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Original scientific paper

FILLING THE GAP: EU PRIVATE INTERNATIONAL LAW AND RIGHTS IN *REM* OVER CRYPTO-ASSETS

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ABSTRACT

This research explores whether the growing legal complexity surrounding crypto-assets should serve as a turning point for the EU to adopt unified conflict-of law rules specifically for rights in rem over crypto-assets. Although the EU has shown dynamic regulatory activity in PIL under Article 81(2) TFEU, its competence is limited in matters concerning property regimes due to the neutrality principle set forth in Article 345 TFEU. Each Member State retains autonomy over substantive property law, and this fragmentation is reflected at the PIL level as well. The paper argues that, in light of the inherently cross-border nature and rising economic significance of crypto-assets, the EU should seriously consider developing unified conflict-of-law rules applicable to rights in rem over crypto-assets in order to enhance legal certainty, coherence, and the integrity of the EU internal market.

Keywords: *Applicable law, Crypto-assets, EU private international law, Lex rei sitae, Qualification, Rights in rem*

1. INTRODUCTION

The rise of distributed ledger technology (DLT) has brought about new forms of intangible digital assets, most notably crypto-assets, whose legal nature and geographical localisation remain uncertain. This uncertainty is especially visible in the context of rights in *rem* over crypto-assets, giving rise to difficult questions not only in substantive private law, but also in private international law (hereinafter: PIL). Although crypto-assets are generally recognised as intangible digital assets, most EU Member States still do not have conflict-of-law rules specifically designed for proprietary relationships concerning such assets. Instead, domestic legal systems continue to rely on traditional rules, particularly the *lex rei sitae*

rule, despite the fact that these rule was originally developed for assets capable of physical localisation. Application of the *lex rei sitae* rule to decentralised digital assets, which lack a fixed territorial connection, therefore remains far from straightforward. As a result, courts may encounter considerable difficulties both in the qualification of proprietary rights relating to crypto-assets and in determining the applicable law in cross-border disputes.

At the EU level, the adoption of the Markets in Crypto-Assets Regulation[1] (hereinafter: MiCA Regulation), which became fully applicable in late 2024, represents an important step towards the harmonisation of crypto-asset regulation within the internal market. While the MiCA Regulation acknowledges proprietary interests in crypto-assets in a broad sense, it deliberately avoids providing a specific private law qualification of such rights and does not introduce conflict-of-law rules governing rights in *rem*. Its primary objective is instead to reduce regulatory fragmentation among Member States and to safeguard the effective functioning of the internal market. Consequently, private law questions are addressed only to the extent necessary to support those regulatory aims, while more fundamental issues of legal qualification remain within the competence of national legal systems.

Against this background, this paper examines whether it would have been appropriate, within the broader framework of the MiCA Regulation, to unify conflict-of-law rules applicable to rights in *rem* over crypto-assets at the EU level. More specifically, the paper considers whether the absence of such a rule constitutes a significant legal gap in the current regulatory framework. The paper advances the argument that leaving these questions entirely to the Member States contributes to a considerable degree of legal uncertainty within the European crypto-asset market. This becomes particularly evident when viewed through the concept of qualification, one of the central methodological tools of private international law. The difficulties arise because proprietary relationships concerning crypto-assets may be placed into different legal categories depending on the approach adopted by a particular legal system. Some legal systems may refuse to recognise rights in *rem* over crypto-assets altogether and instead resolve disputes exclusively through the application of the *lex fori*. Others may accept the existence of proprietary rights over crypto-assets by interpreting the legal category underlying the *lex rei sitae* rule more broadly. In this sense, the problem is not limited merely to the absence of unified conflict-of-law rule. Rather, it reflects a deeper methodological issue concerning the qualification of legal categories in private international law and the

[1] Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on markets in crypto-assets, and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 [2023] OJ L 150.

extent to which traditional proprietary concepts can accommodate crypto-assets. At the same time, the scope of this paper remains deliberately limited. The analysis focuses exclusively on the qualification of the legal category underlying the *lex rei sitae* rule. It does not address the separate issue of determining the connecting factor itself, namely the localisation of crypto-assets and the qualification of the *locus rei sitae*. That issue raises distinct methodological difficulties due to the inherently digital, decentralised, and intangible nature of crypto-assets and therefore deserves separate analysis.

In addition to this introduction, the paper is divided into four further chapters. The following chapter analyses the existing EU legal framework governing crypto-assets. The third chapter examines the broader legislative activity of the EU in the field of private (international) law and its implications for legal relationships involving crypto-assets. The fourth chapter forms the central part of the paper and explores, through the application of methods of qualification within the national PIL systems of Member States, the difficulties associated with subsuming proprietary relationships concerning crypto-assets under the traditional *lex rei sitae* rule. Finally, the concluding chapter presents the principal findings of the research and offers concluding observations concerning the future development of private international law in this field.

2. CRYPTO-ASSETS IN EUROPEAN UNION LAW

2.1. The Digital Finance Package

At the EU level, the normative regulation of crypto-assets began in 2020, when the European Commission introduced the Digital Finance Package[2], aimed at strengthening the competitiveness and innovative capacity of the EU financial sector, while at the same time safeguarding the interests of investors in crypto-markets, particularly consumers.[3] The Package consisted of several initiatives. Within its framework, the Commission published the Retail Payments Strategy[4], which seeks to further promote the digitalisation of retail payments and the development of instant payments, while also reducing Europe's dependence on global

[2] European Commission, *Digital Finance Package: Commission sets out new, ambitious approach to encourage responsible innovation to benefit consumers and businesses*, Available at: [https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1684], Accessed 14 March 2026.

[3] Vandezande, N., *Crypto-assets: the European Legal Framework*, Intersentia, Cambridge, Antwerp and Chicago, 2023, p. 331.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a Retail Payments Strategy for the EU, COM(2020) 592 final.

corporations in the field of cross-border payments through the development of innovative European solutions.[5] Furthermore, in 2022, the Digital Operational Resilience Act was adopted with the aim of establishing uniform rules concerning the security of network and information systems used by financial entities in the course of their business operations, in order to ensure a high level of digital operational resilience.[6] The third legislative measure emerging from the Digital Finance Package was the DLT Pilot Regime Regulation[7], which lays down rules governing market infrastructures based on distributed ledger technology (DLT) for the trading of financial instruments in the form of crypto-assets.[8] Finally, the fourth and central pillar of the Package is the MiCA Regulation, adopted in 2023, which will be discussed in greater detail below.

2.2. MiCA Regulation

The substantive scope of the MiCA Regulation encompasses uniform rules governing the public offering and admission to trading of crypto-assets, as well as rules relating to the provision of crypto-asset services.[9] In that respect, the Regulation applies to all natural and legal persons, as well as other undertakings, engaged in the issuance, public offering or admission to trading of crypto-assets, together with entities providing crypto-asset services within the European Union. As a regulation, it is binding in its entirety and directly applicable in all EU Member States.[10] The MiCA Regulation entered into force in 2023, although certain provisions became applicable progressively. The Regulation has been fully applicable in its entirety since 30 December 2024.[11]

Pursuant to the MiCA Regulation, a crypto-asset is defined as *"a digital representation of a value or of a right which is able to be transferred and stored electronically using distributed ledger technology or similar technology"*.[12] In this regard, it

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5 Vandezande, *op. cit.,* note 3, p. 331.

6 Art 1(1) of the Regulation (EU) 2022/2554 of the European Parliament and of the Council of 14 December 2022 on digital operational resilience for the financial sector and amending Regulations (EC) No 1060/2009, (EU) No 648/2012, (EU) No 600/2014, (EU) No 909/2014 and (EU) 2016/1011 [2022] OJ L 333.

7 Regulation (EU) 2022/858 of the European Parliament and of the Council of 30 May 2022 on a pilot regime for market infrastructures based on distributed ledger technology, and amending Regulations (EU) No 600/2014 and (EU) No 909/2014 and Directive 2014/65/EU [2022] OJ L 151.

8 Vandezande, *op. cit.*, note 3, p. 332.

9 Art 1(1) MiCA Regulation.

10 Arts 2(1) and 149(4) MiCA Regulation.

11 Art 149 MiCA Regulation.

12 Art 3(1)(5) MiCA Regulation.

should be emphasised that certain provisions of the MiCA Regulation are not, in principle, applicable to all possible manifestations of crypto-assets or tokens. Indeed, the MiCA Regulation distinguishes between four categories of tokens: asset-referenced tokens, e-money tokens, utility tokens and, finally, crypto-assets in the broader sense.[13] An asset-referenced token is defined as a type of crypto-asset that seeks to maintain a stable value by referencing another value or right, or a combination thereof, including one or more official currencies.[14] Such tokens essentially constitute a form of stablecoin.[15] By contrast, e-money tokens are a type of crypto-asset whose value is linked exclusively to the value of a single official currency.[16] The principal distinction between these two categories therefore lies in the fact that e-money tokens seek to maintain stability solely by reference to one fiat currency, without the possibility of combinations characteristic of asset-referenced tokens.[17] As regards utility tokens, these are defined as a type of crypto-asset intended to provide access to a good or service supplied by the issuer of that token itself.[18] Although the general definition of crypto-assets has already been outlined above, certain limitations of the MiCA Regulation in relation to this broader category of crypto-assets should nevertheless be highlighted. In particular, the substantive scope of the MiCA Regulation expressly excludes crypto-assets that qualify as financial instruments[19], deposits, funds other than e-money tokens, and similar financial products. Likewise, the Regulation does not apply to crypto-assets that are unique and non-fungible, namely NFTs.[20]

The regulatory requirements laid down by the MiCA Regulation primarily concern the conditions governing the authorisation of issuers, as well as the public offering, issuance and admission to trading of crypto-assets, together with the authorisation of providers of crypto-asset services. These regulatory requirements are not uniform across all categories of crypto-assets; rather, they differ depending on whether the crypto-asset in question constitutes a crypto-asset other than an

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13 Vandezande, *op. cit.*, note 3, p. 332.; Asscheman, A., *„Crypto-assets under MiCAR: a deep dive into risks, solutions, and regulatory convergence*", ERA Forum, Vol. 24, 2023, p. 491.

14 Art 3(1)(6) MiCA Regulation.

15 Poulle, J.-B. *et al*, *EU Banking and Financial Regulation*, Edward Elgar Publishing, Cheltenham and Northampton, 2024, p. 664.

16 Art 3(1)(7) MiCA Regulation.

17 Poulle, *op. cit.*, note 15, p. 664.

18 Art 3(1)(9) MiCA Regulation.

19 It refers to transferable securities, money market instruments, options and futures, among others, that are issued using distributed ledger technology and are classified as financial instruments in accordance with 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) [2014] OJ L 173.

20 Art 2(3) and (4) MiCA Regulation; Vandezande, *op. cit.*, note 3, pp. 335-336.

asset-referenced token or e-money token, or whether it falls within one of those specific categories. In any event, one of the central requirements is that issuers intending to offer crypto-assets to the public or seek their admission to trading on a trading platform are required to publish a white paper in advance. That white paper must contain all essential information necessary to enable potential investors to make an informed investment decision, including information concerning the characteristics of the crypto-asset, the rights and obligations attached to it, the technology employed, and related matters.[21] It should be emphasised, however, that the provisions governing the issuance of crypto-assets do not apply to crypto-assets for which no identifiable issuer can be determined, namely crypto-assets and services operating on fully decentralised DLT systems, such as the cryptocurrency Bitcoin.[22]

Furthermore, in addition to the rules governing the public offering of crypto-assets, another important component of the MiCA Regulation concerns the provision of crypto-asset services. Such services may, on a professional basis, be provided by legal persons and other undertakings, provided that they have obtained authorisation from the competent authority.[23] The purpose of the regulatory requirements applicable to providers of crypto-asset services is to ensure a high standard of service for clients, a standard which derives from obtaining authorisation to provide such services, satisfying organisational and prudential requirements, and establishing effective internal risk-management mechanisms.[24] The requirements imposed on providers of crypto-asset services are of particular importance because the majority of participants in the crypto-market rely on one or more of these services, notwithstanding the fact that the crypto-market was originally conceived as a fully decentralised system operating without intermediaries. Equally important, particularly in the context of legal relationships involving a cross-border element, is the fact that providers authorised to offer one or more crypto-asset services in their home Member State, namely the Member State in which they

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21 Poulle, *op. cit.*, note 15, p. 664.

22 Art 2 (3)(4) MiCA Regulation; Zetzsche, D.; Woxholth, J., *The EU Law on Cryptoassets: A Guide to European FinTech Regulation*, Cambridge University Press, Cambridge, 2025, p. 45; Vandezande, *op. cit.*, note 3, p. 335.; MiCA Regulation, recitals 22 and 26.

23 Art 59(1) of the MiCA Regulaton. According to the art 3(1)(16), the MiCA Regulation distinguishes a comprehensive range of services related to crypto-assets, namely: the provision of custody and administration of crypto-assets on behalf of clients; the operation of a crypto-asset trading platform; the exchange of crypto-assets for funds; the exchange of crypto-assets for other crypto-assets; the execution of orders for crypto-assets on behalf of clients; the placing of crypto-assets; the reception and transmission of orders for crypto-assets on behalf of clients; the provision of advice on crypto-assets; the provision of crypto-asset portfolio management; and the provision of crypto-asset transfer services on behalf of clients.

24 Asscheman, *op. cit.*, note 13, p. 493.

have their registered office, are entitled to provide those services throughout the European Union without the need for any physical presence in other Member States.[25] A further important distinction between providers of crypto-asset services and persons subject to the rules governing the public offering or issuance of crypto-assets under the MiCA Regulation lies in the fact that all providers of crypto-asset services, such as custodians, remain subject to the relevant MiCA provisions governing crypto-asset services even in relation to crypto-assets that are excluded from the MiCA rules on public offerings and issuance. This includes, for example, cryptocurrencies based on fully decentralised systems whose issuer cannot be identified, such as Bitcoin.[26] Indeed, the very purpose of the general definition of crypto-assets under the MiCA Regulation is to encompass all other forms of tokens in addition to those categories specifically regulated, unless such tokens are either entirely excluded from the scope of the Regulation or only certain provisions of the MiCA Regulation are excluded in relation to them.[27]

Although the MiCA Regulation is, in essence, an instrument of regulatory law and therefore predominantly public-law in character, it nevertheless contains a number of provisions which, by their nature, traditionally belong to the sphere of private law and are intended to protect the interests of investors and clients, particularly consumers. For example, the Regulation provides for a consumer's right of withdrawal from the purchase of crypto-assets; rules governing the civil liability of offerors and issuers towards holders of crypto-assets in cases where the information contained in the white paper is inaccurate or misleading; rules concerning the civil liability of providers of crypto-asset custody services in the event of loss of clients' crypto-assets or private keys; as well as provisions requiring the legal segregation of clients' crypto-assets from the assets of the service provider, particularly in situations of insolvency.[28] Nevertheless, all of the foregoing examples amount only to fragmentary private-law regulation of legal relationships concerning crypto-assets within the meaning of the MiCA Regulation.[29] It should be observed that the Regulation does not provide an answer to two fundamental questions, particularly having regard to the specific mobility of crypto-assets as digital objects. First, the MiCA Regulation contains no provision addressing the substantive legal qualification of crypto-assets as such, nor does it qualify the

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25 Vandezande, *op. cit.*, note 3, p. 371.; MiCA Regulation, recital 76.

26 Zetzsche, *op. cit.*, note 22, p. 102.; MiCA Regulation, recital 22.

27 Tomczak, T., *Crypto-assets and crypto-assets' subcategories under MiCA Regulation*, Capital Markets Law Journal, Vol. 17, No. 3, 2022, pp. 380-381.

28 Asscheman, A, *op. cit.*, note 13, p. 492; art 15(1), art 26(1), art 52(1), art 75(1)(7)(8), and art 82(1) MiCA Regulation.

29 Omlor, S., *Germany and the EU*, in: Eggen, M.; Jeng, L.; Omlor, S. (eds.), Control and Ownership of Digital Assets: A Comparative Law Survey, Mohr Siebeck, Tübingen, 2026, p. 77.

subjective proprietary rights that may exist in relation to crypto-assets. Secondly, the Regulation likewise does not contain a unified conflict-of-laws rule governing the direct rights of holders in relation to crypto-assets, that is, a rule corresponding to the traditional private international law rule governing proprietary rights, namely the *lex rei sitae* rule. This omission is somewhat surprising given that the very purpose of the MiCA Regulation is to prevent regulatory fragmentation of the crypto-asset market, fragmentation which could distort competition within the Union's internal market and simultaneously hinder the cross-border provision of crypto-asset services.[30]

3. EU LEGISLATIVE ACTIVITIES IN THE FIELD OF PRIVATE (INTERNATIONAL) LAW

In light of the foregoing, it should be noted that the EU is not empowered to regulate, whether through unification or harmonisation, the entire body of private law or the entirety of a particular field of private law. Rather, its competence extends only to specific segments of private law, insofar as this is necessary to ensure the proper functioning of the Union's internal market.[31] Consequently, EU legislative activity in the field of private law ranges from fragmented unification or harmonisation in certain areas of substantive private law to a very high degree of unification in the field of private international law. To date, substantive harmonisation within EU law has been most pronounced in the areas of consumer contract law, employment law, copyright law, industrial property law and insurance law.[32] By contrast, legislative activity in the field of private international law has been considerably more dynamic, based on the competence conferred by Article 81(2) of the Treaty on the Functioning of the European Union[33] (hereinafter: TFEU) concerning judicial cooperation in civil matters, which inter alia includes the unification of conflict-of-laws rules, all with a view to ensuring the smooth functioning of the internal market.[34]

However, the most contentious issue for the purposes of this research, namely the qualification of crypto-tokens as such, as well as the qualification of the legal relationship between a token and its holder, which consequently raises the question

30 MiCA Regulation, recital 5.

31 Perišin, T., *Ima li Europska unija ovlast regulirati privatno (posebice ugovorno) pravo?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, Nos. 5-6, 2012, p. 1800.; Josipović, T., *Privatno pravo Europske unije - Opći dio*, Narodne novine, Zagreb, 2020, pp. 669-672.

32 Josipović, *op. cit.*, note 31, pp. 669-670.

33 Treaty on the Functioning of the European Union (consolidated version) [2016] OJ C202.

34 Martiny, D., *Lex rei sitae as a connecting factor in EU Private International Law*, IPRax, No. 2, 2012, p. 120.

whether a proprietary relationship in respect of the token may exist, in principle falls outside the scope of EU competence. This is because, pursuant to Article 345 TFEU, the Treaties do not prejudice the rules in Member States governing the system of property ownership. That provision therefore reflects the principle of neutrality of the founding Treaties with regard to national systems of property law.[35] Indeed, each Member State maintains its own rules of property law and, consequently, its own autonomously developed legal concepts.[36] This approach has likewise been adopted in the MiCA Regulation, as is evident from Article 75(7) thereof, which expressly provides for the segregation of clients' crypto-assets from the custodian's own assets *"in accordance with the applicable law"*. Evidently, beyond requiring the legal separation of clients' crypto-assets from those of the custodian, the intention was not to provide a more precise substantive legal qualification of crypto-assets or of legal relationships concerning crypto-assets. Instead, these matters were left to the substantive laws of the Member States.

Moreover, the neutrality of the founding Treaties with regard to the regulation of substantive proprietary relationships is also reflected at the conflict-of-laws level. The EU has not adopted unified conflict-of-laws rules governing proprietary relationships; rather, each Member State continues to apply its own autonomous rules of private international law. Nevertheless, the legal systems of the Member States largely adhere to the traditional private international law rule for determining the applicable law governing rights in *rem*, namely that such rights are governed by the law of the state in which the asset is situated, that is, by the *lex rei sitae* rule.[37] [38] As an exception to the foregoing, however, it should be noted that, in relation to certain legal relationships, only specific proprietary aspects have been regulated, and only insofar as necessary, in particular cross-border contexts. Examples

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35 CJEU, Judgment of 22 October 2013, *Staat der Nederlanden v Essent NV*, C-105/12, ECLI:EU:C:2013:677, para. 29.

36 Lehmann, M., *Exclusive Jurisdiction*, in: Dickinson, A.; Lein, E. (eds.), The Brussels I Regulation Recast, Oxford University Press, Oxford, 2015, p. 261.

37 Briggs, A., *The Conflict of Laws*, 3rd edition, Oxford University Press, Oxford, 2013, p. 298.; Josipović, T.; Ernst, H., *Stvarno pravo*, in: Josipović, T. (ed.), Privatno pravo Europske unije – Posebni dio, Narodne novine, Zagreb, 2022, p. 400.

38 Art 20 of the Private International Law Act, Official Gazette, Nos 101/17, 67/23 (hereinafter: ZMPP) (Croatia); §31(1) of the Federal Act of 15 June 1978 on Private International Law, Original version: Federal Law Gazette No. 304/1978 (National Council: legislative period XIV, government bill 784, committee report 945, p. 96. Federal Council: committee report 1841, p. 377.) (hereinafter: IPRG) (Austria); Art 43(1) of the Introductory Act to the Civil Code in the version promulgated on 21 September 1994, Federal Law Gazette [Bundesgesetzblatt] I p. 2494, last amended by Article 2 of the Act of 25 June 2021 (Federal Law Gazette I p. 2133); Article 240 last amended by Article 10 of the Act of 22 December 2020 (Federal Law Gazette I, p. 3328) (hereinafter: EGBGB) (Germany); Dika, M.; Knežević, G.; Stojanović, S., *Komentar Zakona o međunarodnom privatnom i procesnom pravu*, Nomos, Belgrade, 1991, p. 67; Martiny, *op. cit.*, note 34, p. 124.

include the protection of third parties' rights in *rem* in cross-border insolvency proceedings, as well as the adaptation of rights in *rem* in matters relating to succession, matrimonial property regimes, and the property consequences of registered partnerships.[39]

4. CONFLICT-OF-LAWS QUALIFICATION OF PROPRIETARY RIGHTS IN CRYPTO-ASSETS

4.1. The General Conflict-of-Laws Rule Governing Proprietary Relationships from the Comparative Perspective of Selected Member States

Given that it has already been indicated that the autonomous private international law systems of the Member States traditionally apply the *lex rei sitae* conflict-of-laws rule, it is first necessary to clarify the general scope of that rule. The legal category underlying the *lex rei sitae* rule, in principle, encompasses all forms of property, both movable and immovable.[40] The scope of application of this conflict-of-laws rule in relation to proprietary relationships primarily includes the creation, existence and extinction of proprietary rights, as well as the content, exercise and transfer of proprietary rights in property.[41] The connecting factor of the rule in question (*locus rei sitae*) is generally regarded as a simple, stable and efficient connecting factor, since the localisation of property is ordinarily straightforward, objectively ascertainable and visible to all, particularly to third parties in light of the *erga omnes* effect of proprietary rights.[42] Against this background, and in the context of crypto-assets, the literature contains a growing number of scholarly contributions addressing the localisation of tokens in the digital environment, that is, the determination of the connecting factor *locus rei sitae*. Although

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[39] Art 8 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) [2015] OJ L 141; art 31 of the Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L 201; art 29 of the Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes [2016] OJ L 183; art 29 of the Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships [2016] OJ L 183; Josipović, *op. cit.*, note 37, p. 400.

[40] Dika, Knežević, Stojanović, *op. cit.*, note 38, pp. 65-67.; arts 22 and 23 ZMPP.

[41] Sajko, K., *Međunarodno privatno pravo*, 5th edition, Narodne novine, Zagreb, 2009, pp. 140-141.

[42] Erlank, W., *The disconcerting exercise of finding and applying the lex rei sitae in Cyberspace*, European Property Law Journal, Vol. 7, No. 3, 2018, p. 215.

this issue undoubtedly deserves careful consideration, given that the connecting factor of a conflict-of-laws rule ultimately determines the legal system whose law will apply, one should not lose sight of the more fundamental question concerning the legitimacy of applying the *lex rei sitae* rule to crypto-assets in the first place. More specifically, the question arises as to how the application of that rule may be justified in light of the inherently intangible nature of crypto-assets, which inevitably leads to the issue of the qualification of the legal category underlying the relevant conflict-of-laws rule. Accordingly, this paper will focus exclusively on the qualification of the legal category underpinning the conflict-of-laws rule governing proprietary rights, whereas the question of the qualification of the connecting factor *locus rei sitae* falls beyond the scope of this contribution and, owing to the intangible nature of crypto-assets, warrants separate examination in the context of their concrete localisation.

4.2. Approaches to Qualification from the Perspective of the Autonomous Private International Law of EU Member States

Qualification is present in every positive branch of law, while within private international law it is generally understood as the method by which factual or legal issues are subsumed under the appropriate conflict-of-laws rule.[43] In other words, it is the method used to determine which conflict-of-laws rule is applicable to a particular situation.[44] Despite its importance and the specific features that will become apparent in the course of this paper, the concept of qualification is only rarely regulated explicitly in national codifications of private international law. At EU level, for example, fewer than half of the Member States expressly regulate qualification, that is, contain an explicit rule governing the method of qualification within their national private international law systems.[45] In the context of the selected legal systems examined in this research, it should be noted that neither the Austrian, Croatian nor German PIL Acts contain a provision specifically regulating qualification.[46] Nevertheless, the fact that these legal systems, like the majority of Member States, do not contain explicit rules on qualification does not mean that conflict-of-laws qualification is not carried out, particularly given that

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43 Tekin, E., *A New Form of Working Relationship in The Digital Age: Crowdworking from a Private International Law Perspective,* in: Villata, F. C.; Župan, M.; Trimmings, K.; Gabrielli, G. (eds.), Law in the Age of Digital Technologies, Milano University Press, Milano, 2025, p. 221; Tekin, E., *Position of French in Private International Law Theory,* in: Kordić, Lj. (ed.), Language(s) and Law, Faculty of Law Osijek, Osijek, 2023, pp. 61-62.

44 Wilke, F. M., *A Conceptual Analysis of European Private International Law*, Intersentia, Cambridge, 2019, p. 114.

45 *Ibid.*, pp. 116-117.

46 *See* IPRG; ZMPP; and EGBGB.

qualification constitutes a prerequisite for the application of any conflict-of-laws rule. It may therefore be concluded that the choice and application of methods of qualification have largely been left to judicial practice and legal doctrine.

The absence of explicit provisions regulating qualification in the national private international law systems of the Member States is likely a consequence of conflict-of-laws unification within EU private international law. Under the influence of EU law, an autonomous interpretation of conflict-of-laws rules and of the concepts contained in EU private international law instruments has gradually developed, reinforced further by the uniform meaning ensured through the interpretative authority of the Court of Justice of the European Union. From today's perspective, traditional national qualification has therefore been substantially displaced by European autonomous qualification.[47] Nevertheless, national methods of qualification continue to play an important role in those areas of private international law that have not been unified at EU level. One such area is the determination of the applicable law governing proprietary relationships, including the application of the general *lex rei sitae* rule.

4.3. Qualification of the Legal Category Underlying the *Lex Rei Sitae* Rule in the Context of Crypto-Assets

When discussing the qualification of a legal category, the primary issue concerns whether a particular legal relationship may be subsumed under a given conflict-of-laws rule, that is, whether the relationship in question falls within the scope of the legal category underlying that rule.[48] Applied to the context of crypto-assets, the issue may be framed as follows: can rights relating to crypto-assets be subsumed under the legal category underlying the *lex rei sitae* rule?[49] Accordingly, for the purposes of this part of the paper, the central issue concerns the qualification of direct subjective proprietary rights in crypto-assets, namely the qualification of the rights held by the token holder in relation to the token itself, together with all legal questions connected thereto, such as the transfer of crypto-assets and the nature and content of the rights that the holder may exercise over them. The need

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47 *Arg. ex* Župan, M., *The New Croatian Private International Law Act, Something Old, Something New and Much Borrowed*, in: Bonomi, A.; Romano, G. (eds.), Volume XXII Yearbook of Private International Law – 2020/2021, Verlag Dr. Otto Schmidt, Köln, 2021, p. 387.

48 Varadi, T. *et al.*, *Međunarodno privatno pravo*, Univerzitet u Beogradu – Pravni fakultet, Belgrade, 2022., p. 121.

49 For instance, the German conflict-of-laws rule provides that rights in *rem* in a thing shall be governed by the law of the state in which the thing is situated (Art 43(1) EGBGB), whereas Croatian law stipulates that rights in *rem* in things are subject to the law of the state in which the things are situated (Art 20 ZMPP). Translation by the author.

to determine an appropriate legal category for such legal relationships involving crypto-assets may be illustrated by imagining a situation in which a person from one state unlawfully transfers a certain quantity of tokens on a DLT system to a third party on the basis of a transaction for value, while that third party is unaware that the transferor is acting without the consent of the lawful holder. In such circumstances, the question arises whether the acquirer, acting in good faith, has in fact become the lawful holder of the token. A further illustration may be found in the converse situation, namely where a third party asserts rights over a particular token controlled by another person, despite the absence of any contractual or other legal relationship between them.[50] Additional examples may arise in the context of custodial arrangements relating to tokens, particularly where insolvency proceedings are opened against the custodian and the custodian's clients seek to separate the tokens from the insolvency estate in order to preserve their rights and prevent the liquidation of the tokens for the benefit of the insolvency creditors. Indeed, there is a broader view that situations involving third-party rights in relation to crypto-assets, such as those outlined above, are particularly suitable for qualification as proprietary relationships from the perspective of private international law.[51] Simplified somewhat, it may therefore be said that the need to apply a conflict-of-laws rule governing proprietary relationships does not fundamentally differ from the corresponding need at the level of substantive law, since, even at the conflict-of-laws level, it is sufficient that one of the parties bases its claim or defence on the assertion: *"This is mine"*.[52]

In light of the foregoing, while the determination of proprietary rights in conventional tangible assets, such as movable and immovable property, is generally carried out through the almost routine application of the *lex rei sitae* rule, courts addressing proprietary relationships concerning crypto-assets will very likely encounter difficulties in selecting the relevant conflict-of-laws rule, that is, difficulties of qualification.[53] Given that a crypto-token constitutes a specific form of intangible object, legal systems whose autonomous private international law has not been technologically adapted may face uncertainty regarding the qualification of direct subjective rights in crypto-assets as such. More specifically, such uncertainty may manifest itself in several ways: under which legal category of a conflict-of-laws rule should rights in crypto-assets be subsumed; how should the boundaries

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50 Tan, S. W., *Transnational Transactions on Cryptoasset Exchanges: A Conflict Of Laws Perspective*, Singapore Journal of Legal Studies, 2022, p. 400.

51 *Ibid.*

52 Burrows, A., *The Conflict of Laws and Unjust Enrichment*, in: Dickinson, A.; Peel, E. (eds.), A Conflict Of Laws Companion, Oxford Academic, Oxford, 2021, p. 195.

53 Critchley, A. D. J., *The Application of Foreign Law in the British and German Courts*, Hart Publishing, Oxford, 2022, p. 14.

between existing legal categories be drawn; and what is the scope of application of the existing conflict-of-laws rules. Put simply, the question is whether direct subjective rights in crypto-assets fit within the existing corpus of conflict-of-laws rules of a given legal system at all.[54]

4.3.1. Qualification of the Legal Category According to *Lex Fori*

The leading method of qualification is qualification according to *lex fori*. This method precedes every conflict-of-laws qualification and, in essence, concerns the selection of the relevant conflict-of-laws rule for a legal relationship containing an international element.[55] The method operates by attributing to the concepts forming the legal category of the relevant conflict-of-laws rule the same meaning and interpretation that those concepts possess within the substantive law of the legal system from which the rule itself originates. This follows from the fact that the conflict-of-laws rule is itself part of that legal order.[56] For example, the Spanish Civil Code expressly provides that qualification for the purpose of determining the applicable conflict-of-laws rule must always be carried out in accordance with Spanish law.[57] Accordingly, the qualification of a legal category is undertaken in line with the systematic structure and conceptual understanding of the *lex fori*.[58] This method is, in principle, particularly suitable in relation to the qualification of proprietary rights in immovable property, especially having regard to the rules on international jurisdiction in civil and commercial matters, pursuant to which exclusive jurisdiction over rights in *rem* in immovable property lies with the courts of the Member State in which the property is situated, that is, by virtue of the *forum rei sitae* jurisdictional criterion.[59] Consequently, in matters concerning proprietary rights in immovable property, the court possessing exclusive international jurisdiction determines the applicable law through the application of *lex rei sitae*, which in practice ultimately results in the application of *lex fori*[60], since the immovable property is located within the territory of the forum state itself. As a

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54 Goetzke, C.; Michaels, R., *Characterisation*, in: Beaumont, P;, Holliday, J. (eds.), A Guide to Global Private International Law, Hart Publishing, Oxford, 2022, pp. 31-32.

55 Đorđević, S., *Teleološka redukcija kolizionih normi i popunjavanje pravnih praznina u Zakonu o rešavanju sukoba zakona sa propisima drugih zemalja*, Zbornik radova Pravnog fakulteta u Novom Sadu, Vol. 53, No. 2, 2019, p. 468.

56 Katičić, N., *Međunarodno privatno pravo*, Pravni fakultet u Zagrebu, Zagreb, 1979, p. 37.

57 Wilke, *op. cit.*, note 44, pp. 114-115.

58 Đorđević, *op. cit.*, note 55, p. 468.

59 Art 24(1) of the 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) [2012] OJ L 351.

60 The *lex causae* coincides with the *lex fori*.

result, there are generally no substantial obstacles to the consistent application of the *lex fori* method, given that the court operates entirely within the boundaries of its own legal system when carrying out qualification.

The situation is, however, considerably more challenging in the context of movable property due to the inherent mobility of such assets, and particularly in relation to crypto-tokens as specific intangible (digital) objects. In that respect, *stricto sensu*, this method of qualification would not be applicable in relation to crypto-assets within those Member State legal systems that strictly adhere to the criterion of tangibility as a prerequisite for the existence of proprietary rights.[61] More generally, qualification according to *lex fori* is unsuitable where a legal relationship or institution is unknown to the law of the forum state, that is, where the relationship cannot be subsumed under any existing legal category.[62] Although ownership and other proprietary rights are undoubtedly recognised within the substantive laws of the Member States, the difficulty lies in the fact that, in certain national legal systems, tokens as intangible objects are not recognised as potential objects of proprietary rights due to the operation of the *numerus clausus* principle and the doctrine of tangibility. In the context of crypto-assets, a strict application of qualification according to *lex fori* would therefore mean that the legal category underlying the *lex rei sitae* rule must be interpreted in accordance with the standards of the substantive law of the Member State from which the relevant conflict-of-laws rule originates. Thus, if one proceeds from Croatian or German substantive law - both of which are grounded in a strict application of the doctrine of tangibility - it follows that legal relationships concerning crypto-assets could not be subsumed under the traditional *lex rei sitae* rule within those legal systems.[63]

An additional challenge to the application of the *lex fori* method may also be found in Austrian law. Under Austrian substantive law, crypto-tokens may potentially constitute suitable objects of ownership and other proprietary rights.[64] However, the relevant conflict-of-laws provision of the Austrian IPRG, namely § 31(1), expressly provides that the rule applies exclusively to tangible property (*körperlichen Sachen*). Consequently, even from the Austrian perspective, the consis-

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61 *Arg. ex* Omlor, *op. cit.*, note 29, pp. 67-68.

62 Goetzke, Michaels, *op. cit.*, note 54, p. 34.

63 Binder, J.-H., *Germany*, in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, pp. 332-333; Omlor, S., *Digital ownership of blockchain tokens: a comparative law guideline*, in: Nordtveit, E. (ed.), The Changing Role of Property Law, Edward Elgar Publishing, Cheltenham, 2023, pp. 137-138; Jakšić, T.; Petrović, S., *Croatia,* in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, p. 191.

64 Miernicki, M., *Austria,* in: Lehmann, M.; Morishita, T. (eds.), Cryptocurrencies in National Laws: A Global Survey, Brill Nijhof, Leiden and Boston, 2025, pp. 114-119.

tent application of qualification according to *lex fori* would not be possible. Given the explicit requirement of tangibility as a precondition for the application of the *lex rei sitae* rule under § 31(1) IPRG, a strict application of the *lex fori* method in the context of crypto-assets would amount to an interpretation *contra legem*.

4.3.2. Qualification of the Legal Category According to Lex Causae

Another method of qualification, alongside qualification according to *lex fori*, is qualification according to *lex causae*. This method is generally criticised in legal scholarship due to the impracticality of its application. The method consists in selecting and interpreting the relevant conflict-of-laws rule on the basis of the law governing the legal relationship in question (*lex causae*), which inevitably gives rise to a form of logical circularity.[65] The very purpose of qualifying a legal category is to identify, through the connecting factor of the most appropriate conflict-of-laws rule, the substantive law applicable to the legal relationship. Under the *lex causae* method, however, qualification is to be carried out precisely according to the law that would govern the relationship (the putative *lex causae*), even though that law is not yet known, since the process is still situated at the stage of qualifying the legal category rather than the connecting factor of the conflict-of-laws rule.[66] Accordingly, in the context of crypto-assets, and specifically with regard to the qualification of the legal category underlying the relevant conflict-of-laws rule, this method should be rejected at the initial stage of qualification. At this stage, the analysis remains concerned with identifying the relevant conflict-of-laws rule governing direct subjective rights in crypto-assets. Until the applicable conflict-of-laws rule has been identified, qualification according to *lex causae* is simply not possible.

Nevertheless, qualification according to *lex causae* assumes particular importance at the second stage of qualification, that is, following the initial qualification according to *lex fori* of the relevant conflict-of-laws rule.[67] Once the applicable conflict-of-laws rule has identified the applicable law, any further qualification within the framework of the applicable substantive law is then carried out according to *lex causae*. Applied to legal relationships concerning crypto-assets, this means that *lex causae* will ultimately resolve issues such as whether a token is capable of constituting an object of proprietary rights at all, what types of rights may exist in

[65] Varadi, *op. cit.*, note 48, pp. 126-127.

[66] *Ibid.*

[67] Katičić, *op. cit.*, note 56, p. 37.

relation to the token and with what content, as well as the conditions governing the acquisition, exercise and extinction of such rights.[68]

4.3.3. Extended Qualification of the Legal Category According to Lex Fori in Accordance with the Functional Approach

In light of the two methods of qualification discussed above, together with the difficulties involved in selecting the relevant conflict-of-laws rule governing direct subjective rights in crypto-assets, it would appear more appropriate *de lege lata* to apply the *lex rei sitae* rule, while interpreting the legal category underlying that rule in a broader sense through the adoption of a functional approach. In other words, qualification should be carried out irrespective of whether, under the *lex fori*, ownership or other proprietary rights may formally exist in relation to tokens at all.[69] The emphasis in this context lies on the relationship of direct control exercised by the holder over the token in question, a relationship which all third parties are required to respect. Whether a particular token is in fact capable of constituting an object of proprietary rights, and if so, which specific proprietary rights may arise in relation to it, is ultimately a matter to be determined by the applicable substantive law (*lex causae*) designated through the connecting factor of the relevant conflict-of-laws rule.[70]

Several arguments may be advanced in support of this position. More generally, such an approach to qualification is not unknown within the doctrine of private international law. Among the principal proponents of an expanded *lex fori* qualification are *Batiffol* and *Niederer*. *Batiffol* argues that one should certainly begin with the legal categories of the *lex fori*, but that those categories must be conceptually broadened so as to identify the underlying substance of the category in question, with the aim of linking the foreign legal institution to that legal category, even

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68 Goetzke, Michaels, *op. cit.*, note 54, p. 34; In the national legal systems of those Member States whose autonomous private international law has dispensed with the doctrine of *renvoi*, this implies that qualification under the *lex causae* is undertaken solely at the level of substantive law, without recourse to the conflict-of-laws rules of the *lex causae*. This approach, in turn, leaves room for the substantive requalification of the legal relationship in light of the relevant connecting factor. In other words, even where a conflict rule relating to rights in *rem* is used as the initial point of reference, it does not necessarily follow that the substantive rules of property law will ultimately govern the relationship; depending on the connecting factor, the matter may instead fall to be governed by rules drawn from another branch of private law.

69 Bonomi, A., *Blockchain and Private International Law – Some General Remarks*, in: Bonomi, A. *et al* (eds.), Yearbook of Private International Law Volume XXIV – 2022 / 2023, Verlag Dr. Otto Schmidt, Köln, 2024, p. 158.; Goetzke, Michaels, *op. cit.*, note 54, p. 34.

70 Dika, Knežević, Stojanović, *op. cit.*, note 38, p. 67.

where the institution itself is otherwise unknown to the law of the forum state.[71] Likewise, *Niederer* maintains that the concepts forming part of the legal categories of the *lex fori* should remain the starting point, but that their scope ought to be expanded where necessary.[72] Accordingly, in the context of crypto-assets, a form of extension of the scope of the legal category underlying the *lex rei sitae* rule should be adopted through an expansive interpretation. Such an approach is also generally recognised in private international law as a legitimate interpretative method for addressing legal lacunae at the conflict-of-laws level.[73] In essence, this amounts to a flexible approach to qualification, characterised by a certain degree of adaptation, whereby the application of the applicable law is extended to situations which the legal category underlying the *lex rei sitae* rule, as the starting conflict-of-laws rule, did not originally encompass, but which are nevertheless sufficiently comparable in legal terms.[74] Such an approach - in which qualification according to *lex fori* remains the starting method, albeit with an expanded understanding of the legal category - also reflects the broader internationalist perspective upon which methods of qualification in private international law should generally rest. This is particularly important given that the legal order of the forum need not necessarily recognise certain legal relationships or institutions at the substantive level in order for its courts to adjudicate upon them, including proprietary relationships concerning crypto-assets.[75] It is precisely here that the qualitative dimension of qualification becomes particularly significant. As *Wilke* explains, conflict-of-laws rules generally rely on broad legal categories, while the terminology employed merely serves as a linguistic tool. This is because, when constructing a conflict-of-laws rule, concepts derived from national substantive law are used to indicate a particular legal category, while at the same time it is intended that the same legal category should also be capable of encompassing foreign substantive law.[76]

4.3.4. Justification for the Extended Qualification of the Legal Category According to *Lex Fori* in Accordance with the Functional Approach

According to the prevailing view in the doctrine of private international law, a conflict-of-laws rule need not necessarily be expressly prescribed. Rather, it is gen-

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71 Varadi, *op. cit.*, note 48, p. 125., citing: Batiffol, H., Lagarde, P., *Droit international privé I*, Paris, 1974, pp. 367-380.; and Batiffol, H., *Aspects philosophiques de droit international privé*, Paris, 1956, pp. 19-36.

72 Varadi, *op. cit.*, note 48, p. 125., citing: Niederer, W., *Einführung in die allgemeinen Lehren des Internationalen Privatrechts*, Zürich, 1956, pp. 221. *et seq*.

73 Varadi, *op. cit.*, note 48, p. 90.

74 Sajko, *op. cit.*, note 41, pp. 184. and 226.

75 Tan, *op. cit.*, note 50, p. 400.

76 Wilke, *op. cit.*, note 44, pp. 115-116.

erally accepted that, as in any other branch of law, legal lacunae may arise within private international law and that such gaps should be filled through ordinary interpretative techniques, including analogy, the application of general principles, and the law-making role of the judge.[77] This concerns situations in which a particular issue cannot be subsumed under any existing conflict-of-laws rule.[78] Such a doctrinal understanding reflects the recognition that it is impossible to legislate conflict-of-laws rules for every legal relationship that may emerge in the future, particularly in light of the evolving nature of social and private legal relationships. This is especially evident in the context of proprietary relationships concerning crypto-assets as a contemporary technological phenomenon. Indeed, the reality of legal lacunae in private international law is expressly acknowledged in the Croatian ZMPP, which specifically regulates the approach to be taken where no conflict-of-laws rule exists for a particular private legal relationship. Thus, Article 7 ZMPP provides that, in the absence of rules determining the applicable law for private-law relationships containing an international element, the court shall apply, mutatis mutandis, the provisions and principles of the ZMPP itself, the principles of the legal order of the Republic of Croatia, and the general principles of private international law as a branch of law. By contrast, neither the Austrian IPRG nor the German EGBGB contains an explicit rule governing the filling of legal lacunae in the conflict-of-laws context. In such legal systems, the law-making role of the judge becomes correspondingly more pronounced.

Before proceeding further with the consideration of techniques for filling legal lacunae in the context of crypto-assets, it is necessary to emphasise the reason demonstrating the need to fill such lacunae in relation to the *lex rei sitae* conflict-of-laws rule and crypto-assets. This necessity is justified by the principle of the closest connection as a fundamental principle of private international law, since that principle reflects Savigny's understanding of identifying the seat (*Sitz*) of a particular legal relationship.[79] In this regard, it should be noted that the principle of the closest connection has been expressly elevated to the status of a general statutory principle within the Austrian IPRG, while in Croatian autonomous private international law it may be discerned as a fundamental principle through an analysis of the overall corpus of conflict-of-laws rules contained in the ZMPP.[80] Although the principle of the closest connection will find its fullest expression at

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77 Katičić, N., *Ogledi o međunarodnom privatnom pravu*, Narodne novine, Zagreb, 1971, p. 22.

78 Kostić-Mandić, M., *Međunarodno privatno pravo*, Pravni fakultet Univerziteta Crne Gore, Podgorica, 2017, p. 65.

79 *Ibid.*

80 § 1 IPRG; Sikirić, H., *Zakon o međunarodnom privatnom pravu*, Pravo u gospodarstvu, Vol. 58, No. 5, 2019, pp. 823-826.

the stage of qualification of the connecting factor *locus rei sitae*, it should nevertheless be emphasised that extending the application of the *lex rei sitae* conflict-of-laws rule to intangible objects such as crypto-assets itself contributes to the realisation of that principle. Were the application of the *lex rei sitae* rule not extended to crypto-tokens, courts would either be compelled to construct an entirely new conflict-of-laws rule with a wholly new legal category and connecting factor, or alternatively apply *lex fori*, which would amount to a denial of the principle of the closest connection and would effectively undermine the very purpose of determining the applicable law in legal relationships containing an international element.[81] Indeed, in legal systems where conflict-of-laws rules are applied *ex officio*, the application of the substantive *lex fori* may constitute only an exception, and not a general solution in situations where no explicit conflict-of-laws rule exists for a particular legal relationship.

In light of the foregoing, analogy should be regarded as the primary and most fundamental method for filling the legal lacunae in question. Through the use of analogy, a certain modification of existing conflict-of-laws rules is achieved, namely the extension of the relevant conflict-of-laws rule to situations that do not originally fall within the scope of the legal category underlying the *lex rei sitae rule*. In this respect, when discussing the application of analogy, it is important to emphasise the legally relevant similarity between control over a token and control over a tangible object in the substantive law sense more generally, a similarity which also finds reflection at the conflict-of-laws level. Generally speaking, for an object to qualify as a suitable object of proprietary rights within a civil-law legal system, it must be individualised (or at least identifiable), capable of being subjected to human control through possession, and, relatedly, it must be possible to exclude all third parties from the use of that object, that is, the object must possess the characteristic of rivalrousness.[82] Applied analogously to tokens, it may be argued that tokens likewise possess a certain degree of individualisation, given that they are associated with a specific public address functioning as a distinct location, albeit one existing in the digital environment.[83] Moreover, only the holder of the relevant private key is capable of disposing of the tokens associated with that address. Furthermore, in the context of crypto-assets, subjection to human control

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81 Wurmnest, W.; Kübler-Wachendorff, M., *The Constitutionalization of Public Policy in Private International Law*, in: Hugo, C.; Möllers, T. M. J. (eds.), Legality and Limitation of Powers: Values, Principles and Regulations in Civil Law, Criminal Law, and Public Law, Nomos, Baden-Baden 2019, p. 299.

82 Gullifer, L., *Proprietary Rights in Digital Assets*, in: Koller, C., Lehmann, M. (eds.), Digital Assets in Enforcement and Insolvency: Securing Creditor Access and Protecting Customer Interests in the Crypto World, Hart Publishing, Oxford and Dublin, 2025, pp. 16-19.

83 Carr, D., *Cryptocurrencies as Property in Civilian and Mixed Legal Systems*, in: Fox, D., Green, S. (eds.), Cryptocurrencies in Public and Private Law, Oxford University Press, Oxford, 2019, pp. 186-187.

is not manifested through possession in the traditional sense, which presupposes the tangible existence of the object possessed, but rather through factual control exercised by means of the private key used to authorise transactions on the DLT system.[84] In this regard, the concept of "control", as developed *inter alia* by the UNIDROIT Principles on Digital Assets and Private Law, emerges as a functional equivalent of possession in relation to crypto-assets. Such control is based both on the positive ability to use the crypto-asset and on the negative ability to exclude all third parties from access to that asset.[85] It is precisely this latter, negative power to exclude third parties that constitutes a defining characteristic of proprietary rights, namely their *erga omnes* effect. Accordingly, the similarity between possession of tangible objects and control over crypto-assets lies in the fact that the holder of the crypto-asset is entitled to exclude any third party from using or accessing the crypto-asset. Likewise, the similarity in terms of rivalrousness is reflected in the fact that the transfer of control over a crypto-asset to a new holder simultaneously prevents the previous holder from disposing of that same crypto-asset.[86] It may therefore be concluded that a holder of a crypto-asset who exercises control over it possesses a form of authority over the crypto-asset which, in substantive terms, closely resembles, first and foremost, ownership of movable property.[87]

Furthermore, in addition to the previously discussed legally relevant similarities between tangible objects and crypto-assets, fundamental legal principles must also be taken into account as a justification for the extended application of the *lex rei sitae* conflict-of-laws rule to crypto-assets. This is because fundamental legal principles, including principles relating to the protection of fundamental human rights and freedoms, constitute the primary foundation for the construction, interpretation and application of any legal rule, including conflict-of-laws rules.[88] Within the context of private international law, the influence of human rights protection standards is realised primarily through the selection of the connecting factors of conflict-of-laws rules, but also at the level of the fundamental institutions of private international law itself.[89] Given that qualification constitutes one of the foundational institutions of private international law, since it precedes the

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84 Gullifer, *op. cit.*, note 82, pp. 16-19.

85 UNIDROIT, *Principles on Digital Assets and Private Law*, UNIDROIT, Rome, 2023, principle 2(2), comment 6.3; Omlor, *op. cit.*, note 29, p. 82.

86 Gullifer, *op. cit.*, note 82, pp. 16-19.

87 Villata, F. C., *Cryptocurrencies and Conflict of Laws*, in: Bonomi, A. *et al.* (eds.), Blockchain and Private International Law, Brill | Nijhof, Leiden and Boston, 2023, p. 335.

88 Đorđević, *op. cit.*, note 55, p. 480.

89 Župan, M., *Utjecaj zaštite ljudskih prava na suvremeno međunarodno privatno pravo*, in: Barbić, J.; Sikirić, H. (eds.), Međunarodno privatno pravo - interakcija međunarodnih, europskih i domaćih propisa, Hrvatska akademija znanosti i umjetnosti, Zagreb, 2020, p. 132.

application of any conflict-of-laws rule, it follows that, in the context of crypto-assets, and for the purpose of ensuring the applicability of the existing *lex rei sitae* rule, the relevant human rights protection standards should also be extended to the legal category underlying the *lex rei sitae* rule. This is particularly justified in light of the fact that proprietary relationships traditionally represent an area where private law intersects with constitutional and Convention-based guarantees of property rights.[90] For example, German legal scholarship has taken the position that crypto-assets fall within the scope of the constitutional guarantee of property.[91] Against this background, and bearing in mind that both the European Convention for the Protection of Human Rights and Fundamental Freedoms[92] (hereinafter: ECHR) and the Charter of Fundamental Rights of the European Union[93] (hereinafter: Charter) are instruments common to all Member States, the following sections will outline additional arguments which, viewed from that perspective, support the extended application of the *lex rei sitae* conflict-of-laws rule in relation to crypto-assets.

At the outset, it should be emphasised that the scope of the protection of property rights under Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms[94] does not extend solely to ownership of tangible objects in the sense of substantive property law. Rather, the concept of property is understood far more broadly from a constitutional perspective, encompassing other rights and interests capable of being classified as possessions.[95] Accordingly, the ECtHR has consistently held in its case-law that the fact that a particular interest is not recognised by national substantive law as a right in the private-law sense does not prevent that interest, having regard to the circumstances of the case, from being classified as property deserving protection under the ECHR.[96] Furthermore, and particularly relevant in the context of crypto-assets

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90 *Ibid.*

91 Omlor, *op. cit.*, note 29, p. 81.

92 European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

93 Charter of Fundamental Rights of the European Union [2012] OJ C 326.

94 Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952, ETS No. 9.

95 van Erp, S.; Akkermans, B., *European Union property law*, in: Twigg-Flesner, C. (ed.), The Cambridge Companion to European Union Private Law, Cambridge University Press, Cambridge, 2010, p. 175; ECtHR, Judgment of 23 February 1995, *Gasus Dosier- und Fördertechnik Gmbh v The Netherlands*, App. no. 15375/89, para. 53.; ECtHR, Judgment of 25 March 1999, *Iatridis v Greece*, App. no. 31107/96, para. 54.; ECtHR, Judgment of 5 January 2000, *Beyeler v Italy*, App. no. 33202/96, para. 100.

96 ECtHR, Judgment of 29 March 2010, *Brosset-Triboulet and Others v France*, App. no. 34078/02, para. 71.

and private international law as a branch of private law, the ECtHR has adopted the general position that, in situations involving private legal relationships where one private party interferes with the peaceful enjoyment of property of another private party, the state assumes a positive obligation to ensure, through its national law, adequate legal protection of property rights, together with effective legal remedies enabling the injured party to seek protection of those rights.[97] It follows from the foregoing that states bear a positive obligation to secure measures ensuring the effective realisation of the guaranteed right to property.[98] Consequently, in order to give effect to the guarantee of property rights at the conflict-of-laws level, courts of the Member States should extend the scope of application of the autonomous national *lex rei sitae* rule so as to encompass crypto-assets, irrespective of the manner in which crypto-assets as intangible objects are treated under the substantive property law of the *lex fori*. The fact that the *lex fori* may not formally recognise the legal position of the token holder as deriving from a particular subjective proprietary right does not diminish the reality that the holder nevertheless exercises exclusive control over the crypto-asset through the private key and is thereby able autonomously and for their own benefit to exercise all rights deriving from that exclusive control over the token.[99] In this regard, it should also be noted that the CJEU, when interpreting the scope of Article 17(1) of the Charter, has taken the view that the guarantee of property extends to rights having economic value which create a legal position within the legal order and enable the holder to exercise those rights autonomously and for their own benefit.[100] In that respect, it should further be emphasised that crypto-tokens generally possess value, whether economic or monetary, depending on whether they are exchanged for economic goods or for money.[101] In light of all the foregoing considerations, even courts of Member States whose substantive law does not recognise ownership or other proprietary rights in crypto-assets would nevertheless be required, through a functional approach, to extend the substantive scope of application of the *lex rei sitae* rule.

Although the doctrine of qualification is sometimes criticised in legal scholarship as a potential instrument of manipulation, such criticism can hardly be levelled against the proposed extended *lex fori* qualification with a functional approach

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97 ECtHR, Judgment of 14 October 2008, *Blumberga v Latvia*, App. no. 70930/01, para. 67.; Schabas, W., *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford, 2015.

98 Schabas, *op. cit.*, note 97.

99 Rueckert, C., *Cryptocurrencies and fundamental rights*, Journal of Cybersecurity, Vol. 5, No. 1, 2019, p. 7.

100 CJEU, Judgment of 22 January 2013, *Sky Österreich GmbH v Österreichischer Rundfunk*, C-283/11, ECLI:EU:C:2013:28, para. 34.

101 Omlor, *op. cit.*, note 63, p. 132.

in the context of crypto-tokens, particularly given the inherently intangible nature of such objects.[102] On the contrary, this approach enables the filling of a legal lacunae by focusing on the function of legal institutions and legal categories themselves. In this respect, the legally relevant similarity between ownership of a tangible object and control over a token lies precisely in the ability to exclude third parties and in the existence of direct subjective proprietary rights in relation to the object itself.[103] In this connection, the application of the *lex rei sitae* rule to crypto-assets may additionally be justified by reference to the residual nature of that rule within the autonomous private international law systems of the Member States in relation to the conflict-of-laws instruments of EU private international law. The latter naturally enjoy priority by virtue of the supremacy of EU law, provided that the legal issue in question falls within the scope of a particular EU private international law instrument. Comparing, on the one hand, the potential applicability of the conflict-of-laws rules governing contractual obligations (Rome I Regulation[104]) and non-contractual obligations (Rome II Regulation[105]), with, on the other hand, the conflict-of-laws rules governing proprietary relationships in relation to direct rights over crypto-assets, it should be emphasised that the conflict-of-laws rules relating to obligations possess an autonomous and uniform European meaning derived from the case law of the CJEU. The CJEU has, in its jurisprudence, distinguished proprietary rights from obligations under EU law. In essence, the distinction lies in the fact that a proprietary right, being linked to a particular object, produces effects *erga omnes*, whereas an obligation may be asserted only against a specific debtor.[106] It therefore follows that obligations possess merely relative effect (*inter partes*), presupposing the existence of a debtor-creditor relationship. By contrast, and crucially in the context of the qualification of direct rights in crypto-tokens, proprietary rights operate in relation to an object, traditionally a thing, and produce absolute effects. This interpretation adopted by the CJEU closely corresponds to the traditional understanding of the operation of obligations and proprietary rights rooted in the Roman law tradition. Consequently, the CJEU's understanding strongly suggests that, for the purposes of EU private international law, neither the Rome I Regulation nor the Rome II Regulation is

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102 Banu, R.; Green, M. S.; Michaels, R., *Introduction*, in: Banu, R.; Green, M. S.; Michaels, R. (eds.), Philosophical Foundations of Private International Law, Oxford University Press, Oxford, 2024, p. 6.

103 *Ibid.*

104 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations [2008] OJ L 177.

105 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [2007] OJ L 199.

106 CJEU, Judgment of 9 June 1994, C-292/93, *Norbert Lieber v. Willi S. Göbel and Siegrid Göbel*,, ECLI:EU:C:1994:241, para. 14.

suitable for governing direct rights existing in relation to crypto-assets where such rights bind all third parties with *erga omnes* effect. This is particularly so where the holder of ownership or another proprietary right stands in no relative legal relationship with those third parties and where, put simply, the claim or defence is based on the assertion: *"This is mine"*.[107] Accordingly, whenever a legal relationship cannot be qualified as an obligation within the meaning of EU private international law, and where the matter does not fall within another specific field of EU private international law, such as succession, matrimonial property or insolvency matters, but instead concerns a relationship producing absolute effects, the *lex rei sitae* rule should, by virtue of its residual function, be applied in such situations on the basis of an extended *lex fori* qualification adopting a functional approach.

5. CONCLUDING REMARKS

From the foregoing, it is evident that considerations regarding the applicability of the legal category underlying the *lex rei sitae* rule in the context of crypto-assets remain largely confined to academic debate. In the legal systems examined in this paper, there is still no meaningful body of case-law addressing the issue, that is, no clear judicial position as to whether the scope of the *lex rei sitae* rule may be extended to crypto-assets as intangible objects. This is particularly significant in legal systems whose substantive law consistently adheres to the doctrine that only tangible objects may constitute "things", since such an approach may equally influence conflict-of-laws qualification through the consistent application of the *lex fori* method.

Indeed, if a court in a given Member State were unable to subsume legal relationships concerning crypto-assets under any existing autonomous conflict-of-laws rule, the only remaining option would be the application of *lex fori*. Such an outcome would, however, amount to a denial of the closest connection principle as one of the fundamental principles of private international law. Conversely, if a court were hypothetically to rely solely on the principle of the closest connection in order to determine the applicable law governing an undefined legal relationship concerning crypto-assets, the question would still arise as to what precisely the court would be seeking an applicable law for, namely, which legal institution or which legal issue. In such circumstances, the court would effectively be required to construct an entirely new legal category for crypto-tokens alongside the existing categories within the corpus of private international law. It therefore appears more appropriate to recognise an extended application of the existing legal category underpinning the *lex rei sitae* rule, particularly given that there are legally relevant

[107] Burrows, *op. cit.*, note 52, p. 195.

similarities between tangible objects and tokens. Such an approach would also contribute to the effective protection of property rights at the conflict-of-laws level from the perspective of both the ECHR and the Charter. Moreover, by proceeding in this manner, the court would not undermine the coherence of domestic substantive law; rather, it would merely adopt a more flexible and expansive understanding of existing legal categories at the conflict-of-laws level. Ultimately, it is the *lex situs* itself that will determine whether a token is sufficiently individualised to constitute a potential object of proprietary rights, as well as resolve all related issues, including the acquisition of proprietary rights, the protection of good-faith acquirers, and the legal remedies available for the protection of such rights.

Nevertheless, as already indicated in this paper, the prevailing understanding remains that the founding Treaties do not affect national systems of property law, a position that also manifests itself at the conflict-of-laws level through the absence of unification efforts within EU private international law. Bearing in mind that the principal objective of the MiCA Regulation was to prevent regulatory fragmentation of the crypto-asset market, fragmentation capable of distorting competition within the Union's internal market and hindering the cross-border provision of crypto-asset services, it must be concluded that a significant legislative omission arose from the failure to introduce a unified European conflict-of-laws rule governing proprietary relationships in respect of crypto-assets. Indeed, any analogous application of the *lex rei sitae* rule to crypto-assets largely depends on national legal concepts, doctrinal approaches, and judicial activism within the Member States. Consequently, the determination of the applicable law governing proprietary rights in crypto-assets remains within the domain of the autonomous private international law rules of the Member States, making it impossible to speak of a genuinely uniform approach across the EU internal market as a whole. This, in turn, perpetuates a considerable degree of legal uncertainty for participants in the European crypto-market, since it remains unclear how courts in individual Member States might approach the determination of the applicable law governing proprietary relationships connected with crypto-assets.

Finally, it should be emphasised that the issue extends beyond the question of the legal category itself and also encompasses the subsequent level of qualification, namely the determination of the connecting factor *locus rei sitae* in the context of localising crypto-assets. The qualification of that connecting factor constitutes a further layer of complexity in conflict-of-laws analysis, since it ultimately determines the applicable substantive law. Accordingly, the adoption of a unified conflict-of-laws rule at EU level would not only facilitate the harmonisation of legal categories and relevant connecting factors for determining the applicable law, but would also enhance legal certainty and contribute to the uniform application

of law across the European internal market, particularly in light of the potential future contribution of the CJEU through its case law.

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