The Virtual Currency Regulation Review

Fourth Edition

Editors
Michael S Sackheim and Nathan A Howell

The Law Reviews

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The Law Reviews

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PREFACE

Tulips arrived in Holland in the late 16th century and quickly became popular. By 1633, novice florists flooded the lucrative tulip trade, starting what has since become popularly known as 'tulip mania'. Tulip mania was, in part, a response to the outbreak of the bubonic plague, which resulted in a lockdown that caused massive unemployment. People had to look for other sources of income and turned to speculative trading in tulip bulbs. Demand for bulbs increased so much that florists started buying and selling still-buried tulip bulbs with promissory notes, using the farmers' bulbs as collateral. Delivery of the tulip bulbs was deferred to a future date, encouraging speculation in the promissory notes, which were resold, creating an unregulated highly leveraged speculative futures market in the tulip bulb promissory notes, in which people with no interest in the underlying tulip bulbs could participate. As tulip prices rose, ordinary people caught speculative fever, spending their salaries and selling their possessions so they could buy tulip bulbs in hopes of making a profit. New and inexperienced florists began to mortgage their homes and businesses to purchase bulbs to sell at auctions, resulting in many of the growers becoming wealthy beyond their wildest dreams. But tulip bulbs proved to be a very unstable market. By January 1637, many florists began to sell off their bulbs and did not purchase more. By February 1637, there was a domino effect. At a Dutch auction the tulip bulbs did not receive any bids and prices were lowered. There were still no bids, resulting in speculative liquidity drying up. Speculators who had purchased bulbs on margin (i.e., with borrowed money) were forced to sell to pay back their lenders, and in the ensuing panic the price of tulip bulbs decreased by 95 per cent or more. Florists who had paid only small amounts of margin to the growers still owed the full purchase price to the growers. The tulip market collapsed. There were no bankruptcy or regulatory laws to help resolve disputes.

Some commentators have drawn parallels between tulip mania and the current speculative fever around virtual currency. It took only a handful of years for the speculative tulip bubble to pop. Nearly 400 years later, in a time when the speed of commerce is measured in milliseconds, virtual currency shows no signs of suffering a similar fate. As the editors of this treatise, we are somewhat ambivalent on the issue. We are not economists. We are lawyers. And with that, let us dispense with the history lesson and fast forward to 2021 and the slightly boring (to others) but utterly fascinating (to us) global regulatory schemes being put into place that are the subject of this treatise.

The fourth edition of *The Virtual Currency Regulation Review* is a country-by-country analysis of developing regulatory initiatives aimed at fostering innovation, while at the same time protecting the public and mitigating systemic risk concerning trading and transacting in virtual currencies and other digital assets. The increased acceptance and use of virtual currencies by businesses and the exponential growth of investment opportunities for speculators marked late 2020 and early 2021.

In 2020, the International Organization of Securities Commissions (IOSCO) published a report titled *Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms*, describing specific areas that jurisdictions could consider in the context of the regulation of crypto trading platforms.

In the country-by-country chapters in the *Review*, the contributing authors provide a guide to the evolving regulation of digital asset transactions in their jurisdictions.

In 2020, the global outbreak of covid-19 had severe effects on every major economy. Echos perhaps of the bubonic plague and tulip mania? At the time of writing, the covid-19 pandemic is ongoing and, while some locations seem to be pushing past their respective peaks of infection, cities that are central to the global financial markets remain under various degrees of lockdown, with many workers in the financial services sector working remotely. Since mid-March 2020, when the pandemic hit the United States in earnest (it had already been raging in China, Italy, Iran and other countries), the price of Bitcoin has gone up in essentially a straight line – from approximately US$5,000 to US$63,000 in April 2021. Virtual currencies are borderless: they exist on global and interconnected computer systems. The virus is also borderless. Virtual currencies are generally decentralised, meaning that the records relating to a virtual currency and transactions therein may be maintained in a number of separate jurisdictions simultaneously. The borderless nature of this technology was the core inspiration for the *Review*. As practitioners, we cannot afford to focus solely on our own jurisdictional silos. For example, a US banking lawyer advising clients on matters related to virtual currency must not only have a working understanding of US securities and derivatives regulation, he or she must also have a broad view of the regulatory treatment of virtual currency in other major commercial jurisdictions.

Global regulators have taken a range of approaches to responding to virtual currencies. In some countries, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money; in other countries, virtual currency may be regulated similarly to securities or commodities. We make one general observation at the outset: there is little consistency (so far) across jurisdictions in their approach to regulating virtual currencies. Perhaps the efforts of IOSCO will help to change that going forward, but there is currently no widely accepted global regulatory standard. That is what makes a publication such as the *Review* both so interesting and so challenging.

It is perhaps ironic that the principal source of strength of virtual currencies – decentralisation – is the same characteristic that the regulators themselves seem to be displaying. There is no central authority over virtual currencies, either within or across jurisdictions, and each regulator takes an approach that seems appropriate to that regulator based on its own narrow view of the markets and legacy regulations. Again, we are hopeful that IOSCO's efforts will help to encourage the emergence of optimal regulatory structures over time. The fourth edition of the *Review* provides a practical analysis of recent legal and regulatory changes and developments, and of their effects, and is not an exhaustive guide to the regulation of virtual currencies globally or in any of the included jurisdictions. Instead, for each jurisdiction, the authors have endeavoured to provide a sufficient overview for the reader to understand the current legal and regulatory environment at a high level. Virtual currency is the broad term that is used in the *Review* to refer to Bitcoin, Ether, Tethers and other stablecoins, cryptocurrencies, altcoins, ERC20 tokens, digital, virtual and cryptoassets, and other digital and virtual tokens and coins, including coins issued in initial coin offerings. We recognise that in many instances the term 'virtual currency' will not be appropriate, and other related terms are used throughout as needed. In the law, the words we use matter a great deal, so, where necessary, the authors of each chapter provide clarity around the terminology used in their jurisdiction and the legal meaning given to that terminology.

We are confident that attorneys advising clients in the cryptocurrency and digital assets space will find the updated fourth edition of the *Review* to be an excellent resource in their own practices.

Michael S Sackheim and Nathan A Howell
Sidley Austin LLP
New York and Chicago
August 2021

Chapter 19

SPAIN

Pilar Lluesma Rodrigo and Alberto Gil Soriano[1]

I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

In Spain, there is no legislation specific to virtual currencies, except for the piece of legislation approved in April 2021 implementing the Fifth Anti-Money Laundering Directive (see Section IV), the law approved in July 2021 on preventing and fighting tax evasion, and a law approved in November 2020, which indirectly relates to virtual currencies; the latter includes measures for the digital transformation of the financial system, including the legal framework for a regulatory sandbox.[2]

In 2018 the Spanish securities regulator (CNMV) and the Bank of Spain issued joint advice on the risks associated with purchasing virtual currencies or investing in products tied to them,[3] and the CNMV has issued two other documents setting out its opinion and position on several matters related to virtual currencies. However, only the CNMV has issued a statement to clarify that it has not authorised any prospectus, nor has it exercised any authorisation for, or power to verify, any transaction in connection with cryptocurrencies and it still stands today.[4]

In 2021, the CNMV and Bank of Spain issued a new press statement on cryptocurrency investment risks.[5]

The Spanish tax authorities have also issued several binding rulings on the tax aspects of activities involving virtual currencies.

1 Pilar Lluesma Rodrigo is counsel and Alberto Gil Soriano is a managing associate at Uría Menéndez. The authors would like to thank Alberto Gómez Fraga and Arianna Vazquez Fernández for their collaboration on this chapter.

2 Law 7/2020 of 13 November on the digital transformation of the financial system, https://www.boe.es/buscar/act.php?id=BOE-A-2020-3580.

3 https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/18/presbe2018_07en.pdf.

4 https://www.cnmv.es/portal/verDoc.axd?t={76316281-6a21-42a5-b742-085dca1d9c7f}.

5 https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/21/presbe2021_15en.pdf.

II SECURITIES AND INVESTMENT LAWS

i Classification and commercialisation of virtual currencies

The CNMV has unofficially stated that virtual currencies per se should not be considered securities. However, a draft law was published in April 2021 that also includes among the financial instruments set out in the Spanish securities market law the instruments issued by means of distributed ledger technology (DLT).[6]

In this respect, following reports from the European Securities and Markets Authority and the European Banking Authority (EBA) (both published in January 2019), cryptoassets can be classified into four categories: (1) currency tokens (cryptocurrencies with no rights or investment purposes); (2) security tokens, which usually provide property rights, interest rights or dividends attached to a business; (3) utility tokens, which facilitate access to a product or a service, but do not serve as a payment method for other products or services; and (4) hybrids, which can fall under more than one of the first three categories.

Without prejudice to the above, the CNMV has acknowledged that the offering and commercialisation of virtual currencies can have investment law implications as follows.[7]

Direct marketing

Where virtual currencies are acquired through platforms operating on the internet (exchanges) and through cryptocurrency automatic teller machines (ATMs), the CNMV considers that investors do not actually directly own the virtual currencies, and instead only have rights in relation to an unsupervised exchange or intermediary. As a consequence, purchasers are exposed to the risk of an intermediary becoming insolvent or not complying with basic rules on proper record-keeping, diligent custody and recording of assets, and the correct management of conflicts of interest.

Contracts for differences

Entities offering these products should be authorised by the CNMV to provide investment services and meet all reporting obligations and other applicable rules of conduct.

Futures, options and other derivatives

If these types of products have been authorised by a regulated supervisor, their active marketing under a public offering by market professionals to retail investors might require a prospectus approved by the CNMV or another EU authority under the passporting arrangements.

Collective investment vehicles that invest in cryptocurrencies

The CNMV has acknowledged that UCITS can invest in cryptocurrencies through financial instruments whose profitability is linked to those currencies and that do not incorporate an implicit derivative instrument, provided that their price is published in a market on a daily basis.[8] Furthermore, Spanish hedge funds can also invest in cryptocurrencies through

6 https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/audiencia/ficheros/ECO_Tes_20210405_AP_LMV.pdf.

7 See CNMV considerations on cryptocurrencies and ICOs addressed to market professionals, 8 February 2018.

8 See CNMV Questions and Answers on legislation on collective investment schemes, venture capital and closed-ended investment vehicles.

derivatives, provided that the settlement of the derivative does not imply the delivery of the relevant currencies, although these types of funds can only be marketed to professional investors. In any event, the prospectus and key investor information document of any Spanish collective investment scheme has to include an express and prominent mention of the investments in cryptocurrencies and the risks thereof.

Acquiring structured bonds where the underlying asset is a virtual currency

Under a public offering regime, the marketing of exchange-traded products and exchange-traded notes require approval by the supervisory authority of an explanatory prospectus that has also been subject to the relevant EU passporting procedure.

ii Initial coin offerings

The CNMV[9] understands that transactions structured as initial coin offerings (ICOs) in many cases should be treated as issues or public offerings of transferable securities given the broad definition of transferable security under Spanish law.[10]

The CNMV sets out the following factors as being relevant in assessing whether transferable securities are being offered through an ICO:

a tokens that assign rights or expectations of a share in the potential increase in value or profitability of businesses or projects or, in general, that they constitute or assign rights equivalent or similar to those of shares, bonds or other financial instruments governed by Spanish securities law; or

b tokens that entitle access to services or to receive goods or products, that they are offered referring explicitly or implicitly to the expectation that the purchaser or investor will obtain a profit as a result of their increase in value or some form of remuneration associated with the instrument, or reference is made to its liquidity or tradability on equivalent or allegedly similar markets to regulated securities markets.

However, with regard to point (b) above, if it cannot be reasonably established that there is a correlation between the expectations of a profit or an increase of value and the evolution of the underlying business or project, then the token should not be considered a financial instrument.[11]

If ICOs qualify as financial instruments, then the regulation contained in, relating to or arising from the Markets in Financial Instruments Directive II, the Prospectus Directive and the Alternative Investment Fund Managers Directive should apply to them.

Even if an ICO does not qualify as a public offer (because it is either aimed at fewer than 150 investors, or involves a minimum investment of €100,000 or a total amount of less than €5 million), if the placement is made using whatsoever form of advertising (including

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9 See CNMV considerations on cryptocurrencies and ICOs addressed to market professionals, 8 February 2018.

10 Article 2.1 of the Spanish Securities Law: 'Any patrimonial right, regardless of its name, which, because of its legal configuration and system of transfer, can be traded in a generalised and impersonal way on a financial market.'

11 See CNMV Criteria in relation to ICOs, 20 September 2018.

websites in Spanish offering the tokens), an entity authorised to provide investment services should intervene in relation to its marketing.[12] The CNMV understands that this requirement is fulfilled if the entity authorised to provide investment services intervenes:

a on the occasion of each individual subscription or acquisition of the securities or financial instruments as a placement agent, broker or adviser, subject to the rules applicable in each case; or

b by validating and supervising the offer in general and, in particular, the information provided to investors, and the placement or marketing procedure used (without an authorised entity having to intervene on the occasion of each subscription or acquisition). With regard to the validation of information, the authorised entity must ensure that the information is clear, impartial and not misleading, and that it refers to the characteristics and risks of the securities issued, as well as the company's legal, economic and financial situation, in a sufficiently detailed manner to allow the investor to make a well-informed investment decision. Likewise, the information for investors shall include a warning on the novel nature of the registry technology and on the fact that the custody of the tokens is not carried out by an authorised entity.

To date, the CNMV has not authorised any ICOs, although it has analysed several potential ICO structures. The action of the CNMV in connection with those projects on the issue of tokens (which could be equivalent to transferable securities) has been limited to confirming that the transaction would not require the approval of a prospectus provided that it complied with the requirements set out in the Spanish legislation not to be considered a public offer; nor would it be subject to verification or prior intervention by the CNMV, although the participation of an investment firm would be necessary.

In addition, the above-mentioned draft law provides that the CNMV may subject the advertising of cryptoassets for investment purposes to authorisation, including the introduction of warnings on risks and characteristics, even though they are not products covered by the Spanish securities market law. For this purpose, in June 2021 the CNMV published a draft circular for public consultation.[13] The purpose of this circular is to develop the standards, principles and criteria to which advertising activity related to cryptoassets will be subject and, in particular, to define the objective and subjective scope, as well as the powers of the CNMV on the supervision and control of advertising of cryptoassets.

III BANKING AND MONEY TRANSMISSION

The Bank of Spain, the Spanish authority responsible for banking and money transfer matters, has not issued any statement or otherwise set out its position on virtual currencies other than in the joint warnings issued with the CNMV mentioned in Section I.

According to the joint warning, and although they acknowledge that virtual currencies are occasionally presented as an alternative to legal tender, the Spanish authorities note that the former differ greatly from the latter in that their acceptance as a means of payment of a debt or other obligations is not mandatory, their circulation is very limited and their value fluctuates widely, meaning that they cannot be considered a sound store of value or a stable unit of account.

12 Article 35.3 of the Spanish Securities Law.

13 https://www.cnmv.es/DocPortal/DocFaseConsulta/CNMV/CP_CircularCriptoactivos_junio2021.pdf.

In this regard, the advice of the EBA on cryptoassets of 9 January 2019 provides that a competent authority will consider a token to be electronic money if it: is electronically stored; has monetary value; represents a claim on the issuer; is issued on receipt of funds; is issued for the purpose of making payment transactions; and is accepted by persons other than the issuer.[14]

At present, no virtual currency, including Bitcoin, is recognised by Spanish law as a digital currency, electronic money or as a payment method. The main concern is consumer protection as an important part of the activities related to cryptocurrencies cannot be included within the scope of European regulations for financial services (EDM2 and PSD2) and, in the instances when some activities do fall within their scope, not all risks attached are adequately addressed and mitigated.

IV ANTI-MONEY LAUNDERING

In addition to the warnings issued by the Bank of Spain and the CNMV on money laundering risks regarding virtual currencies themselves and the activities related to them, on 27 April 2021 the Spanish government approved Royal-Decree Law 7/2012[15] amending the current anti-money laundering (AML) legal framework and transposing some EU AML provisions, including the Fifth Anti-Money Laundering Directive.[16]

Thus, the new Paragraphs 5, 6 and 7 of Article 1 of the current Law 10/2010 of 28 April on the prevention of money laundering and terrorist financing include the following definitions:

a virtual currency: 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 that can be transferred, stored and traded electronically;

b exchange between virtual currencies and fiat currencies: the purchase and sale of virtual currencies through the delivery or acceptance of euros or any foreign legal tender or electronic money accepted as medium of exchange in the country where it has been issued; and

c custodian wallet provider: a legal or natural person that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.

Similarly, the new Article 2(z) will, in turn, consider providers engaged in exchange services between virtual currencies and between virtual currencies and fiat currencies and custodian wallet providers to be obliged entities, including non-resident entities providing services through branches or agents, or providing services without a permanent establishment that

14 https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf.

15 Royal-Decree Law 7/2012 of 27 April, transposing EU directives in the fields of competition, prevention of money laundering, credit institutions, telecommunications, tax measures, prevention and reparation of environmental damage, transfer of employees in the provision of cross-border services and consumer protection, https://www.boe.es/diario_boe/txt.php?id=BOE-A-2021-6872.

16 Directive (EU) 2018/843 of 30 May 2018.

provide similar services to those referred to above. The entities must be registered with the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC), the Spanish competent authority on anti-money laundering.

V REGULATION OF EXCHANGES

The regulation to which an exchange is subject under Spanish law depends on whether or not the assets are traded as financial instruments and on the type of activity performed within the exchange.

Although there is no specific regime for trading platforms for virtual currencies or other cryptoassets, the CNMV[17] has indicated that to the extent that the assets traded in an exchange are not considered to be financial instruments, at a very minimum they should be subject to rules related to custody, registration, management of conflicts of interest between clients and transparency on fees (in addition to anti-money laundering regulations). Therefore, the CNMV recommends that these platforms voluntarily apply the principles of securities market regulations relating to the aforementioned matters to ensure the proper functioning of their activities. If they qualify as financial instruments, Spanish securities market legislation applies, which means the corresponding authorisations must be obtained, including, where appropriate, an authorisation as a trading venue (such as a regulated market, a multilateral trading system or an organised trading facility), or as an investment firm or credit institution that operates as a systematic internaliser. On this matter, in response to the consultation document on an EU framework for markets in cryptoassets, the independent committee of the CNMV noted that the mains risks of exchanges are the following: (1) absence of transparency in the information requirements and regulatory status of the companies involved; (2) operational resilience and good risk governance (in cases of loss of cryptoassets, for instance); (3) absence of solutions to mitigate conflicts of interest; and (4) absence of adequate advertising standards.

However, the Bank of Spain has not given any guidance on whether activities performed by an exchange would qualify as payment services or currency exchange services for regulatory purposes where virtual currencies are used solely for payment purposes (rather than as securities or similar instruments).

To the extent that regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs) located in Spain require that the instruments traded on or through them be represented in book entries, tokens cannot be traded on Spanish regulated markets, MTFs or OTFs because they cannot be represented in book entries. However, this should change in the near future in accordance with the proposal for an EU Regulation on a pilot regime for market infrastructures based on DLT (the DLT Regulation Proposal). This provides that a DLT MTF should be able to request an exemption from the requirement for book entry and recording with a central securities depositary (CSD) set by Regulation (EU) No. 909/2014, where the DLT MTF complies with requirements equivalent to those applying to a CSD.

17 See CNMV Questions and Answers intended for FinTech companies on activities and services that may be related to the CNMV, last updated 12 March 2019.

Furthermore, a draft Royal Decree published in April 2021, in line with the DLT Regulation Proposal, provides that the requirement for clearing through a central counterparty may be waived in relation to transactions on shares and share pre-emption rights carried out through DLT.[18]

VI REGULATION OF MINERS

With the exception of the tax issues explained in Section IX, there is no regulation of miners in Spain, and the Bank of Spain and the CNMV have not expressed their views on this matter.

However, to the extent that miners would not be considered issuers of financial instruments or electronic money, or as placing financial instruments, no licence or authorisation would be required under Spanish law to mine.

VII REGULATION OF ISSUERS AND SPONSORS

To the extent that virtual currencies could be classed as financial instruments or as electronic money, their issuers must obtain the corresponding authorisations from the CNMV and the Bank of Spain. In terms of virtual currencies as financial instruments, see Section II.ii regarding ICOs. Neither the Bank of Spain nor the current legislation considers a virtual currency to be electronic money; therefore, its issuance falls outside the scope of the Spanish legislation on electronic money institutions, although the assessment has to be made on a case-by-case basis.

The concept of 'sponsors' does not exist under Spanish law.

VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

In recent years, fraud through acts of disposition involving cryptocurrencies such as Bitcoin has been increasing. As with any other type of asset, there are criminal liabilities associated with virtual currencies, given that the conduct of a third party (such as a wealth manager) may cause a loss to an investor.

Wealth is a legal interest protected under Spanish criminal law. Since cryptocurrencies are considered valuable assets, they are also part of the concept of wealth. As a consequence, improper acts of disposition of cryptocurrency assets may fall under a number of criminal offences (e.g., fraud, misappropriation of funds or corporate mismanagement).

The offence most commonly committed involving cryptocurrencies is fraud, which is regulated in Article 248 of the Criminal Code. Fraud is committed when the perpetrator, for financial gain and by means of deception, causes the victim to act in error, resulting in him or her carrying out an act of disposition to his or her own detriment or to the detriment of a third party. There must be a link between the perpetrator's deception and the victim's [disposition of property (see Supreme Court judgment 531/2015 of 23 September).

Article 248.2(a) of the Criminal Code provides that another type of fraud (computer fraud) is committed when perpetrators use manipulation through a computer or similar device to carry out an unauthorised transfer of an asset to the detriment of the victim or

18 https://portal.mineco.gob.es/RecursosArticulo/mineco/ministerio/participacion_publica/audiencia/ficheros/ECO_Tes_20210430_AP_RD_Instrumentos.pdf.

a third party (Supreme Court judgment 860/2008 of 17 December). Unlike regular fraud, this provision does not require deception – which is interpreted narrowly – as it is replaced by manipulation through a computer or similar device. Thus, this crime can be committed in different ways, given the broad nature of the expression 'manipulation through a computer or similar device'. For example, the offence would be committed when an individual alters an email address or bank account number, or uses files to unlock a user's passwords.

Since 23 December 2010, companies may be held criminally liable for acts of fraud committed on their behalf and for their direct or indirect benefit by their directors or employees (Articles 31 *bis* and 251 *bis* of the Spanish Criminal Code). Corporate criminal liability is not alternative but cumulative to that of the individuals who have committed the criminal offence (i.e., the directors or employees and the company they work for can be held criminally liable simultaneously).

On 20 June 2019, the Criminal Chamber of the Spanish Supreme Court ruled for the first time on a case of fraud involving cryptocurrencies (judgment 326/2019 of 20 June). In this case, the Supreme Court upheld a sentence of imprisonment given to an investment manager as the perpetrator of the fraud. According to the judgment, the investment manager signed several high-frequency trading agreements with the aggrieved parties in which he undertook to (1) manage Bitcoins that were delivered to him as a deposit, (2) reinvest dividends, and (3) upon maturity, deliver the profits obtained in exchange for a commission. However, it was proven that at the time of signing those agreements the defendant did not intend to fulfil his contractual obligations (in fact, he did not make any investments at all), and his sole intention was to take possession of the clients' Bitcoins and simulate the execution of the agreements.

As regards civil liabilities arising from the criminal offence, the Supreme Court denied the aggrieved parties' request to be compensated with Bitcoins rather than with their equivalent value in euros (they justified their petition on the fact that Bitcoin had increased in value significantly since the high-frequency trading agreements were signed). According to the Supreme Court, Bitcoins are intangible assets that cannot be reinstated, and they are not 'electronic money' in the sense set out in Spanish Law 21/2011 of 26 July. Thus, although the aggrieved parties handed over Bitcoins (and subsequently lost them because of the fraud), the perpetrator was ordered to pay back an amount in euros equivalent to the Bitcoins' value at the time when they were handed over to him (plus additional compensation for the increase in their value until the agreements expired).

Since that first ruling, regional courts have also heard cases involving cryptocurrencies (e.g., the Provincial Court of Álava judgment 4/2021 of 15 January 2021; Provincial Court of Badajoz judgment 25/2021 of 6 April 2021; Provincial Court of Burgos judgment 96/2021 of 23 March 2021).

Additionally, according to press releases, the Spanish National Court[19] is currently conducting a number of investigations into alleged pyramid scams concerning investments of millions of euros and thousands of potential aggrieved parties. Proceedings handled by the National Court refer to a wide range of crimes (fraud, money laundering, counterfeit documents and crimes against the Public Treasury, among others).

19 The Spanish National Court has jurisdiction throughout Spain over matters envisaged in Article 65 of Law 6/1985 of the judiciary (e.g., fraud that has a serious impact on the national economy or affects a large number of victims located in more than one region).

The Spanish Criminal Procedure Law does not contain any specific provisions in connection with acts of disposition involving cryptocurrencies. Therefore, the standard rules for summary proceedings should apply to cryptocurrency crimes provided that the penalty does not exceed nine years in prison. Summary proceedings are divided into three stages:

a the criminal investigation, which is led by an investigating judge (rather than the public prosecutor) who determines whether there are reasonable indicia of criminal wrongdoing and, if so, determines the identity of the perpetrator;

b the intermediate stage, in which the prosecution can bring formal charges in an accusation brief and the accused parties are entitled to contest those charges in a defence brief; and

c lastly, the trial, which is a public hearing during which evidence is examined and the court decides based on the merits of the case.

The main procedural difficulties Spanish authorities may face when it comes to prosecuting these crimes are lack of jurisdiction and competence. The anonymity with which perpetrators act, the places from which they do so (in most cases outside Spain) and the fact that the illegally obtained funds usually end up in other countries prevent judicial action being taken against them in Spain. In these kinds of cases, the Spanish Supreme Court has traditionally embraced the 'theory of ubiquity', under which the offence should be regarded as having been committed in Spain if any substantial element of the criminal activity (unlawful action, damage, profit of the perpetrators, etc.) took place in Spain.[20] In this regard, the Supreme Court states that, among all authorities with potential jurisdiction over the case in accordance with that criterion, exclusive jurisdiction should be given to the court that begins the criminal investigation in the first place.

Having said that, in cases of computer fraud the Spanish Supreme Court disregarded the 'theory of ubiquity' and instead applied the criterion of 'efficacy of the criminal investigation' (see decisions dated 24 October 2019, 28 November 2019 and 16 January 2020). According to that approach, the accused's domicile determines jurisdiction since 'it is in that place where the investigation can be effective' (i.e., courts located in that territory are expected to have easier access to the sources of information necessary to conduct the criminal investigation). The Spanish Supreme Court has also pointed out that this criterion is the one adopted by the Convention on Cybercrime dated 23 November 2001 (ratified by the Kingdom of Spain on 17 September 2010), according to which 'when more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution'.[21]

IX TAX

Virtual currencies perform an economic function (store of value or medium of exchange), which means that their possession and use may have tax implications. In addition, they pose a higher-than-average risk of being used as a means to commit tax fraud given that it is very difficult to determine the true identity of their owners (to the point that they are almost

20 See agreement of the non-jurisdictional plenary session of the Criminal Chamber of the Supreme Court dated 3 February 2005.

21 Article 22.5.

anonymous), and that the transactions are peer-to-peer and may have a cross-border element, and therefore the ability of tax authorities to monitor them is reduced. All this has put them under the spotlight of the Spanish tax authorities, albeit the tax regime and reporting obligations regarding virtual currencies are still at an early stage.

i Income tax and value added tax (dynamic approach)

The tax treatment of virtual currencies and their trading differs within the country, depending on the tax. From an accounting standpoint, the Spanish Accounting Board considers virtual currencies to be an intangible asset or a commercial stock, depending on their use.

To date, the Spanish tax authorities have considered that any operation (except mining) with virtual currencies constitutes a barter transaction for income tax purposes (personal income tax, corporate income tax and non-resident income tax), which means that users of virtual currencies make a capital gain or loss with any delivery of virtual currencies; and tax compliance becomes complicated and burdensome for both the taxpayer and the tax authority.

The Spanish tax authorities set out in binding tax ruling V0808-18 of 22 March that the use of virtual currencies outside of the performance of an economic activity may result in capital gains or losses at the moment in which the transaction takes place (Article 14.1(c) of Law 35/2006 of 28 November on personal income tax (the PIT Law)), with a tax rate of up to 23 per cent for individuals. According to binding tax ruling V1604-18 of 11 June, fees charged by the exchange increase and the decrease the acquisition and sale price, respectively, if they are directly related to the transaction. The first-in, first-out principle applies. The income obtained from mining is considered business income, and the applicable tax rate could be as much as 48 per cent for individuals, depending on the autonomous region where they reside. The corporate income tax rate is 25 per cent, while the non-resident income tax rate is 24 per cent (19 per cent for residents of the European Union and European Economic Area). The Spanish tax authorities also state in binding tax ruling V1149-18 of 8 May that the exit tax regulated in Article 95 *bis* of the PIT Law does not apply to virtual currencies.

As regards value added tax (VAT), the Spanish tax authorities' position, as set out in binding tax rulings V1274-30 of 6 May and V1748-18 of 18 June, is aligned with that of the European Court of Justice, which in *Hedqvist*[22] held that virtual currencies constitute a currency in the sense of Article 135(1)(e) of the VAT Directive and are a direct means of payment, therefore services related to those currencies (including mining) are covered by the VAT exemption granted by that Article. Consequently, input VAT will not be deductible.

ii Net wealth tax and reporting obligations (static approach)

Virtual currencies, as an asset, fall under the scope of Law 19/1991 of 6 June on net wealth tax (the NWT Law) and therefore must be declared by filing Form 714 with the Spanish tax authorities by 30 June each year. According to Article 24 of the NWT Law, taxpayers must report their virtual currencies' market value in euros on 31 December. There is no official market value, so taxpayers will have to rely on the most widely used websites (such as www.coindesk.com). The Spanish tax authorities endorsed this conclusion in binding rulings

22 Judgment of 22 October 2015, *Hedqvist*, Case C-264/14.

V0590-18 of 1 March and V2289-18 of 3 August, among others. The net wealth tax rate can be up to 2.75 per cent, depending on the autonomous region of residence (there are some regions with a zero per cent rate).

In addition to the net wealth tax, there are three independent obligations to declare all assets held abroad worth more than €50,000 (bank accounts, securities and real estate). Taxpayers must submit Form 720 (informative report of assets and rights held abroad) by 31 March each year. To date, virtual currencies have not been considered to be securities or held in a bank account for tax purposes; therefore, it seems they need not be included in a Form 720 declaration. However, this approach has recently changed. In this regard, Law 11/2021 on measures to prevent and fight tax evasion includes a new obligation to report the amount of virtual currencies held in Spain or abroad (through Form 720), identifying the owner and the beneficial owner; and to report all transactions involving virtual currencies (acquisitions, sales, barter transactions or transfers).[23]

The Annual Tax and Customs Control Plan for 2018, published in the Spanish Official Gazette of 23 January 2018, pointed out that, in the context of the prevention and suppression of smuggling, drug trafficking and money laundering, the tax authorities 'will detect and prevent the use by organised crime of the deep web to trade in any illicit goods, as well as the use of cryptocurrencies such as Bitcoin or similar as a means of payment'. In addition, the National Anti-fraud Office attempted to identify all entities that operate with virtual currencies, and sent them requests to provide specific information. Thus, the pre-filled tax forms that the Spanish authorities make available to the taxpayers each year include that the taxpayer has carried out transactions with virtual currencies. The Annual Tax and Customs Control Plans for 2020 and 2021 published in the Spanish Official Gazette of 28 January 2020 and 1 February, respectively, reiterate that the Spanish tax authorities will continue gathering information and designing control initiatives to ensure that transactions with cryptoassets are duly reported and that the funds have a licit origin.

The Spanish tax authorities also assessed the possibility of imposing new reporting obligations, regulating 'human ATMs' (persons carrying out physical transfers of virtual currencies using apps such as Meetup) and establishing a sanctioning regime for non-compliance with these reporting obligations.[24] In fact, Law 11/2021 requires: (1) wallet providers to provide information on virtual currencies balances (segregated by virtual currency), owners, authorised persons or beneficiaries of these balances; and (2) exchanges to provide information on the transactions carried out, identifying the parties involved, address, tax identification number, class and number of virtual currencies, and price and date of the transaction. These reporting obligations also apply to issuers of ICOs with tax residence in Spain.

X LOOKING AHEAD

While on the one hand no specific legislation on virtual currencies has been adopted in Spain, other than the Spanish anti-money laundering law, the need for comprehensive regulation of, inter alia, tax, consumer protection and regulatory aspects has already been discussed in

23 https://www.boe.es/eli/es/l/2021/07/09/11/con.

24 www.meetup.com.

both Spanish legislative chambers by all political parties, and several proposals have been approved that deal with virtual currencies and DLT, in line with the current EU proposal on these matters.

On the other hand, the Spanish supervisory bodies (the CNMV, the Bank of Spain and SEPBLAC) understand that the transnational nature of virtual currencies and the activities related to them (issuance, deposit, marketing, etc.) means that their regulation should be addressed at an international level or, at the very least, at EU level, so that as many regulators and supervisory bodies as possible adopt and share common positions, otherwise uncoordinated regulatory approaches may prove ineffective and create incentives for regulatory arbitrage. The first step is Directive 2018/843 of 30 May 2018, amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which directly regulates virtual currencies for the first time at EU level and has already been implemented in Spain and the new EU proposals (MiCA, the DLT Regulation Proposal)

Despite the potential risks that virtual currencies pose as a consequence of their lack of regulation, both the Spanish legislature and supervisory bodies are aware of their importance and of the technological developments behind them, and they are therefore pressing for the speedy adoption of regulations and common positions on this matter.

Appendix 1

ABOUT THE AUTHORS

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Pilar Lluesma Rodrigo is counsel in Uría Menéndez's Madrid office. She began her career at Uría Menéndez in 1995 and rejoined the firm in 2018, having worked in the legal department of INVERCO from 2016 to 2017.

She has 25 years of experience advising a wide range of financial entities, including credit entities, investment services firms, collective investment schemes management companies, and private equity management companies, in regulatory and financial matters.

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Alberto Gil Soriano joined Uría Menéndez in 2012 and is a managing associate in the tax department.

He has more than nine years of experience advising resident and non-resident entities in general tax law and anti-money laundering and terrorist financing matters. He has also expertise in tax planning for high net worth individuals, in tax litigation and in local taxes. In addition, he has broad experience in tax regularisations.

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