The Virtual Currency Regulation Review

Fifth Edition

Editor
Paul Anderson

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THE VIRTUAL CURRENCY REGULATION REVIEW

FIFTH EDITION

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Chapter 21

SPAIN

Pilar Lluesma Rodrigo and Miguel Pérez Campos[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 new Circular approved by the Spanish securities regulator (CNMV) on the advertising of cryptoassets (see Section IX). In October 2021, the Bank of Spain put in place a register for providers who are engaged in the exchange of services between virtual currencies and fiat currencies and for custodian wallet providers (see Section V).

In 2018, the CNMV and the Bank of Spain issued joint advice on the risks associated with purchasing virtual currencies or investing in products tied to them.[2] In addition, the CNMV 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.[3]

In 2021, the CNMV and Bank of Spain issued a new press statement on cryptocurrency investment risks.[4]

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

Lastly, on 17 March 2022, the CNMV, Bank of Spain and the Insurance regulator issued a joint communication on the statement of the European supervisory authorities addressed to retail investors on inherent risks in cryptoasset investment.[5]

1 Pilar Lluesma Rodrigo is counsel and Miguel Pérez Campos 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 https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/18/presbe2018_07en.pdf.
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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:

a currency tokens (cryptocurrencies with no rights or investment purposes);

b security tokens, which usually provide property rights, interest rights or dividends attached to a business;

c 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

d 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.

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.

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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 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]

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

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.

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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 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. Similarly, 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.

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.

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:

a is electronically stored; has monetary value;

12 Article 35.3 of the Spanish Securities Law.

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b represents a claim on the issuer; is issued on receipt of funds;
c is issued for the purpose of making payment transactions; and
d is accepted by persons other than the issuer.[13]

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[14] amending the current anti-money laundering (AML) legal framework and transposing some EU AML provisions, including the Fifth Anti-Money Laundering Directive.[15]

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

13 https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf.
14 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.
15 Directive (EU) 2018/843 of 30 May 2018.

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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 REGISTER OF THE BANK OF SPAIN

As previously mentioned, in October 2021, the Bank of Spain put in place a register for providers who engage in the exchange of services between virtual currencies and fiat currencies and for custodian wallet providers.

The Second Additional Provision Royal-Decree Law 7/2012 provides that entities engaged in the exchange of services between virtual currencies and fiat currencies and custodian wallet activities should be registered with the Bank of Spain.

To register, and maintain the status of registered entity, applicants not only must comply with the general requirements for the obliged subjects provided by the AML law but also the providers and their administrators have to meet the requirements of commercial and professional honourability set out for credit institutions under Article 30 of the Royal Decree 84/2015.[16]

VI 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:

a absence of transparency in the information requirements and regulatory status of the companies involved;

b operational resilience and good risk governance (in cases of loss of cryptoassets, for instance);

16 Banco de España - Services - Of general interest - Register of providers engaged in exchange services between virtual currencies and fiat currencies and custodian wallet providers (bde.es).

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.

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c absence of solutions to mitigate conflicts of interest; and
d 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.

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]

VII 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.

VIII 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.

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

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IX REGULATION ON THE ADVERTISING OF CRYPTOASSETS

The recently passed Circular 1/2022, 10 January 2022, of the CNMV[19] has developed the standards, principles and criteria to which advertising activity related to cryptoassets presented as investment object will be subject and, in particular, it has defined the objective and subjective scopes, as well as the powers of the CNMV on the supervision and control of the advertising activity.

According to the objective scope of the Circular, any advertising addressed to investors or potential investors located in Spain in which cryptoassets are implicitly offered as an investment object will be subject to CNMV's supervision. In this regard, a cryptoasset is offered or to which attention has been drawn as a possible investment object when its acquisition is promoted or any reference is made to its profitability, price or value (current or future), which could suggest an opportunity to invest in the cryptoasset, even if they may eventually be used as a medium of exchange.

Despite the Circular providing a list of obliged subjects that have to comply on its advertising activity with the control and supervision requirements set out under this new regime for advertising, the subjective scope of this Circular is very broad, which implies any legal or natural person would be an obliged subject to the extent that it carries out on its own initiative or on behalf of a third party an advertising activity on cryptoassets in return for a consideration (this would include, for instance, not only providers of advertising services but also influencers or content creators).

The control and supervision regime of the Circular sets out certain obligations related to:

a content and message of the commercial communications: as it is usual in the advertising of financial instruments, it is mandatory to include certain warning messages addressed to retail investors and provide additional information on the risks associated to the investment in cryptoassets; and

b supervisory powers of the CNMV to request the cease or rectification of the advertising activity: an advertising campaign considered as a mass campaign, namely those aimed to a target of more than 100,000 people, must be notified to the CNMV with at least 10 working days prior to its execution.[20] After the communication, CNMV could suggest changes in the advertising pieces submitted in order to comply with the Circular requirements. All other advertising activities that do not qualify as mass campaign are also subject to CNMV supervisory action but are not required to be notified in advance.[21]

X 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.

19 https://cnmv.es/DocPortal/Legislacion/Circulares/Circular_1_2022_EN.pdf.

20 https://sede.cnmv.gob.es/ov/Documentos/FormularioCriptoactivos.pdf.

21 http://cnmv.es/portal/verDoc.axd?t={1cbaf61c-57c2-4830-bd6a-071f806795e2}.

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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 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:

a to manage Bitcoins that were delivered to him as a deposit;
b to reinvest dividends; and
c upon maturity, to 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 transactions.

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

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perpetrator was ordered to pay back an amount in euros that was 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; Superior Court of Justice of the Basque Country judgment 38/2021 of 30 April 2021).

Additionally, according to press releases, the Spanish National Court[22] 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).

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 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 that 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 (e.g., unlawful action, damage and profit of the perpetrators) took place in Spain.[23] 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 has 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

22 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).

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

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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'.[24]

XI TAX

From a tax standpoint, in recent years, virtual currencies have become an area of tax issues and questions. The proliferation of multiple virtual coins and their increasing popularity among the general public have compelled the Spanish tax authorities to focus on the correct taxation of the acquisition, holding and transfer of these intangible assets. As with any other asset, any transaction with virtual currencies may potentially trigger tax implications. Nevertheless, given the particularity of the functioning of virtual currencies markets (for instance, the anonymity of some transactions or the fact that some of the virtual currencies' operators are not resident or established in Spain), the tax authorities perceive this kind of asset as more susceptible to the rise of tax fraud. Thus, in recent years, the Spanish tax authorities have been trying to focus on the control of virtual currencies by introducing new reporting obligations, among other means.

i Income tax and value added tax

No specific Spanish regulations have been passed regarding taxation of virtual currencies. Therefore, transactions with virtual currencies must be taxed according to the existing legal institutions, and in light of the specific characteristics of the intangible assets, which in some cases may not be perfectly adapted to the operation of virtual currencies. This limitation has led to some taxpayers requesting the tax authorities to issue binding rulings regarding several aspects of the taxation of virtual currencies.

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 an asset transfer for income tax purposes (personal income tax, corporate income tax and non-resident income tax). Therefore, with any transfer of a virtual currency in exchange for a different virtual currency or for euros gives rise to a capital gain or loss. Thus, when carrying multiple transactions with virtual currencies in a tax year, compliance with tax obligations becomes complicated and burdensome for both the taxpayer and the tax authority.

Regarding the above, three important binding rulings have been issued by the Spanish tax authorities:

a V0808-18 of 22 March establishes that the use of virtual currencies outside of the performance of an economic activity may result in capital gains or losses at the moment

24 Article 22.5.

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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 currently up to 26 per cent for individuals;

b V1604-18 of 11 June accepts that fees charged by the exchange can increase or decrease the acquisition and sale price, respectively, if they are directly related to the transaction and that the first-in, first-out principle applies; and

c V0999-18 of 18 April sets forth the tax treatment of the exchange of some virtual currencies for different ones.

According to this ruling, the exchange of one virtual currency for a different one triggers a capital gain or loss. In this case the taxpayer will have to prove the tax authorities the value of the virtual currencies in euro when the exchange happens.

Conversely, the mining activity is considered a business activity and will be taxed as so in the Personal Income Tax for natural resident persons at progressive rates which go up to 54 per cent in some Autonomous Regions. For legal entities subject to Corporate Income Tax the tax rate will be generally 25 per cent and for non-residents, the tax rate for Non Residents Income Tax will be 24 per cent (19 per cent for residents of the European Union, Norway and Iceland). Additionally, the mining activity will be subject to a local tax known as Business Activity Tax.

Regarding the exit tax applicable to natural persons who change their tax residence from Spain to a different country, the Spanish tax authorities have stated in binding tax ruling V1149-18 of 8 May that it does not apply to embedded capital gains derived from virtual currencies.

As regards value-added tax (VAT), the Spanish tax authorities' position, as set out in binding tax rulings V1274-20 of 6 May and V1748-18 of 18 June, is aligned with that of the European Court of Justice, which in *Hedqvist*[25] 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. In this regard, the Spanish tax authorities have established that services related to virtual currencies will apply the VAT exemption for financial services. Thus, input VAT will not be deductible. Regarding the mining activity the Spanish tax authorities have established that this is an activity not subject to VAT as there is no clear link between the service rendered and the remuneration received. Consequently, the mining activity does not confer per se on the miner, the condition of VAT entrepreneur, and therefore any VAT input borne by a taxpayer carrying out virtual currencies mining activity will not be deductible if connected to this activity.

ii Wealth tax and reporting obligations

Law 19/1991 of 6 June on wealth tax (the WT Law) establishes the obligation of the taxpayer to declare all of their assets and liabilities in order to determine their net wealth, which is subject to taxation. Virtual currencies, as an asset, fall under the scope of the WT Law.

However, the WT Law does not specifically regulate how virtual currencies should be declared. Nevertheless, the Spanish tax authorities in some binding rulings, for instance

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

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V2289-18 of 3 August, have stated that the closing rule of the WT Law applies. This means that virtual currencies must be declared according to their 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 net wealth tax rate can be up to 3.50 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, Law 11/2021 on measures to prevent and fight tax evasion has included a new obligation to report the amount of virtual currencies held abroad. This obligation is still pending to be finally put into force, although it is foreseen that it will enter into force as of 1 January 2023 to report virtual currencies held during 2022. In principle, a new form will be created for these purposes (Form 721), to identify the owner and the beneficial owner; and to report all transactions involving virtual currencies (acquisitions, sales, barter transactions or transfers).[26]

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, 2021 and 2022 published in the *Spanish Official Gazette* of 28 January 2020, 1 February and 31 January 2022, 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.

In addition to the above laws, Law 11/2021 has also introduced two new reporting obligations:

a wallet providers to provide information on virtual currencies balances (segregated by virtual currency), owners, authorised persons or beneficiaries of these balances; and

b 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.

XII LOOKING AHEAD

On the one hand, very few rules on virtual currencies have been adopted in Spain, the need for comprehensive regulation of, inter alia, tax, consumer protection and regulatory aspects has already been discussed in 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.

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

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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 (e.g., issuance, deposit and marketing) 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.

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Appendix 1

ABOUT THE AUTHORS

PILAR LLUESMA RODRIGO

Uría Menéndez

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.

In particular, within the regulatory field, she advises on matters such as authorisations, cross-border provision of services, marketing of products, rules of conduct and transparency, disciplinary proceedings, reporting to supervisory authorities, anti-money laundering, derivatives and service client agreements.

MIGUEL PÉREZ CAMPOS

Uría Menéndez

Miguel Pérez Campos joined Uría Menéndez in 2013 and has been a senior associate of the firm since 2021. From January to March 2020, he was seconded to the Frankfurt office of Hengeler Mueller.

Miguel has more than nine years of experience advising domestic and foreign companies on M&As, corporate restructuring transactions for corporate groups, real estate transactions and due diligence processes both of asset deals and share deals. He also advises in tax procedures and to family groups and high net worth individuals.

Miguel obtained a law and business management and administration degree from the University of Valencia. He also holds a master's degree in tax law from the Centre of Financial Studies. Miguel is an associate professor at the University of Valencia.

URÍA MENÉNDEZ

Calle del Príncipe de Vergara, 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 915 860 400
pilar.lluesma@uria.com

© 2022 Law Business Research Ltd

miguel.perez@uria.com

Calle Colón, 28
46004 Valencia
Spain
Tel: +34 96 352 91 91
miguel.perez@uria.com

www.uria.com

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