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Qualification of Cryptocurrencies in Private Law on the Example of China, Germany and the United Kingdom

Kwalifikacja kryptowalut w prawie prywatnym na przykładzie Chin, Niemiec i Wielkiej Brytanii

ABSTRACT

In Polish private law, there are different positions regarding the legal qualification of cryptocurrency units. The issue is of both theoretical and practical importance, as it affects the regulations that may be applied to them. And the views range from assumption that cryptocurrencies are a part of property of a person entitled only as a claim, through the position that their holders have absolute property rights to such goods derived from the analogous application of the provisions on things, to i.a. position that cryptocurrency is not a component of property, but having a specific public address and a private key that allows the use of cryptocurrency constitutes a favorable factual situation with a measurable property value and may be recognized as a component of property. However, the comments made so far are usually devoid of a comparative legal perspective. This article aims to partially fill this gap by looking at the solutions proposed or adopted in different legal orders: Chinese, German, and British (English, Welsh, and Scottish). The result of the conducted considerations is the conclusion that the problem with the qualification of cryptocurrencies occurs not only in Polish law, and its resolution in favor of the assumption that their holders may have absolute property rights to them, which seems to be generally the right direction, and at the same time the one gaining ground in various countries, requires the intervention of the legislator.

Keywords: cryptocurrency regulation; crypto-asset; digital asset; virtual currency; legal nature of cryptocurrency; cryptocurrency as a thing

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INTRODUCTION

Despite the fact that cryptocurrencies appeared in circulation in Poland over 10 years ago, our private law so far lacks a uniform position in the doctrine and case law indicating their legal qualification, as well as provisions that directly concern them. Certain regulations only appear in public law.[1] The problem of qualification has not been solved by the 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,[2] that – subject to exceptions – will apply from 30 December 2024 and does not include the definition of cryptocurrencies, which are the most well-known type of crypto-assets. It only indicates in Article 3 (1) (5) that, for the purposes of this Regulation, "crypto-asset" means a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology.[3] Similarly, the problem of legal qualification of cryptocurrencies is not solved by the earlier issued Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC,[4] which – as a result of its amendment by the so-called AML V Directive[5] – defines virtual currencies.[6] Pursuant to its Article 3 (18) the term "virtual

[1] See P. Katner, *Cryptocurrencies: The Impossible Domestic Law Regime?*, [in:] *Rapports polonais, XXI Congrès international de droit comparé / 21st International Congress of Comparative Law, Asunción 23–28 X 2022*, eds. B. Lewaszkiewicz-Petrykowska, D. Skupień, Lodz 2022, pp. 164–172. See also Draft Act on Cryptoassets, 22.2.2024, https://legislacja.rcl.gov.pl/projekt/12382311/katalog/13040399 (access: 12.6.2024), hereinafter: the Draft Act on Crypto-assets, currently at the opinion stage.

[2] OJ L 150/40, 9.6.2023. Article 1 (1) of Regulation 2023/1114 lays down uniform requirements for the offer to the public and admission to trading on a trading platform of crypto-assets other than asset-referenced tokens and e-money tokens, of asset-referenced tokens and of e-money tokens, as well as requirements for crypto-asset service providers.

[3] This definition is also referred to in Article 2 (10) of the Draft Act on Crypto-Assets; however, it should be noted that under Article 48 (2) in conjunction with Article 3 (1) (7) of Regulation 2023/1114, a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency is deemed to be electronic money and is referred to in the Regulation as "electronic money token" or "e-money token". See also Article 2 (2), (3) and (4) of Regulation 2023/1114 and the definition of crypto-asset in Article 3 (14) of the Regulation (EU) 2023/1113 of the European Parliament and of the Council of 31 May 2023 on information accompanying transfers of funds and certain crypto-assets and amending Directive (EU) 2015/849 (OJ L 150/1, 9.6.2023).

[4] OJ L 141/73, 5.6.2015, hereinafter: the Directive AML IV.

[5] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (OJ L 156/43, 19.6.2018).

[6] Virtual currency is a broader concept than cryptocurrency.

currencies" means a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically.[7]

There is no doubt that cryptocurrency trading is allowed in Poland.[8] However, in the case of civil law events relating to it, there are many issues in Polish civil law that – in the absence of specific regulation – cannot be resolved without indicating the legal qualification (nature) of cryptocurrencies.[9] Determining what a cryptocurrency is from the point of view of private law is important, among others, to indicate the provisions applicable to its acquisition by the first holder, to its transfer, to the contract obliging to perform such a disposition, to the rights of persons holding cryptocurrency units and to the claims that protect the title to them, to the method of conducting execution against cryptocurrencies, as well as for the proper use of conceptual apparatus (e.g. can we talk about the existence of a "right" to cryptocurrency units, in particular ownership right, their "possession", "sale", "loan").[10]

It should be noted that the issue of legal qualification of cryptocurrencies occurs not only in Polish law. It is also analyzed in other legal systems, although the significance of its solution – due to differences in applicable regulations – varies. Therefore, in order to expand the discussion carried out in the Polish literature to include a comparative law aspect that has not been looked at so far, it is worth taking into account the solutions proposed or in force in other countries and the argumentation used there, both in the doctrine and case law. All the more so because, due to the wide availability of cryptocurrencies in Poland and their increasing occurrence as a component of property,[11]

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[7] See, however, Article 38 (2) (c) of Regulation 2023/1113, which amends Article 3 (18) of Directive AML IV and in place of the definition of virtual currencies introduces the definition of crypto-asset similar to the one in Regulation 2023/1114. The amendment will apply from 30 December 2024.

[8] See, i.a., Komunikat Narodowego Banku Polskiego i Komisji Nadzoru Finansowego w sprawie „walut" wirtualnych, 7.7.2017, https://www.knf.gov.pl/knf/pl/komponenty/img/Komunikat_NBP_KNF_w_sprawie_walut_wirtualnych_7_07_2017_57361.pdf (access: 13.6.2024). For more, see P. Katner, *op. cit.*, pp. 159–162, 166.

[9] As to attempts to qualify cryptocurrencies in Polish private law, see K. Zacharzewski, *Bitcoin jako przedmiot stosunków prawa prywatnego*, "Monitor Prawniczy" 2014, no. 21, p. 1133; K. Górniak, *Prawo własności jednostek waluty kryptograficznej*, "Kwartalnik Prawa Prywatnego" 2019, no. 3, pp. 566–567; P. Machnikowski, [in:] *System Prawa Prywatnego*, vol. 3: *Prawo rzeczowe*, ed. E. Gniewek, Warszawa 2020, p. 30; M. Michna, *Bitcoin jako przedmiot stosunków cywilnoprawnych*, Legalis 2018, Chapter II, § 6; J. Szewczyk, *O cywilnoprawnych aspektach bitcoina*, "Monitor Prawniczy" 2018, no. 5, p. 247; T. Dybowski, A. Pyrzyńska, [in:] *System Prawa Prywatnego*, vol. 5: *Prawo zobowiązań – część ogólna*, ed. K. Osajda, Warszawa 2020, p. 271.

[10] See P. Katner, *op. cit.*, pp. 162–166, 173–178.

[11] For example, see K. Łukasik, *Jak Polacy inwestują w kryptowaluty*, 2023, https://pie.net.pl/wp-content/uploads/2023/07/Tygodnik-PIE_28-2023.pdf (access: 13.6.2024, p. 6; K. Rębisz, *Kryptowalutowi miliarderzy. Lista Forbesa z polskim akcentem*, 6.4.2022, https://www.parkiet.com/kryptowaluty/art36024891-kryptowalutowi-miliarderzy-lista-forbesa-z-polskim-akcentem (access: 13.6.2024).

the issue is not only of theoretical importance, but also of significant importance for practice, including jurisprudence.

CRYPTOCURRENCIES IN CHINESE PRIVATE LAW

Due to the fact that China enacted in 2020 a new Civil Code, it could be expected that issues regarding cryptocurrencies are regulated therein. However, Chinese law still does not provide a specific definition of cryptocurrencies, and the academic discussion has failed to reach a consensus as to such. The main notices and announcements that have been issued by Chinese government for cryptocurrencies do not define in detail neither virtual currencies, nor cryptocurrencies but rather refer to certain types as their examples. In some cases, they also present only certain features of virtual currencies. For example, the Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation of 15 September 2021 provides that "Virtual currencies do not have the same legal status as legal tender. Bitcoin, Ethereum, Tether, and other virtual currencies have the following distinguishing features: not being issued by monetary authorities, relying on cryptography and distributed ledger and similar technologies, and existing in digital forms".[12]

From civil law point of view, it should be noticed that Bitcoin was described in the Notice on the Prevention of Risk about Bitcoin by the People's Bank of China from December 2013 as a specific virtual commodity.[13] Due to this, under China's Civil Code, cryptocurrencies should be interpreted as network virtual property (or online virtual assets, according to another translation of the Chinese code term into English), a concept introduced to the Code by Article 127, which provides that "where any laws provide for the protection of data and network virtual property, such laws shall apply".[14] However, the Code does not specify its nature. And

[12] The People's Bank of China, Cyberspace Administration of China, The Supreme People's Court, The Supreme People's Procuratorate, Ministry of Industry and Information Technology, Ministry of Public Security, State Administration for Market Regulation, China Banking and Insurance Regulatory Commission, China Securities Regulatory Commission, State Administration of Foreign Exchange, Notice on Further Preventing and Resolving the Risks of Virtual Currency Trading and Speculation, 15.9.2021, https://www.pbc.gov.cn/en/3688253/3689012/2025080817521950275/index.html (access: 14.6.2024), hereinafter: the 2021 Notice.

[13] The People's Bank of China, Ministry of Industry and Information Technology, Banking Regulatory Commission, Securities Regulatory Commission, Insurance Regulatory Commission, Notice on the Prevention of Risk about Bitcoin, December 2013, hereinafter: the 2013 Notice. See also J. Hu, *The Regulation of Cryptocurrency in China*, "International Journal of Digital Law and Governance" 2024, vol. 1(1), pp. 57–58.

[14] See translation in *China*, report prepared by national reporter as a supplement to the General Report *Cryptocurrencies: The Impossible Domestic Law Regime?* for the 21st International Congress of Comparative Law, Asunción 23–28.10.2022, p. 7, footnote 4. The translation of Article 127, available at https://www.chinajusticeobserver.com/law/x/civil-code-of-china-part-i-general-princi-

in doctrine, the nature of network virtual property is controversial between the right *in rem* theory, where the holder has the right *in rem* to the network virtual property, and the claim theory, where the holder has a claim on the issuer of the network virtual property. The position is also expressed that in a situation where the network virtual property is issued by the centralized manager and the holder cannot enjoy and dispose of it without the cooperation of the issuer, the claim theory seems more reasonable. But it cannot apply where there is no issuer, as in case of many cryptocurrencies.[15]

However, nowadays the issue of civil law qualification of cryptocurrencies seems to be of secondary importance in China. This is because the Chinese government has taken a number of restrictions on cryptocurrency trading, such as shutting down cryptocurrency exchange platforms and restricting the mining of cryptocurrencies, by way of several administrative agencies jointly promulgating departmental regulations (in the form of a notice or an announcement).[16] Finally, the 2021 Notice provides that "Virtual currency-related activities are illegal financial activities" and "Where any legal person, unincorporated organization, or natural person breaches public order and good morals when investing in virtual currencies or related derivatives, the corresponding civil juristic behavior is void and the losses arising therefrom are to be borne by themselves". Although the Notice 2021 is not issued through legislation and in theory does not have the power to dismiss acts involving cryptocurrencies, as it is only a departmental regulation, in accordance with Article 153 (2) of the Civil Code a civil juristic act that offends the public order and good morals is void. And the Supreme Court in 2019 in Minutes of the National Courts' Civil and Commercial Trial Work Conference indicated that "Violation of departmental regulations does not affect the validity of contracts in general, but if the departmental regulations relate to public order and good moral such as financial security, market order, and national macro policies, the contracts shall be determined invalid".[17] As a result, in the vast majority of cases brought before courts, legal transactions relating to cryptocurrencies (e.g. sales contracts, contracts of the mandate of investment involving cryptocurrencies) are ruled invalid.[18]

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ples-20200528 (access: 14.6.2024), is as follows: "Where there are laws particularly providing for the protection of data and online virtual assets, such provisions shall be followed".

[15] See *China…*, p. 7. See also J. Hu, *op. cit.*, pp. 67–69, who, in addition to the two views mentioned, considers the position that cryptocurrency is an intellectual property object.

[16] For example, see the Notice 2013; Norton Rose Fulbright, *China Issues Announcement to Ban Fundraising through Token Offerings*, 2017, https://www.nortonrosefulbright.com/en/knowledge/publications/aa676f71/china-issues-announcement-to-ban-fundraising-through-token-offerings (access: 14.6.2024).

[17] Cited after *China…*, p. 8.

[18] See *ibidem*, pp. 8–14 and the decisions of Chinese courts indicated there. See also J. Hu, *op. cit.*, p. 59.

QUALIFICATION OF CRYPTOCURRENCIES IN GERMAN PRIVATE LAW

German law lacks a consistent legal framework for the qualification of cryptocurrencies, as well as comprehensive solutions for the treatment of them in private law, i.a. contract law, law of property, inheritance law, civil law procedure, etc. Admittedly, the transposition of the AML V Directive in 2019 led to the recognition of crypto-assets in the German Banking Act of 1961 (KWG – Kreditwesengesetz),[19] where they are defined in Section 1 (11) fourth and fifth sentences KWG[20] consistent, but broader in scope than the definition of virtual currency in the amended Directive AML IV, and by virtue of Section 1 (11) first sentence KWG, they are expressly recognized as financial instruments for the purpose of the German Banking Act. However, the KWG does not distinguish between cryptocurrencies and other types of crypto-assets. The recognition of crypto-assets in the KWG is also of little use when one looks at the treatment of cryptocurrencies under German private law, as it does not help to clarify their position in the traditional categories of private law. And as the treatment of cryptocurrency under private law has not yet been addressed in statutory law,[21] the solution of that problem rests on the application of established general principles. There is also a growing number of court decisions referring to virtual currencies, but so far they are confined to judgments of lower instances, which leaves substantial degree of legal uncertainty.[22]

As in other Member States of the Eurozone, cryptocurrencies are not recognized in Germany as legal tender. This follows from Article 128 (1) third sentence of the Treaty on the Functioning of the European Union. Most scholars are also of the

[19] https://www.gesetze-im-internet.de/kredwg/KWG.pdf (access: 14.6.2024).

[20] "Kryptowerte im Sinne dieses Gesetzes sind digitale Darstellungen eines Wertes, der von keiner Zentralbank oder öffentlichen Stelle emittiert wurde oder garantiert wird und nicht den gesetzlichen Status einer Währung oder von Geld besitzt, aber von natürlichen oder juristischen Personen aufgrund einer Vereinbarung oder tatsächlichen Übung als Tausch- oder Zahlungsmittel akzeptiert wird oder Anlagezwecken dient und der auf elektronischem Wege übertragen, gespeichert und gehandelt werden kann. Keine Kryptowerte im Sinne dieses Gesetzes sind 1. E-Geld im Sinne des § 1 Absatz 2 Satz 3 des Zahlungsdiensteaufsichtsgesetzes oder, 2.ein monetärer Wert, der die Anforderungen des § 2 Absatz 1 Nummer 10 des Zahlungsdiensteaufsichtsgesetzes erfüllt oder nur für Zahlungsvorgänge nach § 2 Absatz 1 Nummer 11 des Zahlungsdiensteaufsichtsgesetzes eingesetzt wird".

[21] The definition of digital products (that includes digital content and digital services) in Section 327 (2) of the German Civil Code (BGB – Bürgerliches Gesetzbuch), https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.pdf (access: 14.6.2024), does not include cryptocurrencies. As a result, Sections 327–327u and 475a BGB that refer to contracts on digital products do not concern cryptocurrencies. One may notice that Section 327 (1) second sentence BGB recognizes that digital presentation of a value may be agreed as a price that is to be paid for the digital products. However, this statement doesn't help with classification of cryptocurrency tokens for the purposes of property or contract law.

[22] See J.-H. Binder, *Cryptocurrencies – Country Report: Germany*, report prepared by national reporter as a supplement to the General Report *Cryptocurrencies: The Impossible Domestic Law Regime?* for the 21st International Congress of Comparative Law, Asunción 23–28.10.2022, p. 2.

opinion that they cannot be qualified as money (or currency).[23] And as they are not recognized as legal tender, they cannot be, at least without modifications, subject to private law principles governing monetary obligations.[24]

In German doctrine, it is also rather agreed that cryptocurrencies as a rule cannot be qualified as claims (ger. *Forderungen*) to the extent that they do not reflect bilateral relationship where the creditor has an enforceable right to claim something from the debtor.[25] However, it has been debated whether these issued by a central issuer (e.g. Libra) could qualify as a claim.[26]

Some authors propose that crypto-assets in general should be qualified as things (tangible goods, Ger. *Sachen*), which would clarify legal titles in such assets and facilitate the application to them of legal principles pertaining to transactions in things.[27] Such a solution is, however, rejected by most authors due to the wording and traditional interpretation of the definition of things in Section 90 BGB, where only tangible (corporeal) objects qualify as things.[28] Cryptocurrency tokens are also not qualified as intellectual property rights under the Act on Copyrights and Related Rights (Gesetz über Urheberrecht und verwandte Schutzrechte, Urheberrechtsgesetz).[29] Thus, most authors qualify cryptocurrency as other property right,[30] although there are some who contest such a solution.[31]

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[23] For example, see S. Omlor, *Kryptowährungen im Geldrecht*, "Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht" 2019, vol. 183, pp. 307–308.

[24] For example, see S. Grundmann, *Commentary to Section 245*, [in:] *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, ed. W. Krüger, München 2019, paras 13–24.

[25] For example, see D. Skauradszun, *Kryptowerte im Bürgerlichen Recht*, "Archiv für die civilistische Praxis" 2021, vol. 221(3), pp. 365–366.

[26] See K. Langenbucher, M. Hoche, J. Wentz, *Virtuelle Währungen*, [in:] *Bankrechts-Kommentar*, eds. K. Langenbucher, D.H. Bliesener, G. Spindler, München 2020, p. 791, para. 37.

[27] See D. John, *Zur Sachqualität und Eigentumsfähigkeit von Kryptotoken*, "Zeitschrift für Bank- und Kapitalmarktrecht" 2020, no. 2, p. 76. See also A. Walter, *Bitcoin, Libra und sonstige Kryptowährungen aus zivilrechtlicher Sicht*, "Neue Juristische Wochenschrift" 2019, no. 50, p. 3613, who argues for *per analogiam* application of principles that refer to tangible goods.

[28] For example, see K. Langenbucher, M. Hoche, J. Wentz, *op. cit.*, p. 790, para. 35; D. Skauradszun, *op. cit.*, pp. 361–363; G. Spindler, M. Bille, *Rechtsprobleme von Bitcoins als virtuelle Währung*, "Wertpapiermitteilungen" 2014, vol. 29, p. 1359.

[29] For example, see B. Beck, D. König, *Bitcoin: Der Versuch einer vertragstypologischen Einordnung von kryptographischem Geld*, "Juristenzeitung" 2015, vol. 70(3), p. 131; M.E. Kütük, C. Sorge, *Bitcoin im deutschen Vollstreckungsrecht – Von der „Tulpenmanie" zur „Bitcoinmanie"*, "Multimedia und Recht" 2014, no. 10, p. 644; A. Schlund, H. Pongratz, *Distributed-Ledger-Technologie und Kryptowährungen – eine rechtliche Betrachtung*, "Deutsches Steuerrecht" 2018, no. 12, p. 600; G. Spindler, M. Bille, *op. cit.*, p. 1360.

[30] For example, see K. Langenbucher, *Digitales Finanzwesen*, "Archiv für die civilistische Praxis" 2018, vol. 218(2), p. 407; A. Schlund, H. Pongratz, *op. cit.*, p. 600; D. Skauradszun, *op. cit.*, pp. 468–469; G. Spindler, M. Bille, *op. cit.*, p. 1360.

[31] For example, see M.E. Kütük, C. Sorge, *op. cit.*, p. 644; D. Paulus, R. Matzke, *Smart Contracts und das BGB – Viel Lärm um nichts?*, "Zeitschrift für die gesamte Privatrechtswissenschaft" 2018,

However, such a qualification does not remove problems to qualify transactions in cryptocurrency for the purposes of contract and property law. As a result, the treatment of cryptocurrency tokens for the purposes of property law in general and the legal classification of transfer of title in particular (as a transfer of ownership, an assignment, one of aforementioned by way of an analogy, a *de facto* shift of legal entitlement based on the parties' actions, Ger. *Realakt*) remains so far largely unsettled.[32] In case of contract law, the situation seems better, among others, due to the quite spacious content of Section 453 (1) first sentence BGB[33] and Section 480 BGB,[34] which allow to apply accordingly the provisions governing sale contract to, i.a., acquiring cryptocurrency against payment of legal tender or exchanging one cryptocurrency into another. However, it is dubious if, e.g., the provisions on money loan contract (Sections 488–490 BGB) or contract for the loan of a thing (Sections 607–609 BGB) could be applied to cryptocurrencies.[35]

QUALIFICATION OF CRYPTOCURRENCIES IN THE UNITED KINGDOM

There is no general legal definition of cryptocurrencies in English or Welsh law. They are usually referred to as exchange tokens or crypto-tokens as one type of crypto--assets.[36] And the term "cryptoasset"[37] is defined in Regulation 14A (3) (a) of the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017 for the purposes of this regulation and has been introduced by Regulation 4 (7) of the Money Laundering and Terrorist Financing (Amendment) Regulations 2019 that implemented the AML V Directive. The definition provides that "cryptoasset" means a cryptographically secured digital representation of value

no. 4, p. 451; C. Rückert, *Vermögensabschöpfung und Sicherstellung bei Bitcoins*, "Multimedia und Recht" 2016, no. 5, p. 296.

[32] See J.-H. Binder, *op. cit.*, pp. 27–30.

[33] "Die Vorschriften über den Kauf von Sachen finden auf den Kauf von Rechten und sonstigen Gegenständen entsprechende Anwendung".

[34] "Auf den Tausch finden die Vorschriften über den Kauf entsprechende Anwendung".

[35] See J.-H. Binder, *op. cit.*, pp. 23–24.

[36] For example, see Gov.uk, *Cryptoassets Manual. CRYPTO10100 – Introduction to Cryptoassets: What Are Cryptoassets*, 30.3.2021, https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual/crypto10100 (access: 16.6.2024); Ministry of Justice, Law Commission, *Digital Assets: Final Report*, Law Commission, 28.6.2023, https://www.lawcom.gov.uk/project/digital-assets (access: 16.6.2024); Ministry of Justice, Law Commission, *Digital Assets as Personal Property: Short Consultation on Draft Clauses*, February 2024, https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2024/02/Feb-2024-digital-assets-and-personal-property-CP.pdf (access: 16.6.2024).

[37] In British legal acts and doctrine, the term "crypto-asset" is spelled "cryptoasset". The latter way of spelling will be used when discussing qualification of cryptocurrencies in the UK.

or contractual rights that uses a form of distributed ledger technology and can be transferred, stored or traded electronically.[38] In 2023 a new, broader definition of crypto-assets was also introduced in Section 417 of the Financial Services and Markets Act 2000 – as a result of its amendment – which does not require the use of distributed ledger technology.[39] However, cryptoassets – and therefore also cryptocurrencies – are not considered as legal tender, money or currency in the UK.[40]

As to private law, English property law is not codified under a comprehensive statute, similar to the Civil Code, and apart from various statutes with certain scope of application,[41] or definitions of "property" for a specific context (like in the Insolvency Act 1986), the general law remains judge made. In this regard, judges decide on a case-by-case basis whether a given thing or right in respect of a thing is "property", with the analysis of this issue focusing on the particular purpose of the given case. And yet, there is no comprehensive statute for the property aspects of cryptoassets, nor authoritative decision from the UK Supreme Court on the general property principles that apply. For a long time there were only various first instance decisions issued on the basis that cryptocurrencies "are property" for the purposes of interim applications relating to jurisdiction, freezing orders, and proprietary injunctions, which were neither binding precedents nor of persuasive authority.[42] It is only in 2023 that, in *Tulip Trading v Van Der Laan*, the Court of Appeal recognised the broader principle that "a cryptoasset such as bitcoin is property" under the law of England and Wales.[43]

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[38] See Money Laundering and Terrorist Financing (Amendment) Regulations 2019, https://www.legislation.gov.uk/uksi/2019/1511/regulation/4/made (access: 16.6.2024).

[39] In this case, 'cryptoasset' means "any cryptographically secured digital representation of value or contractual rights that (a) can be transferred, stored or traded electronically, and (b) that uses technology supporting the recording or storage of data (which may include distributed ledger technology)".

[40] For example, see A. Held, A. MacPherson, B.Y. Ripley, *United Kingdom (UK) Report with a Focus on the Law of England and Wales and the Law of Scotland*, report prepared by national reporter as a supplement to the General Report *Cryptocurrencies: The Impossible Domestic Law Regime?* for the 21st International Congress of Comparative Law, Asunción 23–28.10.2022, 1.1–1.3; HM Treasury, Financial Conduct Authority, Bank of England, *Cryptoassets Taskforce: Final Report*, October 2018, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752070/cryptoassets_taskforce_final_report_final_web.pdf (access: 29.12.2023), p. 12. See also Bank of England, *The Digital Pound: A New Form of Money for Households and Businesses?*, February 2023, https://www.bankofengland.co.uk/-/media/boe/files/paper/2023/the-digital-pound-consultation-working-paper.pdf (access: 29.12.2023), pp. 21–23.

[41] For example, see Law of Property Act 1925, available at https://www.legislation.gov.uk/ukpga/Geo5/15-16/20 (access: 8.7.2024).

[42] See A. Held, A. MacPherson, B.Y. Ripley, *op. cit.*, 4.1.1.

[43] See *Tulip Trading v Van der Laan* [2023] EWCA Civ 83, [2023] 4 WLR 16 at [24]. See also Ministry of Justice, Law Commission, *Digital Assets: Final Report…*, p. 44; Ministry of Justice, Law Commission, *Digital Assets as Personal Property…*, p. 7.

There is also a problem, that if cryptocurrencies are the object of property rights which bind third parties to its creation – as opposed to personal rights in respect of things, which can be enforced only against a specific person – then what kind of property they are. Traditionally, the English property is divided between real property and personal property. The rights to the latter are subdivided between rights relating to "things in possession" (tangible things) and rights relating to "things in action" (legal rights or claims enforceable by action).[44] And cryptocurrencies do not easily fall within any of these categories.

To this extent the *Digital Assets: Final Report* prepared by the Law Commission, published in June 2023, states that since the judgment in *AA v Persons Unknown*[45] was handed down in 2019, courts in at least 14 of those 24 cases, including the Court of Appeal, have cited that judgment in support of the proposition that the digital asset in question is a thing which is capable of being an object of personal property rights. In *AA v Persons Unknown*, Mr Justice Bryan said that it would be "fallacious" to proceed on the basis that the law of England and Wales recognizes no form of property other than things in possession and things in action. He explicitly recognized the difficulty in the classification of crypto-token (which, on their face, are things which are neither things in action nor things in possession). Citing the full reasoning of the UK Jurisdiction Taskforce legal statement[46] on the point, he held that a crypto-token could be an object of personal property rights even if it was not a thing in action in the narrow sense.

Taken together, the case law demonstrates that the courts of England and Wales now recognize crypto-tokens as distinct things which are capable of being objects of personal property rights. Further, through the consistent application of *AA v Persons Unknown* (as opposed to any contrary approach), courts have deliberately proceeded in a manner that carves out a third common law-based category of thing to which personal property rights can relate".[47]

In addition to the above, the report states that "the idea that crypto-tokens are capable of being objects or things in themselves (and are best described in those terms) is now widespread in legal and academic commentary, to the extent that it is standard in authoritative practitioner texts and textbooks".[48] However, in conclusions, it recommends statutory confirmation that a thing (like crypto-token,

[44] For example, see Ministry of Justice, Law Commission, *Digital Assets as Personal Property…*, p. 3.

[45] [2019] EWHC 3556 (Comm), [2020] 4 WLR 35 at [55]–[61].

[46] UK Jurisdiction Taskforce, *Legal Statement on Cryptoassets and Smart Contracts*, November 2019, https://www.blockchain4europe.eu/wp-content/uploads/2021/05/6.6056_JO_Cryptocurrencies_Statement_FINAL_WEB_111119-1.pdf (access: 10.8.2023).

[47] Ministry of Justice, Law Commission, *Digital Assets: Final Report…*, pp. 45–46.

[48] *Ibidem*, p. 45, footnote 170 and the literature cited therein; Ministry of Justice, Law Commission, *Digital Assets as Personal Property…*, p. 7.

e.g. bitcoin) will not be deprived of legal status as an object of personal property rights merely by reason of the fact that it is neither a thing in action nor a thing in possession and gives a number of examples how such a statute confirmation will provide greater legal certainty and will allow the law to develop from a strong and clear conceptual foundation. Still, the report provides that it is not necessary to define in statute the hard boundaries of such third category things (not necessarily digital, i.e. milk quotas) because the common law is the better vehicle for determining those things as objects of personal property rights.[49]

As a result, the report led to the publication in February 2024 by the Law Commission of a document titled *Digital Assets as Personal Property: Short Consultation on Draft Clauses*. It confirms the position taken in the report *Digital Assets: Final Report* and contains a short draft bill regarding English and Welsh law – intended to confirm that a thing can be the object of property rights even though it is neither a thing in action nor a thing in possession – calling for consultations before handing it to the Government to decide whether it should be implemented.[50]

In the law of Scotland, the nature of cryptocurrencies is unclear and will be largely determined by common law. However, there is a general absence of case law on cryptocurrency in Scots law, and so far, there has not been extensive scholarly discussion about its nature. Basing on the current discussion and the principles of law, it seems that at least some cryptocurrencies will be accepted as property, and cryptocurrencies would appear to constitute a sub-category of incorporeal movable property.[51] In this sense, they have more in common with intellectual property rights, although they differ from them in some respects. If so, then cryptocurrencies could be owned (subject of ownership) and it should be possible to make them subject of other property rights, but it will not be possible to possess them as such (albeit that there could be equivalence for some purposes depending upon the degree of control a party has over the assets).[52] Nevertheless, as indicated above, in the absence of case law and legislative acts, the issue of the status of cryptocurrencies in Scotland has not yet been finally resolved.

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[49] Ministry of Justice, Law Commission, *Digital Assets: Final Report…*, pp. 19, 53–55.

[50] See Ministry of Justice, Law Commission, *Digital Assets as Personal Property…*

[51] See, among others, A. Held, A. MacPherson, B.Y. Ripley, *op. cit.*, 4.1.2; A. MacPherson, B.Y. Ripley, *Digital Assets Law Reform in England and Wales and Prospects for Scotland*, https://www.abdn.ac.uk/law/blog/digital-assets-law-reform-in-england-and-wales-and-prospects-for-scotland (access: 6.6.2024). See also D. Fox, *Digital Assets in Scots Private Law*, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3914228&download=yes (access: 6.6.2024), who points out that digital assets are most appropriately analyzed as a species of corporeal movables. Still, digital asset are not goods as currently defined in the Sale of Goods Act 1979, available at https://www.legislation.gov.uk/ukpga/1979/54 (access: 8.7.2024).

[52] See A. Held, A. MacPherson, B.Y. Ripley, *op. cit.*, 4.1.2.

CONCLUSIONS

Comments on solutions adopted in quite distinct legal systems confirm that the problem with the legal qualification of cryptocurrencies in private law is common. In principle, there is no objection to the need to protect the title to the obtained cryptocurrency units. However, doubts concern whether the protecting right is of a relative or absolute nature, and if so, on what basis. These doubts are understandable, taking into account various types of cryptocurrencies, including those issued by a specific entity, without the cooperation of which the authorized person cannot use or dispose of them, as well as the catalog of rights effective against third parties adopted in different legal systems. In connection with this last issue, it is worth paying attention to the position adopted in English and Welsh law by the Law Commission, according to which – despite the slowly emerging case law accepting the qualification of the right to cryptocurrency as personal property right binding third party to its creation and the lack of obstacles to this of a statutory nature – it was considered advisable to resolve such doubts by statute and an appropriate project was prepared. Thus, it seems that such an action in order to grant the right to cryptocurrency units an absolute nature should even more take place in legal orders – such as the Polish one – that adopt a closed catalog of absolute rights and in which such an obstacle occurs. This conclusion can be drawn from the problems with the qualification of cryptocurrencies in German law and the problems resulting from the on the surface clever assumption that the right to cryptocurrency is the "other property right".

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ABSTRAKT

W polskim prawie prywatnym występują rozbieżne stanowiska dotyczące prawnej kwalifikacji jednostek kryptowalut. Zagadnienie to ma znaczenie zarówno teoretyczne, jak i praktyczne, gdyż determinuje zakres regulacji, które mogą mieć do nich zastosowanie. Prezentowane poglądy obejmują m.in. koncepcję uznającą kryptowaluty za element majątku osoby uprawnionej jedynie w postaci wierzytelności; stanowisko przyjmujące, że ich posiadaczom przysługują bezwzględne prawa podmiotowe o charakterze rzeczowym, wywodzone z analogicznego stosowania przepisów o rzeczach; stwierdzenie, zgodnie z którym kryptowaluty nie stanowią same w sobie składnika majątku, natomiast posiadanie określonego adresu publicznego oraz klucza prywatnego umożliwiającego korzystanie z kryptowaluty tworzy korzystną sytuację faktyczną o mierzalnej wartości majątkowej, która może zostać uznana za składnik majątku. Dotychczasowe rozważania w tym zakresie są zazwyczaj pozbawione perspektywy prawnoporównawczej. Celem artykułu jest częściowe wypełnienie tej luki poprzez analizę rozwiązań proponowanych lub przyjmowanych w wybranych porządkach prawnych: chińskim, niemieckim oraz brytyjskim (angielskim, walijskim i szkockim). Przeprowadzone rozważania prowadzą do wniosku, że problem kwalifikacji prawnej kryptowalut nie jest zjawiskiem charakterystycznym wyłącznie dla prawa polskiego. Ponadto jego rozstrzygnięcie na rzecz uznania, że posiadaczom kryptowalut mogą przysługiwać bezwzględne prawa podmiotowe, co wydaje się kierunkiem zasadnym i jednocześnie coraz szerzej akceptowanym w różnych państwach, wymaga interwencji ustawodawcy.

Słowa kluczowe: regulacja kryptowalut; kryptoaktywa; aktywa cyfrowe; waluta wirtualna; prawna natura kryptowaluty; kryptowaluta jako rzecz