyoming (US) has allowed DAOs to be formed as a limited company and therefore gaining the status of a legal person starting from the year 2021. Due to the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States of America of October 29, 1954, the law in Wyoming has concrete legal implications in Germany and a DAO is recognized a limited company there too.¹⁷ The lack of harmonized legal framework on the EU level is consequently adding to the complex pattern. It can be argued that in opaque situations, where it is impossible to draw a line whether a DAO or a pseudonymous group is considered a legal person, the claimant will have to invoke jurisdiction by the special rules for jurisdiction in Brussels I bis.

If the issuer can be tracked down and is considered a legal person, the issue can be the lack of concrete presence in the EU region. The claimant would have to search for indicators of central administration of the issuing party or their principal place of business. If it can be ascertained that the defendant legal person carries out business activities in a certain Member State, then it would be for the defendant to show that they are domiciled elsewhere as the ECJ has established in Judgment *Club la Costa*.¹⁸

The issues arising from the decentralized and open nature of blockchain and ICOs can be categorized as follows: figuring the domicile of the defendant, distinguishing contractual and tortious matters; defining the place of performance, or the place where the harmful event occurred, or where the event giving rise to it occurred; and distinguishing consumers from other potential subscribers of tokens.

¹⁶ The autonomous interpretation of the domicile of a legal person has existed before Regulation 1215/2012 as it was already set out in the proposal for Regulation 44/2001.

¹⁷ *Mienert*, How can a decentralized organization (DAO) be legally structured, 3.

¹⁸ See ECJ September 14, 2023, C-821/21 *NM v Club La Costa (UK) plc, sucursal en España et al.*, ECLI:EU:C:2023:672, para. 31.

When determining the domicile of the defendant, it needs to be defined who are the persons liable for launching the ICO and publishing the white paper, which may not be an unambiguous obstacle to tackle if the persons are working from behind of pseudonyms and are dispersed in different countries. As discovered, the plaintiff may need to invoke jurisdiction based on special rules for jurisdiction if they cannot ascertain whether the issuer is a legal person, or if the issuer's domicile cannot be figured.

Consumer contracts are included in the Regulation Brussels I bis in the art. 17-19. It is necessary to establish if these provisions are applicable when an ICO is launched. In the art. 17(1) consumers are described as persons concluding contracts outside their trade or profession. ICOs give rise to ambiguous situations when the object of assessment is whether the issuer is pursuing commercial or professional activities or directing such activities to the Member State of the consumer's domicile. ECJ has constituted matters which are capable of constituting evidence from which it may concluded that the person's activities are directed to the Member State of the consumer's domicile, such as the international nature of the activity, use of currency or language other than the generally used one in the Member State in which the issuer is established, or mention of phone numbers with an international code.¹⁹

To conclude, ICOs give rise to multilayered jurisdictional questions in the Member States. Some of the obstacles are rooted in the decentralized and open nature of the blockchain and which also ascertains the ambiguous situations presented before. The following chapters discuss the Regulation Brussels Ibis and the ECJ preliminary rulings expansively and how one is supposed to interpret the applicable provisions related to ICOs and liability in contractual civil disputes.

¹⁹ ECJ December 7, 2010, C-585/08 Peter Pammer vs. Reederei Karl Schlüter GmbH & Co KG and C-144/09 Hotel Alpenhof GesmbH vs. Oliver Heller § 93. It is worth mentioning that the list is non-exhaustive but it is always up to the national court to ascertain whether evidence exists.

2 EU Regulation on jurisdiction, enforcement, and recognition of judgments

2.1 General provisions and special jurisdiction in Brussels I bis

2.1.1 Territorial and material scope

It is written down in recital 6 of the preamble of Brussels I bis that to attain the objective of free circulation of judgments in civil and commercial matters, the Union shall have a binding and directly applicable legal instrument which will govern the rules over jurisdiction and the recognition and enforcement of judgments. Given the principle of mutual recognition of judicial decisions, the Union engages in measures of judicial cooperation to facilitate access to justice and enhance the proper functioning of the internal market (§ 3). Even though the territorial scope of Regulation Brussels I bis contains the Member States of the Union there is an exception which is imposed in art. 68(1): “This Regulation shall, as between the Member States, supersede the 1968 Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.”

Besides the territory of the Union there must be a connecting factor between the proceedings to which Brussels I bis is applicable and the Member States in order to apply Regulation as stated in § 13 of the preamble. Common provisions of jurisdiction shall apply when the defendant is domiciled in a Member State, which means in practice that the common connecting factor is the domicile of the defendant.²⁰

General provisions regarding the jurisdiction of Regulation Brussels Ibis are laid down in *Chapter II: Jurisdiction* in art. 4, 5, and 6. According to art. 4 (1) persons domiciled in a Member State shall be sued in the courts of that Member State regardless of their nationality. If persons domiciled in a Member State are not nationals of the said Member State, they will be governed by the rules of jurisdiction applicable to nationals of the Member State (art. 4 (2)). Further, according to art. 5 (1) persons domiciled in a Member State may be sued in the courts of another Member State by virtue of the rules set out in Sections 2 to 7 of *the Chapter II* of the Regulation.

²⁰See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Preamble (15): Jurisdiction is to be generally based to support the principle of transparency and predictability. The other connecting factors shall be applicable only in well-defined situations.

If the defendant is domiciled somewhere else than a Member State, “the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State” (art. 6 (1)). In general, the defendant would be a subject of to the national rules of jurisdiction applicable in the territory of the Member State of the court seized as stated in recital 14 of the preamble.

As set up previously, the defendant’s domicile is not an exclusive connecting factor but there are alternative grounds of jurisdiction. The close connection which determines jurisdiction must uphold the principle of legal certainty and reasonability because reasonable foreseeability of the location of litigation is crucial as set out in recital 16. In relation to ICOs the emphasis is on constituting alternative grounds of jurisdiction and therefore reasonably foreseeable connecting factors because of transnational nature of transactions taking place in blockchains.

There are provisions with which Regulation may ensure the protection of weaker parties such as employees and consumers. Therefore, there are rules of jurisdiction which shall apply regardless of the defendant’s domicile. Consumer contracts are subject to the exclusive grounds of jurisdiction which means in practice that the parties will have only limited autonomy to determine the courts having jurisdiction. The connecting factors which become grounds for jurisdiction take into consideration the principle of protection of the weaker party. In the context of ICOs *click-wrap agreements*²¹ can be used to obtain consent from investors, which may become a relevant factor if investors are deemed to be consumers. As the click-wrap agreements can contain choice-of-court agreements it is relevant to notice situations awoken by ICOs that possibly call for the exception of the general *lis pendens* rule. The exception does not cover situations where the parties have agreed upon exclusive choice-of-court agreements, or an exclusively designated court has been seized first. The exception is to ensure that the designated court has priority to evaluate the validity and the extension of validity of the said choice-of-court agreement.²² The question of click-wrap agreements in ICOs will be discussed e.g. with the case of *Jaouad El Majdoub v CarsOnTheWeb.Deutschland*.²³

Having covered the territory where Brussels I bis applies and the different grounds for jurisdiction, the material scope is yet to be discussed. As stated in art. 1(1) Regulation applies to

²¹ Simply put, click-wrap agreement is a digital contract which is not signed but consent is given by clicking a button or a checkbox:” I agree” click. A relevant legal issue with click-wrap agreements is how persons can express explicit consent if it is given by a singular tick-in-a-box.

²² See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Preamble (22).

²³ ECJ May 21, 2015, C-322/14 *Jaouad El Majdoub v CarsOnTheWeb.Deutschland*.

civil and commercial matters whatever the nature of the court or tribunal but not extending to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*). It has already been set up in recitals 10 and 11 of the preamble that Regulation is meant to be applied widely in civil and commercial matters also acknowledging the term court extensively – including also courts or tribunals common to several Member States.

Brussels I bis is not applicable to arbitration (art. 1(2)(d)). Yet Brussels I bis does not prevent a court of a Member State from examining whether an arbitration agreement is null and void in accordance with the national law. It is worth noting that a ruling given regarding an arbitration agreement is not subject to the rules of recognition and enforcement. If a court had decided an arbitration agreement is null and void, it would not preclude the said court's judgment on the substance of the matter.²⁴ The question of validity of an arbitration agreement may appear intriguing in relation to ICOs: An arising trend is to use smart contracts as vessels for pre-agreed methods for dispute resolutions. Due to the possibility of being null and void in accordance with national law, it is worth studying how these pre-agreed methods will change the assessment of jurisdiction. The other exceptions for applying Brussels I bis are imposed in art. 1(2).

2.1.2 Contractual disputes, especially regarding consumer contracts

As covered in the previous chapter, one must be always able to invoke jurisdiction based on the domicile of the defendant considering predictability as one of the objectives of Regulation Brussels I bis. However, there are exceptions to the general provisions for which there are certain requirements that must be met to apply these special provisions.

In matters relating to a contract a person domiciled in a Member State may be sued in another Member State in the courts for the place of performance of the obligation (art. 7 (1)(a)). Unless otherwise agreed, the place of performance refers to the Member State where goods were delivered or, were ought to be delivered in the sale of goods, or where services were provided or were ought to be provided in the sale of services (art. 7 (1)(b)). If the latter does not apply, then art. 7 (1)(a) applies.

²⁴ See Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Preamble (12).

It has been established by ECJ that the concept ‘matters relating to a contract’ does not necessarily require the conclusion of a contract to exist but for the said provision to apply, there must be an identifiable obligation since the jurisdiction is determined by the place of performance of the obligation in question. Provision 7 (1) is not to be understood covering situations where there is no obligation freely assumed by one party to another. This rule of special jurisdiction for matters relating to a contract expects the establishment of a legal obligation into which parties have entered with consent and on which the claimant’s action is based.²⁵ Besides, Advocate General Bot has given his stance on the topic in Judgment *Profit Investment SIM*: “The causal link between the right to restitution and the contractual relationship is sufficient to bring the action for restitution within the scope of matters relating to a contract.”²⁶ That is if there was a freely assumed obligation which leads to an act of performance and therefore constitutes the right for restitution.

The ECJ interpretation has remained immutable with respect to the understanding of the concept of ‘matters relating to a contract’. In relation to contractual obligations the ECJ has referred to its own case law various times, e.g. to C-375/13 *Harald Kolassa v Barclays Bank plc.*, C-419/11 *Česká spořitelna, a.s. v Gerald Feichter*, C-27/02 *Petra Engler v. Janus Versand GmbH*²⁷, and C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*²⁸. It can be concluded from the existing case law that an identifiable obligation is essential for the application of art. 7(1) and if one does not prevail, the jurisdiction must be based on either the general ground for jurisdiction or on extracontractual grounds.

An insightful question is to ask how studying the established concept of contractual obligations further relates to ICOs and investments made there. Token subscription can take place in the primary market or secondary market, which contributes to the discussion by distinguishing the different contractual parties operating on different levels and possibly distinguishing the situations in which rules for special jurisdiction for consumer contracts may apply. The provisions for consumer contracts presuppose the conclusion of a contract whereas art. 7(1) does not.

²⁵ See ECJ January 28, 2015, C-375/13 *Harald Kolassa v Barclays Bank plc.*, p. 10 para. 37, 39. See also the recited ECJ March 14, 2013, C-419/11 *Česká spořitelna, a.s. v Gerald Feichter.*, p. 8 para. 46-47.

²⁶ *Opinion of Advocate General Bot*, April 23 2015, C-366/13 *Profit Investment SIM SpA v Stefano Ossi and Others*, p. 14, para. 80.

²⁷ See ECJ January 20, 2005, C-27/02 *Petra Engler v. Janus Versand GmbH*, para. 50

²⁸ See ECJ September 17, 2002, C-334/00 *Fonderie Officine Meccaniche Tacconi SpA v. Heinrich Wagner Sinto Maschinenfabrik GmbH (HWS)*, para. 22.

In matters relating to consumer contracts jurisdiction is determined by articles 17, 18, and 19 of Section 4 of Brussels I bis, without prejudice to Article 6 and point 5 of Article 7 if the contract is for the sale of goods on instalment credit terms or for a loan repayable by instalments, or in all other cases the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities (art. 17(1)).

According to art. 18(1) the consumer may bring proceedings against the other party of the contract either in the court of the Member State where the party is domiciled or in the courts for the place where the consumer is domiciled. On the other hand, the other contract party may bring proceedings against the consumer only in the courts of the Member State in which the consumer is domiciled (art. 18(2)).

Whenever an investor desires to invoke jurisdiction on the basis of special provisions laid down in art. 17 and 18, they must enjoy the status of a weaker contractual party, and the action brought against the other party must be against the professional concerned with whom the consumer has concluded the contract. It must be understood that applying these rules of special jurisdiction for consumer contracts is rather strict considering art. 17 constitutes derogation from the general rule of jurisdiction which is founded on the principle of jurisdiction being generally based on the defendant's domicile.²⁹

The concept of 'the other party', which is referred to in art. 18, has been established in the case law of the ECJ. In Case *Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH* the referring court has asked if the concept of 'the other party' laid down in art. 16(1) of Regulation No 44/2001 must be interpreted as meaning that it also covers, in circumstances such as those at issue in the main proceedings, the contracting partner of the operator which has a registered office in a Member State. The concept of 'the other party' is relevant in the context of ICOs as a single transaction can be divided into several international contractual relationships such as the circumstances in Case Maletic indicate: The plaintiffs had booked and paid a package holiday through the online travel agency but also made a secondary contractual agreement with the travel operator. Consequently, the second contractual relationship could not have been inferred as domestic as the first contract had been made

²⁹ ECJ January 28, 2015, C-375/13 Harald Kolassa v Barclays Bank plc, p. 2 para. 11. The Court has underlined that the rules of jurisdiction must be highly predictable, and jurisdiction must be available on the ground save – that being the defendant's domicile.

through the travel agency located in another Member State.³⁰ These two contracts mentioned were inseparable. The ECJ has concluded that the key objective of minimizing the possibility of concurrent proceedings and therefore ensuring that irreconcilable judgments will not be given in two Member States must be considered. Therefore, in circumstances in which the secondary contract is transnational in nature the *other party* covers both the contracting party and the operator – given that the consumer has contractual relationship with both and they are inseparable.³¹

Given the fact that the consumer concludes a contract with the other party it still needs to be established if the consumer can truly be considered a consumer within the meaning of art. 17(1). Further, it is to be studied in which cases obligations truly stem from a consumer contract. The analysis with respect to consumer status is now going to divert to studying commerce on the primary and secondary market. The party, with whom the subscriber has concluded a contract, may make a difference in this sense: The tokens can be acquired from either the original issuer or an intermediary.

To invoke jurisdiction based on Regulation No 1215/2012 art. 17(1) three conditions must be fulfilled. There must be an individual person engaged in activities outside his trade or profession. Second, the right of action must relate to a consumer contract concluded by a consumer and a person pursuing commercial or professional activities. Third, the contract concluded must fall within the scope of art. 17(1)(a) to (c). The article is not given broad interpretation because the concept ‘contract concluded by consumer’ is independent of categorizations of national law and the special ground for jurisdiction is notably an exception to a general rule. Therefore, the sole intention to participate in an investment operation launched by an issuer is not enough by virtue of the actual wording of art. 17(1) and the precedent art. 15(1) of Regulation No 44/2001. Advocate General Szpunar has given his opinion on how ‘contracts concluded’ should be interpreted in Case Kolassa: The question was about whether Kolassa, an Austrian consumer, had concluded the contract with Barclays Bank which launched the investment operation by means of a special prospectus. Second, the question was about

³⁰ ECJ November 14, 2013, C-478/12 Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH, p.4 para. 29.

³¹ ECJ November 14, 2013, C-478/12 Armin Maletic and Marianne Maletic v lastminute.com GmbH and TUI Österreich GmbH, p. 6 para. 30-32. Conversely, See Judgments C-274/16 and joined judgments C-477/16 and C-448/16 in which the term ‘the other party’ did not cover a third party as different contractual relationships were separable. Therefore, it is relevant to assess whether different contracts are inseparable.

whether the obligations of the issuing party stem from an actual contractual obligation or from delict.³²

Advocate General's reasoning is based on the fact there was a bearer bond which was concluded with an intermediary – in this case with the bank direktanlage.at AG. This bank had purchased the bond from Barclays Bank, which constituted for Kolassa only the right to the delivery of bill payable to bearer. Kolassa had ought to be regarded as the holder of the bond in the economic sense.³³ Advocate General has taken the view there had been no conclusion of a contract for the purpose of art. 15 of Regulation 44/2001, and consequently the article mentioned did not apply to the case. As a counter argument was presented that the holder of the bearer bond, i.e. direktanlage.at AG, did not assume any economic risk due to the bond.³⁴ Nevertheless, the plaintiff's argument did not contribute to the question of whether Kolassa had concluded the consumer contract with Barclays Bank. Advocate General has further elaborated that accepting jurisdiction of the courts of the Member State where the consumer is domiciled would run counter to the principle of predictability in the prevailing circumstances.³⁵

In Judgment Kolassa the ECJ has ruled art. 15(1) of Regulation 44/2001 is to be interpreted as meaning that the applicant cannot invoke jurisdiction under that provision in circumstances such as those of the case in the main proceedings. Further, the ECJ has elaborated that in circumstances where the applicant has acquired the bearer bond from a third party and the original issuer has not assumed any obligation or risk toward the applicant, the applicant cannot invoke the jurisdiction either based on art. 5(1) of Regulation 44/2001. Article 5(1) is the precedent of art. 7(1) of Regulation No 1215/2012.³⁶

To invoke jurisdiction on the basis of art. 17(1) of Regulation No 1215/2012 there must be a contract concluded between a consumer and the issuer as has been established in the case law. Freely assumed economic risk as the acquirer of the bond does not solely conclude contract between the issuer and the consumer in the sense that the consumer can invoke jurisdiction in the courts of the Member State where they are domiciled. Furthermore, there

³² See also *Opinion of Advocate General Szpunar*, September 3, 2014, C-375/13 Harald Kolassa v Barclays Bank plc, p. 8. The Advocate General has referred to the French title of section 4 of Chapter II of Regulation No 44/2001: 'compétence en matière de contrats conclus par les consommateurs'

³³ *Opinion of Advocate General Szpunar*, September 3, 2014, C-375/13 Harald Kolassa v Barclays Bank plc, p. 7 para. 30.

³⁴ *Opinion of Advocate General Szpunar*, September 3, 2014, C-375/13 Harald Kolassa v Barclays Bank plc, p. 8 para. 36.

³⁵ *Opinion of Advocate General Szpunar*, September 3, 2014, C-375/13 Harald Kolassa v Barclays Bank plc, p. 8 para. 43.

³⁶ ECJ January 28, 2015, C-375/13 Harald Kolassa v Barclays Bank plc, p. 14 para. 1-2.

needs to be an identifiable contractual obligation to invoke jurisdiction based on the place in which a contractual obligation should be fulfilled. The ECJ has given a broad meaning to ‘matters relating to a contract’. Yet, it has also been established even before Case Kolassa that the phrase ‘matters relating to a contract’ is not to be understood covering situations in which there is no obligation freely assumed by one party towards another.³⁷ Situations in which there are distinguishable chained contracts may become complex in that sense that there are multiple identifiable obligations in relation to different parties on various levels.

2.2 Prorogation of jurisdiction with choice-of-court clauses

Another question at stake is whether a *choice-of-court clause* included in the prospectus (*white paper*) is binding in relation to an investor. Given that ICOs are launched in the digital environment the issuing parties may rely on jurisdiction clauses included in T&C provisions and click-wrap agreements. As presented previously, there may be multilevel conduct of contract, which means there can be more than two parties linked in a contractual relationship or at least in a legal relationship. Usage of jurisdiction clauses have been covered in multiple ECJ preliminary rulings, such as in Judgment *Profit Investment SIM SpA v Stefano Ossi and Others*.³⁸

T&C agreements and click-wrapping contain a variety of complexities in relation to ICOs when jurisdiction clauses are contained in them. First, the status of investors may play a relevant part if they are regarded as consumers and therefore governed by the rules set out in art. 17 and 18. Second, the existing case law may not sometimes be applicable in ICO subscription cases depending on the structure of the token subscription process. Third, the enforceability of a choice-of-court clause acts differently in cases where a subscriber has acquired tokens on the secondary market instead of the primary market. In the context of ICOs and token subscription three relevant questions are to be tackled: the question of broadness of trade or commerce, the question of a durable record in click-wrappings, and the question of acquaintance of terms and conditions on the secondary market versus the primary market.

Adding up to the complexity, it cannot be drawn on a general level whether choice-of-court clauses are null and void because that is dependent on the legislation of Member States. In recital 20 of the preamble of Regulation Brussels I bis it is stated that when a question arises whether a choice-of-court agreement in favor of a court or courts of a Member State is null and

³⁷ See ECJ June 17, 1992, C-26/91 Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA (TMCS), para. 15.

³⁸ ECJ April 20, 2016, C-366/13 Profit Investment SIM SpA v Stefano Ossi and Others.

void to its substantive value, such a question shall be resolved in accordance with the national legislation of the Member State of the court or courts designated in the agreement. There is the objective to enhance the effectiveness of choice-of-court clauses and avoid abusive litigation tactics and therefore it has been necessary to establish an exception to the general *lis pendens* rule as mentioned previously in this study. The exception covers situations in which there is a court not designated in an exclusive choice-of-court agreement having been seized subsequently of proceedings involving the same cause of action and the same parties.

Consequently, it is written in recital 22 of the preamble that the first seized court should be required to stay its proceedings as soon as the designated court has been seized and until the latter court declares that it has no jurisdiction under the exclusive choice-of-court agreement.

Regulation Brussels I bis contains the provision of prorogation of jurisdiction which is written in article 25. The preceding equivalent provision was written in article 23 of Regulation No 44/2001. The article enables deviation from the general jurisdictional rules if certain requirements are met. According to art. 25(1) parties, regardless of their domicile, can direct jurisdiction when they have agreed that a court or courts of a Member State are to have jurisdiction to settle a dispute which has arisen or may arise from in connection with a particular legal relationship. That is if such an agreement is not deemed to be null and void as to its substantive validity under the law of the Member State.

The ECJ adopts a key aim following from the case law regarding article 23 of Regulation 44/2001 in judgment *Profit Investment SIM SpA v Stefano Ossi and Others*: The article 23 exists to ensure there is real consent on the part of persons concerned to avoid unilaterally incorporated jurisdiction clauses going unnoticed by the other party or parties.³⁹ Such a clause must be in writing or evidenced in writing (art. 25(1)(a)); in a form which accords with practices which the parties have established between themselves (art. 25(1)(b)); or in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware (art. 25(1)(c)). Any communication by electronic means which provides a durable record is inferred as 'writing' in the sense of art. 25(1)(a). Article 25(2) does not necessarily require such a durable record to exist initially but there should be a possibility of providing a record of the agreement conferring jurisdiction regardless of whether general terms and conditions have been durably recorded.

³⁹ ECJ April 20, 2016, C-366/13 *Profit Investment SIM SpA v Stefano Ossi and Others*, p. 8 para. 39.

It is to be noted the cross-border nature of ICO subscription and how it may alter the evaluation of choice-of-court clauses. The ECJ has indicated in Judgment Profit Investment SIM that it is to be assessed by the referring court whether the contract falls under the heading ‘international trade or commerce’ as in art. 25(1)(c). Further, the referring court should find out if there was a practice in the branch of international trade or commerce in which parties are involved.⁴⁰ For such a determination, the ECJ has provided objective indicators, e.g. in Judgment *Castelletti v Trumpy*: The consent to jurisdiction clause is presumed to prevail when the conduct is consistent with a usage governing the area of international trade or commerce in which the parties operate and of which they are ought have been aware.⁴¹ Whereas publicity is not required for the existence of a usage, it must be assessed whether the course of conduct in question is generally and regularly followed by operators in the branch of international trade or commerce.⁴² The ECJ has reminded that contracts must be inferred as one forming part of international trade or commerce – given the operations in question seem to fall under the heading ‘international trade or commerce’.⁴³

Once the referring court has established if the token subscription falls under international trade or commerce, the question of durability of a record shall be discussed. It is laid down in art. 25(2) in Regulation Brussels I bis that any communication by electronic means which provides a durable record of the agreement is equivalent to ‘writing’. As click-wrapping is becoming more and more common practice for acquiring consent from people online, it is worth studying what kind of legitimacy the ECJ has given to jurisdiction clauses included in click-wrap agreements. Even though the case law studied may not be sometimes applicable depending on the structure of the token subscription process⁴⁴, it still provides further knowledge about the complex choice-of-court clauses. In Judgment *Jaouad El Majdoub v CarsOnTheWeb.Deutschland* the referring court has asked whether click-wrapping so as that a purchaser agrees to terms and conditions by clicking a hyperlink opening a new window meets the requirement of art. 23(2). The equivalent provision is now included in art. 25(2) of Brussels I bis.

As background for Judgment *El Majdoub*, there was a jurisdiction clause conferring jurisdiction to a court in Leuven in disputes such as one in the main proceedings. The applicant took the

⁴⁰ ECJ April 20, 2016, C-366/13 Profit Investment SIM SpA v Stefano Ossi and Others, p. 8, para. 41.

⁴¹ ECJ March 16, 1999, C-159/97, *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA*, para. 20–21.

⁴² ECJ April 20, 2016, C-366/13 Profit Investment SIM SpA v Stefano Ossi and Others, p. 9, para. 45–46.

⁴³ See ECJ April 20, 2016, C-366/13 Profit Investment SIM SpA v Stefano Ossi and Others, p. 8, para. 42.

⁴⁴ See *Ortolani*, The impact of blockchain technologies and smart contracts on dispute resolution: arbitration and court litigation at crossroads, 447.

view that the clause could not have been invoked against him. The reasoning was based on the fact that the window containing terms and conditions was not automatically available by the time the applicant opened the site for registration or during a transaction.

The ECJ's stance on interpretation of art. 23 of Regulation No 44/2001 is strict as ensuring real consent is the key aim of the provision. To constitute real consent between the contracting parties there must be a demonstration of willing consent that is clear and precise and the subject of such a demonstration shall be the clause conferring jurisdiction.⁴⁵ Nevertheless, the ECJ does not forbid the idea that consent is given expressly to terms and conditions by clicking a relevant box on the seller's website.⁴⁶ To summarize the ECJ's interpretation, article 25 is independent of a certain way of presentation and terms and conditions accessible on the screen as a form of electronic communications shall be treated equally to terms and conditions provided in a written form.

Yet, electronic communications must offer the same guarantees as information provided in a written form. It means in practice that terms and conditions, including jurisdiction clauses, must be accessible on the screen and the durable record should be accessible before the conclusion of the contract. The latter condition refers to the possibility of saving and printing information regarding the jurisdiction clause in question before the conclusion of the contract. As presented before, article 25(2) does not require a durable record being made automatically but the sole possibility of making one.

Whereas article 25 allows issuing parties to include jurisdiction clauses in click-wrap agreements which are accessible through a link, provisions regarding consumer protection may not be as flexible as the provision portrayed in art. 25 of Regulation Brussels I bis. By virtue of art. 5(1) of Directive 97/7/EC, which has been replaced by Directive 2011/83/EU, the ECJ took the view in Judgment *Content Services Ltd v Bundesarbeitskammer* that a business practice consisting of making information only accessible via a hyperlink on a website does not meet the requirements of providing information to a consumer on a durable medium. According to the ECJ, enclosing information on a website through a hyperlink cannot be regarded as giving information to a consumer nor as receiving information in consumer's end.⁴⁷

⁴⁵ See also ECJ February 7, 2013, C-543/10 Refcomp SpA v Axa Corporate Solutions Assurance SA et al., para. 28.

⁴⁶ ECJ May 21, 2015, C-322/14 Jaouad El Majdoub v CarsOnTheWeb.Deutschland, p. 6, para. 31.

⁴⁷ ECJ July 5, 2012, C-49/11 Content Services Ltd v Bundesarbeitskammer, para. 51. See also Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, Art. 2(10). Durable medium refers to any instrument which enables the consumer or the trader to store

However, consumer protection is not the objective of Art. 25 of Regulation Brussels I bis and therefore it does not constitute an obstacle for using click-wrapping to enclose jurisdiction clauses.

There is also the dilemma of whether the token holder has acquired tokens in the secondary market instead of the primary market and how that changes the assessment regarding jurisdiction clauses enclosed in the prospectus. For such a jurisdiction clause to be binding in relation to a token holder, two conditions must be fulfilled. The first condition is that a token holder has succeeded in the rights and obligations of the primary market purchaser they bought the tokens from, under the applicable national law. The second condition is the so-called acquaintance requirement: a token holder must have had a possibility to acquaint themselves with the contents of terms and conditions included in the prospectus.

information addressed personally to them in an accessible way for the future reference for a period adequate.

3 MiCa Regulation – regulating markets of crypto-assets

3.1 Types of ICOs falling under the provisions of MiCa Regulation

3.1.1 The complexity of categorizing crypto-assets

Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets has been applied in the Member States since 30 December 2024. To understand how MiCa Regulation possibly contributes to the discussion of jurisdictional complexities, it is necessary lay out the different categories regarding crypto-assets – and therefore tokens created for ICOs. For laying the groundwork for the definitions adopted within the EU, one must get acquainted with classifications adopted elsewhere. In this study the existing situation will be compared to the one prevailing in the United States.

In the U.S. cryptos are being treated as a single kind of asset by the classifications made by the regulators. This does not imply coherent alignment between authorities, but differing definitions made by them and which seem to lump all crypto-assets into singular categories establishing jurisdiction for several agencies simultaneously. The situation leads to overlapping regulations and jurisdictions contributing to a setting where no agency has clear jurisdiction.

The SEC, I.R.S, CFTC, and FinCEN classify crypto-assets differently but transactions involving these assets are likely to fall subject to multiple regulatory requirements that do not always align. Seeking to assert jurisdiction by classifying the same assets very differently, the regulatory authorities have developed a confusing and complicated situation where developers, issuers, buyers, and persons facilitating the exchange of crypto-assets must comply with overlapping regulations.⁴⁸

To comply with these regulations there are different rules that different actors must follow. By virtue of the definition adopted by the Financial Crimes Enforcement Network (FinCEN), issuers of crypto-assets may be subject to the rules meant for persons engaged in the business of transmitting and exchanging money even if the crypto-assets are not intended to act as a currency. This is due to the guidance of FinCEN, published in 2013, in which crypto-assets were defined as any medium of exchange without legal tender status. As result, facilitators have

⁴⁸ *Goforth*, U.S. Law: Crypto is money, Property, Commodity, and a Security, all at the Same Time, 2.

become obligated to report to FinCEN and required to engage in AML⁴⁹ and KYC⁵⁰ requirements.⁵¹

As a comparison, the Securities and Exchange Commission (SEC) has adopted the classic Howey test to determine if a crypto-asset is sold as an investment contract. From the Commission's perspective, a crypto-asset is considered a security if the following requirements are met: There is an investment of money or something of value in a common enterprise. Additionally, the investor should expect profits based primarily on entrepreneurial efforts of others. SEC has concluded that most tokens involve sale of securities.⁵²

These two authorities are merely an example of how the regulatory situation unfolds in the U.S. The key finding to be carried out from Goforth's study is that a unanimous approach with aligning classifications would guarantee the most optimal legal certainty for all the parties involved - regardless of the state where new tokens are launched or purchased. As mentioned, conflicting regulations easily contribute to prevailing uncertainty and from the point of view of jurisdictional issues can lead to regulatory gaps. These possible gaps can further encourage issuers of tokens or intermediaries with malicious interests to engage in actions that are not governed clearly by any authority.

The uncertain perception of crypto-assets has led to actions within the EU both on a national level and on a supranational level. Like in the U.S. both regulating and classifying crypto-assets have become somewhat of an obstacle. This is due to the nature of crypto-assets which typically hold hybrid-like features, making them easily subject to several different regulations, directives, or national laws. Another factor to be considered is that the level of regulation regarding ICOs and crypto-assets altogether is fragmented within the EU: Some Member States, e.g. Malta, have an elaborate set of rules on a national level whereas others have refrained from taking a stance on crypto-assets. The situation is similar to the one in the U.S. as some states have remained silent on their perceptions of crypto-assets but there are also states which have differed from the federal approach – e.g. Texas, Massachusetts, New Jersey, and North Carolina have state level regulations which can be applied to cryptos.⁵³ In the context of European Union,

⁴⁹ Anti-Money Laundering.

⁵⁰ Know-Your-Customer.

⁵¹ *Goforth*, U.S. Law: Crypto is money, Property, Commodity, and a Security, all at the Same Time, 2.

⁵² *Goforth*, U.S. Law: Crypto is money, Property, Commodity, and a Security, all at the Same Time, 6.

⁵³ See *Goforth*, U.S. Law: Crypto is money, Property, Commodity, and a Security, all at the Same Time, 7. The author reminds that compliance with federal requirements does not always guarantee compliance on a state level. This is however dependent on the state statute.

fragmentation contributes to lack of unity between the Member States on a field that the Union has regulatory power over.⁵⁴

The EU has recognized the need for mitigation of divergences between the Member States. In the Proposal for MiCa Regulation, it is recognized that divergence in rules and interpretation of crypto-assets hinders the functionality of the internal market, and the uneven playing field for crypto-asset providers consequently increases legal uncertainty. Therefore, it is necessary to have a harmonized and dedicated legal framework for crypto-assets. The framework is to support innovation and fair competition while also guaranteeing a high level of integrity of markets in crypto-assets and protection of retail holders. Such need for harmonization can be also motivated by recognizing the limitations of the existing EU law: E.g. not all crypto-assets are covered by Union legislative acts on financial services.⁵⁵

While it is possible some ICOs fall under the scope of MiFID II⁵⁶, there are still crypto-assets and related services which need to be regulated and governed separately. The perplexity is guaranteed as tokens usually hold hybrid-like features making it complex to define whether MiCa Regulation or MiFID II should be applied to a token. For example, the mere existence of attached profit rights is commonly sufficient for a token to fall under the scope of MiFID II. The following chapters seek to unfold how crypto-assets, to which MiCa Regulation can be applied, are classified, and what kind of implications this new regulation has for jurisdictional issues – let them be direct or indirect.

3.1.2 Material scope and territorial scope

In recital 22, it is stated that “Regulation should apply to natural and legal persons and certain other undertakings and to the crypto-asset services and activities performed, provided or

⁵⁴ Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final is based on Article 114 TFEU, which confers on the European institutions competence to lay down appropriate provisions for the approximation of laws of the Member States that have as their objective the establishment and functioning of the internal market.

⁵⁵ 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, Preamble § 6. See also Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, COM(2020) 593 final, p. 5, where the legal framework is motivated by its positive effects on the internal market, such as reducing administrative burden, financial stability, and an increased level of consumer and investor protection.

⁵⁶ 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 (recast).

controlled, directly or indirectly, by them, including when part of such activities or services is performed in a decentralized manner. - - This Regulation covers the rights and obligations of issuers of crypto-assets, offerors, persons seeking admission to trading of crypto-assets and crypto-asset service providers.” This same scope is laid down in Article 2 of the Regulation.

The scope leaves certain types of crypto-assets outside the provisions of MiCa Regulation. First, providing crypto-assets in a fully decentralized manner without an intermediary makes a crypto-asset fall outside the scope. Second, providing crypto-assets without an identifiable provider makes crypto-assets fall outside the scope but MiCa Regulation remains applicable in relation to service providers of such crypto-assets. Third, crypto-assets lacking relative value and the features of interchangeability and transferability are left outside the Regulation.⁵⁷ Crypto-assets, which typically lack these features, are referred to as non-fungible tokens and are known to hold value based on their unique characteristics and the utility it gives to the holder of the token. Fourth notable exception are financial instruments that are left outside the scope. There are also other crypto-assets and service providers that are not covered by the Regulation but because of the aim of this study not all of them will be discussed.⁵⁸

The MiCa Regulation takes a ‘substance over form’ approach with regards to applicability to crypto-assets. According to recital 18, the crypto-assets are classified into three categories: e-money tokens, asset-referenced tokens, and other than e-money and asset-referenced tokens. Such a classification is adopted in Article 1 in which the subject matter is laid down: Uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets and for crypto-asset providers.

The classification is explained more thoroughly in recital 18 of the preamble. E-money tokens seek to stabilize their worth in relation to other assets. In practice, this typically means that e-money tokens aim to stabilize in relation to one official currency as they are being used electronic surrogates for coins and banknotes. E-money tokens differ from electronic money in the sense that e-money tokens do not automatically guarantee a claim against the token issuer

⁵⁷ 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, Preamble § 10 and 17.

⁵⁸ 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, Art. 2(2).

by virtue of Directive 2009/110/EC. Before MiCa Regulation this could have led to undermining the confidence of holders of such crypto-assets.⁵⁹

Asset-referenced tokens differ from e-money tokens in relation to how they aim to stabilize themselves. Stabilization happens by referencing another value or right, or combination thereof. This can include several one or several official currencies. Tokens which are neither e-money tokens nor asset-referenced tokens cover an opaque set of tokens, including e.g. utility tokens whose value is tied to the service or product within the ecosystem. Due to this tie utility tokens cannot be inferred as investments nor regulated like securities.⁶⁰

Whenever a token falls within the definition of crypto-assets as they are understood in MiCa Regulation, it establishes obligations directed to offerors of crypto-assets and persons seeking admission to trading. These obligations are related to requirements of drawing up, notifying, informing, storing, and registration. The obligations that must be undertaken by the service providers are laid down in Art. 1(2).

Offerors of tokens other than e-money and asset-referenced tokens are obliged to be legal persons, and such tokens shall be monitored and supervised by competent authorities (preamble (23)). Moreover, offerors are expected to draw up, notify to their competent authority, and publish mandatory disclosures in a white paper when seeking admission to trading (preamble (24)). For the protection of token holders, rules of civil liability shall be applied to offerors, persons seeking admission to trading, and members of management body for the information published in the white paper (preamble (39)).

Following from the classification there are different levels of requirements which are applied depending on the type of token launched into circulation. More stringent requirements are applied to asset-referenced tokens in comparison to other than asset-referenced tokens (preamble (40)). Issuers of such tokens are obliged to have a registered office within the Union to ensure proper supervision and monitoring (preamble (42)). Offers to the public of asset-referenced token must be put on hold until a competent authority has approved the white paper

⁵⁹ 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, § 19: Holders of electronic money as defined in Directive 2009/110/EC are always provided with a claim against the electronic money issuer and have a contractual right to redeem, at any moment and at par value, the monetary value of the electronic money held.

⁶⁰ See Karam, Utility Tokens: Definition, Types, and Examples. <https://cryptonews.com/academy/what-is-utility-token/>. Referred 23.6.2025.

(preamble (43)). Issuers are also required to upkeep an adequate custody policy to ensure segregation between assets offered to the public and the issuer's own assets (preamble (55)).

When these requirements are compared to tokens which fall under the scope of Directive 2014/65/EU (*MIFID II*) it can be noticed that the directive establishes similar obligations for investment firms, market operators and data reporting services providers in relation to authorization, provision of investment services, authorization and operation of regulated markets, and supervision, cooperation and enforcement by competent authorities (Art. 1). As some tokens can be inferred as transferable securities they fall under the scope of financial instruments as laid down in Section C and therefore under the scope of Directive 2014/65/EU.

It must be however kept in mind not all tokens demonstrate the qualities of financial instruments. The Commission has motivated further the need for MiCa Regulation as a means to ensure the capability of benefiting from having an internal market. With regard to crypto-assets, this refers to a unified regime which also enables the service providers to scale up the activities at EU level.⁶¹ Article 2 reveals both the material and territorial scope of the Regulation: It applies to issuance, offerings to the public, admission to trading, and providing services in the Union. Operating at the Union level establishes obligations, and it is dependent firstly upon the fact whether the service provider is established in the Union to begin with or whether the service provider is a third-country firm. If a person established in the Union receives crypto-asset services on their own initiative from a third-country firm, the crypto-asset services are not deemed to be provided in the Union. On the contrary, where the third-country firm undertakes actions demonstrating attempts to provide services within the Union, its services are not deemed to be acquired by the client's own initiative. Situations like these call for the authorization of the third-country firm to be able to provide services in the Union.⁶²

3.2 Analysis of an expected impact on jurisdictional issues

MiCA Regulation became fully applicable in all Member States from 30 December 2024 as laid down in Art. 149(2). Therefore, actual long-term impacts in relation to ICOs and jurisdictional questions can be only theorized at this point. The expected impacts can be divided into general

⁶¹ See European Commission, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, p. 4.

⁶² 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, recital 75.

impacts on jurisdictional issues and ICO specific impacts which possibly contribute to mitigating jurisdictional issues in civil disputes.

Increasing the sources of funding for companies through increased ICOs has been one of the specific objectives of the initiative for EU Framework for crypto-assets.⁶³ Therefore, the general objectives like asserting legal certainty by strengthening consumer and investor protection and supporting fair competition and market integrity by harmonizing the regime for crypto-assets are the key factors enabling the efficient use of ICOs for fundraising. While enabling ICOs to become more structured and trustworthy the provisions supporting the achievement of the general objectives help tackling jurisdictional questions which cannot be answered alone with provisions of Brussels I bis.

A commonly positive impact can be expected with the provisions regarding white papers and the information that shall be enclosed in them. The impact which can be realistically expected is the mitigation in civil disputes which are given rise by inconsistent and insufficient prospectus about the ICO. This is partly due to the fragmented regime for crypto-assets and namely ICOs, which had led to a situation where the quality of white papers differed significantly. Simply put, ICO issuers enclosed insufficient information about the projects being launched to the extent that investors could not make rational investments.

Zetzsche et al. have studied a sample consisting of documentation of over 1 000 ICOs. The study group have carried out remarkable results of white papers with their study that was published in 2018. First, in 54.76 % of cases the white papers did not include the name of the issuer let alone any background information about them. In 42.35 % of cases where the name was provided, the author was a different person from the one who had actually initiated or issued the ICO.⁶⁴

In 20.46 % of the sample there was merely technical information enclosed in white papers. In 31.04 % of cases the white papers did not have any information regarding the initiators or the backers. The study group also recognized the lack of financial information in the white papers: Financial information was missing altogether, including circumstances of capital collected and the stage, in 24.71 % of cases. Notably, in 96.95 % of cases the white papers were lacking

⁶³ *European Commission*, Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets, and amending Directive (EU) 2019/1937, p. 145.

⁶⁴ *Zetzsche et al.*, The ICO Gold Rush: It's a scam, it's a bubble, it's a super challenge for regulators, 16.

information about the storage of capital collected and whether it will be stored segregated or pooled.⁶⁵

With the application of MiCA Regulation there are mandatory requirements to draw up a white paper in accordance with the provisions laid down in Articles 6⁶⁶, 19⁶⁷, and 51⁶⁸. Additionally, there are lists of minimum details which shall be enclosed in white papers for each type of crypto-asset. These lists are laid down in Annexes I, II, and III.

Nowadays the information requirements are aligned within the Union. Mandatory information of the issuer is e.g. the name, legal form, registered address and head office (where different), date of registration, legal entity identifier, and identity, business address and functions of persons that are members of the management body of the issuer – regardless of the type of crypto-asset that is sought to be brought to the public.⁶⁹ This information alongside with an elaborate description of the crypto-asset, financial conditions, underlying technology, and information of rights and obligations will balance the information asymmetry that has previously prevailed in ICOs. Even the disclosure of the competent court is required in all Annexes.⁷⁰

Whereas the legal certainty of investments made for ICOs can be enhanced by more elaborate and detailed white papers, the initiators or issuers are encouraged to take seriously admission to trading due to financial impacts: SMEs are imposed a new cost with the white paper requirement, estimated around 35 000 € per document. Offerings which are exempt from this cost do not exceed the threshold of 1 000 000 € over the period of 12 months.⁷¹ While the cost itself may not prevent fraud from taking place in ICOs, it is indeed a discouragement given the fact that the white paper must be also drawn up in accordance with the rules in MiCA Regulation and after that provided to regulatory bodies to be pre-approved.

To conclude, the new requirements regarding white papers and their pre-approval are factors that possibly mitigate the need for investigation of jurisdiction due to mitigation in civil disputes altogether. Notably the requirement to disclose information of the rights and obligations of the parties partaking may strengthen the confidence to make investments for ICOs, and the

⁶⁵ *Zetzsche et al.*, The ICO Gold Rush: It's a scam, it's a bubble, it's a super challenge for regulators, 15.

⁶⁶ Persons seeking admission to trading of crypto-assets other than e-money or asset-referenced tokens.

⁶⁷ Persons seeking admission to trading of asset-referenced tokens.

⁶⁸ Persons seeking admission to trading of e-money tokens.

⁶⁹ See Annexes I, II, and III, especially points 1-5 which are common to e-money tokens, asset-referenced tokens and crypto-assets other than e-money tokens and asset-referenced tokens.

⁷⁰ See Annex I, Part G, point 10; Annex II, Part C, point 15; and Annex III, Part D, point 8.

⁷¹ See *EPRS*, Updating the Crypto-assets Regulation and establishing a pilot regime for distributed ledger technology, p. 7

requirement of being monitored⁷² possibly mitigates the number of attempts to use ICOs for fraudulent intentions.

The crypto-asset white paper requirements can positively affect jurisdictional issues on a general level. MiCA Regulation can however have more specific impacts, namely on ICOs and how they are perceived in the EU crypto-asset regime. Conceptually ICOs are like conventional initial public offerings of equity stock but instead of conveying voting rights or dividends they may provide access to products or services.⁷³ In an ICO, tokens are offered to the public for the first time, but an ICO initiator or issuer can be providing crypto-asset services in accordance with MiCA provisions.

As MiCA Regulation sets out obligations of registration for different actors in markets for crypto-assets it may ease jurisdiction issues when the general rule for jurisdiction may be applied. For example, in Article 16 it is stated the issuers of asset-referenced tokens are required to be legal persons or other undertakings which have been authorized by a competent authority in accordance with Article 21 and are established in the Union. For invoking jurisdiction in accordance with Article 4(1) of Brussels I bis, the applicant needs to know first the person of the defendant and secondly the domicile of the defendant. With the new requirements for white papers, the issuers and initiators are obliged to enclose such information by their own initiative.

Further, when invoking jurisdiction by virtue of Article 4(1), which is the general rule, the applicant does not have to distinguish whether the matter of the civil dispute is contractual or extra-contractual in nature. The domiciles of different actors in crypto-asset markets can be determined with the help of Article 3(33) points *a-f* of MiCA Regulation together with Article 63 of Brussels I bis. In the MiCA Regulation the term '*home member state*' is used instead of the wording '*domicile*'. For offerors and persons seeking admission to trading the home member state is the place of registered office or a branch in the Union. For third-country firms the home member state is the Member State in which the crypto-assets are intended to be offered to the public for the first time, or where the first application for admission to trading is made. For issuers of asset-referenced tokens the home member state is the location of the registered office. The same goes for crypto-asset service providers. For issuers of e-money tokens the

⁷² See for reference e.g. 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, Art. 20(1): the competent authorities shall assess whether an application for authorization including the crypto-asset white paper comprises all the required information.

⁷³ See *Florysiak – Schandlbauer*, The Information Content of ICO White Papers, 8.

home member state is the place in which it has been authorized as a credit institution or as an electronic money institution.

As covered before in this study, for the purposes of Brussels I bis, a company or other legal person is domiciled where it has its statutory seat, central administration, or principal place of business (Art. 63). In its preliminary ruling *Club La Costa* the ECJ reconfirmed that the domicile of legal persons shall be determined according to an autonomous interpretation of EU law. The ECJ further reminded that these three indicators of the domicile do not have hierarchy but the applicant needs to choose between them.⁷⁴

While in a sense this enables forum shopping to some extent, it also ensures that a legal person is being sued in a Member State where the judgment will probably be enforced. Further, Article 63 of Brussels I bis ensures that the applicant is not deprived from a forum in the Union altogether.

As regards the definition of ‘statutory seat’ referred in Article 63(1)(a), there are clarifications established in paragraph 2 for the purposes of Ireland, Cyprus, and the United Kingdom. These clarifications constitute autonomous definitions of the concept ‘statutory seat’, making a registered office comparable to a statutory seat. Therefore, a registered office may in certain circumstances suffice for a statutory seat, and the applicant can sue the legal person in the Member State of the registered office. This is relevant to applicants seeking to sue crypto-asset issuers or service providers as legal persons’ home member state is often determined by the place where the legal persons or similar undertaking is registered.

The ECJ reminds that the details set out in Art. 63(2) are not merely presumptions of fact which may be rebutted by evidence to the contrary. The clarifications defining the concept of ‘statutory seat’ serve the objectives of Brussels I bis: predictability, transparency, and uniformity in all Member States.⁷⁵ Consequently, the clarifications established by the ECJ together with Art. 3(33) of MiCA Regulation may ease determining the domicile of the defendant.

As discussed, in consumer contract related civil disputes the jurisdictional issues are given rise by the concept of ‘consumer’ and the vagueness of the definition ‘directing commercial activities’ to a Member State. The European Commission asserts in its report that Brussels I has

⁷⁴ ECJ September 14, 2023, C-821/21 NM v Club La Costa (UK) plc, sucursal en España et al. ECLI:EU:C:2023:672, para.63.

⁷⁵ ECJ September 14, 2023, C-821/21 NM v Club La Costa (UK) plc, sucursal en España et al. ECLI:EU:C:2023:672, para. 66.

strengthened consumer protection compared to its precedents allowing consumers to choose between *forum rei* and *forum actoris* for consumer contracts within the meaning of Art. 17 of the Regulation.⁷⁶

The definition of ‘directing commercial activities’ has been covered in the ECJ preliminary rulings Pammer (C-585/08) and Hotel Alpenhof (C-144/09). The ECJ has published a list of factors with which courts of Member States can establish whether a certain activity is directed to a certain Member State. The circumstances to be considered are e.g. the international nature of the actions, usage of neutral top-level domain names, and notion of telephone numbers with the international code.

With the application of MiCA Regulation, it may be easier to determine whether an activity is directed at a Member State. By virtue of Article 65 there is an obligation for crypto-asset service providers to submit a list of Member States where the crypto-asset services are directed to and what crypto-asset services the provider intent to provide on a cross-border basis. This Article is given the presumption that the service provider is indenting to provide crypto-asset service in more than one Member State.

Article 65 of MiCA Regulation may help avoid unambiguous situations as there is no need to rely solely on indicators of international commercial activity as established by the ECJ, but in cross-border cases it can be investigated which countries the crypto-asset service provider has informed the competent authority. The target Member States are referred to as ‘host Member States’, and the application of Article 65 does not presuppose the crypto-asset service provider’s physical presence within the territory of a host Member State. However, the information required in points a-d of Article 65(1) shall be informed to host Member States.

The unregulated state of crypto-assets imposes risks on consumers such as risks of losses from fraudulent or deceptive activities, limited access to adequate information and operational risks arising from failings of service providers.⁷⁷ MiCa Regulation takes on the issue of failings of service providers by defining the obligations of service providers when incidents take place. According to Art. 75(8) service providers are held accountable to their clients for the loss of

⁷⁶ *European Commission*, Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2025) 268 final, p. 11.

⁷⁷ *European Commission*, Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on Markets in Crypto-assets and amending Directive (EU) 2019/1937, COM(2020) 593 final – SEC(2020) 306 final – SWD(2020) 381 final, p. 15-17.

crypto-assets or of the means of access to the crypto-assets. Furthermore, there are measures that enhance consumer protection in situations in which crypto-assets are offered through outsourcing.

In the process of transforming an investment project idea into an ICO, a well-developed ICO structure is created by making an ICO vehicle in the form of a limited liability company, trust or foundation. In the making of an ICO vehicle it is possible that the start-up consults legal and consultancy advisors or tech entrepreneurs, i.e. utilizing an external party in the process. In this structure model it is probable that several service providers will be involved in the ICO launching process e.g. by establishing the ICO vehicle, preparing the necessary documents, functioning as the vehicle's directors or trustees or providing support in the launching and sale process. Potential investors will then make a contract with the ICO vehicle that will start the token sale. Thus, the legal relationship is created between the ICO vehicle and investors buying the tokens.⁷⁸

For the protection of investors, it is significant that crypto-asset service providers (ICO vehicles) do not delegate all the legal responsibilities to third parties through outsourcing, which could eventually lead to a situation in which investors would not be able to bring proceedings against the crypto-asset service provider.

In art. 73(1) it is stipulated that crypto-asset service providers shall take all reasonable steps to avoid additional operational risks and shall remain fully responsible for discharging all their obligations under the Title when outsourcing services or activities to third parties of operational functions. Further, in art. 73(1)(a-b) it is commanded crypto-asset service provider's responsibilities shall remain immutable in the case of outsourcing, i.e. responsibilities are not delegated, and that outsourcing does not alter the legal relationship between the crypto-asset service provider and their clients.

Engaging in outsourcing services or activities constitutes certain obligations regarding preventive measures for crypto-asset service providers. Such preventive measures include writing up a policy on outsourcing which contains contingency plans and exit strategies considering the nature and scope of the service provided (art. 73(2)). Crypto-asset service providers shall also write up a written agreement in which their rights and obligations are defined and those of the third parties to which they are outsourcing (art. 73(3)).

⁷⁸ *Zetzsche et al.*, The ICO Gold Rush: It's a scam, It's a Bubble, It's a Super Challenge for Regulators, p. 281.

Asserting the responsibilities of the crypto-asset service providers which also outsource some or all their services or activities enhance the customer security who typically also hold a weaker party status in such legal relationships. Whereas the provisions regarding outsourcing do not straight-forward resolve jurisdictional issues revolving around ICOs, they act as preventive measures in the case of failings of operational functions. More specifically, they verify to whom address civil claims arising from failings of crypto-asset services as outsourcing does not alter the responsibilities of the service provider nor the legal relationship concluded.

Putting together the different elements of MiCa Regulation presented in this Chapter, it can be summarized that most of the expected implications have emphasis on prevention and enhancing client security by creating equal access to adequate information to projects to be launched and underlining the obligations and responsibilities of them who are offering and selling tokens to the public or pursuing to provide any other crypto-asset service within the Union.

4 Analytic approach to the findings

4.1 Insights from pre-existing studies

Before diving into the key topics to be discussed in this study it is vital to address the findings of previous studies revolving around ICOs and overall digitalization and its impact on jurisdiction and litigation.

In 2017, Iris M. Barsan published a study titled *Legal Challenges of Initial Coin Offerings (ICO)*. Barsan argues in this study that contractual grounds for jurisdiction cannot be invoked in respect of ICOs. According to the study, a sale of goods cannot be in question if one assumes cryptocurrencies as goods. Thus, a barter would be at hand and therefore it would be impossible to determine the characteristic performance. On the other hand, if one assumes cryptocurrencies to be inferred as money, then an exchange of those would not qualify as ‘a sale of goods’. Barsan’s motivation is twofold: first, it is argued that an exchange between two cryptocurrencies should not be considered a sale of goods, and second, the goods being exchanged are not tangible and thus do not qualify with regard the notion of ‘a sale of goods’.⁷⁹

To my understanding this approach to crypto-assets is nowadays outdated. Several factors around crypto-assets have evolved over time after the conduct of the study. E.g. crypto-assets have achieved the status of a legal tender in some countries, namely in El Salvador and Central African Republic.⁸⁰ But besides that, the legislation and categorization with respect to crypto-assets has evolved, which brings to my statement that service of goods and services should be assessed in the light of digitalized contract environment. This statement will be now further explained.

MiCa Regulation acknowledges different types of crypto-assets dividing them into three main categories as discussed in Chapter 3.1.2: electronic money tokens, asset-referenced tokens and other than electronic money and asset-referenced tokens (e.g. utility tokens). These different kinds of tokens hold different characteristics and have different uses. Electronic money tokens are specifically tied to one official currency by stabilizing its value by referencing to an official currency (art. 3(1)(7)). They function as a tender, and their value can be converted into an official currency. Utility tokens, on the contrary, are only intended to provide access to a

⁷⁹ Barsan, *Legal Challenges of Initial Coin Offerings (ICO)*, p. 63.

⁸⁰ See for reference CoinMarketCap, *Countries Which Allow Cryptocurrency As Legal Tender*, <https://coinmarketcap.com/legal-tender-countries/>. Cited 10.5.2026. See also Newhedge, *Cryptocurrency Legality Map*, <https://newhedge.io/bitcoin/legality-map>. Cited 10.5.2026.

good or a service (art. 3(1)(9)). Overall, crypto-asset means a digital representation of a value or of a right which can be transferred and stored electronically using distributed ledger technology or a similar technology (art. 3(1)(5)).

When discussing digital contracts, such as ICOs, the emphasis should be on the factual contract, meaning that the stress should be on the fact what is being exchanged and what is being received as remuneration. Thus, one should investigate what kind of crypto-asset is being used as a tender and what kind of right or value does the crypto-asset received as remuneration hold. Digital contracts require pivoting of the mindset: crypto-assets have value and can constitute rights to tangible goods and services and therefore cannot be separated from the physical world. An actual example of how their monetary value can be observed is that exchanging crypto-assets also has tax consequences. For example, in Finland it is mandatory to inform to income taxation all the transactions in which crypto-assets are being used. That will then result in either capital gains or capital losses.⁸¹

The point of the statement is that different crypto-assets hold different kinds of characteristics, and their uses also differ. Crypto-assets which are meant to be used the same way as fiat currency may already have either legal status or can be used as a tender by contract. Nevertheless, their value is stabilized by a reference to an existing official currency. Further, the crypto-assets obtained by the exchange may not be inferred as money if their use is to represent a right to a goods or service. The notion of '*a sale of goods*' or '*a sale of services*' does not require the remuneration to be physically tangible. Crypto-assets are as tangible as software, and yet the ECJ recognizes such objects to fall under the provision of art. 7(1)(b) of Brussels I bis.⁸² It goes without saying that applicability of art. 7(1)(b) depends on the ICO investment contract at hand but the possibility of invoking jurisdiction based on 'the place of performance of a sale of goods or services' cannot be disregarded altogether.

The Commission's report, *COM (2025) 268 final*, to the European Parliament, the Council and the European Economic and Social Committee is a forecast of the possible issues the application of Regulation No 1215/2012 will be facing now and in the future. The topics covered by the report which are also relevant to this study include: 1) the standard to be used when

⁸¹ See for reference vero.fi: File income from crypto assets and virtual currencies, <https://www.vero.fi/en/individuals/property/investments/virtual-currencies/>. Cited 10.5.2026.

⁸² See ECJ November 28, 2024, C-526/23 VariusSystems digital solutions GmbH v GR, owner of the undertaking B & G. ECLI:EU:C:2024:985. In this preliminary ruling the ECJ established the place of performance in a situation in which a customer had acquired and accessed a software, and the question was what is place of performance of digital services.

assessing if the matter has cross-border implications⁸³; 2) the broad concept of matters relating to a contract⁸⁴; 3) determination of place of performance of contractual obligations⁸⁵; 4) the notion of a consumer⁸⁶; 5) the delivery of digital goods⁸⁷; and 6) the issue of having a third country counterpart that is not domiciled in the Union⁸⁸.

Many of the topics listed here have been either discussed earlier or will be covered later in this study. However, the lack of standard for the notion ‘cross-border implications’ can generate interesting situations arising from ICO related civil disputes. ICOs are by nature cross-border crowdfunding projects and can have participants domiciled anywhere in the world. Even though participants can be dispersed across the globe the ICO initiator or initiators can be usually tracked down to some country from which the crowdfunding project is launched.

Considering the number of ICO projects launched, the leading place is taken by the US, followed by the UK and Singapore.⁸⁹ The number of projects and their country of origin can be tracked due to the current functionalities of ICOs. ICOs are relatively centralized having a start-up in the background responsible for launching the project and conducting the token sale. Investors’ counterparty can be therefore identified in the token sale: the project development team.⁹⁰ This will naturally help assessing the scope of civil and commercial dispute at hand.

In art. 1(1) of Brussels I bis the scope of application is set out. The regulation applies to civil and commercial matters with cross-border implications. Even though it is not mentioned in art. 1(1), the regulation’s recital (3) has similar language to art. 81 TFEU – containing the wording ‘cross-border implications’. For the lack of a specific provision, the ECJ has established guidelines to follow when evaluating if the civil or commercial matter has cross-border implications. The international element, which is necessary to bring the matter under the scope of Brussels I bis, can be derived from different factors. The ECJ has accepted both personal factors and objective factors to be considered when assessing the notion of cross-border implications. Personal

⁸³ **COM (2025) 268 final**, June 2, 2025, Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), p. 2.

⁸⁴ COM (2025) 268 final, p. 6.

⁸⁵ COM (2025) 268 final, p. 6-7.

⁸⁶ COM (2025) 268 final, p. 11.

⁸⁷ COM (2025) 268 final, p. 18.

⁸⁸ COM (2025) 268 final, p. 5.

⁸⁹ See for reference Icobench, 70+ ICO statistics you need to know in 2026, <https://icobench.com/stats/ico-statistics/>. Cited 13.5.2026.

⁹⁰ *Myalo*, Comparison of ICO, DAOICO, IEO and STO. Case Study, p. 18.

factors are related to the domicile or habitual residence of the parties. Objective factors are related to e.g. the place of performance of the obligation under the dispute or the subject matter of the proceedings which may be in a third state. The ECJ Judgments *Inkreal* (C-566/22) and *FTI Touristik* (C-774/22) showcase the fact that a dispute can be brought under the provisions of Brussels I bis even in a situation in which the parties are domiciled in the same Member State. Then the factor pointing to the cross-border implications needs to be found in the objective grounds of the subject matter at hand.⁹¹

It is reasonable to ask what kind of impact this sort of assessment has on ICOs. ICOs and other online crowdfunding methods powered by distributed ledger technology are growing and their characteristics are also developing. For example, according to collected statistics of ICOs, ICO crowdfunding projects have collected already 50 billion dollars since their inception even though their survival rate is 10 %.⁹² To enhance security of investor funds there has been a proposal for a new model with which to carry out crowdfunding projects: DAICO.⁹³ This means that ICOs are possibly developing towards a more decentralized crowdfunding model eventually to a point where there is no identifiable administrator who could be first tracked down and assessed whether that defendant's domicile suffices for an international element and second be sued based on the domicile of the defendant.⁹⁴ The DAICO model will be specifically explained in the following chapter.

The point is that when ICOs are adopting new features of more decentralized models but are still exposed to certain risks by default, the need for means to determine cross-border implications do not disappear. Decentralized online funding methods are merely showcasing the need for acknowledgement of objective factors pointing to a prevailing international element. Eventually, basing cross-border implications on domicile or habitual residence alone won't be enough or will at least deprive the Regulation No 1215/2012 of its intended effectiveness as recognized in the Commission Staff Working Document.⁹⁵

⁹¹ **SWD(2025) 135 final**, June 2, 2025, Commission Staff Working Document, p. 1-2. See also the wording of Regulation No 1215/2012, recital (3): "the Union is to adopt measures relating to judicial cooperation in civil matters having cross-border implications."

⁹² See for reference Icobench, 70+ ICO statistics you need to know in 2026, <https://icobench.com/stats/ico-statistics/>. Cited 13.5.2026.

⁹³ *Myalo*, Comparison of ICO, DAOICO, IEO and STO. Case Study, p. 18.

⁹⁴ As an author's side note it is to be recognized that fully decentralized crypto-asset funding projects or token sales fall outside the scope of Regulation (EU) No 2023/1114 alias MiCa Regulation. Therefore, the client protection provided by the provisions of the said Regulation would not apply to fully decentralized crypto-asset services.

⁹⁵ SWD(2025) 135 final, p. 2.

The objective of Brussels I bis is based on the Union's own objective to maintain and develop an area of freedom, security and justice, inter alia by facilitating access to justice. Further, it is stipulated that as an addition to the defendant's domicile justifiable grounds for jurisdiction may be based on a close connection between the court and the action or facilitation of sound administration of justice.⁹⁶

The lack of uniformity between national courts regarding the notion of 'cross-border implications' could have a direct effect on a person's right to have access to justice. Therefore, objective factors will need to be further studied for the next steps of digital funding and commercial activities. The worst-case scenario is that an investor engaging in a funding project similar to an ICO may be deprived from his right to bring actions to courts of a Member State if the objective factors go under the radar in some Member States. The study conducted by European Commission revealed that whereas Member States investigate personal and objective elements when determining cross-border implications, there are still Member States whose national courts look solely into personal elements (domicile or habitual residence) when assessing the question.⁹⁷

It is yet to be asserted why understanding the jurisdictional issues regarding ICOs makes a difference. In this study the meaningfulness is perceived through the risk analysis regarding ICOs. Since its inception in the year 2013, ICO has faced both its peak and backlash from multilayered risks, some of which are inherent. European Securities and Markets Authority has listed the most prominent risks linked to ICOs in a statement conducted already in 2017. ESMA has emphasized five different risks: unregulated space, high risk of losing all the invested capital, lack of exit options and extreme price volatility, inadequate information, and flaws in technology.⁹⁸

Whereas the prevailing risk can be as simple as buying tokens which do not have intrinsic value and will turn out worthless due to fragility of the start-up, there have been detected large-scale ICO scams. OneCoin Ltd. may be the best-known scheme in this field. OneCoin was a globally orchestrated scam attracting investors all over the world between 2014-2019, gaining over 4 billion dollars as investments. Now, over 40 million dollars in forfeited assets are available as

⁹⁶ See for reference Regulation (EU) No 1215/2012 recital (3) and recital (16).

⁹⁷ SWD(2025) 135 final, p. 1.

⁹⁸ European Securities and Markets Authority, Statement: ESMA alerts investors to the high risks of Initial Coin Offerings, p. 1-2.

victim compensation.⁹⁹ Considering the amount of money lost to a fraudulent cause and the amount of money retrieved, the losses were dreadful for the investors involved in the scheme. It is dumbfounding that only 1 % may be refunded to the victims of the scam.

In a study conducted in 2018 has concluded the key numbers of ICOs of 2017. In the study it has been found that 11 % of the US dollars raised to date went to scams. The amount was 1.3 billion dollars out of 12 billion dollars. It is to be noted that 11 % went mostly to three known scams.¹⁰⁰ It is safe to say that most assets are not lost to fraudulent causes but the risk of becoming a victim of a scheme when investing in ICOs is still there.

Alongside actual cryptocurrency scams there are ICOs that work as a vessel for illicit means. For example, in the case of Munchee Inc., a California based business, had created an iPhone application for reviewing restaurant meals. In 2017 the said firm started a token campaign to raise funds for the worth of 15 million dollars in capital to improve the existing app and to launch MUN tokens which could have been used as utility tokens and for trading on secondary markets. The issue was that based on the circumstances of the case the tokens launched were deemed as securities in accordance with the U.S. Securities Act. However, Munchee offered and sold MUN tokens in violation of the Securities Act because Munchee had not followed the provisions requiring filing registration statements and having one in effect before offering tokens to the public and selling them. In this case the funds collected were able to be retrieved back to the investors.¹⁰¹

Although it is hard to track how much money is lost on fraudulent schemes and how many ICO projects are being launched to avoid provisions of legislation, it is certain that the number will never vanish to extinction. The attainability of ICO powering platforms, e.g. Ethereum, and fragility of new launching projects entail optimal circumstances for possible civil and commercial disputes even if there are no illicit purposes included in the actions. Noting the scale of scams which have already taken place and the modest possibility of being refunded as a victim, it is vital to create clarity at least in the jurisdictional questions arising from contractual relationships being created around ICO crowdfunding projects.

⁹⁹ U.S. Department of Justice, Justice Department Announces Compensation Process for OneCoin Fraud Victims With Funds Recovered Through Asset Forfeiture. <https://www.justice.gov/opa/pr/justice-department-announces-compensation-process-onecoin-fraud-victims-funds-recovered>. Cited 13.5.2026.

¹⁰⁰ Satis Group, Cryptoasset market coverage initiation: Network creation, p. 25.

¹⁰¹ Securities and Exchange Commission, Administrative proceeding File No. 3-18304, In the matter of Munchee Inc., respondent, p. 1, 9-10.

4.2 Issues to be addressed and solutions proposed

This chapter covers the main dilemmas in the context of invoking jurisdiction based on provisions set out in Brussels I bis. Considering the objective and scope of this study, the issues can be distinguished into three categories. First, there is the question of having a contract party domiciled outside the Union but offering ICOs within the Union. Second, ICOs need to be characterized as a contract to figure out the place of performance for digital goods as meant in art. 7(1)(b) of Brussels I bis. Third, the notion of a consumer should be thoroughly studied to determine when to invoke jurisdiction by virtue of art. 17(1). These jurisdictional questions will be also studied in the light of Regulation (EU) 2023/1114 aka MiCa Regulation as the rules set out in the Regulation have refined the responsibilities of crypto-asset providers and consumer rights.

It goes without saying that ICO initiators and offerors may be domiciled within or outside of the Union and receiving crowdfunding from anywhere and from anyone. To apply Chapter II of Regulation Brussels I bis, the defendant must be domiciled in a Member State – saving some special exceptions, e.g. consumer contract disputes. The general rule itself as laid down in art. 4(1) expects the defendant to be domiciled in a Member State of the Union and to be sued in courts of that Member State. Further, in order to sue the defendant in another Member State, the defendant still must be domiciled within the Union (art. 5(1)).

It has been established by ECJ that Brussels I bis cannot be applied to disputes involving defendants that are domiciled outside the Union but the jurisdiction shall be determined as set out in art. 6. The question has been covered e.g. in Judgment *Land Berlin* in which the ECJ has sought that concentration of proceedings by virtue of art. 6(1) of Regulation No. 44/2001 cannot be applied if one of the defendants is domiciled outside the Union as the rule creates a derogation from the general rule and therefore shall be interpreted strictly.¹⁰² The current situation can add up to the complexity of judiciary – especially in contracts related to providing digital goods from outside the Union.

Regulation No 2023/1114 aka MiCa Regulation may bring some clarity to the situation when it comes to providing crypto-asset services within the Union. ‘To enable effective supervision and to eliminate the possibility of evading or circumventing supervision, crypto-asset services should only be provided by legal persons that have a registered office in a Member State in which they carry out substantive business activities, including the provision of crypto-asset

¹⁰² See ECJ April 11, 2013, C-645/11 *Land Berlin*, ECLI:EU:C:2013:228, para. 56.

services.¹⁰³ Undertakings other than legal persons should be under certain conditions be permitted to provide crypto-asset services within the Union.¹⁰⁴ However, the crypto-asset service provider has no obligation to be authorized or to have a registered office in the Union if a person established in a Member State receives crypto-asset services on his own initiative.¹⁰⁵

The requirements set for receiving an authorization and a registered office in a Member State have been covered already in *Chapter 3.2* but they may play an important role when assessing jurisdiction for civil disputes arising from ICO crowdfunding. When assessing overall if MiCa Regulation is relevant to ICO related civil disputes, it must be noted that the scope of the term ‘*crypto-asset service*’ is wide. In art. 3(16) crypto-asset service can refer to any of the following activities: ‘providing custody and administration of crypto-assets on behalf of clients; operation of a trading platform for crypto-assets; exchange of crypto-assets for funds; exchange of crypto-assets for other crypto-assets; placing of crypto-assets; reception and transmission of orders for crypto-assets on behalf of clients; providing advice on crypto-assets; providing portfolio management on crypto-assets; or providing transfer services for crypto-assets on behalf of clients.’ Due to the functionality of ICOs, they tick multiple boxes simultaneously.

To set up a scene of how ICOs can be structured and launched it is necessary to lay out the applicable rules of MiCa Regulation. The criteria for becoming a provider of crypto-asset services within EU requires the person to be a legal person in accordance with art. 59(1)(a) or an institution mentioned in art. 59(1)(b) of the Regulation. If the provider is to be an undertaking other than a legal person, there is an obligation to ensure certain level of protection for third parties’ interests equivalent to that afforded by legal persons (art. 59(3)). Additionally, these legal persons or undertakings shall have a registered office in a Member State in accordance with art. 59(2). The rule includes the presupposition that a provider shall have a place of effective management in the Union and at least one of the directors to be domiciled in the Union.

¹⁰³ 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, Preamble § 74.

¹⁰⁴ 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, Preamble § 74.

¹⁰⁵ 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, Preamble § 75.

Generally, ICOs can be launched by any semi-centralized formation, not necessarily a legal person. Launching an ICO is technically possible without any screening for the crowdsale by anyone if legislation allows that.¹⁰⁶ Whereas typical ICOs are relatively centralized, a newer version of ICOs has already been presented in 2018. This new way to launch an ICO is combining characteristics of ICO and DAO, being named DAICO.

As mentioned before in this study, DAOs stand for decentralized autonomous organizations and are one way to arrange crowdfunding. Standing out from previous organization forms, DAOs aim to disregard central management by creating a virtual entity consisting of thousands of members regardless of physical residence. Even though different DAOs may be arranged a bit differently, their essence can be characterized as follows: ‘a new form of scalable, open, self-organized networks that are coordinated by crypto-economic incentives as well as self-executing code on the blockchain to achieve common goals.’¹⁰⁷ Given the structure and operational functionalities of DAOs they construct multilayered dilemmas with regard to determining corporate status, responsibilities and applicable law – and also jurisdiction.

In the U.S. it is possible to gain legal entity status for a DAO by a legal wrapper. By virtue of the ‘Vermont model’ one can establish a blockchain-based limited liability company (BLLC) and by linking a DAO to the BLLC, the DAO can gain legal entity status and therefore engage in contractual agreements and offer liability protection for participants.¹⁰⁸ Alternatively, Wyoming Limited Liability Company Act enables a DAO to be recognized as a limited liability company whose articles of incorporation include a statement that the company is a DAO.¹⁰⁹

Therefore, ICOs can be powered by a semi-centralized development team or a semi-decentralized entity that can even obtain legal status in some countries. Importantly, the application of the MiCa Regulation now requires that these formations must comply with the provisions laid down in art. 59 when providing crypto-asset services within the Union. Given the obligation to have a registered office and place of effective management in a Member State where they carry out at least part of their crypto-asset services will ease the determination of jurisdiction since the applicant can invoke jurisdiction based on articles 4 and 63 of the Regulation Brussels I bis. As presented before, ECJ has concluded in Judgment *Club La Costa* that article 63 is intended to provide an autonomous definition of a domicile for legal persons to

¹⁰⁶ Myalo, Comparison of ICO, DAOICO, IEO and STO. Case Study, p. 20.

¹⁰⁷ Mienert, How can a decentralized autonomous organization (DAO) be legally structured?, 1–2.

¹⁰⁸ Mienert, How can a decentralized autonomous organization (DAO) be legally structured?, 5.

¹⁰⁹ Mienert, How can a decentralized autonomous organization (DAO) be legally structured?, 6.

unify application and secure transparency in all Member States.¹¹⁰ Whereas the obligation to comply with new provisions of the MiCa Regulation does not tackle all the jurisdictional issues in EU, it gives applicants a way to sue in Member States of the Union even though the ICO launcher is originally a third-country formation due to the obligation to become a legal person with a registered office and place of effective management in a Member State of the Union. Thus, the applicant may be able to bring proceedings before the courts of the Member State where this registered office and effective management is located – given that is accordance with the interpretation of a legal person’s domicile.

If the applicant wants to invoke jurisdiction based on contractual obligations based on provisions laid down in art. 7(1), it is necessary to establish what the place of performance for digital goods is. This further requires deepening understanding of how ICOs work as a contract between the investor and the initiator.

A study conducted in 2020 found over 90 % of the study group’s sample ICOs were launched on *Ethereum*, on an existing blockchain. Theoretically, an ICO can be launched on a new blockchain or an existing blockchain by applying smart contracts. A single Ethereum ‘account’ consists of a public and private key which operates in the following manner: the public key’s concentration, named hash, represents an address from which transactions can be made, and these transactions will be shown in the public ledger. The private key is an equivalent to a password controlling transfers from the ‘account’. On Ethereum, the *ERC20*¹¹¹ smart contract is commonly implemented and used to supervise Ethereum addresses.¹¹²

When an ICO is launched on Ethereum, investors send cryptos to the token sale address controlled by the promoter with the promise of being granted tokens in return, backed up by the ERC20 smart contract. Before the public crowdsale there can be a restricted pre-sale (pre-ICO) to a selected number of investors. Depending on the success of the possible pre-sale and crowdsale the ICO will meet its threshold. The threshold model common to ICOs is known as *soft-cap* indicating the minimum number of investments (tokens) which can be accepted to launch the ICO. If the threshold is not met, the investments will be returned to the investors. This ordeal can be governed by the smart contract. The tokens to distributed to the investors

¹¹⁰ ECJ September 14, 2023, C-821/21 NM v Club La Costa (UK) plc, sucursal en España et al. ECLI:EU:C:2023:672, para. 66.

¹¹¹ ERC20 is a smart contract standard.

¹¹² *Fahlenbrach – Frattaroli*, ICO investors, Financial Markets and Portfolio Management, p. 6-9.

can be mintable in the sense that they hold no initial balance, but they are made from nothing to every contributor.¹¹³

When perceiving ICOs from the perspective of art. 7(1) it is to be assessed what is place of performance of digital goods or services. Answering the question also requires analysis of the contractual obligations at hand and what they consist of. ECJ has motivated in its Judgment *Various Systems* that when offering software as digital goods the place of performance is to be determined by the Member State in which the customer is domiciled or has a registered office. Namely, the place of performance is ought to be the country in which the software is accessed and used. Further, the time when the digital good or service is provided is from the moment the said software can be used and its quality can be inspected.¹¹⁴

Given the fact providing software to be accessed and used is very different to launching an ICO crowdfunding campaign and providing remuneration for investments collected, ECJ preliminary rulings need to be further investigated. In Judgments *Various Systems* and *Granarolo*, ECJ has defined it is necessary to distinguish the main characterizing obligation if there are more than contractual obligations linked to the contract.¹¹⁵ In *Judgment Saye Home & Garden*, the hierarchy between art. 7(1)(a) and 7(1)(b) has been established based on the provision written in art. 7(1)(c). ECJ has founded whenever a contractual relationship is based on a contract for the sale of goods or services, it excludes the application of art. 7(1)(a). Additionally, to apply art. 7(1)(b) there must be prevailing presumption of activity taking place in return for remuneration; i.e. requirement of a positive act.¹¹⁶

If an ICO process is dissected into parts, the connecting factor, i.e. the place of performance can be recognized. The viability of an ICO is highly dependent on ‘investments’¹¹⁷ flooding in through the crowdsale to meet the so-called *soft-cap*. Before the investment there are no contractual obligations between the ICO launcher and the investor. When the investment takes place only then can there be expectation of a positive counteract. Alternatively, if the soft-cap is not met the ICO does not become viable and the investments made will be returned to senders’

¹¹³ *Fahlenbrach – Frattaroli*, ICO investors, Financial Markets and Portfolio Management, p. 6-9.

¹¹⁴ See ECJ November 28, 2024, C-526/23 *VariusSystems digital solutions GmbH v GR*, owner of the undertaking B & G. ECLI:EU:C:2024:985, para. 21–23.

¹¹⁵ See ECJ November 28, 2024, C-526/23 *VariusSystems digital solutions GmbH v GR*, owner of the undertaking B & G. ECLI:EU:C:2024:985, para 20 and ECJ July 14, 2016, C-196/15 *Granarolo SpA v Ambrosi Emmi France S*. ECLI:EU:C:2016:559, para. 33.

¹¹⁶ ECJ March 8, 2018, C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA*, ECLI:EU:C:2018:173, para. 34, 38.

¹¹⁷ Investments are to be understood as an act of sending crypto-assets to the token sale address with a justifiable expectation for remuneration.

accounts – leading to a situation in which the investor does not have any justifiable expectations for tokens to be launched through the ICO. Considering how an ICO becomes a contract on the blockchain between two parties, contractual obligations are only awoken when investors make voluntary transactions from their ‘account’ to the token selling address, which also creates the core to the contract.

As covered in Chapter 2.1.2, to apply provision written in art. 7(1)(b) there must be an identifiable legal obligation into which the parties have entered with consent. With ICOs the identifiable obligations are laid written in *the white paper* (prospectus). Therefore, the obligations are not freely assumed only by one party.

If determined on a general level what suffices for the place of performance for token distribution as remuneration for investments, it can be argued that the Member State from which the investor makes the investment is the place of performance in accordance with art. 7(1)(b). Yet again, the claimant is facing the question of the domicile of the defendant since art. 7 presupposes the defendant is domiciled in a Member State to be sued in another Member State (the place of performance).

Consumer contracts are the only connecting factor covered in this study, which does not presuppose the defendant to be domiciled in a Member State.¹¹⁸ According to art. 18 a consumer may bring proceedings to courts of the Member State where he or she is domiciled or in courts of the Member State where the other party is domiciled. Regarding ICOs it is necessary to establish when an investor can be considered a consumer. The notion of a consumer has been covered in multiple preliminary rulings given by the ECJ. In Judgment *Schrems*, the ECJ determines that *consumer status* is not a definition in general, but it includes two defining elements stemming from the provision of art. 15(1) Regulation No 44/2001: firstly the notion ‘with regards to a contract’ and secondly the requirement of the contract being concluded outside the trade or profession of the given person.¹¹⁹

¹¹⁸ See Regulation (EU) No 12125/2012 recital (14) para. 2 in which it is stipulated that certain rules of the Regulation should apply regardless of the defendant’s domicile.

¹¹⁹ *Opinion of Advocate General Bobek*, November 14, 2017, C-498/16 Maximilian Schrems v Facebook Ireland Limited, para. 29.

Keeping these defining factors in mind it is to be concluded that the consumer status is always contract-specific, and the second factor refers to ongoing structured economic activity that is in connection with the contract which was entered.¹²⁰

Advocate General *Bobek* gave also his insight into the question of whether consumer status is static or dynamic. Enforcing foreseeability is the starting point meaning in practice that the purpose of the contract shall be held as the defining element. This means i.e. when the original consumer status does not hold, only then can consumer status be reassessed. However, Advocate General does not exclude the possibility of dynamic approach altogether but saves it for exceptional scenarios. Such scenarios contain situations in which the contract is not specific with its aim or has indeterminate contents and lasts for a long period of time. With contracts which contain both private and professional content it is to be assessed if the professional content constitutes a marginal part in the contract. If so, consumer status can still be retained.¹²¹

Furthermore, the ECJ has already inferred in Judgment *Personal Exchange International Limited* that a person can be covered by the special rules for consumers and be deemed to be the weaker party if the contract in question is concluded outside the trade or profession of the person given and solely for the purpose of satisfying the person's own needs in terms of private consumption.¹²² In this Judgment the Court argues that consumer status may be retained in a scenario in which a person wins substantial amounts of money by regularly participating in a game of which terms and conditions are laid down by the offering company. Similarly, in Judgment *Petruchová* the Court cited existing case law by stating the status of person as a consumer must be examined solely from the perspective of the contract at hand considering its nature and purpose. Thereof, the person's possible knowledge or expertise in the field of contract are irrelevant as such.¹²³

The thought to be carried out by these judgments is that regarding ICOs is necessary to bear in mind the nature and purpose of the contract when assessing consumer status. If the contract with its terms and conditions written in the white paper are determinate and specific, it is

¹²⁰ *Opinion of Advocate General Bobek*, November 14, 2017, C-498/16 Maximilian Schrems v Facebook Ireland Limited, para. 30-31.

¹²¹ *Opinion of Advocate General Bobek*, November 14, 2017, C-498/16 Maximilian Schrems v Facebook Ireland Limited, para. 39, 41-42.

¹²² ECJ December 10, 2020, C-774/19 A.B., B.B. v Personal Exchange International Limited, ECLI:EU:C:2020:1015, para. 25.

¹²³ See ECJ October 3, 2019, C-208/18 Jana Petruchová v FIBO Group Holdings Limited, ECLI:EU:C:2019:825, para. 56, 59.

possible for the investor to be deemed a consumer if the person engaging in the crowdfunding is a natural person operating outside his trade or profession having concluded the contract.¹²⁴ Further, a natural person can possibly retain consumer status in a situation in which he has expertise and experience on investments in general but not specifically in the contractual relationship at hand. This is due to the previous preliminary rulings made by the ECJ covered here.

However, the whole intention of art. 17(1) is the protection of the weaker party meaning in practice that there are justifiable grounds for providing more favorable rules of jurisdiction compared to the general rules.¹²⁵ Given the purpose of the provision it is to be addressed by a national court whether a given person suffices for a consumer. In unclear circumstances these evaluations can be resolved ad hoc.

It has been discussed in Chapter 2.1.3 how choice-of-court agreements can be implemented in the prospectus through e.g. T&C or click-wrap-agreements but the topic yet to be discovered is if these can be applied to ICO contracts with relation to investors inferred as consumers. Notably investors will be deemed as consumers in many instances given the interpretation by many preliminary rulings. Art. 19 of Brussels I bis stipulates that the provisions laid down in Section 4 (art. 17 and 18) may be departed only if one of the three alternative grounds is met. The three alternative factors in the provision are: 1) an agreement entered after the dispute has arisen; 2) an agreement which allows consumer to bring proceedings in courts other than indicated in art. 17 and 18; 3) or an agreement entered into by the consumer and the other party, both of whom are habitually resident or domiciled in the same Member State, which confers jurisdiction on the court of that Member State provided that is allowed by the legislation of said Member State.

Minding there are several requirements in relation to the contents of white papers, key terms and conditions must be known and informed before the contractual relationship.¹²⁶

Consequently, the first alternative grounds for deviation can be mostly disregarded. Given the nature of ICOs there are many functions taking place simultaneously after the crowdfunding: there can be admission to trading and providing multilevel crypto-asset services to investors

¹²⁴ See ECJ October 3, 2019, C-208/18 Jana Petruřová v FIBO Group Holdings Limited, ECLI:EU:C:2019:825 , para. 71. The court has emphasized that a consumer must be a natural person in the light of Regulation No 1215/2012.

¹²⁵ See Regulation (EU) No 1215/2012, p. 74, §18.

¹²⁶ See for reference: Chapter 3.2 and especially the paragraph concerning the minimum details which shall be included in the prospectus in accordance with Annexes I, II and III of MiCa Regulation.

participating. Thus, laying out the terms beforehand to be accepted and to be monitored by a smart contract is common with regards ICOs, and it can be expected that the parties engaged in the contract are not going to agree on deviations after a dispute has arisen.

The second grounds for deviation are possible since they are offering a so-called third country option to the consumer since art. 18 allows the consumer to bring proceedings to the courts of his own domicile (Member State) or the domicile of the defendant who is domiciled in a Member State.

The third grounds are intriguing in the sense of notion of '*the same domicile*'. It is more apparent to determine the domicile of a consumer who is a natural person and normally has the concentration of all personal interests in the same Member State. As discussed before, MiCa Regulation has stipulated new requirements for crypto-asset service providers in the Union, requiring them to be either legal persons or equivalent undertakings. This requirement includes dedication of administration to some extent in a Member State and a registered office in a Member State. Similarly, art. 17(2) already presupposes that a party not domiciled in a Member State can still be interpreted to be domiciled in a Member State in which the party has a branch, agency or establishment with regard to disputes arising from the operations of the said branch, agency, or establishment.

In that regard, MiCa Regulation does not expand the notion of the same Member State as laid down in art. 17(2) *per se*. Theoretically, it is possible to have a prorogation clause included in the white paper based on the third grounds for deviation given the condition of the same domicile at the time of conclusion of contract is sufficed.

Overall, MiCa Regulation does not change the interpretation of Articles 17 and 18. The purpose of the new regulation is to provide foreseeability, transparency, and security to clients committed to receiving crypto-asset services in the Union. The means through which these objectives are achieved are diverse and not necessarily restricted to the notion of a consumer as understood in Brussels I bis.¹²⁷ Thus, MiCa Regulation may not bring new aspects with respect to interpretation of art. 17 as the concept of 'a consumer' has been well established before in the preliminary rulings in the light of the need for protection of a weaker contractual party.

¹²⁷ See for reference: Chapter 3.2.

4.3 Applicability of existing case-law to ICOs

In this final analysis chapter, the focus will be on the preliminary rulings showcased in this study and their applicability to ICOs. Simultaneously, the principle of technology neutrality will be assessed and its implications on ICOs and the arising technologies.

The basis for judicial cooperation in civil matters is included in art. 81 of the TFEU.¹²⁸ In accordance with art. 81(1) the Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such provisions to envisage how in civil and commercial disputes jurisdiction shall be determined are now enclosed in Regulation (EU) No 1215/2012 alias Brussels I bis.

The underlying guiding principle, which may not always be mentioned in written form in regulations, is technology neutrality. The Union rationalizes technology neutrality with the objective of legislation longevity: technology dependency would result in possibly obsolete legislation which would require continuous amendments. Keeping laws and regulations technology neutral has a two-way positive implication: as laws and regulations are not dependent on certain technology there is no favoring or discrimination towards any technology.¹²⁹ The Union's stance is to be presumed to cover justice as a whole – from the legislation to interpretation and practical application.

Veerpalu has taken the analysis of the principle of technology neutrality further by deriving its foundations from the general principle of equal treatment provided for in art. 20 of the Charter of Fundamental Rights.¹³⁰ Art. 20 stipulates that everyone is equal before the law.¹³¹ The argument is reasonable also in the light of the objective of Brussels I bis: “maintaining and developing an area of freedom, security and justice, - - by facilitating access to justice.” Facilitating access to justice should not be dependent on the technology being used.

Although technology neutrality is a guiding principle piercing the Union laws and regulations some contradictions have been detected. *Veerpalu* has detected wider application of the

¹²⁸ Treaty of the functioning of the European Union (consolidated) (2016/C 202/01).

¹²⁹ Interoperable Europe, Technology neutrality. <https://interoperable-europe.ec.europa.eu/collection/common-assessment-method-standards-and-specifications-camss/solution/elap/technology-neutrality>. Cited 14.5.2026.

¹³⁰ *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 73.

¹³¹ See Charter of Fundamental Rights of the European Union, 2000/C 364/01), Article 20.

principle is not apparent but often the ECJ preliminary rulings are either missing a notion of technology neutrality completely, or the application of technology neutrality is inconsistent. To showcase the inconsistency a few preliminary rulings are brought forward. The notion of technology neutral approach is implemented namely in the wording of *Judgment UsedSoft GmbH v Oracle International Corp* where the ECJ states that it does not make a difference whether a copy of a computer program is made available by means of a download or by means of a physical medium.¹³²

The dilemma of tangible and digital mediums of the *Judgment UsedSoft* has been commented on by Advocate General Bot. In the opinion it is argued that limiting copyright exhaustion only to tangible mediums leads to erroneous interpretation. The opinion is motivated by the fact that distribution of computer programs by downloading from the internet cannot escape a classification of ‘distribution right’. Technology neutral approach is found by conversely reading the first sentence of recital (28) of Directive 2001/29: “copyright protection under this Directive includes the exclusive right to distribution of the work incorporated in a tangible article”. The converse reading creates the assumption that also other mediums are possible forms of distribution.¹³³

As shown, the principle of technology neutrality may not always be expressed directly but can be hidden in the wording of recitals or provisions.

However, the ECJ has given contradicting judgments in this context. For example, in *Judgment Art & Allposters International BV v Stichting Pictoright*, the ECJ decided that an undergone alteration of a medium makes a reproduction to fall outside the provisions of Directive 2001/29.¹³⁴ Veerpalu has commented on the Judgment by arguing that the judgment sets physical and digital mediums apart and in different positions with respect to Directive 2001/29 by tying the principle of copyright exhaustion to physical mediums.¹³⁵

The ambiguous status of the principle of technology neutrality functions as a launching pad to the actual analysis of this chapter which focuses on answering the following questions: 1) Is the

¹³² ECJ July 3, 2012, C-128/11 *UsedSoft GmbH v Oracle International Corp*, ECLI:EU:C:2012:234, supra note 64, point 47.

¹³³ Opinion of Advocate General Bot, April 24, 2012, C-128/11 *Axel W. Bierbach, administrator of UsedSoft GmbH v Oracle International Corp.*, p. 13-14, para. 71, 75.

¹³⁴ ECJ January 22, 2015, C-419/13 *Art & Allposters International BV v Stichting Pictoright*. ECLI:EU:C:2015:27, para. 49.

¹³⁵ *Veerpalu*, *Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist*, p. 76.

legislation considered technology neutral in its written language; and 2) can legislation be interpreted and applied in a technology neutral manner even if the wording of the legislation indicates otherwise? These questions will be naturally studied in the context of ICOs and related legislation covered in this study. In addition to answering these general questions, I will be providing my insights into the most significant interpretations of the existing case-law with respect to ICOs in the context of this study. From the perspective of technology neutrality, the following topics will be assessed: 1) ICO's status as an object of a contract; 2) the notion of the place of performance for the purpose of 7(1)(b); and 3) the notion of the domicile of the defendant.

Overall, all the provisions enclosed in Regulation No 1215/2012 have been written in a manner which does not refer to any certain technological solution nor differentiate physical environment from digital environment. If searching with the keyword 'digital' from the entire regulation, zero search results show up. The only provision that entails any reference to digitalization is article 25 regarding prorogation of jurisdiction. In that provision's second paragraph there is a notion specifically dedicated to all electronic means which may be used to provide a durable record of a prorogation agreement and will be deemed to be equivalent to physical writing. In its wording art. 25 remains neutral with respect to electronic means since the only requirement for electronic means to be equivalent to physical writing is the durability of the agreement. It has been up to the ECJ to further establish what term durability means in practice. As discussed in Chapter 2.2, durability of a record has been already established during the time of Regulation No 44/2001, the precedent of Regulation No 1215/2012. The ECJ's stance has been that the interpretation of the provision is independent of a certain way of presenting terms and conditions but them being accessible on the screen in a digital format suffices for to meet the requirements and to be treated equally to written form. The approach is appropriate considering the scope of the Regulation and the meaning of prorogation clauses. If treated differently depending on the fact whether the clause is in 'writing' or available as a durable record through electronic means, persons could have unequal access to justice, which, naturally, runs counter to the objectives of the Regulation.

Regulation No 2023/1114 alias MiCa Regulation is inherently a different kind of regulation due to its objective: ensuring "that Union legislative acts are fit for the digital age and contributing to a future-proof economy that works for people, including by enabling the use of innovative technologies. The Union has a policy interest in developing and promoting the uptake of transformative technologies in the financial sector, including the uptake of distributed ledger

technology.”¹³⁶ The preamble recognizes crypto-assets being the main applications of distributed ledger technology and the problematic state of some of them falling outside the Union legislation regarding financial instruments as defined in Directive No 2014/65/EU. The uncertain state of crypto-assets calls for a dedicated and harmonized framework for markets in crypto-assets.¹³⁷

Thus, Regulation No 2023/1114 cannot be separated from technology dependency as its inherent objective is to provide framework for market in crypto-assets which are in turn applications of distributed ledger technology (blockchain). Composing such a framework cannot be inferred as any sort favoritism or discrimination because the framework’s whole intention is fill a regulatory gap which may hinder the development of a crypto-asset market and innovation of digital services or distort the functionality of the internal market.¹³⁸ The motivation behind the framework links to art. 3, para.1, subpara. 3 of TEU: “The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth...”.¹³⁹ The driving force for the regulation is therefore to fulfill other fundamental objectives of the Union.

Whereas technology neutrality is a guiding principle which is to be found in the Union legislation and case-law, there are grounds for legislation which is tied to technological development. As explicitly addressed in this study, there are prevailing uncertainties regarding crypto-assets as a concept and further as an object of cross-border civil dispute and litigation. MiCa Regulation thrives for providing certainty on a market which has been unregulated before.

With respect to ICOs it is yet to be addressed whether the ECJ case-law can be applied in a technologically neutral manner. As discussed before, legislation and regulations should be free from favoritism and discrimination against any technology and composing new legislation should aim for longevity by being independent from any technological solution. Veerpalu has reminded that the longevity and flexibility of legislation should not be restricted to written provisions, but technology neutrality should be considered in practice too: “the executive and the judiciary must keep the principle in mind when implementing and interpreting legal rules.”¹⁴⁰ The key insight to be mentioned from Veerpalu’s study in the context of this study is that the

¹³⁶ Regulation (EU) No 2023/1114, preamble (1).

¹³⁷ See Regulation (EU) No 2023/1114, preamble (3), (4), and (6).

¹³⁸ See Regulation (EU) No 2023/1114, preamble (5).

¹³⁹ See Consolidated versions of the treaty of the European Union and the treaty of the functioning of the European Union (2016/C 202/01), art. 3, para. 1, subpara. 3.

¹⁴⁰ *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 78.

principle of technology neutrality can be applied neutrally even though a provision is not constructed in a technology neutral manner. This is naturally provided that sufficient impact assessment and research have been conducted, and the executive and judiciary accept the shift of the burden of applying the principle onto them whereas the legislation *ex ante* remains immutable.¹⁴¹

It is undisputed that ICOs and the jurisdictional questions arising from the perspective of Brussels I bis have been discussed on a theoretical level via different studies but are still lacking case-law which would address the issues in an explicit manner. The best that can be offered is applying the Regulation to the questions and locating the case-law which creates a practical interpretation around the framework. Although the case-law that has been presented in this study has not namely mentioned ICOs and only rarely the digital environment, Brussels I bis is applied to all civil and commercial matters which have cross-border implications. The Regulation does not disregard such matters which happen in a digital environment or the object of which is in a digital form. Thus, it is justified to apply the technology neutral case-law in the process of trying to establish rules around ICOs. The thesis can be also motivated by the fact that the ECJ often relies on its own existing case-law whenever establishing rules for interpretation. With respect to ICOs and their jurisdictional issues it is a similar situation: locating the appropriate preliminary rulings and making conclusions on that basis.

Now, some interpretations of the existing case-law will be addressed in the context of this study. ICO's status as an object of a contract has been discussed in Chapter 4.1 but now a technologically neutral focused approach will be proposed. ICOs as a concept is not unambiguous due to their inherent digital nature and the variety of functions for which they can be used. As a response to the uncertainty, MiCa Regulation divides them into three different categories based on their functionalities and how their value can be determined. It is certain that some crypto-assets are meant to be used as cryptocurrencies as a means of payments. This is also namely mentioned in the preamble of Regulation No 2023/1114: "the absence of an overall Union framework for markets in crypto-assets can - - lead to missed opportunities in terms of - - alternative payment instruments or new funding sources for Union companies."¹⁴² As mentioned before the Regulation takes on a 'substance over form' kind of approach on

¹⁴¹ See *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 87-88. The author argues that implementation neutrality can be founded and justified in a situation where the general rule may lead to discrimination and hindering innovation if the principle is not implemented on the executive and judiciary level.

¹⁴² See Regulation (EU) No 2023/1114, preamble (5).

crypto-assets, and thus the functionalities and characteristics of a crypto-asset function as defining factors. When considering the applicability of art. 7(1) of Regulation No 1225/2012, the division of different crypto-assets established in MiCa Regulation cannot be disregarded. But when considering the status of ICOs as goods or services, a technologically neutral approach would be taking a substance over form approach.

Neither Regulation No 1215/2012 nor its precedent Regulation No 44/2001 determine what kind of nature ‘goods or services’ need to be to fall under art. 7(1)(b) or 5(1)(b) (precedent). By the concept ‘nature’, I now refer to the essence of the object and whether that is physically tangible or intangible. In its Judgment *Granarolo*, the ECJ has established the concept of sale of goods and sale of services. For the purposes of identifying jurisdiction with respect to a sale of goods or services, art. 5(1) of Regulation No 44/2001 adopts as a connecting factor the obligation which characterizes the contract. As a result, a contract that is characterized by a supply of goods must be classified a sale of goods.¹⁴³

Regarding ICOs it has been proposed that a sale of goods includes the requirement of tangibility as covered in Chapter 4.1.¹⁴⁴ However, this outcome seems problematic from the perspective of technology neutrality. The ECJ has elaborated in Judgment *Granarolo* that art. 5(1)(b) of Regulation No 44/2001 defines the connecting factor autonomously in order to reinforce the objectives of unifying the rules of jurisdiction and ensuring predictability.¹⁴⁵ It follows from the objectives of the Regulation that disregarding certain types of goods based on being provided on a digital medium would distort the application of provisions in the Member States as the Regulation is to be applied in all civil and commercial matters with a few exceptions. Giving only tangible goods the status of goods in the meaning of art. 7(1)(b) of Regulation No 1215/2012 would not enforce the uniformity of application nor ensure foreseeability. The preamble of Regulation No 1215/2012 or Regulation No 44/2001 do not include any mention of the essence of the goods with respect to art. 7(1)(b) or 5(1)(b). The same goes for the ECJ preliminary rulings.

As for the notion of ‘a sale of services’ the ECJ has established that the second indent of art. 5(1)(b) holds that the concept of ‘services’ “requires at least the party who provides the services carries out a particular activity in return for remuneration.”¹⁴⁶ It is further showcased in Judgment *Various Systems C-526/23* that the notion of ‘services’ does not require tangibility in

¹⁴³ See ECJ July 14, 2016, C-196/15 *Granarolo SpA v Ambrosi Emmi France SA*, ECLI:EU:C:2016:559, para. 30-31.

¹⁴⁴ *Barsan*, *Legal Challenges of Initial Coin Offerings (ICO)*, p. 63.

¹⁴⁵ ECJ July 14, 2016, C-196/15 *Granarolo SpA v Ambrosi Emmi France SA*, ECLI:EU:C:2016:559, para. 32.

¹⁴⁶ ECJ July 14, 2016, C-196/15 *Granarolo SpA v Ambrosi Emmi France SA*, ECLI:EU:C:2016:559, para. 37.

order to fall under the scope of art. 7(1)(b) of Regulation No 1215/2012. In this Judgment the object of the sale of services was software which was deemed to be provided to the customer the moment the said software was usable, and its quality could be inspected.¹⁴⁷

If an intangible object suffices for the notion of ‘a sale of services’, it is only reasonable and foreseeable that an intangible object also suffices for the notion of ‘a sale of goods’.

Having now addressed the notion of goods and services in a technologically neutral manner, it is reasonable to proceed with the concept of place of performance as meant in art. 7(1)(b). The place of performance for digitally transmitted goods and services has been covered in Judgment *Varius Systems C-526/23*. In the Judgment, the place of performance is determined by first locating the object of the sale of services: making the software available to the customer. As the dominating characteristic of the contract is making the service available to the customer, the place where such service was received was determined to be the place of performance.¹⁴⁸

It has been established in earlier *Judgment Wintersteiger C-523/10* that the rules of jurisdiction must serve the objective of foreseeability and therefore an uncertain location does not suffice for the place of damage for the purpose of application of art. 5(3). In determining the place of performance or place where the damage occurred, it is vital to locate a place that is “definite and identifiable for both the applicant and the defendant and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings.”¹⁴⁹ Similar motivation can be found in *Judgment Saey Home & Garden C-64/17* in which the ECJ stipulates that the interpretation of the place of performance must respect the objectives of predictability and proximity. It follows from these objectives that the closest linking factor in the sale of services is the place of the main provision of services.¹⁵⁰

The preliminary rulings define the place of performance of a sale of goods and services in a technologically neutral manner by stipulating the factors to be considered when assessing the closest linking factor in such a contractual dispute. With respect to ICOs the same stipulated factors apply and thus it is to be considered which of the contractual obligations is the defining

¹⁴⁷ ECJ September 5, 2024, C-526/23 *VariusSystems digital solutions GmbH v GR*, owner of the undertaking B & G, ECLI:EU:C:2024:985, para. 21.

¹⁴⁸ ECJ September 5, 2024, C-526/23 *VariusSystems digital solutions GmbH v GR*, owner of the undertaking B & G, ECLI:EU:C:2024:985, para. 23.

¹⁴⁹ ECJ April 19, 2012, C-523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, ECLI:EU:C:2012:220, para. 36-37. See also ECJ September 5, 2024, C-526/23 *VariusSystems digital solutions GmbH v GR*, owner of the undertaking B & G, ECLI:EU:C:2024:985, para. 23.

¹⁵⁰ ECJ March 8, 2018, C-64/17 *Saey Home & Garden NV/SA v Lusavouga-Máquinas e Acessórios Industriais SA*, ECLI:EU:C:2018:173, para. 44, 46.

obligation and simultaneously the closest linking factor to determine an objectively foreseeable place of performance both for the applicant and the defendant. The objectives of foreseeability and proximity remain immutable regardless of the medium through which a sale of goods or services is provided and independent of the factor whether the object of sale is tangible or intangible. Therefore, the same neutral approach can be applied as it is to ICOs. ICOs inherently digital nature does not therefore constitute an insurmountable obstacle to determine the place of performance for the purpose of art. 7(1)(b).

Similarly, determining the domicile of the defendant for the purpose of art. 2 and 3 of Regulation No 1215/2012 may become simpler with the current requirement of authorization and registration in a Member State if pursuing to provide crypto-asset services within the Union, which is stemming from the provisions provided by Regulation No 2023/1114.¹⁵¹

The rules for determining the domicile of a legal person have been defined in *Judgment Club La Costa C-821/21* in which the ECJ reminded “the domicile of companies and legal persons is determined, in the absence of such clarification, according to an autonomous interpretation of EU law.”¹⁵² To enhance the objective of transparency and uniformity the rules set out in art. 63 are not to be inferred as merely presumptions just to be rebutted by evidence to the contrary.¹⁵³

Given the current form of ICOs it is possible to determine the domicile of the defendant even though composing a start-up and launching a new ICO take place in a digital manner. The start-up launching an ICO generally needs to go through the authorization and operating conditions as laid down in art. 59 of MiCa Regulation. The provision includes requirements to establish a legal person or a similar undertaking through which crypto-asset services are provided with. It follows from the art. 59(2) that a crypto-asset service provider shall have a registered office in a Member State where they carry out at least some part of the crypto-asset services and shall have effective management in the Union. Yet, it is laid down in art. 59(7) that crypto-asset service providers who provide their services on a cross-border basis are not required to have physical presence in the host Member State as they can provide crypto-asset services within the Union based on the right of establishment or the freedom to provide services.

¹⁵¹ See for reference Regulation (EU) No 2023/1114, art. 59.

¹⁵² ECJ September 14, 2023, C-821/21 NM v Club La Costa (UK) plc, sucursal en España, CLC Resort Management Ltd, Midmark 2 Ltd, CLC Resort Development Ltd, European Resorts & Hotels SL, ECLI:EU:C:2023:672, para. 60.

¹⁵³ ECJ September 14, 2023, C-821/21 NM v Club La Costa (UK) plc, sucursal en España, CLC Resort Management Ltd, Midmark 2 Ltd, CLC Resort Development Ltd, European Resorts & Hotels SL, ECLI:EU:C:2023:672, para. 66.

This is not a problem to establish the domicile of the defendant. Regardless of whether a crypto-asset service provider has physical presence in a host Member State, it is stipulated that a registered office must be established in some Member State in which some of the operations are carried out (home Member State). Then one must follow the guidelines for determination of domicile stipulated in art. 63 of Brussels I bis to locate the domicile of the crypto-asset provider. In the absence of more specified guidelines for digitally composed legal persons and companies, the linking factor must be established in accordance with 63 respecting the objective of uniformity of application and foreseeability.

For the purposes of art. 17 a consumer may invoke jurisdiction based on the provisions laid down in art. 17 and 18 of Brussels I bis if the contract has been concluded with a person who pursues commercial or professional activities in the consumer's domicile (Member State) or in several Member States one of which being the consumer's domicile (art. 17(1)(c)). Additionally, in art. 17(2) the defendant is deemed to be domiciled in a Member State if they have a branch, agency or other establishment in one of the Member States and the dispute arises from the operations of said branch, agency or establishment. For consumer contracts a sufficient linking factor to establish a domicile for the defendant in a Member State is to have some sort of establishment in the Union and the dispute directly derives from the said establishment.

The requirements for crypto-assets providers and other crypto-asset operators are directly technologically dependent as they are directed to operators in the markets for crypto-assets which are powered by distributed ledger technology. However, the requirements to define the domicile for these operators are not limited to any technological solution. As the different linking factors set out in art. 63 of Brussels I bis are equal, it is to be assessed on a case-by-case basis if a domicile in a Member State can be found.

4.4 De lege ferenda

Having so far discussed the nature of ICOs, their functionalities, questions deriving from them with respect to jurisdiction and litigation and solutions proposed, it can be speculated what kind of measures are expected to be undertaken with regard to legislation to keep up with the digital progress.

The speculation is now two-fold. First, it is discussed whether the existing legislation aids creating future-proof regulation with respect to ICOs. In this same context, it will be addressed the prospects of ICOs and where their technological progress is heading to. Second, I will be considering the proposal regarding the extension of the application expressed in Report from

the Commission to the European Parliament, the Council, and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012.¹⁵⁴ This proposal will be viewed from the technological point of view and the principles pursued by Regulation No 1215/2012.

It is reasonable to evaluate does Regulation No 1215/2012 alias Brussels I bis, which has been compiled in a technologically neutral manner, assist in the creation process of future-proof legislation equipped with means to answer questions stemming from technological advancements. The more technology evolves, the more the question of technology neutrality becomes a topic of debate. With the emerge of Regulation No 2023/1114 alias MiCa Regulation there are now general and specific obligations for different kinds of operators in the markets of crypto-assets. In the sense of technological neutrality, the regulation is tied to certain types of crypto-assets and thus to the distributed ledger technology. On the other hand, the regulation is aiming for neutrality to some extension as the material scope covers most of crypto-assets being provided within the Union. The aspects of regulation neutrality can be found e.g. in the fact that the regulation takes on a substance over form approach on crypto-assets.

Veerpalu has brought forward a few well-founded arguments against the principle of technology neutrality. In its simplicity, neutral provisions tend to be too vague and general to the extension that the inherent meaning of the provision may remain indefinite.¹⁵⁵ In the absence of clear and definite rules, the pressure of establishing uniform rules for interpretation is on the executive and judiciary. If the interpretation of a rule remains ambiguous in the litigation of a national court, the national court may invoke art. 267 of TFEU to bring the question related to EU law before the Court of Justice.¹⁵⁶ Thus, indefinite EU legislation may put additional pressure on the ECJ to establish the preliminary rules for interpretation.

¹⁵⁴ COM (2025) 268 final, Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), p. 4-5.

¹⁵⁵ *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 79.

¹⁵⁶ Consolidated versions of the Treaty of the European Union and the Treaty of the Functioning of the European Union (2016/C 202/01), art. 267.

Criticism toward the principle of technology neutrality has been motivated by a linguistic argument arguing that the language in legislation is based on the existing reality and cannot therefore be future-proof in the sense of precise and clear laws.¹⁵⁷

Reed has elaborated the analysis of the undesirable implications even further. It is argued that technology neutrality can accelerate prospective regulating before properly understanding how the new technology will be used and what kind of issues the regulation needs to solve. An assumption generally made of technologically neutral regulating is that it is flexible enough to be bent to arising technologies when in reality this may not be practical or have desirable outcomes.¹⁵⁸ Similar argument has been presented by Gervais who agrees that technology neutrality may have unforeseen implications some of which are not desirable: when technology neutrality is applied to a regulation it means in practice that it will be applied to new technologies, the invention and development of which cannot be foreseen. Thus, the application of technology neutral regulation may hinder their deployment or prevent it altogether.¹⁵⁹

How does the technology neutral regulation relate to ICOs? As studied in the previous chapters of this study, it is possible seek answers to the jurisdictional questions from the linguistically neutral Brussels I bis by locating the intention of the lawmaker through the written texts in the preamble and relevant case-law provided by the ECJ. Additionally, the opinions of Advocate Generals have provided more insight into the questions being studied. Although the solutions proposed in this study to the jurisdictional questions are not apparent or certain by any chance, the motivation behind them can be located in the prevailing jurisdictional rules set out in Brussels I bis.

It is noteworthy to remember that ICOs are merely one means to equip blockchain technology and that ICOs are not the ending point in field of crowdfunding methods powered by blockchain technologies. Whereas the jurisdictional issues showcased in this presentation have been able to be addressed, there is a lingering feeling of uncertainty when looking at the prospects of ICOs.

In January 2018, the founder of Ethereum proposed a new improved version of ICOs: DAICO. DAICO is a crowdfunding method combining the ICO model with some benefits from DAOs –

¹⁵⁷ *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 79.

¹⁵⁸ *Reed*, Taking Sides on Technology Neutrality, p. 282.

¹⁵⁹ *Gervais*, Towards a new core copyright norm: the reverse three-step test, p. 27.

which have been covered briefly before in this study. Whereas ICO investments have an inherent risk of being attacked either by an irresponsible launching team or by being exposed to a scam, DAICOs enhance investor security through decentralization and not fully trusting any centralized group. A noticeable difference between an ICO and a DAICO is that after completing the contribution period the investors regain some control over funds as they can vote on their usage. The benefit of the DAICO model is that it provides investors with more control over the investments made and more transparency and thus mitigating the risks arising from the classic ICO model.¹⁶⁰

Even though a DAICO contract is published by a single development team to raise funds, the control over the funds raised is transferred to the investors engaged in the fundraising project. After the contribution period there is a voting mechanism which can be used by the investors. Such a voting mechanism has two types of resolutions first of them being raising the tap and second being a self-destruction mechanism which means in practice that all the remaining funds will be proportionately withdrawn by the token holders.¹⁶¹

While the new ICO model 2.0 possibly strengthens investor security by letting them regain control after the crowdfunding process, DAICOs may entail issues which are yet unforeseen. If one were to theorize the possible obstacles, the mechanism of the voting system could be brought forward. It is easy to imagine a situation in which investors have regained control in the form of a voting system and they're deciding on the usage of the funds collected: to continue or to withdraw. Let us assume that opinions are divided and eventually lead to a situation which is dissatisfactory to some of the investors. However, the voting has passed with the appointed majority vote with a quorum. The investors left with the dissatisfactory outcome feel like the contract has been breached and want to bring proceedings in front of a competent court. This is the starting point for jurisdictional issues in such a situation. If one is to make a crowdfunding contract in which they are expecting tokens as remuneration through a DAICO contract, what kind of contract is at hand?

In a model that is inherently decentralized and in which the development team has limited control over the funds collected during and after the contribution period, the person to be sued

¹⁶⁰ See for reference Ethresearch, Explanation of DAICOs. <https://ethresearch.ch/t/explanation-of-daicos/465>. Cited 17.5.2026. See also Brave NewCoin., ICOs version 2.0 – What are DAICOs and will they revolutionize the ICO? <https://bravenewcoin.com/insights/icos-version-2-0-what-are-daicos-and-will-they-revolutionize-the-ico>. Cited 17.5.2026.

¹⁶¹ Ethresearch, Explanation of DAICOs. <https://ethresearch.ch/t/explanation-of-daicos/465>. Cited 17.5.2026.

in this hypothetical scenario is ambiguous. Considering that the scale of DAICO crowdfunding projects may vary, it is possible that the number of participants may vary from dozens to thousands and who can be dispersed all around the world.¹⁶² When entering a contract that is based on the DAICO model, is an investor concluding the contract solely with the start-up that publishes the project or is the contract model a little more nuanced considering the conditions in which tokens can be acquired as remuneration? Hence, tracking down the party responsible may become an obstacle. Moreover, if there is no intermediary but all the transactions take place in a fully decentralized ledger in which all the decisions are made through a democratic voting system, it possible that the project falls outside the scope of MiCa Regulation.¹⁶³

It is relevant to ponder whether it is sustainable to compose technology specific legislation to tackle the uncertainties. As recognized previous studies technological specificity has been rejected as technologically neutral legislation has been hailed as the correct way to regulate. There can be however recognized pros in technology specific regulations as it creates substantial certainty as to scope of the regulation and as result securing regulatory compliance.¹⁶⁴ It has been proposed that the lawmaker should approach legislation in a technology neutral manner if the behavior to be regulated does not go through alterations because of use of different technologies.¹⁶⁵

I weigh in the discussion with the argument of sustainability. Given the fast-paced progression of different distributed ledger technology applications, technology specific legislation can be easily criticized. Considering the existing and possible means to equip distributed ledger technology and all the variations of centralization and decentralization, it would be a disadvantage to try to fill the regulatory gaps with specific laws and regulations for each application equipping the functionalities of distributed ledger technology. If the progression of ICOs is solely viewed it can be perceived that remarkable advancements have been made in a timeline of five years: ICOs were presented to the public for the first time in 2013 and DAICO emerged already in 2018 with the first launched project, the Abyss.¹⁶⁶ The unpredictability of

¹⁶² See e.g. Brave NewCoin., ICOs version 2.0 – What are DAICOs and will they revolutionize the ICO? [ICOs version 2.0 — What are DAICOs and will they revolutionize the ICO? - Brave New Coin](#). Cited 17.5.2026. On the website, the world’s first DAICO, the Abyss, is said to have had 4,897 investors and raising over 15 million dollars over the timeline of April 16 to May 16 in 2018.

¹⁶³ See Regulation (EU) No 2023/1114, preamble (22): “Where crypto-asset services are provided in a fully decentralized manner without any intermediary, they should not fall within the scope of this Regulation.

¹⁶⁴ *Reed*, Taking Sides on Technology Neutrality, p. 283.

¹⁶⁵ *Reed*, Taking Sides on Technology Neutrality, p. 283.

¹⁶⁶ See for reference of the timeline presented *Myalo*, Comparative Analysis of ICO, DAOICO, IEO and STO. Case Study, p. 18.

new emerging technologies and their implications on jurisdictional issues would put the lawmaker in a position where laws and regulations would need to be updated continuously to keep up with advancements that take place every few years or even more frequently. ICOs development is merely an example in this debate.

If technology specific legislation is to be disregarded in this context, other solutions must be innovated. A realistic and reasonable approach would be implementation neutrality of a legal rule. Veerpalu has argued that even a legal rule, which is not constructed in technology neutral manner, can still be applied neutrally given that sufficient impact assessment has been undergone. Such an impact assessment entails factors such as consistent treatment with similar technologies, functional equivalence and effect equivalence of the technologies and the objective of enhancing transparency.¹⁶⁷ Similarly, Reed has proposed in his study that implementation neutrality may be in place if all known and anticipated implementations of a technology can be used in compliance with the regulation.¹⁶⁸

This solution will mean in practice that the executive and judiciary will need to adopt the principle of technology neutrality as a working tool when navigating through possible new jurisdictional issues deriving from technological advancements. In order to be able to make an impact assessment to ensure implementation neutrality, the executive and judiciary need to be acquainted to some extent with jurisdictional problems that different distributed ledger applications entail. This can of course become an occupational burden depending on how many civil disputes are to given rise by ICOs and similar crowdfunding methods.

Having discussed briefly the impact of technology neutrality and technology specificity with respect to ICOs and DAICOs, it is to be addressed whether application of Brussels I bis should be extended to apply to defendants domiciled in a third country.

Such a proposal has been presented in the Commission's report from 2025. The Commission's proposal for the extension of application of Brussels I Regulation was presented already in 2010 leading to the adoption of the Convention of the Recognition and Enforcement of Foreign Judgments in Civil or Commercial matters in 2019. This, however, does not constitute jurisdictional grounds in a multilateral manner and the question of applicability of Brussels I bis in relation to defendants domiciled outside the Union remains unanswered. The need for assessment is motivated by divergence between the national legislation of the Member States

¹⁶⁷ *Veerpalu*, Decentralised technology and technology neutrality in legal rules: an analysis of De Voogd and Hedqvist, p. 82, 87-88.

¹⁶⁸ *Reed*, Taking Sides on Technology Neutrality, p. 283.

in which grounds for jurisdiction may be even exorbitant. The current state of affairs can easily deprive persons of justice, creating unequal access to justice and the divergence of national provisions regarding jurisdiction creates an unequal footing the applicant and defendant, especially in a situation where a person seeks to sue a foreign company domiciled outside the Union and the parent company domiciled within the Union. In some situations, the outcome is irreconcilable judgments.¹⁶⁹

Considering the possible extension of the Regulation in a few well-based premeditated occasions, there could be some advantages with respect to jurisdictional issues stemming from ICOs and similar applications. As covered in Chapter 4.1.1, the United States takes the leading place when it comes to the number of ICO projects launched according to the statistics provided by ICObench.¹⁷⁰ Thus, it is apparent that investors from the Member States are also partaking in crowdfunding projects launched outside the Union. These third-country firms are exempt from the authorization process for crypto-asset service providers if a person established in the Union receives crypto-asset services from a third-country firm by his own initiative.¹⁷¹ In these situations the jurisdiction would be resolved in accordance with art. 6 of Brussels I bis, meaning that jurisdiction is governed by national laws if the defendant is domiciled outside the Union.

Extension could be well-based in situations where the applicant is a weaker party, and the premeditated extensions would serve the objectives of foreseeability and legal certainty from the perspective of both parties. The extension proposed could ease the determination of jurisdiction when ICOs have evolved further into their decentralized form in which they have no central administration which could be tracked down and in which their functions operate through a dispersed decentralized voting system. Then the applicant would not have to be able to locate the defendant's domicile in order to invoke provisions of Brussels I bis if only the premeditated requirements for the extension are met. Further, then it would not always be necessary to establish whether a crypto-asset service provider is providing services in a

¹⁶⁹ COM, June 2, 2025, Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the application of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of

judgments in civil and commercial matters (recast), COM (2025) 268 final, p. 5.

¹⁷⁰ See for reference Icobench, 70+ ICO statistics you need to know in 2026, <https://icobench.com/stats/ico-statistics/>. Cited 13.5.2026.

¹⁷¹ See Regulation (EU) No 2023/1114, preamble (75).

Member State of the Union if the extension of application could be invoked based on the applicant's status.

To summarize, it can be said that there is and will be prevailing obstacles deriving from either the fast-paced technological advancements and the slow-paced legislation as in its current form it cannot serve fully to the purposes trying to be achieved because of new uprising technologies, of which effects are still unforeseen. In that sense conducting studies of the current applications is worthy in itself as a part of the process of preparing for further advancements to come. ICOs are today, DAICOs are tomorrow, but the day after tomorrow is yet to be seen and predicted.