Safe Bank 2(99) 2025

DOI: 10.26354/bb.16.2.99.2025

Rafał Włoczka*
ORCID: 0009-0000-7729-5036
rafal.wloczka@gmail.com

# The problem of the legal qualification of selected crypto-asset services in light of MiCAR

## Abstract

The article examines the possible legal qualification for providing custody and administration of crypto-assets and providing transfer services for crypto-assets on behalf of clients, concerning e-money tokens within the meaning of Regulation (EU) 2023/1114 of the European Parliament and of the Council on Markets in crypto-assets, as payment services within the meaning of Directive (EU) 2015/2366 of the European Parliament and of the Council on payment services in the internal market.

The article examines whether the specified services fall within the scope of the payment services, and analyses the potential implications of this. The study uses a legal-dogmatic approach based on the interpretation of legal acts, case law, and the domestic and foreign academia.

The results show that the recognition of these services as payment services would entail dual regulatory requirements – for both crypto asset providers and payment service providers. This issue is crucial for the stability of the financial market and the effectiveness of the supervision of its participants.

**Keywords:** MiCAR, PSD2, crypto-asset services, payment services, CASPs

**JEL codes:** K22, K23, G28

## Introduction

This article examines the legal qualification of the services of providing custody and administration of crypto-assets on behalf of clients (Article 3(1)(16)(a) of Regulation (EU) 2023/1114 of the European Parliament and of the Council of

* Rafał Włoczka – Lawyer specializing in financial regulations; extramural PhD student at the Faculty of Law and Administration of the Jagiellonian University in Cracow.

31 May 2023 on crypto-asset markets)[1] and the provision of transfer services for crypto-assets on behalf of clients (Article 3(1)(16)(j) of MiCAR), the subject of which may be e-money tokens.[2]

The concept of crypto-assets under MiCAR is not homogeneous. It includes asset-referenced tokens (Article 3(1)(6) of MiCAR), EMTs (Article 3(1)(7) of MiCAR), and crypto-assets other than asset-referenced tokens or EMTs (Article 4 *et seq.* of MiCAR). Although the determination of the meaning and scope of the subject matter of crypto-assets has been subject to significant changes during the legislative phase of MiCAR (see Tomczak 2023, *passim*; Tomczak 2022, *passim*), and these issues may evoke interpretative challenges (Korus 2024, *passim*), this article is only concerned with EMT-related services.

It should first be noted that the provision of crypto-asset services is regulated by MiCAR. At the same time, in recognising the possibility of a potential double qualification of crypto-assets or crypto-asset-related services as being subject to both MiCAR and other EU financial services legislation, the EU legislator has introduced corresponding conflict of law rules.

Under Article 2(4) of MiCAR, crypto-asset-specific rules do not apply to those crypto-assets that are covered by other EU regulations on the functioning of the financial market. This assumption is based on the regulatory paradigm of the EU financial services market, i.e. "same activity, same risk, same rules" (recital 9 of MiCAR). According to this approach, if a given right or service (including crypto-assets) falls under a different legal regime in the financial services area, it should be covered by the relevant rules, regardless of any technological aspects.

However, the indicated catalogue of exemptions from MiCAR treats crypto-assets as qualifying as "funds" specifically. Under Article 2(4)(c) of MiCAR, the regulation does not apply to crypto-assets that qualify as funds unless they qualify as EMTs. The exception provided for EMTs from MiCAR's general exemption means that the provisions of MiCAR apply to EMTs. At the same time, there is no conflict of laws rule that excludes the application of other regulations to this type of crypto-asset. Consequently, it must be assumed that EMTs may be subject to both MiCAR and the payment services-specific regulation. This article focuses on analysing this thesis and its legal implications.

1 Regulation (EU) 2023/1114 of the European Parliament and of the Council of 31 May 2023 on crypto-asset markets and amending Regulations (EU) No 1093/2010 and (EU) No 1095/2010 and Directives 2013/36/EU and (EU) 2019/1937 (OJ EU. L. 2023, No. 150, p. 40, as amended; hereinafter: MiCAR).

2 Hereinafter as: EMT.

## 1. EMT – crypto-asset or electronic money?

Under Article 3(1)(7) of MiCAR, EMTs are a type of crypto-asset that purports to maintain a stable value by referencing the value of one official currency. Article 48(2) of MiCAR further provides that EMTs are considered electronic money. Treatment of EMTs directly as "electronic money" is also confirmed *expressis verbis* in recital 66 of MiCAR. This approach is also confirmed by the draft PSR[3] which equates EMTs with electronic money. Recital 29 of the draft PSR indicates that the payment services rules should unambiguously specify the situations in which the regime applicable to payment services will not apply to EMT-related activities. This allows one to assume that if the EU legislator had intended to exclude the application of the rules applicable to payment services to transactions involving EMTs, it would have done so explicitly. However, at the current stage of legislative work on the draft PSR, there are no provisions exempting its application to transfer services for crypto-assets, and crypto-asset custody and administration services on behalf of clients.

Given the above, there is a strong case to be made that the provision of some type of crypto-asset services, involving the use of EMTs, results in these activities being simultaneously subject to the regulatory regime applicable to payment services.

## 2. Does storing and administering crypto-assets mean operating a payment account?

Deciding whether the activity of storing and administering crypto-assets can be classified as a payment account activity first requires defining and identifying the design features of the instrument.

Under Article 4(12) of the PSD2[4], a payment account means an account held in the name of one or more payment service users which is used to execute payment transactions. This definition is faithfully reproduced in Article 2(25) of the Payment Services Act[5]. Importantly, the mere operation of a payment account does not constitute a payment service (see Article 3(1)(1–8) of the PSA and Annex I to the PSD2). Nevertheless, due to the functionally inseparable link between the payment account and certain payment services, the operation of a payment account is considered to be an ancillary service arising from the payment services contract (Czech 2021, p. 27).

---

3 Position of the European Parliament adopted at first reading on 23 April 2024 with a view to the adoption of Regulation (EU) 2024/... of the European Parliament and of the Council on payment services in the internal market and amending Regulation (EU) No 1093/2010 (accessed on 20.05.2025: https://www.europarl.europa.eu/doceo/document/TA-9-2024-0298_EN.html; hereinafter: draft PSR).

4 Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC, 2013/36/EU and Regulation (EU) No 1093/2010 and repealing Directive 2007/64/EC (OJ EU. L. 2015 No 337, p. 35 as amended; hereinafter: PSD2).

5 Hereinafter as: PSA.

The concept of a payment account has three essential elements: firstly, it must have the characteristics inherent in accounts, i.e. it must allow certain values (in this case, funds) to be recorded; secondly, it must allow payment transactions to be performed; and thirdly, it must be held for one or more users.

Firstly, a payment account must have a bookkeeping function to record funds correctly. The view of the bookkeeping component of payment accounts is confirmed by doctrine which points out that a payment account "*is an accounting device maintained by the payment service provider, used to record receivables between the parties to the legal relationship: payment service provider and user*" (Czech 2021, p. 23; Iwański 2025, thesis 11). The record-keeping nature of a payment account allows for the disclosure of the amount of claims between the account holder and the payment service provider[6] maintaining the payment account (Czech 2019, p. 49). The indicated feature is essential for the economic purpose of payment accounts, i.e. to enable the execution of payment transactions. This is because it makes it possible to keep records and to make appropriate settlements of the funds held in the accounts (so with regard to bank accounts: Janiak 2022, Nb 1).

Secondly, the payment account must be used to perform payment transactions. The payment account agreement should specify the types of services provided in connection with the account; this may include services related to payment transactions (Czech 2021, p. 30). At this point, however, attention should be drawn to the incorrect positions expressed in legal doctrine which indicate that the performance of payment transactions should be the "predominant purpose" or a purpose at least equivalent to the other functions of the account for it to qualify as a payment account (cf. Czech 2021, p. 30). Such reasoning seems to go too far. While, by their nature, payment accounts should primarily perform payment functions, the qualification of an account as a payment account should be determined by the scope of functionalities associated with it (similarly, see Blocher 2019, p. 30). Neither the PSA nor the PSD2 provide any basis to introduce a subjective criterion of the 'predominant nature' of the assumed purpose of using the account for its proper classification. This is confirmed by the jurisprudence of the Court of Justice of the European Union[7] which indicates that, to assess the "payment" nature of an account, it is necessary to establish whether the account enables the execution of payment transactions. There are even positions in doctrine attributing an overriding character to this attribute. According to this approach, the concept of a payment account should be understood functionally as "*an account (including a bank account) that serves (has the function of) performing payment transactions*" (Blocher 2019, p. 71). The very possibility of performing payment transactions from an account, regardless of its economic purpose, renders it a payment account.

This assertion is also confirmed by the positions expressed by the European Commission. Indeed, it indicates that all accounts may qualify as payment accounts

6 Hereinafter as: PSP.
7 Hereinafter as: CJEU.

if they are not covered by the exemption arising from the PSD2, if they allow payment transactions to be made, and even if these transactions are not made to or from third parties in relation to the account holder.[8] The European Commission's position was taken into account and confirmed by the Polish legislator during legislative work on the draft PSA.[9]

Thirdly, the payment account must be maintained by the PSP in favour of the user. Against this background, M. Blocher rightly points out that a payment account can only be one to which the characteristic of "externality" can be attributed, resulting from the obligatory relationship between the PSP and the user-account holder (Blocher, 2019, p. 73). This thesis is well demonstrated if the wording of Article 2(25) PSA is read along with Article 4(12) PSD2, where it is indicated that a payment account is *an account held in the name of one or more payment service users* (French: *un compte qui est détenu au nom d'un ou de plusieurs utilisateurs de services de paiement*). Notwithstanding the academic differences concerning the meaning of the possibility to attribute an account to a specific holder (cf. in this respect, i.a. Rogoń 2012, pp. 44–45; Blocher 2019, pp. 73–74; Czech 2021, pp. 28–29), the operation of a payment account is a service provided by the PSP to its holder (i.e. an entity other than the PSP). Thus, the PSP acts in this relationship in an intermediary role, enabling payment transactions using the account. This is confirmed by the fact that technical accounts, internal accounts, *loro*/*nostro* accounts, accounts opened by banks to service credit commitments, and other similar accounts do not constitute payment accounts under the PSA (Byrski, Zalcewicz, Bajor 2021, Article 2(25)).

In view of the above, a funds accounting and record-keeping system that allows the execution of payment transactions and that is operated for the benefit of a user (entity) who acts in a different role to the entity operating that system should be considered a payment account. Thus, it should be considered whether the provision of the custody and administration of EMTs on behalf of customers can be considered the operation of a payment account within the meaning of the regime applicable to payment services.

Under Article 3(1)(17) of MiCAR, the service defined therein should be understood as safekeeping or controlling, on behalf of clients, crypto-assets or the means of access to such crypto-assets where applicable in the form of private cryptographic keys (French: *la garde ou le contrôle, pour le compte de clients, de crypto-actifs ou des moyens d'accès à ces crypto-actifs, le cas échéant sous la forme de clés cryptographiques privées*).

Crypto-asset service providers[10] providing crypto custody and administration on behalf of clients should establish and implement a custody policy. The provision of such services must have a contractual basis. The contract should clarify the nature

[8] European Commission staff paper, *Your questions on PSD. Payment Services Directive 2007/64/EC. Questions and answers*, answers to questions 25, 31, 150, 187 and 262 (accessed on 20.05.2025: https://finance.ec.europa.eu/system/files/2023-06/110222-faq-transposition-psd_en.pdf ).

[9] Uzasadnienie rządowego projektu ustawy z 17 maja 2011 r. o usługach płatniczych, Druk Sejmowy VI kadencji, Druk nr 4217.

[10] Hereinafter as: CASP.

of the service provided. This may include the custody of crypto-assets belonging to clients or the disposition of means of access to those crypto-assets, in which case, the client retains control over the stored crypto-assets. The crypto-assets or the means of access to them can also be transferred under the full control of a CASP. These entities, when storing or having the means to access crypto-assets belonging to clients, should ensure that these crypto-assets are not used for their own purposes (MiCAR, recital 83).

The contract between the CASP and the client for the provision and administration of the crypto-asset custody service by the CASP on behalf of the client must set out the parties' obligations and rights and the CASP's responsibilities (Article 75(1) of MiCAR). This agreement must include, i.a. a description of the nature of the service to be provided and the policy for the custody of crypto-assets by the CASP concerned (Article 75(1)(b)–(c) of MiCAR).

CASPs providing the service of custody and administering crypto-assets on behalf of clients are required to keep a register, open in the name of each client, in which a record would be kept of the positions corresponding to each client's rights in crypto-assets. In this register, CASPs are obliged to register all operations arising from their clients' instructions as soon as possible (Article 75(2) of MiCAR). In addition to its accounting and record-keeping function, this arrangement is intended to ensure the transparency of CASPs' activities vis-à-vis their clients (Zetzsche, Sinnig, Nikolakopoulou 2024, p. 219). The safekeeping and administration of clients' crypto-assets itself should be done in accordance with the CASP's internal policies and rules and procedures adopted to ensure custody or control of crypto-assets or the means to access them (Article 75(3) in conjunction with Article 70(1) of MiCAR)

Analysis of the indicated rules makes it possible to conclude that a CASP providing custody and administration of clients' crypto-assets does not become their owner, but only has custody of these assets (records the legal and factual status on the part of the authorised client and has custody of clients' crypto-assets). This interpretation is consistent with the nature of crypto-assets which constitute a *sui generis* property right (Article 3(1)(5) of MiCAR). I believe that, consequently, the "account" of crypto-assets should be ascribed the characteristics of a proprietary account (proprietary account) as found in the case of financial instruments[11] (Chłopecki 2016, p. 9). Indeed, cryptocurrencies are a specific category of property rights that can be traded. Furthermore, as stated above, CASPs are obliged to record all transactions resulting from their clients' instructions as soon as possible (Article 75(2) sentence 2 MiCAR). In my opinion, this obligation corresponds to the constitutive nature of the entry in the crypto "account". Indeed, I see no reason to treat crypto-assets, including EMTs, differently from other types of tokenised rights (see, in this regard, Wosiak 2023, *passim*; Włoczka 2022, pp. 78–81), or financial instruments which are also subject to registration in proprietary accounts (Sójka, Godlewski 2022, thesis 2; Michalski 2023, Nb 19). This view would make it possible

[11] Act of 29 July 2005 on trading in financial instruments (Journal of Laws 2024, item 722, as amended).

to distinguish crypto-assets from funds held in payment accounts (e.g. bank accounts) which constitute the account holder's claim on the PSP[12] (on the nature of the account holder's claim on the bank, see e.g. Gołaczyński 2023, Nb 16; Bączyk 2020, Nb 106).

Of course, this difference does not make it clear that the service of providing custody and administering crypto-assets on behalf of clients cannot constitute the activity of maintaining a payment account under the payment services regime. Even if one accepts as correct the understanding of the so-called crypto-asset accounts as proprietary accounts, this does not affect their legal qualification under MiCAR and the PSD2. The domestic understanding of the nature of the contractual relationship arising from a bank account agreement, including payment accounts and securities accounts (and in this case, crypto-assets), cannot affect the interpretation of EU law. Neither MiCAR nor the PSD2 define the normative nature of the accounts or the effects of making entries in these accounts.

With this in mind, it should be pointed out that there are important similarities between payment accounts and crypto-asset custody and administration services. Firstly, in both cases, there is a contractual basis for the CASP or PSP to provide the service to the client. Secondly, the custody and administration of crypto-assets on behalf of clients includes, *verba legis*, the maintenance of an open register of items corresponding to the rights of each client, and therefore, the service includes a record-keeping and accounting component. Thirdly, the custody and administration of crypto-assets on behalf of clients does not preclude the same CASP from being able to provide the service of transferring those crypto-assets. This means that, at least in theory (and usually also in practice), the service of storing crypto-assets will be functionally linked to the ability to dispose of them.

Thus, in my view, it is possible to consider the service of providing custody and administering EMTs on behalf of the client as an activity that qualifies as the operation of a payment account. This qualification will depend on the specific circumstances of the contractual relationship between the CASP and the client but, in principle, there are no normative differences that would support a separate qualification of this type of activity. This means that the qualification of the maintenance of so-called crypto-asset accounts on behalf of clients by a CASP as a payment account is not excluded.

## 3. Transfer of crypto-assets or payment transaction?

To determine whether an EMT transfer service qualifies as a payment transaction, it is first necessary to define the defining features of both activities. Bearing in mind the findings above on the nature of the crypto-asset custody and administration

[12] See on the nature of the obligation relationship arising from the bank account agreement: judgment of the Appellate Court in Szczecin of 6 March 2015, I ACa 40/15, LEX No. 1770856.

service, the EMT transfer service may entail the need for a CASP to be authorised to provide payment services.

Article 4(5) of the PSD2 defines the term "payment transaction" as an action initiated by the payer, on behalf of the payer or by the payee, involving the deposit, transfer, or withdrawal of funds, irrespective of the underlying obligations between the payer and the payee. This concept refers to the overall and single action between payer and payee, and not only to the individual relationships of the payer and payee with its own PSP.[13] A similar, but not identical, implementation of this definition can be found under Article 2(29) of the PSA.

With this in mind, it can be pointed out that the concept of a payment transaction must consist of the fact that their object is funds (e.g. EMTs – *author's note*) that are transferred by means of a closed catalogue of settlement activities, and that these activities are carried out on the user's initiative, i.e. the payer or the payee (Czech 2023, p. 59). On the other hand, the execution of payment transactions must have a basis in an agreement between the PSP and the customer (Article 4(21) PSD2) or in an individual payment transaction agreement (Article 44(1) PSD2).

Payment transactions can be categorised, depending on the entity initiating them, as "initiated by the payer", transactions "initiated by the payee", and transactions "initiated through the payee" (Byrski, Zalcewicz, Bajor 2021, Article 2(25); Grabowski 2020, Nb 59). However, payment transactions themselves can be divided into direct debits (Article 3(1)(2)(a) PSA), payment transactions using a payment card, or similar instrument (Article 3(1)(2)(b) PSA) and credit transfers (Article 3(1)(2)(c) PSA). Within the scope of this article, special attention should be paid to credit transfer services as this represents the most emblematic type of money transfer.

Under Article 3(4) of the PSA, credit transfer means a payment service for crediting a payee's payment account, where a payment transaction from the payer's payment account is made by the PSP maintaining the payer's payment account based on an instruction given by the payer. Under this service, the payer gives a payment instruction (order) to the PSP maintaining the payment account and the transaction itself is made using (debited) funds held on the payment account. However, the PSP is responsible to the payer for causing the payee's payment account to be credited (Iwański 2025a, thesis 18). The definition of a credit transfer referred to in Article 3(4) of the PSA is indeed similar to the definition of a credit transfer referred to in Article 63c of the Banking Law.[14] Thus, to some extent, it is permissible to use an auxiliary interpretation of this concept with reference to the national banking law acquis (with the proviso, however, that the interpretation of PSA through the prism of banking law can only be done in an auxiliary manner – the PSA, being an implementation of PSD2, is characterised by a kind of autonomy of the conceptual grid, aiming to ensure the effectiveness of European law). This allows for an easier grasp of the concept of 'crediting the account' of the payee as a result of a credit transfer. It denotes an entry

[13] CJEU judgment of 21 March 2019, C-245/18, Tecnoservice Int. Srl, ECLI:EU:C:2019:242, paragraph 26.
[14] Banking Law Act of 29 August 1997 (Journal of Laws 2024, item 1646, as amended).

that indicates an increase in the amount of the debt owed by the PSP maintaining the payee's payment account to the holder of that account as a result of the receipt of a certain amount of funds (Pisulinski 2025, Nb 2).

Thus, the payment service referred to in Article 3(1)(2)(c) PSA in conjunction with Article 3(4) PSA is the transfer of funds from the account holder's account to the payee, initiated by the payer, the execution of which is the PSP's responsibility. The proper execution of the transfer order, on the other hand, is to "add" funds to the payee's account, i.e. to increase the debt of the PSP maintaining the payee's account towards the payee.

Under Article 3(1)(26) of MiCAR, the provision of transfer services for crypto-assets on behalf of clients means the provision, on behalf of a natural or legal person, of transfer services for crypto-assets from one address or account on a distributed ledger to another. The conceptual scope of this service should include the activities of intermediary entities that provide the transfer of crypto-assets on behalf of a client from one address or account on a distributed ledger to another. Thus, the scope of this service does not include, for example, validators, nodes or so-called miners, that may be part of the process of validating transactions and updating the state of the distributed ledger (MiCAR, Recital 93).

The provision of a crypto-asset transfer service must be based on a contractual node between the CASP and the client which must set out the parties' obligations and responsibilities. The mandatory elements of this contract are described in Article 82(1)(a) to (e) of MiCAR. In accordance with the disposition of Article 82(2) of MiCAR, on 26 February 2025 the European Securities and Markets Authority[15] has published guidelines for CASPs providing transfer services for crypto-assets on behalf of clients with regard to procedures and policies, including client rights, in the context of transfer services for crypto-assets.[16]

Under the Guidelines, CASPs are required to provide information to the client regarding, i.a. a description of the form and procedure to initiate or consent to a crypto-asset transfer and to withdraw an instruction or consent, including a specification of the information that the client must provide to properly initiate or execute a crypto-asset transfer (including the method of authentication), and the conditions under which the CASP may reject a crypto-asset transfer instruction. This information must specify the means and timeframe by which the client must notify the CASP of any unauthorised or incorrectly initiated or executed crypto-asset transfers, as well as the CASP's liability, including its maximum amount, for unauthorised or incorrectly initiated or executed transfers (Guidelines, paragraph 12).

The above makes it possible to reconstruct at least the following characteristics that are relevant for the provision of a crypto-asset transfer service on behalf of clients.

15 Hereinafter as: ESMA.

16 ESMA, on rules and procedures, including customer rights, in the context of crypto-asset transfer services under the Crypto-assets Markets Regulation (MiCA) with regard to investor protection, ESMA35-1872330276-2032, 26 February 2025 (hereinafter: Guidelines).

Firstly, the service in this area is performed by the CASP which, being in the role of an intermediary, acts on behalf of the client to transfer crypto-assets. There is, in my view, no sufficient normative basis to conclude that the scope of the CASP's activities in this area is reduced to merely technically enabling the transfer of crypto-assets from one account to another. In particular, MiCAR does not contain a legal standard that would convincingly and unequivocally indicate what kind of activity undertaken by a CASP makes the service merely "technically enabling" the transfer, as opposed to the activity undertaken by a PSP (cf. Minto 2024, p. 371, to the contrary but without extensive argumentation).[17] Thus, the role of a CASP providing transfer services for crypto-assets is structurally similar to that of a PSP performing payment transactions.

Secondly, the provision of this service must be based on an agreement setting out the rights and obligations of the parties in relation to the transfer of crypto-assets. It is worth noting that the contract referred to in Article 82 of MiCAR could qualify as a "framework contract" within the meaning of the PSD2, i.e. a payment service contract covering the future execution of individual and subsequent payment transactions (Herrera 2025, p. 391).

Thirdly, the CASP is responsible for due performance (although the extent and amount of this responsibility may depend on the internal policies and procedures adopted, in accordance with para. 25 of the Guidelines), i.e. the transfer of crypto-assets involving the crediting of the transferred value (by overwriting blocks in *blockchain* technology) to the transfer recipient's account. However, it is worth noting that a CASP's liability for unauthorised crypto-asset transfers has not been shaped as strictly as a PSP's liability for unauthorised payment transactions.

The construction of the transfer services for crypto-assets as presented in this way corresponds, in its design, to the constitutive features of a payment transaction including, in particular, a funds transfer order.

Summarising the issue of the EMT transfer service on behalf of clients, I believe that it may qualify as a service for the execution of payment transactions including, in particular, a credit transfer service, subject to the regulation inherent in payment services. This is prejudiced by the structural identity (or the very far-reaching normative proximity of the two activities) demonstrated above. In addition, it is important that the EU legislator has not introduced a normative exemption that would unambiguously indicate the exclusive jurisdiction of a specific legal regime over these operations. On the contrary, recitals 90 and 93 of the MiCAR Regulation unequivocally indicate the recognition of the phenomenon of the overlapping of these regulations and the acceptance of the full consequences resulting from such a situation. On the contrary, in analogous cases, e.g. the transfer of monetary values related to the handling of assets arising from securities, including dividends, distribution of income,

[17] However, it should be borne in mind that in the case of crypto-asset services, which would really only amount to the provision of a distributed finance infrastructure within which *peer-to-peer* transfers could take place, this reasoning could be considered correct.

or distribution of other profits, the EU legislator has provided for the application of only the regime applicable to payment services (Article 3(h) PSD2).

This means that for transfer services for crypto-assets on behalf of a client which are provided directly by a CASP that accepts a transfer order from a client and acts to execute it, there is a structural identity between the concept of a payment transaction and this service. Thus, when EMTs are the subject of such a transfer – there is a duality of legal regimes applicable to this situation – MiCAR and the regime are applicable to payment services.

## 4. Do crypto-asset service providers have to be payment service providers? Conclusions.

Given the legal analysis set out above, I believe that, in the case of EMT transfer services and the custody and administration of EMTs on behalf of clients, it is possible to conclude that these activities constitute payment services. Consequently, it would be necessary for a CASP to obtain a specific authorisation to provide such services.

The problem described in this article has been recognised directly by the EU legislator. Indeed, it explicitly considered that, i.a. a crypto-asset transfer service may overlap in scope with payment services (MiCAR, recitals 90, 93). The EU legislator seems to take the position that crypto-asset services qualifying simultaneously as payment services require both relevant authorisations. This is prejudiced by recital 93 to MiCAR, stating that: "*in such cases, the transfers [i.e. the qualification of a crypto-actives transfer service as a payment service – author's note] should be carried out by an entity authorised to provide payment services in accordance with this Directive*". Currently, the problem of the confluence of the two standards has been recognised by the European Commission which has asked the European Banking Authority[18] to develop potential legislative suggestions in this area.[19] In response to this call, the EBA has published an opinion on the interplay between the PSD2 and MiCAR regimes[20]. The EBA submits that due to the qualification of EMTs as e-money – the problem of the application of the dual legal regime to certain services provided by CASPs needs to be regulated at the level of EU law. Leaving this issue without

[18] Hereinafter as: EBA.

[19] EC, Directorate General for Financial Stability, Financial Services and Capital Markets Union, Letter to EBA and ESMA entitled "Subject: Interplay between MiCA and PSD2 – Possible "no action letter" by the EBA", Brussels 5.12.2024 (accessed 20.05.2025: https://www.eba.europa.eu/sites/default/files/2024-12/3225040c-5f3d-410f-9156-f06a43231938/Letter%20to%20EBA%20and%20ESMA%20on%20the%20interplay%20between%20MiCA%20and%20PSD2.pdf).

[20] European Banking Authority, Opinion on the interplay between Directive EU 2015/2366 (PSD2) and Regulation (EU) 2023/1114 (MiCA) in relation to crypto-asset service providers that transact electronic money tokens, 10.6.20205, EBA/Op/2025/08 (accessed on 7.07.2025: https://www.eba.europa.eu/sites/default/files/2025-06/e2958c99-a1b0-4b07-9d31-bcba0a28dbe7/Opinion%20on%20the%20interplay%20between%20PSD2%20and%20MiCA.pdf).

legislative intervention may lead to undesirable consequences from the standpoint of an EU financial sector regulatory policy[21].

I believe that the the EU legislative, while regulating these issue, should adopt a position clarifying that no authorisation as a PSP is necessary for CASPs providing the services analysed. The following arguments may be in favour of such interpretation of EU law. Firstly, following the argument derived from the principle of rationality of the legislator, it should be considered that MiCAR is a complete normative regulation. Thus, the performance of activities regulated under the MiCAR regime, which require authorisation to operate as a CASP, should not require an additional authorisation to carry out other regulated activities. This argument is underscored by the fact that the EU legislator has nowhere explicitly indicated in MiCAR that such a necessity exists. Secondly, an applicant for authorisation as a CASP must specify the scope of its intended activities in its application (Article 62(2)(d) of MiCAR). These services, on the other hand, are specifically regulated in MiCAR and in the delegated acts and guidelines of supervisory authorities adopted under MiCAR. These solutions are incompatible with MiCAR (e.g. with regard to the use of strong authentication for payment transactions or in the area of liability for unauthorised payment transactions). Thus, the application of both the requirements under the PSD2 regime (and, in the future, the draft PSR) and MiCAR to services with EMTs as their object would raise significant difficulties.

In view of the above, I believe that a desirable legislative solution would be for the draft PSR to prejudge the issue under consideration by establishing a standard excluding the scope of application of the payment services regime to crypto-asset services having EMTs as their object.

Notwithstanding the above, it should also be pointed out that, from a purely practical point of view, many CASPs will be able to require authorisation to provide payment services – not only because of their EMT-enabled services, but also because they transact and hold client funds (Minto 2024, p. 373). This has also been recognised by the EU legislator which has indicated that CASPs may themselves provide payment services linked to the crypto-asset service they offer if they hold the relevant authorisation issued under the regime applicable to payment services (Article 70(4) of MiCAR).

## Bibliography

Bączyk M. (2020). *Rozdział 20. Umowy bankowe w polskim systemie prawnym*. In: M. Stec (ed.), *Prawo umów handlowych. System Prawa Handlowego. Tom 5C*, ed. 1, Warszawa.

Blocher M. (2019). *Cechy konstrukcyjne rachunku płatniczego. Glosa do wyroku TS z dnia 4 października 2018 r., C-191/17*, Europejski Przegląd Sądowy, No. 6.

[21] *Ibidem*, p. 3.

Blocher M. (2019). *Podstawowy rachunek płatniczy i umowa podstawowego rachunku płatniczego*, Warszawa, not published.

Byrski J., Zalcewicz A., Bajor B. (2021). In: J. Byrski (ed.), A. Zalcewicz (ed.), *Ustawa o usługach płatniczych. Komentarz*, ed. 2, Warszawa, commentary to Article 2 pkt 25.

Chłopecki A. (2016). *(Niektóre) paradoksy prawa papierów wartościowych*, Przegląd Prawa Handlowego, No. 9.

Czech T. (2021). *Pojęcie rachunku płatniczego*, Monitor Prawa Bankowego, No. 7–8.

Czech T. (2023). *Transakcja płatnicza*, Monitor Prawa Bankowego, No. 10.

Czech T. (2019). *Wpis na rachunek płatniczy*, Monitor Prawa Bankowego, No. 10.

Dokument służb Komisji Europejskiej, *Your questions on PSD. Payment Services Directive 2007/64/EC. Questions and answers* (accessed on 20.05.2025 r.: https://finance.ec.europa.eu/system/files/2023-06/110222-faq-transposition-psd_en.pdf).

EC, Directorate-General for Financial Stability, Financial Services and Capital Markets Union, letter addressed to the EBA and ESMA (2024). Entitled "Subject: Interplay between MiCA and PSD2 – Possible 'no action letter' by the EBA", Brussels 5 December 2024.

European Banking Authority (2025). *Opinion on the interplay between Directive EU 2015/2366 (PSD2) and Regulation (EU) 2023/1114 (MiCA) in relation to crypto-asset service providers that transact electronic money tokens*, 10.6.20205, EBA/Op/2025/08.

ESMA Guidelines (2025). Guidelines on transfer services for crypto-assets under MiCA, ESMA35-1872330276-2032, 26 February 2025.

Gołaczyński J. (2023). In: E. Gniewek (ed.), P. Machnikowski (ed.), *Kodeks cywilny. Komentarz*, ed. 11, Warszawa, commentary to Article 725.

Grabowski M. (2020). In: M. Grabowski, *Ustawa o usługach płatniczych. Komentarz*, ed. 2, Warszawa, commentary to Article 2.

Herrera L.A. (2025). *PSD3 and the Regulation on Payment Services in the Context of Crypto Assets as a Means of Payment*. In: C.P. Sempere (ed.), *Governance and Control of Data and Digital Economy in the European Single Market. Legal Framework for New Digital Assets, Identities and Data Spaces*, Vol. 71.

Iwański W. (2025). In: K. Osajda (series ed.), J. Dybiński (volume ed.), *Ustawa o usługach płatniczych. Komentarz*, ed. 5, Warszawa, commentary to Article 2.

Iwański W. (2025a). In: K. Osajda (series ed.), J. Dybiński (ed. volume), *Ustawa o usługach płatniczych. Komentarz*, ed. 5, Warszawa, commentary to Article 3.

Janiak A. (2022). In: M. Gutowski (ed.), *Kodeks cywilny. Tom III. Komentarz. Art. 627–1088*, ed. 3, Warszawa, commentary to Article 725.

Judgment of the Appellate Court in Szczecin of 6 March 2015, I ACa 40/15, LEX No. 1770856.

Judgment of the Supreme Court of 8 December 2010, V CSK 163/10, OSNC-ZD 2011, No. 2, position: 48.

Judgement of the CJEU of 21 March 2019, C-245/18, *Tecnoservice Int. Srl*, ECLI:EU:C:2019:242

Judgement of the CJEU of 4 October 2018, C-191/17, *Bundeskammer für Arbeiter und Angestellte v. ING-DiBa Direktbank Austria Niederlassung der ING-DiBa AG*, ECLI:EU:C:2018:809.

Korus K. (2012). *Pojęcie usługi płatniczej w ustawie o usługach płatniczych*, Monitor Prawa Bankowego, No. 7–8.

Korus K. (2024). *Zakres przedmiotowy pojęcia kryptoaktywa w Rozporządzeniu MiCA*, Monitor Prawa Bankowego, No. 7–8.

Michalski M. (2023). In: M. Wierzbowski (ed.), L. Sobolewski (ed.), P. Wajda (ed.), *Ustawa o obrocie instrumentami finansowymi. Komentarz*, ed. 4, Warszawa, commentary to Article 7.

Minto A. (2024). *E-money tokens and coordination issues between Market in Crypto-assets Regulation (MiCAR) and the payment services legislation (PSD2)*, Capital Markets Law Journal, Vol. 19, No. 4.

Pisuliński J. (2025). In: P. Machnikowski (ed.), *Prawo bankowe. Komentarz*, ed. 1, Warszawa, commentary to Article 63c.

Pyzioł W., Walaszek-Pyzioł A. (2012). *Pozycja prawna banku jako wykonawcy usług transferu środków pieniężnych*, Przegląd Prawa Handlowego, No. 3.

Rogoń D. (2012). *Usługi płatnicze powiązane z kredytem na przykładzie umowy o konsumencką kartę kredytową*, Monitor Prawa Bankowego, No. 7–8.

Sójka T., Godlewski M. (2022). In: T. Sójka (ed.), *Obrót instrumentami finansowymi. Komentarz*, Warszawa, commentary to Article 7.

Uzasadnienie rządowego projektu ustawy z 17 maja 2011 r. o usługach płatniczych, Druk Sejmowy VI kadencji, Druk No. 4217.

Włoczka R. (2022). *Pojęcie papieru wartościowego wobec zjawiska tokenizacji*, Kraków, not published.

Wosiak K. (2023). *Depozyt papierów wartościowych w technologii rozproszonego rejestru (DLT) a „własność" papierów wartościowych*, Monitor Prawa Bankowego, No. 11.

Zetzsche D., Sinnig J., Nikolakopoulou A. (2024). *Crypto custody*, Capital Markets Law Journal, tom 19, nr 3.