The Virtual Currency Regulation Review

Third Edition

Editors
Michael S Sackheim and Nathan A Howell

The Law Reviews

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Third Edition

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This article was first published in August 2020
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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www.TheLawReviews.co.uk

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Enquiries concerning editorial content should be directed
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ISBN 978-1-83862-513-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

AMERELLER

ANDERSON MORI & TOMOTSUNE

ARTHUR COX

BECH-BRUUN

BRANDL & TALOS RECHTSANWÄLTE GMBH

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PREFACE

We are pleased to introduce the third edition of *The Virtual Currency Regulation Review* (the *Review*). The increased acceptance and use of virtual currencies by businesses and the exponential growth of investment opportunities for speculators marked late 2019 and early 2020. In 2019, it was reported that several of the largest global banks were developing a digital cash equivalent of central bank-backed currencies that would be operated via blockchain technology, and that Facebook was developing its own virtual currency pegged to the US dollar – Libra – to be used to make payments by people without bank accounts and for currency conversions. In 2019, the US House of Representatives' Committee on Financial Services held a hearing on the potential impact of Libra in which one witness testified that Libra posed a fundamental threat to the ability of sovereign nations to maintain distinct monetary policies and respond to currency crises.

The *Review* is a country-by-country analysis of developing regulatory initiatives aimed at fostering innovation, while at the same time protecting the public and mitigating systemic risk concerning trading and transacting in virtual currencies. In February 2020, the International Organizations of Securities Commissions (IOSCO) published a final report titled 'Issues, Risks and Regulatory Considerations Relating to Crypto-Asset Trading Platforms'. The final report describes issues and risks identified to date that are associated with the trading of cryptoassets on cryptoasset trading platforms (CTPs). In relation to the issues and risks identified, the report describes key considerations and provides related toolkits that are useful for each consideration. The key considerations relate to: (1) access to CTPs; (2) safeguarding participant assets; (3) conflicts of interest; (4) operations of CTPs; (5) market integrity; (6) price discovery; and (7) technology. IOSCO advised that these seven key considerations (and the related toolkits described in the report) represent specific areas that IOSCO believes jurisdictions could consider in the context of the regulation of CTPs.

Fortunes have been made and lost in the trading of virtual currencies since Satoshi Nakamoto published a white paper in 2008 describing what he referred to as a system for peer-to-peer payments, using a public decentralised ledger known as a blockchain and cryptography as a source of trust to verify transactions. That paper, released in the dark days of a growing global financial market crisis, laid the foundations for Bitcoin, which would become operational in early 2009. Satoshi has never been identified, but his white paper represented a watershed moment in the evolution of virtual currency. Bitcoin was an obscure asset in 2009, but it is far from obscure today, and there are now many other virtual currencies and related assets. In 2013, a new type of blockchain that came to be known as Ethereum was proposed. Ethereum's native virtual currency, Ether, went live in 2015 and opened up a new phase in the evolution of virtual currency. Ethereum provided a broader platform, or protocol, for the development of all sorts of other virtual currencies and related assets.

In 2020, the global outbreak of the novel coronavirus (or covid-19) impacted virtually every person on the planet and had severe and sudden effects on every major economy. At the time of writing, the pandemic is ongoing and, while some locations are pushing past their respective 'peaks' of infection, cities that are central to the global financial markets, such as New York City, remain under strict lockdown orders, with many workers in the financial services sector working remotely. It is unclear when these cities will return to a version of 'normal'. In the midst of all this chaos, there is a natural experiment under way in the cryptocurrency markets. We are perhaps learning what happens when our governments are strained and their competence is questioned. Since mid-March 2020, when the pandemic hit the United States in earnest (it had already been raging in China, Italy, Iran, etc.), the price of Bitcoin has gone up in essentially a straight line – from approximately US$5,000 to almost US$10,000 as at mid-May. Now, to be fair, this follows a significant price decline preceding March, but it is at least interesting to observe that the most widely held cryptocurrency is weathering a significant economic storm with apparent ease.

When we first launched the *Review* three years ago, we were optimistic but sceptical about whether virtual currencies would be widely and consistently in commercial use. However, the virtual currency revolution has come a long way and has endured a sufficient number of events that could or should have been fatal for the asset class. Our confidence in the long-term viability of virtual currency has only increased over the previous year. Virtual currencies and the blockchain and other distributed ledger technology on which they are based are groundbreaking, and are being deployed right now in many markets and for many purposes. As lawyers, we must now endeavour to understand what that means for our clients.

Virtual currencies are borderless: they exist on global and interconnected computer systems. They are generally decentralised, meaning that the records relating to a virtual currency and transactions therein may be maintained in a number of separate jurisdictions simultaneously. The borderless nature of this technology was the core inspiration for the *Review*. As practitioners, we cannot afford to focus solely on our own jurisdictional silos. For example, a US banking lawyer advising clients on matters related to virtual currency must not only have a working understanding of US securities and derivatives regulation; he or she must also have a broad view of the regulatory treatment of virtual currency in other major commercial jurisdictions.

Global regulators have taken a range of approaches to responding to virtual currencies. Some regulators have attempted to stamp out the use of virtual currencies out of a fear that virtual currencies such as Bitcoin allow capital to flow freely and without the usual checks that are designed to prevent money laundering and the illicit use of funds. Others have attempted to write specific laws and regulations tailored to virtual currencies. Still others – the United States included – have attempted to apply legacy regulatory structures to virtual currencies. Those regulatory structures attempt what is essentially 'regulation by analogy'. In some countries, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money; in other countries, virtual currency may be regulated similarly to securities or commodities. We make one general observation at the outset: there is no consistency across jurisdictions in their approach to regulating virtual currencies. Perhaps the efforts of IOSCO will help to change that going forward, but there is currently no widely accepted global regulatory standard. That is what makes a publication such as the *Review* both so interesting and so challenging.

The lack of global standards has led to a great deal of regulatory arbitrage, as virtual currency innovators shop for jurisdictions with optimally calibrated regulatory structures that provide an acceptable amount of legal certainty and virtual currency scofflaws shop for jurisdictions with regulatory structures that provide no meaningful regulation. While some market participants are interested in finding the jurisdiction with the lightest touch (or no touch), most legitimate actors are not attempting to flee from regulation entirely. They appreciate that regulation is necessary to allow virtual currencies to achieve their potential, but they do need regulatory systems with an appropriate balance and a high degree of clarity. The technology underlying virtual currencies is complex enough without adding layers of regulatory complexity into the mix.

It is perhaps ironic that the principal source of strength of virtual currencies – decentralisation – is the same characteristic that the regulators themselves seem to be displaying. There is no central authority over virtual currencies, either within or across jurisdictions, and each regulator takes an approach that seems appropriate to that regulator based on its own narrow view of the markets and legacy regulations. Again, we are hopeful that IOSCO's efforts will help to encourage the emergence of optimal regulatory structures over time. Ultimately, the borderless nature of these markets allows market participants to 'vote with their feet', and they will gravitate towards jurisdictions that achieve the right regulatory balance of encouraging innovation and protecting the public and the financial system. It is much easier to do this in a primarily electronic and computerised business than it would be in a brick-and-mortar business. Computer servers are relatively easy to relocate; factories and workers are less so.

The third edition of the *Review* provides a practical analysis of recent legal and regulatory changes and developments, and of their effects, and looks forward to expected trends in the area of virtual currencies on a country-by-country basis. It is not intended to be an exhaustive guide to the regulation of virtual currencies globally or in any of the included jurisdictions. Instead, for each jurisdiction, the authors have endeavoured to provide a sufficient overview for the reader to understand the current legal and regulatory environment at a high level.

Virtual currency is the broad term that is used in the *Review* to refer to Bitcoin, Ether, Tethers and other stablecoins, cryptocurrencies, altcoins, ERC20 tokens, digital, virtual and crypto assets, and other digital and virtual tokens and coins, including coins issued in initial coin offerings. We recognise that in many instances the term 'virtual currency' will not be appropriate, and other related terms are used throughout as needed. In the law, the words we use matter a great deal, so, where necessary, the authors of each chapter provide clarity around the terminology used in their jurisdiction and the legal meaning given to that terminology.

Based on feedback on the first and second editions of the *Review* from members of the legal community throughout the world, we are confident that attorneys will find the updated third edition to be an excellent resource in their own practices. We are still in the early days of the virtual currency revolution, but it does not appear to be a passing fad. The many lawyers involved in this treatise have endeavoured to provide as much useful information as practicable concerning the global regulation of virtual currencies.

The editors would like to extend special thanks to Ivet Bell (New York) and Dan Applebaum (Chicago), both Sidley Austin LLP associates, for their invaluable assistance in organising and editing the third edition of the *Review*, and particularly the United States chapter. The assembly of this third edition is made all the more remarkable by the fact that

many of the authors and contributors are working from home, with dogs barking in the background and children at their feet. Special thanks go out to all those dogs and children for being as tolerant as possible as we try to conduct the work of busy lawyers and also produce this *Review*.

Michael S Sackheim and Nathan A Howell
Sidley Austin LLP
New York and Chicago
August 2020

Chapter 3

AUSTRIA

Nicholas Aquilina, Raphael Toman and Florian Braunauer[1]

I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

i Definition of virtual currencies

Various industries have long used virtual 'currencies' tailored for their respective purposes, such as online gaming and social gaming, where operators often use self-created currencies or currency units for placing stakes or making certain payments inside a game, albeit in most cases not based on blockchain technology.[2] While there have been several initial coin offerings (ICOs) in Austria, by the beginning of 2019, this hype and the market around cryptocurrencies as a whole have since slowed down, even though several projects, such as the crypto-stamp of the Austrian Post Office, attracted some media attention.

Nevertheless, the Austrian Parliament passed an amendment to the Austrian Financial Markets Anti-Money Laundering Act (FM-GwG) to implement the provisions of the Amendments to the Fourth EU Anti-Money Laundering Directive[3] (known as the Fifth AML Directive) in July 2019. Although this amendment entered into force on 1 October 2019, the most relevant provisions apply as of 10 January 2020. One of the key provisions of the amendment is Section 2 Paragraph 21, which for the first time defines virtual currencies under Austrian law:

> *Virtual currencies: a digital representation of value that is not issued or guaranteed by a central bank or a public authority, and 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 definition is based on Article 1(2)(d) of the Fifth AML Directive and relates to function rather than form of virtual currencies.[4] Furthermore, the definition does not make a distinction as to whether virtual currencies are generated using blockchain technology and represents a technology-neutral approach taken by the legislators of the Fifth AML Directive and consequently also by the Austrian legislature.

1 Nicholas Aquilina and Raphael Toman are attorneys and Florian Braunauer is an associate at Brandl & Talos Rechtsanwälte GmbH.

2 Rericha/Aquilina, 'Initial Coin Offering: Ein Fall für die FMA?', *ecolex* 2017, 1116.

3 Directive (EU) 2018/843 amending Directive (EU) 2015/849 (Amendments to the Fourth EU Anti-Money Laundering Directive).

4 Aquilina/Ewerz, 'Virtuelle Währungen und Kryptofinanzdienstleistungen: Klarer Trend zu mehr Regulierung', *ecolex* 2020, 160 with further references.

With this technology-neutral approach, the EU legislature intended to cover all types of virtual currencies. The best known and economically most relevant form of virtual currencies are cryptocurrencies, which are commonly understood to be special forms of virtual currencies characterised by certain technical features: payment systems and the storage and management of cryptocurrencies are organised by a decentralised computer protocol and protection is ensured by cryptographic signature sequences. However, there may be blockchain-based coins, often referred to as tokens, that are not created by a decentralised network of miners by solving complex mathematical problems, but rather issued by an individual or company in the course of an ICO or initial token offering (ITO).

Even though the Austrian definition of virtual currencies does not necessary cover all kinds of coins and tokens, the regulation of both coins and tokens will be analysed accordingly in the following sections.

ii Virtual currencies and general civil law

From a very general perspective, Austrian civil law – in particular the Austrian Civil Code (ABGB) – does not contain a definition of virtual currencies or specific regulation targeted at virtual currencies. Rather, it distinguishes only between the notions of persons and objects. As virtual currencies obviously cannot be qualified as persons, they need to be qualified as objects. Within the term 'objects', a distinction is made between objects that are movable and immovable, and physical and non-physical. Virtual currencies constitute data records in an account book. Neither a data record nor an account book are (necessarily) physical objects as they are not perceptible to the senses, which is a prerequisite for physical objects, and therefore virtual currencies are classified as non-physical objects under general civil law.[5] Although the distinction between movable and immovable objects only applies for physical objects, the prevailing opinion in Austria is nevertheless in favour of applying the rules on movable property to virtual currencies.[6] However, storage media on which an entire blockchain, and thus also the private key of a Bitcoin owner, is stored, are qualified as physical objects according to Section 302 ABGB if they are regarded as a single unit in legal transactions. Therefore, a card containing a blockchain and a digital key of Bitcoin could be regarded as a physical object. However, as a digital key, which may be temporarily stored on a physical storage medium, but can also be transferred separately (i.e., digitally), Bitcoin shall be still qualified as a non-physical object pursuant to Section 292 ABGB.[7]

iii Virtual currencies and the term 'money'

The mainstream use and understanding of the word currency in terms of virtual currencies implies that – at least under certain circumstances – virtual currencies could be considered as money from a legal perspective. However, the legal definition of currencies is legal tender recognised by the state that is subject to compulsory acceptance, also referred to as fiat currencies.[8] Money as qualified by Austrian law is created by a sovereign act in which the

5 Vonkilch/Knoll, Bitcoins und das Sachenrecht des ABGB, *JBl* 2019, 139 (141) with further references.

6 Anderl/Aigner/Schelling in Anderl (Hrsg), *Blockchain in der Rechtspraxis* (2020), 61 with further references.

7 Aquilina/Stadler, 'E-Commerce-Transaktionen im B2C Bereich' in Eberwein/Steiner (Hrsg), *Bitcoins*, 98–99.

8 Rericha/Aquilina, 'Initial Coin Offering: Ein Fall für die FMA?', *ecolex* 2017, 1116 (1117).

state determines a certain currency and raises it to the status of legal tender.[9] The Euro Act further qualifies what is considered as legal tender.[10] Virtual currencies, on the other hand, are (generally) not a state product, but are either created decentralised and online (as in the case of Bitcoin), or issued by a non-governmental person, company or agency (e.g., a company that carries out an ICO). Virtual currencies (generally) lack an official act of a state government, which is why they are generally not regarded as money.

As virtual currencies are not qualified as money (or legal tender or currency), transactions involving the exchange of virtual currencies for other objects are therefore generally not subject to the special civil law rules on making a purchase, but rather are subject to the more general rules of exchange in kind (i.e., qualified as exchanging one object for another).[11] This also corresponds to the definitions of the Fifth EU Anti-Money Laundering Directive and the FM-GwG, which refer to virtual currencies as means of exchange accepted by natural or legal persons.[12] With regard to exchanging virtual currencies for fiat money (such as the euro), the transaction is considered a purchase contract because, in this case, an object (virtual currency) is exchanged for fiat money.

II SECURITIES AND INVESTMENT LAWS

The following provides a brief overview of the applicability of the Austrian (Alternative) Investment Fund Managers Act and the Austrian Capital Markets Act to virtual currencies.

i Alternative Investment Fund Managers Act

Since many people regard and use virtual currencies as an investment, the provisions on collective investments might be relevant. These can be found in the Alternative Investment Fund Managers Act (AIFMG) and in the Investment Fund Act (InvFG). Both Acts govern investment undertakings (including sub-funds) that collect funds from a number of investors to invest them for the benefit of those investors in accordance with a specified investment policy as long as the funds do not serve the operational activity of the investment undertaking. Undertakings pursuant to the InvFG (investment funds) shall only invest the funds in transferable securities, whereas undertakings pursuant to the AIFMG (alternative investment funds) may invest the funds in a wider variety of assets. The managing of both investment funds and alternative investment funds requires a licence issued by the Financial Market Authority (FMA).

With respect to purchasing virtual currencies themselves, the FMA states that an ICO or ITO might fall within the scope of the AIFMG if the funds of the token or coin holders are invested for their benefit pursuant to a defined investment strategy.[13] Additionally, the FMA

9 Falschlehner/Klausberger, 'Zur finanzmarktrechtlichen Einordnung von Bitcoins' in Eberwein/Steiner (Hrsg), *Bitcoins*, 38–39.

10 Section 1 Euro Act covers banknotes denominated in euros as well as coins and collector coins denominated in euros or cents.

11 Aquilina/Stadler, 'E-Commerce-Transaktionen im B2C Bereich' in Eberwein/Steiner (Hrsg), *Bitcoins*, 103–104.

12 Article 1(2)(d) Fifth EU Anti-Money Laundering Directive); Section 2(21) FM-GwG.

13 FMA FinTech Navigator on ICO (https://www.fma.gv.at/querschnittsthemen/fintechnavigator/initial-coin-offering/; accessed on 21 July 2020).

took the view that business models requiring participation in the mining of cryptocurrencies such as Bitcoin may constitute an alternative investment fund (AIF) and may therefore fall within the scope of the AIFMG.[14]

Apart from that, virtual currencies may be part of the assets of investment funds or AIFs. Investment funds shall only invest their funds in virtual currencies in case the virtual currencies are structured as transferable securities (see subsection ii). With respect to virtual currencies being part of the assets of an AIF, the explanatory notes to the AIFMG expressly emphasise that the AIFMG should apply to all AIFMs that manage the full range of funds not covered by the UCITS Directive.[15] An Austrian AIF can thus be used to implement any investment strategy in which virtual assets are invested.[16]

ii Prospectus requirement

When financial instruments or other investment opportunities are offered to the public, there is usually an information imbalance in the market. To compensate for this, the Austrian legislation requires the issuer to provide a prospectus.

With respect to the prospectus requirement in Austria, there is a dualism regarding the applicable legal sources: for transferable securities, the prospectus obligation arises from the Prospectus Regulation;[17] for investments, the prospectus obligation is stipulated in the Capital Markets Act 2019 (KMG 2019), which entered into force on 21 July 2019 and repealed the Capital Markets Act 1991 (KMG 1991).

The EU legislature understands transferable securities in accordance with the Markets in Financial Instruments Directive II (MiFID II).[18] These mainly include equities and equity-type securities, as well as non-equity securities, such as debt securities and other securitised debt securities.[19] The FMA stated that certain factual characteristics are required for the qualification of securities pursuant to the Prospectus Regulation in addition to the formal criteria mentioned above.[20] Those criteria include transferability, tradability and the granting of rights similar to stocks, bonds, etc. The securitisation of the right in a document is not a mandatory requirement for a security. Securities are transferable if they can be transferred without their legal or technical substance changing. The decisive factor for tradability is that the security is sufficiently standardised and uniformly structured. Virtual currencies usually fulfil these two requirements. Whether virtual currencies grant rights that are similar to stocks, bonds, etc., depends on the individual structure of a virtual currency. Coins typically do not grant such rights and the same applies for utility tokens. With respect to tokens representing a claim to future payouts against the issuer (security tokens), this could be the case. In summary, the FMA is of the opinion that security tokens regularly qualify as transferable securities pursuant to the Prospectus Regulation and consequently, the public

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14 FMA FAQ on the application of the AIFMG (status: August 2018). We note that the FMA deleted the respective statement in an updated version. On this basis, it may be assumed that the FMA redeemed its legal assessment.

15 Explanatory notes to the AIFMG (ErläutRV 2401 BlgNR XXIV. GP 3).

16 Majcen, 'Bitcoins und andere virtuelle Währungen . . . bald eine neue Anlageklasse im modernen Asset Management?', *ÖBA* 2017, 691 (695).

17 Regulation 2017/1127.

18 Directive 2014/65/EU.

19 Lorenz/Zib in Zib/Russ/Lorenz (Hrsg), *Kapitalmarktgesetz* (2008) Section 1(37) ff.

20 FMA FinTech Navigator on ICOs (https://www.fma.gv.at/en/cross-sectoral-topics/fintech-navigator/initial-coin-offerings/; accessed on 21 July 2020).

offer of such tokens triggers the prospectus obligation pursuant to the Prospectus Regulation. The requirements that a prospectus for the public offer of securities must meet can be found in the annexes to the Prospectus Regulation.

In accordance with Section 1(1)(3) KMG 2019, investments are uncertificated property rights (rights to claims, membership rights or rights *in rem*)[21] for the direct or indirect investment of several investors who carry the risk, either alone or jointly with the issuer, and do not administer the invested funds themselves. Typical investments pursuant to the KMG are uncertificated profit participation rights, limited partnerships and silent participations.[22] For assessing whether virtual currencies qualify as investments, one must assess whether the token or coin in question grants its holder a property right (in the broadest sense) against the issuer.[23] With respect to security tokens, this is regularly the case. However, since the FMA believes that most security tokens are securities, security tokens that are investments will be the exception rather than the rule. Utility tokens might grant their holders a property right against the issuer depending on the individual structure of the token. With regard to payment tokens and coins, there usually is no property right against the issuer. Furthermore, the investment arising from these tokens or coins is usually achieved only when their holders transfer them. This activity is performed by the token or coin holder and therefore by the possible investors. Pursuant to the KMG 2019, there is no investment if the investors administer the funds themselves, therefore payment tokens and coins are not investments. Based on current market standards, it is unlikely that virtual currencies qualify as investments pursuant to the KMG 2019, but if they do, a prospectus would be required.

A distinction must be made between genuine decentralised virtual currencies such as Bitcoin and Ether, and those coins and tokens that can be created centrally by a certain individual or company in any number and are not open to mining by other users, such as is generally the case with ICOs or ITOs.[24] Decentralised cryptocurrencies usually do not trigger a prospectus requirement, rather such cryptocurrencies are created by a large number of users on the basis of protocol calculations (mining). Cases in which a cryptocurrency is created by a central party must be evaluated individually as to whether there is an investment pursuant to the KMG 2019 or even a security pursuant to the Prospectus Regulation. With respect to investments, there were indications that a security token would meet the requirements for a prospectus requirement under the KMG 2019.[25] The FMA has now clarified that the public offer of a token or coin, which is not or only partially transferable, embodies claims to capital or yield and in which all token or coin holders form a risk community, is subject to the prospectus requirement for investments pursuant to the KMG 2019.

Issuers have to decide from an *ex ante* consideration at the time of an ICO or ITO whether the token or coin to be issued requires a prospectus according to the KMG 2019 or the Prospectus Regulation. If the issuer comes to the conclusion that the ICO or ITO would qualify as a public offer of an investment or a security, there are some options to make use of exceptions to the prospectus obligation: if tokens or coins are offered for a minimum of

21 Zib/Russ/Lorenz in Zib/Russ/Lorenz (Hrsg), *Kapitalmarktgesetz* (2008) Section 1(30).

22 Kalss/Oppitz/Zollner, *Kapitalmarktrecht*, second edition (2015) Section 11(17).

23 Völkel, Initial Coin Offerings aus kapitalmarktrechtlicher Sicht, *ZTR* 2017, 103 (106).

24 Paulmayer, 'Initial Coin Offerings (ICOs) und Initial Token Offerings (ITOs) als prospektpflichtiges Angebot nach KMG?', *ZFR* 2017, 532.

25 ibid.

€100,000 each, the offer only addresses either an unlimited number of qualified investors or fewer than 150 persons per Member State of the European Economic Area who are not qualified investors, the prospectus obligation does not apply for investments or securities.

The exact requirements regarding a prospectus for the public offer of either securities or investments depends on the total consideration. Generally, for the public offer of securities or investments with a total consideration of less than €250,000, no prospectus is required. If the total consideration of a public offer of either securities or investments is between €250,000 and €2 million, the Alternative Financing Act (AltFG) applies and stipulates eased rules with respect to the prospectus obligation. Only if the total consideration exceeds €5 million is the aforementioned dualism shown: for the public offer of securities, a prospectus shall be disclosed in accordance with the Prospectus Regulation; for the public offer of investments, the provisions of the KMG 2019 apply. Of course, it is permissible to publish a prospectus that is only intended for the next highest value threshold. In certain cases, this might even be advantageous (e.g., passporting if the public offer is made in other EU Member States as well).

The relevant thresholds for the public offer of securities and investments are shown in the following table.

Threshold (12 months)	Securities	Investments
< €250,000	No prospectus requirement	No prospectus requirement
€250,000 to €2 million	Information obligation pursuant to the AltFG	Information obligation pursuant to the AltFG (exception: outstanding amount exceeds €5 million within seven years)
€2 million to €5 million	Simplified prospectus according to Annex D to the KMG 2019; optional prospectus according to Annex I to the Prospectus Regulation	Simplified prospectus according to Annex D to the KMG 2019; optional prospectus according to Annex A to the KMG 2019
> €5 million	Prospectus pursuant to Annex I to the Prospectus Regulation	Prospectus pursuant to Annex A to the KMG 2019

III BANKING AND MONEY TRANSMISSION

i Banking Act

Virtual currencies might also be relevant for banks or might relate to services that shall be performed exclusively by banks. It is therefore vital to assess the Austrian banking law as to whether virtual currencies might fall under its scope. The most important legal source of Austrian banking law is the Banking Act (BWG), which, inter alia, contains an exhaustive list of banking transactions in Section 1(1). The provision of these banking transactions requires a licence issued by the FMA if they are carried out for commercial purposes – this means carrying out banking transactions regularly, as opposed to only occasionally.[26] However, the Austrian courts rarely exempt an activity from the licensing requirement on the grounds of lack of commerciality as they often interpret it very broadly.

Deposit business (Section 1(1)(1) BWG)

Deposit business pursuant to Section 1(1)(1) BWG is the receipt of external funds for administration (first case) or as a deposit (second case). Funds are accepted within the meaning of Section 1(1)(1) BWG for administration (first case) if the recipient has a 'certain degree

26 Waldherr/Ressnik/Schneckenleitner in Dellinger (Hrsg), *Bankwesengesetz* (8. Lfg 2016) Section 1(25).

of discretion' with regard to these funds in order to use them as agreed in the interest of the depositor.[27] The depositor thus has an unconditional claim for repayment of the amount remaining under contractually agreed administration. The realisation of an administrative activity does not conflict with the fact that the depositor can decide for him or herself in individual cases or intervene with instructions, as long as the recipient has 'the power of limited independent action'. However, in cases where the depositor specifies in each case how the funds shall be invested, and thus the receiving institution lacks any discretionary power, money is not considered as being accepted for administration. In addition, if the repayment claim depends on the economic condition of the company in which the investor participates by acquiring company shares, this is not considered a deposit business.[28]

According to prevailing opinion, the acceptance of repayable funds from the public that are used as a means of investment is considered a deposit subject to Section 1(1)(1) BWG (second case). A deposit pursuant to Section 1(1)(1) BWG (second case) is subject to the depositor having an unconditional claim for repayment with respect to the money deposited.[29] A conditional repayment claim, which also includes a loss participation of the depositor, therefore does not qualify as a deposit within the meaning of the law.[30]

The issuance of genuine virtual currencies shall not be qualified as a deposit business according to Section 1(1)(1) BWG. As there is no issuer for such virtual currencies, users also have no repayment claim. The situation may be different with centrally issued virtual currencies. According to the FMA, an ICO or ITO might lead to receiving funds for administration if the conditions of the ICO or ITO provide for the repayment of these funds.[31]

Safekeeping and administration of securities for other parties (Section 1(1)(5) BWG)

If cryptocurrencies qualify as securities, their safekeeping and administration requires a licence for the custody business issued by the FMA. The term 'securities' in this respect differs from the term used in prospectus law, because the definition of securities for the purpose of custody business stems from the Depot Act (DepotG). Section 1(1) of the DepotG stipulates that only shares, participation certificates, bonds, certificates and other fungible securities qualify as securities. According to the prevailing opinion, fungibility and embodiment do not automatically qualify a right as a security – the right must serve as a capital investment.[32] Consequently, coins and most tokens would not qualify as securities for the sake of the custody business. However, security tokens regularly fulfil those criteria and the safekeeping of such tokens therefore triggers a licensing obligation that, pursuant to the BWG, has priority over the registration obligation pursuant to the FM-GwG. Custodians of tokens that qualify as securities therefore 'only' need to obtain a licence pursuant to the BWG.

27 Supreme Administrative Court decisions of 22 February 2006, 2005/17/0195; 4 September 2008, 2008/17/0034.

28 Brandl/Toman in Saria/Stocker (Hrsg), Unternehmensanleihen und Crowdfunding, 152; Waldherr/Ressnik/Schneckenleitner in Dellinger (Hrsg), *Bankwesengesetz* (8. Lfg 2016) Section 1(23).

29 Oppitz in Chini/Oppitz (Hrsg), *BWG – Bankwesengesetz* Section 1(10); Schrank/Meister, 'Cash Pooling im Lichte des BWG', *ZFR* 2013, 257.

30 Oppitz in Chini/Oppitz (Hrsg), *BWG – Bankwesengesetz* Section 1(10).

31 https://www.fma.gv.at/en/cross-sectoral-topics/fintech-navigator/initial-coin-offerings/.

32 Subhash/Stadler, Die Emission von Wertrechten auf Basis verteilter elektronischer Register – Distributed Ledger Technology, *wbl* 2020, 181 (189) with further references.

Issuing and managing means of payment (Section 1(1)(6) BWG)

Virtual currencies may have payment functions. Instruments with such payment functions are subject to strict regulations that can be found in the BWG and in the Payment Services Act (ZaDiG). The BWG regulates means of payment, whereas the ZaDiG is targeted at payment instruments. The main difference between the two Acts is that a payment instrument can only be used for performing or initiating a payment order,[33] whereas a means of payment represents the payment itself.[34] Additionally, a payment instrument shall be personalised and – contrary to means of payment – can only be used by a certain person.

The term means of payment generally comprises accepted monetary surrogates in circulation that are accepted by a larger group of persons, such as credit cards, travellers cheques and e-money. Thus, the issuance of vouchers or regional currencies, as well as the issuance of coins or tokens created within the framework of an ICO or ITO, may well be subject to the provisions of Section 1(1)(6) BWG. However, a means of payment within the meaning of Section 1(1)(6) BWG requires that it is accepted by a larger group of persons.[35] Genuine virtual currencies do not fall under the scope of Section 1(1)(6) BWG because they either lack a central issuer or they do not function as means of payment in a sufficiently big network.

ii Securities Supervision Act

As mentioned in subsection i, virtual currencies may qualify as securities, depending on their individual structure. If such virtual currencies are issued, the prospectus obligation governs the issuance. However, the issuance and other services related to virtual currencies that qualify as securities are regulated in the Securities Supervision Act, whose obligations require a financial instrument.

The Austrian legislature did not expand the definition of financial instruments to include units of account or virtual currencies.[36] Rather, the relevant provisions (of the WAG, KMG, etc.) are to be applied by taking a technology-neutral approach. However, the FMA stated that security tokens in particular might qualify as transferable securities pursuant to MiFID II.[37] Consequently, the following services fall under the WAG if they relate to one or more security tokens: investment advice; portfolio management by managing portfolios on an individual basis with the discretion under a power of attorney of the client; and acceptance and transmission of orders. These security services are subject to holding a licence issued by the FMA as an investment firm or to cooperate with an investment firm.

iii E-Money Act

Although virtual currencies are currently not legal tender in Austria (see Section I.iii), they could be regarded as e-money pursuant to the E-Money Act (E-GeldG). Section 1(1) E-GeldG defines e-money as any electronically (including magnetically) stored monetary value in the form of a claim against an e-money issuer issued against payment of a sum of

33 Waldherr/Ressnik/Schneckenleitner in Dellinger (Hrsg), *Bankwesengesetz* (8. Lfg 2016) Section 1(57e).

34 Haslhofer-Jungwirth/Kaufmann/Ressnik/Zimmermann in Weilinger (Hrsg), *ZaDiG* (2017) Section 1(50).

35 FMA FinTech Navigator on ICOs (https://www.fma.gv.at/querschnittsthemen/fintechnavigator/initial-coin-offering/; accessed on 22 July 2020).

36 Seggermann in Brandl/Saria (Hrsg), *WAG 2018*, second edition, Section 1(86).

37 FMA FinTech Navigator on ICOs (https://www.fma.gv.at/en/cross-sectoral-topics/fintech-navigator/initial-coin-offerings/; accessed on 22 July 2020.

money. Therefore, there must at least be the possibility of a three-party relationship (issuer–buyer–third point of acceptance).[38] The criteria must be cumulative.[39] However, virtual currencies are different from e-money because a virtual currency, unlike e-money, does not express capital in conventional units of account (e.g., euros) but in virtual units of account.[40] Decentralised cryptocurrencies such as Bitcoin or Ether also do not have a single issuer, but are created in the network via a specific algorithm; they also do not create a claim against an issuer. The situation may, of course, be different in the case of virtual currencies issued in the course of an ICO or ITO. Frequently, participants in an ICO acquire only a claim against the issuer for the transfer of the respective volume of coins or tokens to a wallet. In general, this requirement is immediately fulfilled by transferring coins or tokens to a participant's wallet. In ICOs, there may thus be cases in which an issuer would require a licence as an e-money institution pursuant to the E-GeldG if the exceptions from the licence obligation – such as found in the case of a limited network (see also Section III.i) for the acceptance of the issued coins or tokens – are not met.

iv Payment Services Act

The commercial provision of payment services may trigger a concession obligation, in particular if a virtual currency is qualified as a means of payment within the meaning of the BWG (see Section III.i) or as a payment instrument. A payment instrument within the meaning of Section 4(14) of the Payment Services Act (ZaDiG) is any personalised instrument, such as a credit card including the cardholder's code or signature, or any personalised procedure agreed between the payment service user and the payment service provider that can be used by the payment service user to issue a payment order, such as the access code of the payment service user and the transaction numbers and transaction codes in online banking.[41] Owing to the lack of personalisation, virtual currencies frequently do not constitute payment instruments pursuant to the ZaDiG, as they are usable and are transferable by anybody. Furthermore, the FMA also applies the limited network exception to the ZaDiG (Section 3(3)(11) ZaDiG; see also Section III.i).

IV ANTI-MONEY LAUNDERING

Virtual currencies are usually designed to be decentralised. Owing to the resulting lack of a central party, the legislature assumes that there is a severe risk that virtual currencies facilitate certain criminal activities. Especially with respect to money laundering and the financing of terrorism, virtual currencies offer the 'benefit' of making it more difficult to trace transactions compared to transactions executed via bank accounts. Therefore, it comes as little surprise that the anti-money laundering rules target virtual currencies.

38 Leixner, *Zahlungsdienstegesetz/E-Geldgesetz 2010* (2011) Section 1(5).
39 Rericha/Aquilina, 'Initial Coin Offering: Ein Fall für die FMA?', *ecolex* 2017, 1116 (1117).
40 Majcen, 'Bitcoins und andere virtuelle Währungen bald eine neue Anlageklasse im modernen Asset Management?', *ÖBA* 2017, 691.
41 Rericha/Aquilina, 'Initial Coin Offering: Ein Fall für die FMA?', *ecolex* 2017, 1116 (1119).

i Specific regulation of virtual currencies providers

Under Austrian criminal law, concealing or disguising the origin of assets resulting from certain criminal activities is classified as money laundering. In addition to penal provisions (Section 165 Austrian Criminal Code (StGB)), various laws and regulations exist in this context to prevent money laundering. The main Austrian law on preventing money laundering is the FM-GwG. This federal Act was passed to implement the EU's Fourth Anti-Money Laundering Directive and is essentially intended to prevent money laundering and the financing of terrorism in the banking and financial services sectors and, thus, is largely aimed at financial institutions.

The latest amendment to the FM-GwG implements the Fifth AML Directive and, for the first time, expressly refers to virtual currencies and includes a definition thereof (see Section I.i). Generally, virtual currencies are characterised by six elements:

a digital representation of value;
b not issued or guaranteed by a central bank or a public authority;
c not necessarily attached to a legally established currency;
d no legal status of currency or money;
e accepted by natural or legal persons as a means of exchange; and
f require electronic transfer, storage and trade.

During the public consultation on the draft of the amendments to the FM-GwG, various stakeholders had issued critical statements regarding those characteristics of virtual currencies. The main ambiguity was found in the criterion of being accepted as means of exchange.[42]

In addition to the legal definition of virtual currencies, the amendment to the FM-GwG also introduced a registration obligation with the FMA for service providers in relation to virtual currencies (Section 32a FM-GwG). The registration requirement applies for custodian wallet providers, exchanges and service providers who either engage in transferring of virtual currencies or in providing financial services for the issuance and selling of virtual currencies (Section 2(22) FM-GwG). In the course of registration, a service provider must disclose, inter alia, the name or company name of the service provider, the managing director, the company's registered office, a description of the business model, a description of the internal control system to comply with the requirements of the FM-GwG, and the identity of the owners and the amount of their shareholding in the service provider. The FMA shall refuse registration if there are doubts as to whether the requirements of the FM-GwG can be met or if the person who wishes to become a service provider with regard to virtual currencies is reliable. The lack of registration could result in the FMA prohibiting the service provider from performing its activities. The FMA should take less restrictive measures in the first instance, however.

ii General provisions

According to Section 1 FM-GwG, the obligations stated in the FM-GwG are directed at credit institutions and financial institutions. However, service providers in relation to virtual currencies are also subject to the rules of the FM-GwG. Further to this, a number of Austrian

42 See for example: Völkel (1/SN-137/ME XXVI. GP – Comment on Ministerial Draft) criticises that this definition would only be based on actual acceptance, as is the case with Bitcoin or Ether. However, a coin issued during an ICO would not be accepted and therefore not be covered by this definition. A similar argument can be made as regards the representation of a 'value' as it may also be questionable whether coins issued at the very beginning of an ICO already have a value.

laws and regulations refer to the FM-GwG when it comes to the anti-money laundering and counter-terrorist financing rules applicable to certain obliged entities. This is the case, inter alia, in the sports betting Acts of Austria's nine provinces, in the AIFMG, the E-GeldG and the BWG. However, other Austrian legislation beyond the FM-GwG may also include specific requirements and obligations aimed at the prevention of money laundering and the financing of terrorism.

The FM-GwG provides for various obligations to be met by the respective obliged entities. Insofar as an entity involved in doing business with virtual currencies is considered an obliged entity pursuant to the FM-GwG, it must subject transactions to its obligations under the FM-GwG, including customer due diligence (know your customer), checking the source of funds and a risk assessment.

According to Section 4 FM-GwG, obliged entities must prepare an internal risk assessment regarding money laundering and terrorist financing. Furthermore, the FM-GwG provides that certain due diligence obligations towards customers must be applied, with enhanced due diligence measures applying in certain cases. Pursuant to Section 5 FM-GwG, customer due diligence is required in the following cases, irrespective of whether the transaction or business relationship is performed by using virtual currencies or fiat money, whereby the thresholds set by the FM-GwG in euros will apply by using exchange rates as in the case of transactions with foreign fiat money (non-euro):

a establishing a business relationship;

b execution of all transactions that do not fall within the scope of a business relationship (occasional transactions) if either:

c the amount of the transaction exceeds €15,000; or

d the transaction is processed electronically by a payment service provider and the amount exceeds €1,000;

e the deposit or disbursement of saving deposits if the amount exceeds €15,000;

f if it is suspected that a customer is a member of a terrorist group, or is involved in transactions that serve money laundering or terrorist financing; and

g in the case of doubts about the authenticity or appropriateness of previously obtained customer identification data.

If one of the above-mentioned cases occurs, the due diligence obligations pursuant to Section 6 FM-GwG, or the simplified or increased obligations pursuant to Section 8 or Section 9 FM-GwG, respectively, must be complied with. The obligations are aimed at depriving customers of the advantage of anonymity; therefore, the most important tasks are to ascertain the best possible identification of a customer and his or her relevant assets, which includes virtual currencies. Customers can be identified, for example, by presenting certain identification documents. Various documents relating to a customer's business activities or financial circumstances can be used to prove the legal origin of assets. Appropriate due diligence measures will also have to be undertaken in the case of handling transactions involving virtual currencies, whereby there are no specific measures that the FM-GwG stipulates as regards transactions involving virtual currencies. The degree of the due diligence methods applied depends on the result of the internal risk assessment, which will need to take the specifics of virtual currencies, in particular as regards traceability and potential anonymity, into account, in particular in terms of checks into the source of funds and wealth.

Moreover, the FM-GwG also provides for certain reporting obligations: according to Section 16 FM-GwG, an obliged entity must report to the Financial Intelligence Unit when there is a suspicion that a customer is using or attempting to use funds resulting from a criminal act listed in Section 165 StGB, or if there is a suspicion that a transaction is related to a criminal organisation, terrorist organisation or terrorist financing. The Financial Intelligence Unit (Money Laundering Reporting Office) is an agency established at the Federal Criminal Police Office. Transactions that create a reporting obligation must not be carried out subject to instructions from the Money Laundering Reporting Office.[43]

V REGULATION OF EXCHANGES

Before the last amendment to the FM-GwG, there were no specific regulations of crypto exchanges in Austria. Therefore, exchanges of virtual currency did not have to obtain a licence or register entry, with the exception of a commercial licence pursuant to the Commerce Regulation.

As mentioned in Section I.i, on 10 January 2020, the amendments to the FM-GwG implementing the Fifth AML Directive became applicable. Providers engaged in exchange services between virtual currencies and fiat currencies or between one or more virtual currencies are regarded as service providers in relation to virtual currencies pursuant to Section 2(22)(b) and (e) FM-GwG. This qualification does not depend on whether an exchange offers trading virtual currencies for fiat money or whether it offers only the trading of one or more virtual currencies among themselves – both exchange models are regarded as service providers in relation to virtual currencies. These service providers are consequently subject to the registration requirement pursuant to Section 32a FM-GwG. The registration requirement triggers anti-money laundering requirements stipulated by the FM-GwG. However, it is insignificant from the perspective of other supervisory legislation (e.g., BWG, WAG).

If an exchange offers its services with regard to tokens that qualify as securities pursuant to MiFID II, the provisions of the Austrian Stock Exchange Act (BörseG) apply. These regulate, inter alia, multilateral systems bringing together multiple third-party buying and selling interests in a way that results in a contract – thus, the typical activity of exchanges. The operation of such a trading venue is governed by the BörseG and the WAG 2018 and requires a licence as an exchange operating company or as a security service provider. In Austria, there is currently no licensed provider of a crypto exchange that allows trading with tokens that qualify as securities.

VI REGULATION OF MINERS

Mining currently does not fit into any regulatory or supervisory structure. On 22 May 2018, the FMA published an update to its FAQ catalogue on the application of the AIFMG. In these FAQs, the FMA takes the view that certain business models in connection with the mining of cryptocurrencies may constitute an AIF.[44] The most important consequence of the applicability of the AIFMG to these business models is the inadmissibility of distribution to

43 Section 17(1) FM-GwG.

44 Piska/Völkel, 'Mining als Alternativer Investmentfonds? Angenommen, die FMA hat Recht . . .', *ecolex* 2018, 703.

private consumers, as such business models do not meet the requirements of Section 48 or 49 AIFMG.[45] However, it remains to be seen whether the FMA will eventually prevail with this view (see also Section II.i).

VII REGULATION OF ISSUERS AND SPONSORS

Genuine virtual currencies such as Bitcoin or Ether typically lack a central issuer as they are created by a large number of users via mining. For the regulation of miners see Section VI.

However, there are virtual currencies that are generated within an ICO or ITO and are therefore issued by a single person. The issuance of virtual currencies within an ICO or ITO generally does not require official authorisation. In addition, the mere issuance of virtual currencies does not trigger any licensing or registration obligations – although an issuer might be subject to those as a result of its business model. The issuance within an ICO or ITO usually fulfils the criteria of a public offer. If the issued coins or tokens qualify as either investments or securities, the prospectus obligation arising from the Prospectus Regulation or the KMG 2019 shall be met. See Section II.ii.

VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

Given that they are considered as objects under civil law, virtual currencies are qualified as a person's assets under Austrian criminal law. Therefore, both civil and criminal law apply to virtual currencies, notwithstanding the more complicated regulatory law situation. As a result, the full scope of criminal law applies to criminal conduct involving cryptocurrencies just as it would if the offence involved legal tender: for example, the embezzlement of a virtual currency or any fraudulent behaviour to elicit virtual currency is prosecuted under Austrian criminal law, and virtual currencies can be the subject matter of civil or criminal proceedings.

There are, however, certain factual difficulties both in criminal and civil procedural law, in particular when it comes to enforcement. Besides the obvious – such as the anonymity immanent to many cryptocurrencies, which leads to difficulties when trying to recover elicited or embezzled assets – there are difficulties in confiscating virtual currency in criminal procedures, and also in executing civil adjudications. At the moment, Austrian authorities have no means to seize virtual currencies other than forcing their owners to transfer a virtual currency to a wallet in the authorities' disposal. This could be done via penalties that aim to change the behaviour of the subject (such as monetary punishments and, if necessary, detention) that are limited quantitatively and qualitatively.

Such punishments cannot be inflicted upon suspects under Austrian criminal procedure law, as they are in conflict with the right not to be obliged to incriminate oneself. This principle is construed widely, prohibiting any means to force a suspect to support the authorities in criminal proceedings against a suspect itself. Therefore, if a suspect is not cooperating, it currently is largely impossible to find, seize and confiscate assets in the form of virtual currencies from suspects under Austrian criminal procedure law.

45 Rirsch/Tomanek/Wintersberger, 'Mining von Kryptowährungen im Anwendungsbereich des AIFMG', *ecolex* 2018, 699 (702).

IX TAX

According to Section 23 No. 1 of the Austrian Income Tax Act (EStG), income from a trade or business that is undertaken with the intention of making a profit can be characterised as a participation in a general economic activity.

Where cryptocurrencies are created by mining, this constitutes a commercial activity. The creation of cryptocurrencies is treated like the production of commodities. The operation of a virtual currency exchange, through which virtual currencies can be exchanged for other virtual currencies or purchased for fiat money, is considered a commercial activity, and thus any income derived from such business is subject to income tax. This also applies to virtual currency automated teller machines through which virtual currencies can be purchased, for example, by inserting euro banknotes.

The income tax treatment of virtual currencies held as private assets depends on whether they are interest-bearing. In that case, virtual currencies are qualified as assets pursuant to Section 27(3) EStG. For non-interest-bearing assets, virtual currencies are subject to taxation according to Section 31 EStG in cases where the period between the acquisition and the disposal does not exceed one year. In cases of different units of a virtual currency having been acquired at different points in time but all being held in the same wallet, the units acquired first are treated as being disposed of first (the 'first in, first out' principle).

As regards value added tax (VAT), the exchange of fiat money for Bitcoin or other similar virtual currencies and vice versa is not subject to VAT. The Court of Justice of the European Union confirmed this in its landmark ruling in the Swedish *Hedqvist* case, which is transferrable to Austria due to the harmonisation of the VAT legislation across the European Union.[46] According to the Austrian tax authorities, mining is also not subject to VAT owing to the lack of an identifiable beneficiary.[47]

With regard to using virtual currencies for paying for goods or services, in general the same tax rules apply as when using legal tender. The basis for the tax assessment is determined by the value of the virtual currency.

X LOOKING AHEAD

The past six months have brought much change with respect to the regulation of cryptocurrencies. Now that the legislature has done its duty, the ball is in the court of authorities and courts. Especially with regard to the terms of the FM-GwG, which are subject to interpretation, the administrative courts and authorities can be expected to clarify the requirements. However, it is questionable how soon the FMA will contribute in this regard, as it is currently being flooded with register applications in connection with virtual currencies.

In July 2020, the Austrian Parliament adopted an amendment of the Financial Market Authority Act, introducing a regulatory sandbox.[48] At the time of writing, the amendment has not yet been published in the Federal Law Gazette. However, the final text of the amendment is already known and will not be subject to further changes. The concept of a regulatory sandbox enables companies to test their business models under the supervision of the FMA

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46 CJEU, 22 October 2015, C-264/14, *Hedqvist*.

47 Ponesch-Urbanek/Beer, 'Kryptowährungen im Experten-Check', ögwthema 2017 H 4, 16; CJEU, 22 October 2015, C-264/14, *Hedqvist*.

48 See legal text adopted by the Austrian Parliament (https://www.parlament.gv.at/PAKT/VHG/XXVII/I/I_00193/index.shtml#tab-Uebersicht; accessed on 22 July 2020).

and is based on similar concepts introduced by other European supervisory authorities, such as the UK Financial Conduct Authority. After receiving a licence for the regulatory sandbox, licences required for the actual exercise of the business model can be applied for separately. However, a participant in the regulatory sandbox may already carry out the envisaged business activities and is not limited to theoretical tests and simulations. The FMA will provide support during this process. As participation in the sandbox programme is restricted to business models that will help to innovate the financial market, fintech companies and business models in the cryptocurrency sector should benefit enormously from this newly introduced concept. In addition, miners and exchanges could use the regulatory sandbox to test their business models in compliance with regulatory requirements and by receiving assistance from the FMA.

Appendix 1

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Since joining Brandl & Talos in 2009, Nicholas frequently contributes to Austrian and international legal journals and regularly speaks at international conferences.

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Raphael Toman is an attorney at Brandl & Talos, specialising in capital markets, banking and securities regulatory law, anti-money laundering and litigation. Clients appreciate his expertise in all matters related to licensing before the Austrian Financial Market Authority, where he also advises virtual currencies service providers on all applicable regulations. Additionally, he advises virtual currencies and other financial services providers in proceedings before civil and administrative courts.

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ISBN 978-1-83862-513-9