Banking - Austria

The brave new world of Bitcoin – Austria

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Despite recent fluctuations in value, the Bitcoin phenomenon shows no sign of slowing. The meteoric rise of the cryptocurrency presents a range of issues that law enforcement agencies, legal regulators and tax authorities must consider in determining how it fits within their existing regulatory frameworks.

Given the convenience of established currency and payment systems, what is driving the ever-growing interest in Bitcoin and other virtual currencies?

A long list of buzzwords (eg, cryptographic algorithms, operational security and transparency, anonymity, decentralised and deregulated organisation, worldwide availability, virtual character and interchangeability with fiat money) can be used to describe the appeal of Bitcoin. In contrast to established yet obscure financial system infrastructures (eg, central banks' (including the European Central Bank) discretionary moneymaking), and due to a significant decline in public trust in these structures, virtual currencies – predominantly Bitcoin – have become the focus of internet aficionados and young entrepreneurs in Austria.(1)

Austria has a long history of using alternative currencies(2) and the early work of a well-known Austrian economist(3) from the Austrian School of Economics is often cited as the theoretical root of Bitcoin. The loss of public trust and the public's willingness to try something new may be why the world's first Bitcoin automated teller machine was established in Austria. In addition, the Austrian virtual economy is becoming increasingly interested in accepting bitcoins. While the goods that can be purchased with bitcoins may not be the most valuable assets,(4) there has been a steady increase in the number of points of sale that accept bitcoins.(5)

Overall, Bitcoin is a phenomenon of the younger, tech-savvy generation. The possibility of paying for services worldwide simply by using a smartphone and without having to consider exchange rates and transaction fees is a unique feature that clearly outguns established financial systems, even if – at least within the single euro payments area – transaction terms and costs are similar.

Has your jurisdiction taken steps to regulate virtual currencies? What is their current status?

Although Bitcoin has been subject to parliamentary consideration,(6) Parliament has taken no legislative steps to provide a reliable legal framework allowing Bitcoin and other virtual currencies to develop.

Austrian financial market laws have qualified Bitcoin (and other virtual currencies) as follows:(7)

- Bitcoin is not official money, as it has not been established by a sovereign act or declared legal tender.
- Bitcoin is not electronic money within the meaning of the E-money Act.(8) This is because the monetary value of Bitcoin is not an electronically stored claim on the issuer,(9) as no issuer exists.(10) Further, no value is stored in the block chain; instead, bitcoins are transferred from one party to the other. The intrinsic value of bitcoins is solely attributed by users when they accept them as an exchange value.
- Bitcoins are not financial instruments within the meaning of the Banking Act or the Securities Supervision Act 2007.
- Bitcoins are not payment instruments within the meaning of the Payment Services Act. However, they may qualify as payment instruments within the meaning of the Banking Act.(11)

In information "provided in the interests of protecting investors and consumers", the Financial Markets Regulator (FMA) referred to Bitcoin as a virtual currency that is neither regulated nor supervised by the FMA.(12)

Further, because Bitcoin may qualify as a payment instrument under the Banking Act, the FMA is of the opinion that the operation of Bitcoin trading and exchange platforms qualifies as a banking activity and requires compulsory licensing in accordance with the Banking Act. Although no Bitcoin trading or exchange platforms exist in Austria, this legal qualification is also relevant to foreign operations – provided that Austrian users can access the foreign exchange – because any sale purchase transaction concluded by an Austrian user could trigger the licensing requirements. Banking activities preformed without proper licensing will be subject to administrative penalties (eg, fines up to €100,000, unless criminal courts have jurisdiction) and potentially create civil law issues.

How are transactions using virtual currencies as the medium of exchange taxed in your jurisdiction?

The taxation of transactions involving virtual currencies as a medium of exchange has not yet been clarified. No clear-cut rules have been issued in relation to the tax treatment of transactions related to Bitcoin or other virtual currencies.

Compared with tax authorities that recognise Bitcoin as a financial service(13) (eg, Spain) and thus exclude Bitcoin transactions from value added tax (VAT), Austrian tax doctrine(14) and draft publications by the tax authorities refer to the fact that Bitcoin is not legal tender; thus, bitcoins are qualified as intangible assets. Special provisions for transactions related to foreign currencies may apply. Further, for income tax purposes, bitcoin holdings do not qualify as savings.

Activities relating to the mining of bitcoins will usually qualify as operating activities. Accordingly, profits arising from the sale of mined bitcoins or the withdrawal of bitcoins from business assets will be subject to income tax. Income derived from bitcoins mined outside operating activities will most likely be exempt from income tax (including speculation tax).

With regard to VAT, a differentiation between operating activities and private consumer activities must be made. If bitcoins are sold by an undertaking, the sale will most likely be subject to VAT, provided that the transfer of bitcoins represents an individual economic substance. Where the payment character of the transfer prevails, no VAT will be triggered. If a consumer uses bitcoins as payment and sells them at an exchange, VAT will most likely not be triggered.(15)

If virtual currencies were to become a mainstream payment system, how might this affect the ability to control inflation in your jurisdiction?

Bitcoin and other virtual currencies could affect the stability of prices only if they become a fully accepted means of payment (ie, the use of bitcoins would have to affect the use of the euro in the Austrian and the European market significantly). While this seems unimaginable, the widespread use of the Tencent QQ coins in China has already caused the Chinese government to ban trading virtual currency for real goods.

Considering that no regulatory institution has oversight over virtual currencies, known policies (including discretionary moneymaking) do not apply to virtual currencies. Thus, the European Central Bank would lose its ability to influence and balance financial markets. Assuming that there is a close link between the virtual currency and the real economy, this may materially affect price stability, which is calculated based on legal tender, financial systems and payment systems.

The European Central Bank published its first study on virtual currency schemes in 2012.(16) In February 2015 the European Central Bank released a follow-up report called "Virtual currency schemes – a further analysis".(17) In this report, the European Central Bank described virtual currencies as "inherently unstable" but potentially transformative in the realm of payments. Further, the European Banking Authority issued its opinion on virtual currencies and identified more than 70 related risks, including risks to:

- financial integrity;
- existing payment systems in conventional fiat money; and
- regulatory authorities.(18)

What are the potential risks of virtual currencies in terms of fraud? How would these be addressed in your jurisdiction? Have any specific instances emerged in which virtual currencies have been used for money-laundering or other fraudulent purposes?

Warnings on the use of virtual currencies issued by regulatory bodies regularly identify the anonymity associated with Bitcoin and other virtual currencies as being conducive to criminal abuse.(19)

The qualification of Bitcoin under Austrian criminal law is difficult to determine.(20) In general, bitcoins are intangible assets. Accordingly, crimes such as theft (applicable to tangible assets) or those related to non-cash means do not apply to Bitcoin.(21) However, bitcoins may be the subject of breach of trust or embezzlement claims.(22) Austrian criminal law further governs a wide array of specialised computer-based crimes. For example, Section 126a of the Criminal Act addresses the withholding of data (eg, bitcoins stored on a stolen smartphone) and Section 148a of the EU Criminal Act (fraudulent abuse of data) applies to situations where an unauthorised person transfers third-party bitcoins (eg, stored on a stolen smartphone) to another wallet.

Money laundering (Section 165 of the Penal Code) may be relevant due to the anonymity offered by virtual currencies. Austrian criminal rules address all relevant aspects of 'money laundering', as defined in the Third Money Laundering Directive.(23) Due to the broad scope of the term 'assets', money-laundering activities related to Bitcoin are covered under the directive.

While Austrian criminal laws governs a range of offences that may relate to virtual currencies and strict rules on the confiscation of assets, there is an apparent lack of rules on money-laundering prevention. By following the Financial Action Task Force Recommendations 2012(24) on customer due diligence, the risks arising from the intrinsic anonymity of virtual currencies could be mitigated.

Different EU member state authorities have thus far taken different approaches to the regulation of virtual currencies. Is this due to the different legal frameworks of the member states or (mainly) by institutional practices of the respective authorities?

Virtual currencies are unregulated instruments compared with other highly harmonised and regulated financial instruments. Accordingly, Austrian authorities are tending to wait for EU institutions (eg, the VAT committee or the European Central Bank) to issue final rules and regulations before establishing their own regimes, to avoid the need to align them with other rules later. This leads to legal uncertainty and thus prevents Bitcoin and other virtual currencies from developing. Other member states (eg, Spain) have identified virtual currencies as a driver for economic growth and pursued a more active approach to establishing favourable regimes with legal certainty.

On the other hand, by outlining the risks involved in virtual currencies (eg, exchange rates, fraudulent behaviour and criminal abuse), regulators and market participants (eg, the European Banking Authority) have unanimously defended their rights and positions in the financial market against this new competitor – one that offers advantages over the traditional financial system.

How likely is it that the regulation of virtual currencies will be harmonized at EU level? Could a consistent regulatory approach be reached through institutional guidelines for the competent authorities in the member states?

From an Austrian standpoint – in particular, considering that the VAT regime and financial markets are harmonised legislative fields – it is highly likely that virtual currencies will be harmonised at the EU level. In addition, the European Banking Authority has presented its opinion on virtual currencies as an appropriate tool on which guidelines or recommendations could be built at a later stage, should a more comprehensive regime be developed.(25) A harmonised regime providing for appropriate oversight in all member states could support virtual currencies and provide positive effects for financial systems and in the payments area.

However, as virtual currencies are a global phenomenon, limiting regulatory activities to the European Union (eg, by proposing new legislation or amending existing legislation "to establish those aspects of the regulatory regime proposed by the European Banking Authority that are not already established in European Union law"(26)) will fall short of what is required to establish a global regulatory framework.(27)

Considering their purely digital character, the nature of virtual currencies is that they can be provided from anywhere worldwide with little or no local infrastructure needed. If, for example, the European Union imposes regulations without adequate regimes outside the European Union, the result could be forum shopping or increasingly precarious structures for consumers.

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Endnotes

(1) "Bitcoin is cash for the Internet", available at http://bitcoin-austria.at/bitcoininfo/was-ist-bitcoin.

(2) Woergl – a small town in Tyrol, Austria – experiemented with an alternative currency based on Silvio Gesell's theories. During the Great Depression, the town successfully experimented with its own local currency under its then mayor, Michael Unterguggenberger. Designed to help the local people by stimulating the local economy and putting the population back to work, 'stamped' money was used. These stamped notes would retain their value only by being stamped each month (ie, the cost of the stamps would reduce the value of the money). The experiment was successful and resulted in employment growth, and meant that during the Great Depression local government projects (eg, housing, a water reservoir and a bridge) were built using the local currency. Despite the experiment attracting international interest – including that of US economist Irving Fisher – the National Bank terminated it on September 1 1933.

(3) Eugen von Bohm-Bawerk, Ludwig von Mises and Friedrich A Hayek. In "Denationalisation of Money" 1976, Hayek held that governments should not have a monopoly over the issuance of money. Alternatively, private banks should be allowed to issue non-interest bearing certificates. These certificates should be open to competition and could be traded at variable exchange rates.

(4) For example, the Austrian branch of takeaway.com (the internet takeaway ordering service) accepts bitcoins. In addition, a bar in Vienna's third district accepts Bitcoin (www.diesels.at).

(5) According to the website coinmap.org, there are 27 points of sale accepting bitcoins in Vienna. This acceptance rate is higher than in Munich, Germany – which has seven points of sale – but significantly lower than in Zurich, Switzerland, which has 41 points of sale.

(6) Parliamentary Question Nr. 1577/J 25. GP, dated May 23 2014.

(7) Falschlehner/Klausberger, *Zur finanzmarktaufsichtsrechtlicher Einordnung von Bitcoins in Eberwein/Steiner (Hrsg)*, Bitcoins, 37ff.

(8) BGBl. I 107/2010 implemented the EU E-money Act (2009/110/EC) into the Austrian legal system.

(9) See the definition of 'electronic money' under Point 2 of Article 2 of EU Directive 2009/110/EC.

(10) 'New' bitcoins are generated by mining (ie, no centralised institution or issuer exists).

(11) The term is interpreted in an extensive manner and will apply to generally accepted monetary surrogates of any kind (Karas/Traxler/Waldherr in *Dellinger, Bankwesengesetz*, § 1 RZ 56).

(12) www.fma.gv.at/en/special-topics/bitcoin.html.

(13) http://finance.yahoo.com/news/bitcoin-exempt-vat-tax-spain-141346341.html.

(14) Loukota/Wimpissinger, *Bitcoins – steuerrechtliche Aspekte in Eberwein/Steiner (Hrsg), Bitcoins*, 63ff.

(15) Loukota/Wimpissinger, *Bitcoins – steuerrechtliche Aspekte in Eberwein/Steiner (Hrsg), Bitcoins*, 95f.

(16) www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemes201210en.pdf.

(17) www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf.

(18) The European Banking Authority's opinion on virtual currencies, EBA/Op/2014/08, July 4 2014, available at www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf.

(19) In its warning (see Footnote 11), the FMA stated that the anonymity of virtual money transactions could be used to finance criminal acts (eg, money laundering, drug trafficking and child pornography).

(20) Glaser, *Bitcoins aus strafrechtlicher Sicht in Eberwein/Steiner (Hrsg), Bitcoins*, 127ff.

(21) Of course, a smartphone may be stolen; however, any bitcoins stored on the smartphone will not be considered. That said, specific computer-based crimes may apply.

(22) For example, bitcoins stored on a stolen smartphone which are transferred to the bitcoin wallet of the thief.

(23) Directive 2005/60/EC of the European Parliament and the EU Council of October 26 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing.

(24) International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation.

(25) See the section entitled "The rationale for a consistent regulatory response across the EU", Point 185 *et seq*, of the European Banking Authority's opinion dated July 4 2014.

(26) Point 186 of the European Banking Authority's opinion, dated July 4 2014.

(27) On May 5 2015 the US Financial Crimes Enforcement Network (FinCEN) entered into an agreement with Ripple Labs Inc. Ripple agreed to pay a significant fine and admitted, among other things, that it had failed to register as a money service business as a result of selling the XRP virtual currency and to satisfy anti-money laundering and transaction reporting obligations. This agreement was based on FinCEN's guidance issued in March 2013, clarifying the applicability of the Banking Secrecy Act on users, administrators and exchangers of virtual currencies and defining 'administrators' and 'exchangers' of virtual currencies as money transmitters. Money transmitters qualify as money service businesses and must be registered under the Banking Secrecy Act.

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