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Contributing Editor: **Josias N. Dewey**

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Austria

Ursula Rath, Thomas Kulnigg & Dominik Tyrybon
Schönherr Rechtsanwälte GmbH

Government attitude and definition

Austrian financial regulators and policymakers are generally receptive to digital assets, new technologies and fintech.

The Austrian government closely monitors developments and continues to foster new technologies such as blockchain, distributed ledger technology and digital assets. While initial coin offerings ("ICOs"), initial token offerings ("ITOs"), security token offerings and initial exchange offerings seem to have slowed down significantly over the last two years, we have noticed an uptick in innovative digital business models across a wide range of industries, especially in the mobile payments services sector, and more generally in platform-based crowdfunding/investment offerings or DeFi applications and non-fungible tokens ("NFTs").

In addition to its dedicated fintech contact point, the Austrian Financial Market Authority (*Finanzmarktaufsicht*; "FMA") established a regulatory sandbox in fall 2020 to assist with new business models requiring authorisation under Austrian financial services regulation (see further below). At the same time, regulators and the government stress that integrity, security and investor protection must not be compromised. While Austrian law does not prohibit cryptocurrencies, the FMA has warned investors of the risks of cryptocurrencies, stating that virtual currencies like Bitcoin and trading platforms for such instruments are neither regulated nor supervised by the FMA. Furthermore, the FMA is increasingly monitoring anti-money laundering ("AML") compliance and tightening requirements for (successful) registration as a virtual asset service provider with the FMA.

While national initiatives in this field are welcome, we expect that the issuance of, and services around, crypto-assets will in the mid-term be regulated on a European level, with the European Commission having published draft legislation on a markets in crypto-asset regulation ("MiCAR") applicable to crypto-assets not covered by existing EU financial services legislation (e.g., the second Markets in Financial Instruments Directive ("MiFID II"), the E-Money Directive, Directive 2015/2366/EU ("PSD II")). As of today, the final text of MiCAR has not yet been published, but meanwhile the Council and the European Parliament reached a preliminary agreement on the MiCAR proposal on 30 June 2022. It is now up to the Council and the European Parliament to approve the preliminary agreement and initiate the formal adoption procedure.

Cryptocurrency regulation

In Austria, cryptocurrencies initially caused quite a headache for financial market regulators, in particular as no statutory definition of cryptocurrencies existed. Meanwhile, different definitions emerged that are used in the crypto space, such as "virtual currency",

"cryptocurrency", "crypto-asset", "coin" or "token". However, currently there is only one legal definition for the term "virtual currency", which was introduced by the 5th Money Laundering Directive (see Article 3 (18) (EU) 2018/843). According to this, virtual currencies are defined as "*a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically*". MiCAR will introduce a new definition of "crypto-asset" (based on the latest draft available, being "*a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*").

In addition to this, there are no cryptocurrencies or fintech-specific laws or regulations that have currently been enacted. Irrespective of the foregoing, according to the Austrian regulator, the 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 that verifies or manages transactions;
- transactions are recorded on a decentralised, publicly held ledger (commonly referred to as "blockchain") and, once executed, cannot be revoked;
- electronic wallets may be used to store and manage virtual currencies (commonly referred to as "wallets"); and
- decentralised network – Peer-to-Peer network.

Furthermore, 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 that are backed by the Austrian government or the Austrian National Bank.

From an Austrian financial services regulatory perspective, cryptocurrencies are currently neither treated as financial instruments (in particular, 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 having certain features (i.e., security/investment tokens; see "Sales regulation", below) will qualify as financial instruments under MiFID II and hence will be covered by financial services regulation under MiFID II and the Markets in Financial Instruments Regulation.

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 remit. Depending on their precise features/content, the operation of various business models based on cryptocurrencies may trigger licensing requirements under the Austrian Banking Act (*Bankwesengesetz*; "BWG"), the Austrian Alternative Investment Fund Managers Act (*Alternative Investmentfonds Manager-Gesetz*; "AIFMG"), the Austrian Payment Services Act 2018 (*Zahlungsdienstegesetz 2018*; "ZaDiG 2018"), or the Electronic Money Act 2010 (*E-Geldgesetz 2010*) and/or prospectus requirements under the EU Prospectus Regulation or the Austrian Capital Markets Act 2019 (*Kapitalmarktgesetz 2019*; "KMG 2019").

In this respect, the general legal framework also applies to cryptocurrencies and new technologies. The FMA is known to apply a "technology-neutral" supervisory approach, meaning that products and services are subject to the same regulatory framework as "traditional" products/services. The underlying rationale is "same risk – same rules". If and to what extent financial services regulation applies primarily depends on the actual product features/activities.

Innovative business models involving cryptocurrencies may be subject to licensing requirements and governed by:

- the BWG – for example, if funds are raised for investment into cryptocurrencies;
- the ZaDiG 2018 – for example, if information of several accounts is consolidated or if payments are initiated;
- the Securities Supervision Act 2018 – for example, if investment advice or portfolio management are provided in relation to financial instruments referencing cryptocurrencies or if orders are received and transmitted in relation to such instruments;
- the AIFMG – for example, if funds are raised for investment into cryptocurrencies according to a pre-defined investment strategy; and
- the Electronic Money Act 2010 – when issuing electronic money.

The FMA has published further guidance on the regulatory treatment of certain activities around cryptocurrencies, ICOs/ITOs and fintech in 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 BWG, the AIFMG and the Electronic Money Act 2010.
- 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 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 ("AIF") under the AIFMG 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 that also settle/process payments in domestic or foreign currency through their own accounts may require a licence under the AIFMG. 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 features. 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 AIFMG.
- There is currently no deposit guarantee scheme and no legal investor protection scheme for cryptocurrencies or tokens.

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. It has set up a dedicated specialist team and fintech contact portal dedicated to those areas, which handles all fintech-related queries.

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 terms and conditions/features, certain token offerings/sales may be subject to prospectus requirements under Austrian securities laws unless a prospectus exemption applies. Each offering must be assessed on a case-by-case basis and the regulatory assessment will depend on the specific technical, functional and economic design of the instruments offered.

For Austrian supervisory law purposes, the FMA has broadly classified tokens as set out below, noting that, in practice, hybrid forms and overlaps frequently occur and that such classification is subject to any further national and international legal developments:
- Security/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. The design of such tokens is often similar to that of "classical securities", in particular bonds or shares. Security tokens are therefore frequently considered transferable securities pursuant to the EU Prospectus Regulation and the Austrian Securities Supervision Act. If a token is classified as a transferable security, this has far-reaching regulatory implications not only for the token issuer (as this may trigger prospectus requirements under European securities laws) but also for trading platforms on which such token is traded (as they will need to become authorised as stock exchanges or regulated trading venues) or custodial or wallet providers (as they will need to become authorised for safekeeping and administration), amongst others. Even if a security token does not classify as a transferable security (in particular because that token/coin is not transferable or its transfer is restricted), but provides access to capital or returns for a risk-sharing group of investors, it may classify as a "Capital Markets Act investment" and its offering may trigger prospectus requirements under the EU Prospectus Regulation unless a prospectus exemption applies.
- Utility tokens: There are many designs of utility tokens. While these are often comparable to vouchers, utility tokens occur in many different forms and also fulfil the function of payment tokens or security tokens (hybrid design), making their classification for supervisory law purposes rather difficult. If the token can only be used for designing a product or a service and is not otherwise associated with any claims, or if the token only grants access to a product or a service without simultaneously serving a payment purpose, then such token will not be covered by supervisory laws. If, on the other hand, the token may be redeemed at the issuer or other users of the platform for the use of a product or a service, then it rather fulfils a payment function similar to a payment token.

- 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).

Accordingly, due to their specific content/features, security/investment tokens will typically be subject to prospectus requirements (unless an exemption applies), while other types of tokens, such as utility tokens or payment/currency 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 may also have the obligation to publish a prospectus, as they may be considered "offerors" for these instruments under the EU Prospectus Regulation. Breaches of the obligation to publish a prospectus are subject to severe sanctions, including under criminal laws.

Taxation

Income tax treatment of cryptocurrencies

Pursuant to Section 27a para. 1 Income Tax Act, income from cryptocurrency holdings (including both current income and profit from disposals) is subject to a special tax rate of 27.5%, and does not count towards the progressive thresholds for the taxation of other income. This provision applies irrespective of whether the amount of tax due is withheld at source (i.e., as capital gains tax), or determined on the basis of the annual income tax return and/or assessment procedure. Since 1 March 2022, Austrian income tax law has provided a definition of "cryptocurrencies" for which this new income taxation is applicable. According to the Income Tax Act, a cryptocurrency is defined "*as a digital representation of value that is not issued or guaranteed by any central bank or public authority and is not necessarily pegged to a legally established currency and does not have the legal status of currency or money but is accepted by natural or legal persons as a medium of exchange and can be transmitted, stored and traded electronically*".

However, an exemption does apply to income from private loans made in cryptocurrency, provided that the transfer contracts underpinning the loan are available to the general public. Income from such private loans is counted towards the progressive income tax thresholds.

Compensation of losses

According to Austria's general tax regulations, profits and losses associated with income from cryptocurrencies can be calculated for tax purposes together with the profits and losses associated with other capital income, such as dividends or proceeds from disposing of shares. Special provisions for the set off of losses exist.

Commercial income

In principle, the special tax rate for cryptocurrencies applies to commercial assets as well as to traditional capital assets. However, the special rate does not apply if generating income from cryptocurrencies is part of the core activity of the business concerned. In particular, this means it does not apply to businesses trading commercially in cryptocurrencies, or to businesses mining currency on a commercial basis. Gains from such activities are taxed, according to the progressive income tax thresholds, up to 55% income tax for individuals or (flat) corporate income tax of 25% (from 2023: 24%; and from 2024: 23%) for corporations.

Capital gains tax

Domestic (Austrian) taxable persons and service providers will be required to deduct Austrian withholding tax ("KESt") from capital income accrued after 31 December 2023. Until this date, the deduction of capital gains tax can be carried out on a voluntary basis. If income from cryptocurrencies was generated prior to 31 December 2023 and no voluntary withholding tax deduction was made, there is an obligation to include this income in the annual income tax return.

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 because the recipient of the mining services cannot be determined (CJEU 22 October 2015, C-264/14, *Hedqvist*; VAT guidelines para. 759).

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 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. 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.

Activities involving cryptocurrencies are subject to AML requirements (including know-your-customer checks and AML prevention systems) if they:

- require a licence under financial services regulation (e.g., as provision of payment services); and
- are subject to AML requirements under commercial law. Pursuant to the Austrian Trade Code (*Gewerbeordnung*), commercial operators, including auctioneers, are subject to AML requirements if they make or receive cash payments of at least €10,000.

With the entry into force of the Financial Markets Anti-Money Laundering Act ("FM-GwG"), which implements the 5th Money Laundering Directive, the FMA has become the competent authority for registrations and ongoing supervision of service providers relating to virtual currencies (as defined in Article 2 No 21 FM-GwG) regarding the prevention of money laundering and terrorist financing.

Service providers that intend to provide one of the following services in relation to virtual currencies in or from Austria are required to register with the FMA before the start of the services:

- services to safeguard private cryptographic keys, to hold, store and transfer virtual currencies on behalf of a customer (custodian wallet providers);
- exchanging of virtual currencies into fiat currencies and *vice versa*;
- exchanging of one or more virtual currencies between one another;
- transferring of virtual currencies; and
- the provision of financial services for the issuance and selling of virtual currencies.

Promotion and testing

True to the government's motto "advice instead of punishment", the Austrian Ministry of Finance has finally implemented a dedicated regulatory sandbox programme that went live in fall 2020. In such a sandbox, companies that require a financial services licence will be able to swiftly and comprehensively clarify regulatory requirements for innovative business models in constant dialogue with the regulator and, if necessary, test such business model based on a scaled-down licence. The selection criteria for admission to the sandbox and further details are based on international best practice. Further information is available here: https://www.fma.gv.at/en/fintech-point-of-contact-sandbox/fma-sandbox.

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, Undertakings for the Collective Investment in Transferable Securities ("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 in commodities. Pension funds and insurance companies are subject to qualitative and quantitative investment restrictions that will typically not permit direct investment into cryptocurrencies. Depending on the relevant investment policy, AIFs 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 is 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.

Ursula Rath
Tel: +43 1 534 37 50412 / Email: u.rath@schoenherr.eu

Ursula Rath is a partner at Schoenherr in its Vienna office, where she specialises in financial services regulation, capital markets, financings and M&A transactions involving the financial services sector. For over a decade, she has advised issuers, selling shareholders, financial institutions and investors on a wide range of equity and debt capital markets transactions, disclosure requirements, inbound and outbound financial services, conduct of business requirements and compliance. She covers the full range of asset management and investment fund work and has advised clients on regulatory changes, such as under CRD IV/V, CRR/CRR II, PSD II or MiFID II or on Brexit contingency planning. As a renowned regulatory expert, Ursula serves as a member of the Fintech and Regulatory Sandbox Advisory Board of the Austrian Ministry of Finance, where she consults on priority actions around innovative business models, start-up financing and digital assets. She is a founding member of blockchain think tank "thinkBLOCKtank", a Luxembourg-based, non-profit organisation, bringing together some of the most respected blockchain and distributed ledger experts from currently more than 15 countries (http://thinkblocktank.org). Ursula regularly publishes on financial services regulation, capital markets and funds.

Thomas Kulnigg
Tel: +43 1 534 37 50757 / Email: t.kulnigg@schoenherr.eu

Thomas Kulnigg is a partner at Schoenherr, where he specialises in venture capital transactions and start-ups as well as technology transactions. Thomas also leads Schoenherr's technology & digitalisation group (https://www.schoenherr.eu/technology-digitalisation) and heads the firm's venture capital and start-up practice.

He is a founding member of think tank "thinkBLOCKtank", a Luxembourg-based, non-profit organisation, bringing together some of the most respected blockchain and distributed ledger experts from currently more than 15 countries (http://thinkblocktank.org) and is a member of the advisory board of the Digital Asset Association Austria (https://daaa.at).

Dominik Tyrybon
Tel: +43 1 534 37 50327 / Email: d.tyrybon@schoenherr.eu

Dominik Tyrybon has been an associate with Schoenherr since 2020. Dominik's main areas of practice are M&A, start-ups, venture capital, FinTech and blockchain matters. Dominik graduated from the University of Vienna (*Mag. iur.* 2018). Before joining Schoenherr, Vienna, he practised with an international law firm as an associate and legal advisor to a blockchain start-up. He is an active crypto investor and regularly publishes on issues relating to crypto regulation.

Schönherr Rechtsanwälte GmbH

Schottenring 19, 1010 Vienna, Austria
Tel: +43 1 534 37 0 / Fax: +43 1 534 37 66100 / URL: www.schoenherr.eu

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