



Blockchain & Cryptocurrency Regulation

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Austria

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Government attitude and definition

The Austrian government closely monitors developments in the area of alternative means of financing through distributed ledger technology and other digital assets, such as initial coin offerings (“ICOs”) or initial token offerings (“ITOs”). It tends to apply an open approach to cryptocurrencies, new technologies and fintech, while at the same time stressing that integrity, security and investor protection must not be compromised.

While Austrian law does not prohibit cryptocurrencies such as Bitcoin, Ethereum, Ripple or Litecoin, there is currently no specific legislation applicable to cryptocurrencies either.

Although there is no statutory definition of cryptocurrencies, according to the Austrian regulator – the Austrian Financial Markets Authority (*Finanzmarktaufsicht*; FMA) – cryptocurrencies are typically characterised as follows:

- they are not issued by any central bank or governmental authority;
- new units of value are typically created using a predefined procedure within a computer network (commonly referred to as “mining”);
- there is no central authority which verifies or manages transactions;
- transactions are recorded on a decentralised, publicly held ledger (commonly referred to as “blockchain”) and, once executed, cannot be revoked; and
- electronic wallets may be used to store and manage virtual currencies (commonly referred to as “wallet”).

As follows from the above, cryptocurrency is currently not treated as “money” or otherwise given equal status with domestic or foreign fiat currency in Austria.

Likewise, there are not yet any cryptocurrencies which are backed by the Austrian government or the Austrian National Bank.

Cryptocurrency regulation

Since there is currently no specific legislation applicable to cryptocurrencies, the general legal framework also applies to cryptocurrencies and the FMA is known to apply a “technology-neutral” supervisory approach to regulation.

From an Austrian financial services regulatory perspective, cryptocurrencies are currently neither treated as financial instruments (in particular, not as securities or derivatives) nor as currency (domestic or foreign), but as commodities. It is worth noting, however, that derivative instruments referencing cryptocurrencies or tokens will qualify as financial instruments under MiFID II and hence will be covered by financial services regulation under MiFID II/MiFIR.

While commodities as such are not subject to supervision by the FMA, this does not mean that business activities involving cryptocurrencies are entirely outside the Austrian regulatory regime. Depending on their features/content, the operation of various business models based on cryptocurrencies may trigger licensing requirements under the Austrian Banking Act (BWG; *Bankwesengesetz*), the Austrian Alternative Investment Fund Manager Act (AIFMG; *Alternative Investmentfonds Manager-Gesetz*), the Austrian Payment Services Act (ZaDiG; *Zahlungsdienstegesetz*) and/or prospectus requirements under the Austrian Capital Markets Act (KMG; *Kapitalmarktgesetz*).

The FMA has published further guidance on the regulatory treatment of certain activities around cryptocurrencies, ICOs and ITOs on the fintech navigator section of its website at <https://www.fma.gv.at/en/cross-sectoral-topics/fintech/fintech-navigator/>.

Key areas to note are the following:

- Purely technical services do not require a licence under financial services regulation. If, however, a technical billing service also includes transfer of funds, this would no longer be considered a purely technical service and would need to be tested against licensing requirements under the Austrian Banking Act, the Austrian Payment Services Act and the Austrian E-Money Act.
- Alternative currencies, payment instruments or means of payment may trigger a licensing requirement if they are intended for payment at third parties, and the network within which they can be used to purchase goods/services is large in terms of geographical reach, type of products/services and/or number of accepting parties (there is a licensing exception for restricted networks, but this has become increasingly strict following the implementation of Directive 2015/2366/EU (“PSD II”). Also, if accounts are operated in connection with currencies, payment instruments or means of payment through which payments are made, the entity holding the accounts may be obliged to become licensed as a payment service provider.
- If capital is raised in order to invest proceeds into cryptocurrencies or mining, this could be regulated as a banking business (deposits business) or as managing an alternative investment fund under the Austrian Alternative Investment Fund Managers Act if funds are invested in accordance with a defined investment strategy, and returns in each case depend on the performance of the underlying investment. If the capital-raising is structured through the issuance of shares or similar participation in a corporation or partnership, this may also trigger prospectus requirements under Austrian securities laws (see “Sales regulation”, below).
- Online platforms for acquiring virtual currencies which also settle/process payments in domestic or foreign currency through their own accounts may require a licence under the Austrian Payment Services Act. Generally, if funds pass through the provider’s accounts, this will trigger a licence requirement under payment services regulations. Some online service providers therefore cooperate with licensed partners and transfer funds via their accounts.
- Brokers of new or alternative payment methods may need to become licensed if they are considering intermediating deposits or loans/insurance. This would be the case if an app or online platform was linked to a specific deposit/current account. The mere listing of product information, for example, via product comparison portals, would not require a licence.
- While merely buying and selling virtual currencies in one’s own name and for one’s

own account generally does not trigger a licence requirement, the buying and selling of virtual currencies may form part of business models that do require a licence. For instance, the operation of a bitcoin vending machine may trigger a licence requirement, depending on its design. Also, clearing a bitcoin vending machine and subsequently transferring any funds collected to a third party may require a payment services licence for money remittance under the Austrian Payment Services Act.

There is currently no deposit guarantee scheme and no legal investor protection scheme for cryptocurrencies or tokens.

Accordingly, given the diversity, complexity and rapid evolution of business models in the fintech space, the regulatory treatment of any business models involving cryptocurrencies or tokens will need to be assessed on a case-by-case basis. The FMA therefore encourages discussion of the regulatory treatment prior to engaging in any business activity and has set up a dedicated specialist team and contact portal dedicated to those areas.

Sales regulation

There is currently no specific regulation dedicated to the sale of cryptocurrencies or tokens, which are thus covered by general securities and commodities laws.

Depending on a token's precise terms and conditions/features, certain token offerings/sales may be subject to prospectus requirements under Austrian securities laws if no prospectus exemption applies.

It appears that tokens may currently be broadly classified as follows:

- Investment tokens: tokens that represent assets, in particular payment claims against a specific issuer, e.g. to participate in future earnings or cash-flows or tokens that represent membership rights within the meaning of corporate law. A subclass of investment tokens is security tokens, e.g. tokenised stocks or bonds.
- Utility tokens: tokens that confer the right to purchase certain goods (excluding Bitcoin and other cryptocurrencies) or certain services. There are many designs of utility tokens, but these are often comparable to vouchers.
- Payment/currency tokens: tokens that are accepted as means of payment for the purchase of goods or services, or tokens that serve the purpose of transferring money and value but do not confer any claims against a specific issuer (e.g. Bitcoin or Ripple).
- "No rights" tokens: tokens that are neither investment-minded nor convey rights, and that cannot be used for payments. Examples could be tokens serving an identification function (e.g. KYC token) or a token that can only be traded on crypto-trading platforms, but otherwise cannot be used (either factually or legally) for any of the above purposes.

Under Austrian law, the offer of transferable securities (within the meaning of regulation (EU) 2017/1129)) and so-called "CMA investments" are subject to prospectus requirements. CMA investments are a local Austrian securities law concept and refer to property rights for which no securities are issued which arise out of the direct or indirect investments of capital of several investors for their collective benefit/risk, and where management of the capital invested is not overseen by the investors themselves. Accordingly, due to their specific content/features, security tokens and other types of investment tokens will typically be subject to prospectus requirements (unless an exemption applies), while other types of tokens, such as utility tokens, payment/currency tokens or "no rights" tokens, usually will not.

No prospectus will need to be published if a prospectus exemption applies. This will be the case if the respective tokens are only offered to qualified investors, or if the offering is directed to fewer than 150 persons who are not qualified investors per EEA Member State, or if the minimum investment is at least €100,000 per investor.

Besides issuers, platform operators also may have the obligation to publish a prospectus, as they may be considered “offerors” for these instruments under the Austrian Capital Markets Act.

Breaches of the obligation to publish a prospectus are subject to severe sanctions, including under criminal laws.

Finally, as of the time of writing, the government is evaluating proposals to regulate certain forms of ICOs and ITOs. If these proposals are implemented into Austrian law, the securities law treatment of token offerings may change in the future.

Taxation

Income tax treatment of cryptocurrencies

In general, capital gains from the sale of cryptocurrencies held as business assets, and income from commercial activities related to cryptocurrencies (e.g. mining, brokerage), are subject to progressive income tax rates of up to 55% for individuals and 25% for corporations.

Special rules apply to cryptocurrencies treated as investment assets and other (non-business) assets:

- Cryptocurrencies are treated as investment assets in case the taxpayer uses them to generate interest income. In this case, capital gains from a subsequent sale are taxed at 27.5% for individuals (taxation at lower progressive income tax rates optional) or at 25% for corporations.
- In case cryptocurrencies are not used to generate interest income, are only acquired and sold occasionally (private sales) and are not part of a business (non-business assets), capital gains are subject to taxation of up to 55% for individuals only if they are acquired and sold within 12 months. A tax exemption applies if capital gains do not exceed €440 per calendar year. In case cryptocurrencies are held for longer than 12 months, capital gains are not taxable.

VAT treatment of cryptocurrencies

The exchange of cryptocurrencies (e.g. Bitcoin) into fiat currency (e.g. euro) and vice versa is VAT-exempt (CJEU 22 October 2015, C-264/14, Hedqvist; VAT guidelines para. 759). Bitcoin mining as such is not subject to VAT (CJEU 22 October 2015, C-264/14, Hedqvist).

Purchases/supplies of goods or services that are subject to VAT, and which are paid for in cryptocurrency, are treated no differently from payments with fiat currency. The assessment basis for transactions subject to VAT is the fair market value of the units.

Money transmission laws and anti-money laundering requirements

As stated above, money transmission laws may apply to certain business activities involving cryptocurrencies. Cryptocurrencies and tokens used as means of payment may trigger a licensing requirement if they are intended for payment to third parties, and the network within which they can be used to purchase goods/services is large in terms of geographical reach, type of products/services and/or number of accepting parties. Also, if accounts are operated in connection with currencies, payment instruments or means of payment, through

which payments are made, the entity holding the accounts may be obliged to become licensed as a payment service provider.

As of today, activities involving cryptocurrencies are only subject to anti-money laundering (“AML”) requirements if they require a licence under financial services regulation (e.g. as provision of payment services) or if they are subject to AML requirements under commercial law. Pursuant to the Austrian Trade Code (*Gewerbeordnung*, GewO), commercial operators, including auctioneers, are subject to AML requirements if they make or receive cash payments of at least €10,000.

However, upon implementation of the fifth Anti-Money Laundering Directive, which will amend the current fourth Anti-Money Laundering Directive (2015/849/EU) and will likely enter into force by the end of 2019, custodian wallet providers (i.e. entities providing services to safeguard private cryptographic keys to hold, store and transfer virtual currencies on behalf of their customers) as well as providers of exchange services between virtual currencies and fiat currencies, will become subject to AML obligations, including KYC checks and AML prevention systems.

Promotion and testing

At the time of writing, there are no “sandbox” or other programmes intended to specifically promote research and investment in cryptocurrency in Austria. However, the Austrian government and Austrian regulators are looking into “sandbox” programmes and international best practice in this respect.

Ownership and licensing requirements

Cryptocurrencies are currently treated by the Austrian regulator as commodities for supervisory law purposes (see “Cryptocurrency regulation”, above). Applicable law as well as internal investment policies may restrict investment managers of certain investors to own cryptocurrencies for investment purposes. For example, UCITS funds, real estate investment funds pursuant to the Austrian Real Estate Investment Funds Act, or staff provision funds and their managers, may not invest into commodities. Pension funds and insurance companies are subject to qualitative and quantitative investment restrictions which will typically not permit direct investment into cryptocurrencies. Depending on the relevant investment policy, alternative investment funds (“AIF”) and their managers may, however, invest in cryptocurrencies.

There are currently no specific licensing requirements imposed on an investment advisor or fund manager holding cryptocurrency, over and above those set out under the general trade law/financial services licensing framework.

Mining

Mining bitcoin and other cryptocurrencies as such is not yet regulated and thus currently permitted. However, raising capital from the public in order to invest proceeds into mining of cryptocurrencies may be regulated (see “Cryptocurrency regulation” and “Sales regulation”, above).

Border restrictions and declaration

There are currently no border restrictions or obligations to declare cryptocurrency holdings.

Reporting requirements

There are currently no reporting requirements for cryptocurrency payments made in excess of a certain value under Austrian law.

Estate planning and testamentary succession

There are no specific rules as to how cryptocurrencies are treated for purposes of estate planning and testamentary succession. Accordingly, general civil law rules apply. Cryptocurrencies qualify as (intangible) assets (*unkörperliche Sache*) for civil law purposes and as such can be included in estate planning/testamentary succession, or form part of a deceased person's estate.



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Ursula was the lead partner advising: Agrana on its €190m combined rights offering and SPO (2017); ABBAG along with the Republic of Austria on the successful €11.2bn exchange offer of debt instruments issued by former Hypo Alpe Adria Group (2016); the bookrunners on Nabriva Therapeutic AG's US IPO and NASDAQ listing; the first level III sponsored ADR program of an Austrian issuer (2015) and its follow-on rights offering (2016); the Austrian national public broadcasting company on its €180m debut bond issuance (2015); America Movil as shareholder in Telekom Austria's €1bn capital increase (2014); the initial purchasers on various rounds of secured notes issuances of Schaeffler Group (2012–2015); and VSE-listed UNIQA Insurance Group AG on its €757m Re-IPO (2013).



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Prior to joining Schönherr in 2006, Thomas worked with small to mid-sized Austrian law firms and the European Center for E-Commerce and Internet-Law (E-Center), under the direction of a.o. Univ.-Prof. Dr Wolfgang Zankl. Thomas holds degrees from the University of Vienna (*Magister iuris, doctor iuris*) and is co-author of a civil law textbook (*Zivilrecht 24*, WUV). Thomas has been a member of the Austrian bar association since 2010 and speaks German (native) and English (fluent).

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