

# Blockchain & Cryptocurrency Regulation

# 2022

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## CONTENTS

<b>Preface</b>	Josias N. Dewey, <i>Holland &amp; Knight LLP</i>	
<b>Foreword</b>	Daniel C. Burnett, <i>Enterprise Ethereum Alliance</i>	
<b>Glossary</b>	The Contributing Editor shares key concepts and definitions of blockchain	
<b>Industry chapters</b>	<i>The evolution of global markets continues – Blockchain, cryptoassets and the future of everything</i>	
	Ron Quaranta, <i>Wall Street Blockchain Alliance</i>	1
	<i>Cryptocurrency and blockchain in the 117<sup>th</sup> Congress</i>	
	Jason Brett & Whitney Kalmbach, <i>Value Technology Foundation</i>	7
	<i>Six years of promoting innovation through education: The blockchain industry, law enforcement and regulators work towards a common goal</i>	
	Jason Weinstein & Alan Cohn, <i>The Blockchain Alliance</i>	20
<b>Expert analysis chapters</b>	<i>Blockchain and intellectual property: A case study</i>	
	Ieuan G. Mahony, Brian J. Colandreo & Jacob Schneider, <i>Holland &amp; Knight LLP</i>	24
	<i>Cryptocurrency and other digital asset funds for U.S. investors</i>	
	Gregory S. Rowland & Trevor Kiviat, <i>Davis Polk &amp; Wardwell LLP</i>	41
	<i>Not in Kansas anymore: The current state of consumer token regulation in the United States</i>	
	Yvette D. Valdez, Stephen P. Wink & Paul M. Dudek, <i>Latham &amp; Watkins LLP</i>	56
	<i>An introduction to virtual currency money transmission regulation</i>	
	Michelle Ann Gitlitz, Carlton Greene & Caroline Brown, <i>Crowell &amp; Moring LLP</i>	82
	<i>Decentralized finance: Ready for its “close-up”?</i>	
	Lewis Cohen, Angela Angelovska-Wilson & Greg Strong, <i>DLx Law</i>	101
	<i>Legal considerations in the minting, marketing and selling of NFTs</i>	
	Stuart Levi, Eytan Fisch & Alex Drylewski, <i>Skadden, Arps, Slate, Meagher &amp; Flom LLP</i>	115
	<i>Cryptocurrency compliance and risks: A European KYC/AML perspective</i>	
	Fedor Poskriakov & Christophe Cavin, <i>Lenz &amp; Staehelin</i>	130
	<i>Distributed ledger technology as a tool for streamlining transactions</i>	
	Douglas Landy, James Kong & Ben Elron, <i>White &amp; Case LLP</i>	146
	<i>Ransomware and cryptocurrency: Part of the solution, not the problem</i>	
	Katie Dubyak, Jason Weinstein & Alan Cohn, <i>Steptoe &amp; Johnson LLP</i>	161
	<i>A day late and a digital dollar short: Central bank digital currencies</i>	
	Richard B. Levin & Kevin R. Tran, <i>Nelson Mullins Riley &amp; Scarborough LLP</i>	171
	<i>U.S. federal income tax implications of issuing, investing and trading in cryptocurrency</i>	
	Pallav Raghuvanshi & Mary F. Voce, <i>Greenberg Traurig, LLP</i>	185
	<i>Raising capital: Key considerations for cryptocurrency companies</i>	
	David Lopez, Colin D. Lloyd & Laura Daugherty, <i>Cleary Gottlieb Steen &amp; Hamilton LLP</i>	196

<b>Expert analysis chapters cont'd</b>	<i>Smart contracts in the derivatives space: An overview of the key issues for buy-side market participants</i> Jonathan Gilmour & Vanessa Kalijnikoff Battaglia, <i>Travers Smith LLP</i>	208
	<i>Tracing and recovering cryptoassets: A UK perspective</i> Jane Colston, Jessica Lee & Imogen Winfield, <i>Brown Rudnick LLP</i>	214
<b>Jurisdiction chapters</b>		
<b>Australia</b>	Peter Reeves, Robert O'Grady & Emily Shen, <i>Gilbert + Tobin</i>	224
<b>Austria</b>	Ursula Rath, Thomas Kulnigg & Dominik Tyrybon, <i>Schönherr Rechtsanwälte GmbH</i>	237
<b>Brazil</b>	Flavio Augusto Picchi & Luiz Felipe Maia, <i>FYMSA Advogados</i>	245
<b>Canada</b>	Simon Grant, Kwang Lim & Matthew Peters, <i>Bennett Jones LLP</i>	256
<b>Cayman Islands</b>	Alistair Russell, Chris Duncan & Jenna Willis, <i>Carey Olsen</i>	268
<b>Cyprus</b>	Akis Papakyriacou, <i>Akis Papakyriacou LLC</i>	276
<b>France</b>	William O'Rorke & Alexandre Lourimi, <i>ORWL Avocats</i>	284
<b>Gibraltar</b>	Joey Garcia, Jonathan Garcia & Jake Collado, <i>ISOLAS LLP</i>	295
<b>India</b>	Nishchal Anand, Pranay Agrawala & Dhruvad Das, <i>Panda Law</i>	305
<b>Ireland</b>	Keith Waine, Karen Jennings & David Lawless, <i>Dillon Eustace LLP</i>	317
<b>Italy</b>	Massimo Donna & Chiara Bianchi, <i>Paradigma – Law &amp; Strategy</i>	327
<b>Japan</b>	Takeshi Nagase, Tomoyuki Tanaka & Takato Fukui, <i>Anderson Mōri &amp; Tomotsune</i>	334
<b>Jersey</b>	Christopher Griffin, Emma German & Holly Brown, <i>Carey Olsen Jersey LLP</i>	345
<b>Kenya</b>	Muthoni Njogu, <i>Njogu &amp; Associates Advocates</i>	353
<b>Korea</b>	Won H. Cho & Dong Hwan Kim, <i>D'LIGHT Law Group</i>	367
<b>Luxembourg</b>	José Pascual, Bernard Elslander & Clément Petit, <i>Eversheds Sutherland LLP</i>	378
<b>Mexico</b>	Carlos Valderrama, Diego Montes Serralde & Evangelina Rodriguez Machado, <i>Legal Paradox®</i>	389
<b>Montenegro</b>	Luka Veljović & Petar Vučinić, <i>Moravčević Vojnović i Partneri AOD in cooperation with Schoenherr</i>	397
<b>Netherlands</b>	Gidget Brugman & Sarah Zadeh, <i>Eversheds Sutherland</i>	402
<b>Norway</b>	Ole Andenæs, Snorre Nordmo & Stina Tveiten, <i>Wikborg Rein Advokatfirma AS</i>	413
<b>Portugal</b>	Filipe Lowndes Marques, Mariana Albuquerque & Duarte Verissimo dos Reis, <i>Morais Leirão, Galvão Teles, Soares da Silva &amp; Associados</i>	426
<b>Serbia</b>	Bojan Rajić & Mina Mihaljčić, <i>Moravčević Vojnović i Partneri AOD Beograd in cooperation with Schoenherr</i>	437
<b>Singapore</b>	Kenneth Pereire & Lin YingXin, <i>KGP Legal LLC</i>	442
<b>Spain</b>	Alfonso López-Ibor Aliño & Olivia López-Ibor Jaume, <i>López-Ibor Abogados</i>	452
<b>Switzerland</b>	Daniel Haerberli, Stefan Oesterhelt & Alexander Wherlock, <i>Homburger</i>	460
<b>Taiwan</b>	Robin Chang & Eddie Hsiung, <i>Lee and Li, Attorneys-at-Law</i>	475
<b>United Kingdom</b>	Stuart Davis, Sam Maxson & Andrew Moyle, <i>Latham &amp; Watkins</i>	482
<b>USA</b>	Josias N. Dewey, <i>Holland &amp; Knight LLP</i>	499

# Austria

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## Government attitude and definition

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

Despite the COVID-19 pandemic, 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.

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 registration of virtual asset service providers.

While national initiatives in this field are welcome, we expect that the issuance of, and services around, cryptoassets will in the mid-term be regulated on a European level, with the European Commission having published draft legislation on a markets in cryptoasset regulation applicable to cryptoassets not covered by existing EU financial services legislation (e.g. MiFID II, the E-Money Directive, PSD II).

## 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”, “cryptoasset”, “coin” or “token”. However, currently there is only one legal definition for the term “virtual currency”, which was introduced by the 5<sup>th</sup> 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”.*

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 will qualify as financial instruments under the second Markets in Financial Instruments Directive (“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”) or the Austrian Payment Services Act (*Zahlungsdienstegesetz*; “ZaDiG”), and/or prospectus requirements under the EU Prospectus Regulation or the Austrian Capital Markets Act (*Kapitalmarktgesetz*).

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 – 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 Austrian Electronic Money Act.
- Alternative currencies, payment instruments or means of payment may trigger a licensing requirement if they are intended for payment at third parties, and the network within which they can be used to purchase goods/services is large in terms of geographical reach, type of products/services and/or number of accepting parties (there is a licensing exception for restricted networks, but this has become increasingly strict following the implementation of Directive 2015/2366/EU (“PSD II”). Also, if accounts are operated in connection with currencies, payment instruments or means of payment through which payments are made, the entity holding the accounts may be obliged to become licensed as a payment service provider.
- If capital is raised in order to invest proceeds into cryptocurrencies or mining, this could be regulated as a banking business (deposits business) or as managing an alternative investment fund (“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

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

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

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

### VAT treatment of cryptocurrencies

The exchange of cryptocurrencies (e.g. Bitcoin) into fiat currency (e.g. Euro) and *vice versa* is VAT-exempt (CJEU 22 October 2015, C-264/14, *Hedqvist*; VAT guidelines para. 759). Bitcoin mining as such is not subject to VAT 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 5<sup>th</sup> 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 a 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.

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