BANKING - AUSTRIA

Virtual currency regulation

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Overview

A significant advantage of virtual currencies is that they are decentralised. No bank or authority poses as the intermediary for virtual currency transactions, which means payments can be transferred directly from one account to another. This creates both advantages and risks to security. On the one hand, transactions do not contain personal information and cannot be erased from the blockchain; however, on the other hand, authorities cannot trace transactions back to an individual user and cannot stop a transaction from being concluded.

Bitcoin, for better or worse, was used to sponsor WikiLeaks after government authorities had frozen its accounts.(1) On similar grounds, there is the continued threat that cryptocurrencies are used to sponsor terrorism, with Europol estimating that such transactions are discovered in 40% of high-profile investigations.(2) Moreover, virtual currencies can be used for money laundering.

These risks have inevitably drawn the attention of EU and domestic regulators.

In a European Parliament report of 2018, it was noted that the most pertinent issues regarding cryptocurrencies are:

- the anonymity of its users;
- the cross-border nature of transactions; and
- the lack of a central authority.

AMLDs

EU regulation with regard to virtual currencies centres on various anti-money laundering directives.(3)

In response to the limited scope of EU Fourth Anti-money Laundering Directive (2015/849 EU) (AMLD4), which did not extend onto virtual currencies, the European Union adopted EU Fifth Anti-money Laundering Directive (2018/843/EU) (AMLD5), which entered into force in 2018 and must be transposed domestically by 10 January 2020. This directive was the first to introduce cryptocurrencies into its definition and also covers cryptocurrency services (ie, custodial wallet providers and virtual currency exchange providers). These entities are regulated similarly to banks and financial institutions and must perform customer due diligence (ie, reporting suspicious activity to the relevant authorities). Finally, the entities will be subject to registration. Notably, the AMLD5 does not entirely address the issue of anonymity of transfers and users.(4)

Austria

In Austria, there is no domestic legislation that directly applies to virtual currencies, although operations using cryptocurrencies may fall under existing laws. The Financial Market Authority (FMA) has stated that Bitcoin is explicitly not within their authority "due to its lack of issuer".(5) Similar reasoning should apply to other virtual currencies.

On the other hand, specific business models may have licensing requirements. For instance, platforms for purchasing crypto assets, which settle payments in euros, require a licence under the Payment Services Act 2018 (ZaDiG 2018; Zahlungsdienstegesetz 2018). Purely technical services would not be covered by these licensing requirements, but would most likely be captured by the requirement for a general trade licence necessary for carrying on a trade in Austria.

Using cryptocurrencies for investment purposes can be treated as a banking business regulated by the Banking Act or an alternative investment fund regulated by the Alternative Investment Fund Managers Act. A similar licensing requirement is imposed on brokers of alternative payment methods if they act as intermediaries for deposits or loans and insurance (eg, where an app or wallet is connected to an existing bank account).(6)

Further, receiving funds from a party for commercial management or a deposit would constitute a banking transaction pursuant to the Banking Act. On the whole, the FMA recommends that a case-by-case analysis of compliance is conducted for each business model.(7)

Notably, there is no specific domestic legislation addressing virtual currency sales, which are instead covered by the general commodities law. Gains from virtual currencies are subject to an up to 55% progressive income tax imposed on individuals and 25% on corporations. Equally, such revenue is valued added tax exempt. Mining is permitted and there are no requirements for it to be reported or declared.(8)

However, mining may fall under the general trade licensing obligations. This is linked to the wider question of whether cryptocurrencies should be viewed as commodities or currencies. If the latter view is correct, mining would be an illegal activity of money production (coinage) over which governments have a total monopoly. Viewing cryptocurrencies as commodities and mining as an activity of trade is more likely correct, since there is no source claiming that cryptocurrencies are outright illegal and a breach of coinage monopoly. In fact, governments which prohibit cryptocurrencies do so for other reasons, such as threats to domestic banking or the inability to conduct surveillance.**(9)** If so, mining requires a general trade licence under Austrian law.

Facebook's Libra currency

Facebook recently announced its intention to enter the virtual currency market with its own currency called Libra. Contrary to Bitcoin, its transactions would require the permission of an intermediary. Further, its value is not linked to any other real currency. Instead, Libra is pegged to low-volatility assets, such as bank deposits and government securities in different currencies.(10) This would ensure a better value stability than that of Bitcoin, for example, which is highly volatile.

Comment

The emergence of new virtual currencies signals the urgency for more regulation. However, flexibility to legislate on such new products was given to the European Commission. It has been mandated until 11 January 2022 to examine and draft legislative proposals for further regulatory measures. Consequently, there should be more regulation anticipated for virtual currencies – both from the European Union and at the domestic level. The Belgian Financial Services and Markets Act 2000 is already active in the area and the Austrian FMA is likely to follow suit.(11)

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Endnotes

(1) Roger Huang, "How Bitcoin and WikiLeaks Saved Each Other", *Forbes* (26 April 2019).

(2) Nikita Malik, "Is Bitcoin a Credible Payment System for Terrorism?", *Forbes* (16 November 2019).

(3) Robby Houben and Alexander Snyers, "Cryptocurrencies and Blockchain - Legal context and implications for financial crime, money laundering and tax evasion", European Parliament (July 2018).

(4) Simont Braun, "AMLD5 and Cryptocurrencies" (October 2018).

(5) FMA, "Bitcoin & Co" (2019).

(6) Global Legal Insights, "Blockchain & Cryptocurrency Regulation 2019 | Austria" (2019).

(7) FMA, "Bitcoin & Co".

(8) Global Legal Insights, "Blockchain & Cryptocurrency Regulation 2019 | Austria".

(9) Global Legal Research Center, "Regulation of Cryptocurrency Around the World" (Library of Congress, June 2018). Accessed 1 July 2019.

(10) Elizabeth Lopatto, "Libra, explained", The Verge (26 June 2019).

(11) Simont Braun, "AMLD5 and Cryptocurrencies".

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