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Government attitude and definition

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

The Austrian government closely monitors developments and continues to foster new technologies such as blockchain, distributed ledger technology and digital assets. While initial coin offerings ("ICOs"), initial token offerings ("ITOs"), security token offerings and initial exchange offerings seem to have slowed down significantly in recent 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, DeFi applications, non-fungible tokens ("NFTs") and open AI solutions.

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

While national initiatives in this field are welcome, the issuance of and provision of services related to crypto-assets will, from mid-2024 onwards, be regulated on an EU-wide level: after long and intense debate among co-legislators, the final text of the Regulation on Markets in Crypto-assets ("MiCA") was finally adopted in April 2023.

MiCA will introduce a comprehensive (cross-border) regulatory framework for the offering and provision of services related to crypto-assets. It lays down (i) transparency and disclosure requirements for the issuance, offering to the public and admission to trading of crypto-assets on a trading platform for crypto-assets, (ii) authorisation requirements for crypto-asset service providers, issuers of asset-referenced tokens and issuers of electronic money tokens, and (iii) provisions for the operation, organisation and governance of crypto-asset service providers as well as crypto-asset issuers. In addition, and to foster integrity of crypto-asset markets, MiCA will introduce measures to prevent insider dealing, unlawful disclosure of inside information and market manipulation related to crypto-assets.

Cryptocurrency regulation

In Austria, cryptocurrencies initially caused quite a headache for financial market regulators, in particular as no statutory definition of cryptocurrencies existed at the time. While there is currently only one statutory definition of the term "virtual currency", defining virtual currencies for AML purposes as "*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*", this has changed under MiCA: MiCA now defines "crypto-asset" broadly and in a technologically neutral way to capture all present and future types of assets that are not covered by any other financial services regulatory framework at EU level ("*a digital representation of a value or of a right that is able to be transferred and stored electronically using distributed ledger technology or similar technology*").

In addition, there are no dedicated cryptocurrencies or fintech-specific laws or regulations. From an Austrian financial services regulatory perspective, cryptocurrencies are currently neither treated as financial instruments (in particular, as securities or derivatives) nor as (fiat) currency (domestic or foreign), but as commodities. 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. For instance, derivatives referencing cryptocurrencies or tokens having certain features (i.e., security/investment tokens; see "Sales regulation", below) will qualify as financial instruments under MiFID II and will hence be covered by financial services regulation under MiFID II and the Markets in Financial Instruments Regulation.

More generally, depending on their specific features/content, the operation of business models based on cryptocurrencies may currently trigger licensing requirements under general financial services legislation (which also applies to cryptocurrencies and new business models/technologies) and/or fall within the remit of Austrian securities laws (see "Sales regulation", below). Based on the "same risk – same rules" principle, the FMA has always applied a "technology-neutral" supervisory approach to crypto-products and services. Whether and to what extent financial services regulation and securities laws apply depends primarily on the product features and business model. Business models involving crypto-assets may be subject to licensing requirements and are governed by:

- the Austrian Banking Act (*Bankwesengesetz*; "BWG") – for example, if funds are raised for investment into cryptocurrencies;
- the Austrian Payment Services Act 2018 (*Zahlungsdienstegesetz 2018*; "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 Austrian Alternative Investment Fund Managers Act (*Alternative Investmentfonds Manager-Gesetz*; "AIFMG") – for example, if funds are raised for investment into cryptocurrencies according to a pre-defined investment strategy, including for mining purposes; and
- the Electronic Money Act 2010 (*E-Geldgesetz 2010*) – when issuing electronic money.

Purely technical services do not require a licence. If, however, a technical billing service also included the transfer of fiat funds, this would no longer be considered a mere technical

service and would need to be tested against licensing requirements under Austrian financial services regulation.

Given the diversity, complexity and rapid evolution of business models, the regulatory treatment of any business models involving cryptocurrencies and crypto-assets must be assessed on a case-by-case basis. Therefore, the FMA encourages discussion of the regulatory treatment before engaging in any business activity. It has set up a dedicated specialist team and the fintech contact portal dedicated to those areas to handle all fintech-related queries and published guidance on the regulatory treatment of certain activities on its website at https://www.fma.gv.at/en/cross-sectoral-topics/fintech/fintech-navigator.

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 an instrument's specific terms and conditions/features, certain token offerings/sales may be subject to prospectus requirements under Austrian securities laws unless a prospectus exemption applies.

For current 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 (some of which changed under MiCA; see below):

- *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 national prospectus requirements similar to the EU Prospectus Regulation, unless a prospectus exemption applies.
- *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. 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.

MiCA affects the historic utility/payment token classification set out above, as it divides crypto-assets that are not MiFID financial instruments into the following sub-categories: (i) asset-referenced token ("ART"); (ii) electronic money token or e-money token ("EMT") covering stablecoins in particular; and (iii) crypto-assets other than ART or EMT, including utility tokens but also Bitcoin. Also, issuers and offerors may need to become authorised and prepare a specific disclosure document ("whitepaper" or "prospectus light") for offering crypto-assets in the EU, unless an exemption applies.

Taxation

Income tax treatment of cryptocurrencies

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

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

Compensation of losses

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

Commercial income

In principle, the special tax rate for cryptocurrencies applies to commercial assets as well as to traditional capital assets. However, the special rate does not apply if generating income from cryptocurrencies is part of the core activity of the business concerned. In particular, this means it does not apply to businesses trading commercially in cryptocurrencies, or to

businesses mining currency on a commercial basis. Gains from such activities are taxed, according to the progressive income tax thresholds, up to 55% income tax for individuals or (flat) corporate income tax of 25% (from 2023: 24%; and from 2024: 23%) for corporations.

Capital gains tax

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

VAT treatment of cryptocurrencies

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

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

Money transmission laws and anti-money laundering requirements

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

In addition, any activities involving cryptocurrencies are subject to AML requirements (including know-your-customer ("KYC") checks and AML prevention systems) if they:

- require a licence under financial services regulation (e.g., as provision of payment services); or
- 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.

Moreover, certain providers of services concerning cryptocurrencies are currently subject to AML, KYC and customer due diligence requirements, reporting obligations and prior registration as VASPs with the FMA if they offer one or more of the following services:

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

Under MiCA, the provision of services related to crypto-assets will become subject to prior authorisation and supervisory oversight. The list of licensable services largely mirrors the list of MiFID II investment services. Similarly, crypto-asset service providers authorised under MiCA will be able to passport services across the EU, which will eliminate one of the major obstacles faced by providers so far. However, only legal entities established in the EU may become authorised under MiCA and may hence provide crypto-asset services to European customers.

Promotion and testing

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

Ownership and licensing requirements

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

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

Mining

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

Border restrictions and declaration

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

Reporting requirements

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

Estate planning and testamentary succession

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

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Global Legal Insights – Blockchain & Cryptocurrency Regulation provides in-depth analysis of blockchain and cryptocurrency laws and regulations across 33 jurisdictions, discussing government attitudes and definitions, cryptocurrency regulation, sales regulation, taxation, money transmission laws and anti-money laundering requirements, promotion and testing, ownership and licensing requirements, and mining.

Also in this year's edition are 13 Expert Analysis chapters, including in-depth guidance and analysis on cryptocurrency compliance, stablecoin regulation, digital asset sanctions, KYC/AML perspectives, cryptocurrency insolvencies, and taxation. Also covered in this year's edition are blockchain decentralisation, intellectual property, and NFTs, making this the definitive legal guide to the global blockchain and cryptocurrency industry in 2024.

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