

Necessity of the Regulation of Virtual Currency in Bosnia and Herzegovina in the EU Harmonisation Process

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Abstract

Given the fact that most virtual currencies are not regulated by national governments, they are considered alternative currencies that exist outside the borders of national monetary policy. Therefore, the main goal of this study is to point out the basic specifics of virtual currencies and their legal status in the legislation of individual European countries through an analysis of available academic literature and positive legal regulations, with special reference to regulation at different authority levels in Bosnia and Herzegovina. Moreover, the purpose of this study is to point out the achieved European standards in this area, which should be followed by the legislation at different authority levels within BiH in the process of European integration.

Keywords: virtual currencies, EU accession, lack of legal regulation.

I. Initial considerations

Virtual currencies are alternative means of payment and a type of digital, predominantly unregulated money used to conduct transactions within a specific virtual community, which are not controlled by a country's central bank. The fast-growing market for these currencies has also brought to the fore the various terms used to describe the various products that all fall under the broader term cryptocurrency¹. That is, this modern form of private money may have different names such as virtual, digital, alternative or cryptocurrencies, money or coins. The main conceptual difference between different types of virtual currencies lies in the possibility of their use in international business². Behind the virtual currency stands a team of developers, and its value is determined in the market in a pure supply-demand relationship³.

This raises the question of the legal status of virtual currencies in national legislations⁴. The problem is that in most countries there are no specific regulations related to virtual currencies. Also, the legal status of virtual currencies differ from

¹ Ehrenfeld, J., Gallagher, R., Lyon, M., Potter, T., Rosenblatt, J., 2019, „Panel: Legal issues surrounding blockchain, cryptocurrency, & bitcoin“, *Transactions: The Tennessee Journal of Business law*, Vol. 20, pp. 1135-1168.

² „In the digital world, a distinction is made between virtual currency and cryptocurrency, coins, stablecoin, utility tokens and security-like tokens.“Turudić, D.A, Milić, J., Štulina, K., 2017, „Korištenje kriptovaluta u međunarodnom poslovanju“, *Zbornik sveučilišta Libertas*, Br.1-2, str 191-210.

³ Radivojević, A., 2018, *Virtual Currency Development and Regulation, Foundation for the Development of Economic Science*, No. 29, pp. 61.

⁴ See: The Law Library of Congress, *Regulation of Cryptocurrency Around the World*, June 2018, p.1. <https://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf>.

country to country and some countries therefore consider this currency a product, while others consider it an asset or financial instrument⁵. In this regard, states approach this issue in two ways: whether by defining the legal nature and regulatory status of virtual currency through existing financial regulations or by adopting new legal solutions on virtual currencies.

II. Regulation at the level of the european union and specific EU countries

At the European Union level, there have been attempts to regulate cryptocurrencies through the *Electronic Money Directive* and the *Payment Services Directive*, but it is argued that virtual currencies differ from electronic money in a way that, unlike electronic money, funds within virtual currencies are not denominated in a traditional unit of account rather but in a virtual unit of account. Therefore, cryptocurrencies should nevertheless remain outside these directives.

The first official definition of virtual currencies is set out in Directive (EU) 2018/843, better known as the Fifth Anti-Money Laundering Directive⁶. According to the definition in Directive (EU) 2018/843, "Virtual currencies represent a digital display of value that is not issued by the Central Bank". The Central Bank or public body does not guarantee transactions and payments in virtual currency. Also, virtual currencies do not have the legal status of currency or money, but natural or legal persons accept it as a means of exchange and it can be transferred, stored and traded electronically⁷.

However, this definition of virtual currency is function-based and no distinction is made as to whether virtual currencies are generated by a crypto mining process or by exchanging goods or services using blockchain technology⁸.

Thus, for example, amendments to the Austrian Law on the Prevention of Money Laundering and Terrorist Financing in Financial Markets (Finanzmarkt-Geldwäschegesetz – *FM-GwG*) implemented Directive (EU) 2018/843 into Austrian legislation and adopted a definition of virtual currency in accordance with Article 1. Paragraph 2 (d) of the Directive. However, there are no specific regulations regarding investments in virtual currencies in Austria. Virtual currencies are not formally money, nor are they a means of payment in Austria. The transactions involving virtual currencies are subject to existing legal provisions⁹.

⁵ Tomić, K., 2020, „Pravno reguliranje virtualnih valuta u Austriji i ostalim zemljama članicama Uuropske unije“, *Zbornik radova Usaglašavanje pravne regulative sa pravnim tekovinama Evropske unije*, godina 4, broj 4, str. 370-384.

⁶ Directive (EU) 2018/843 of the European Parliament and of the Council from May 30, 2018 amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Ppurpose of Money Laundering or Terrorist Financing and amending Directives 2009/138 / EC and 2013/36 / EU, Official Journal of the European Union L 156/43.

⁷ Article 1, paragraph 2, point (d) of Directive (EU) 2018/843.

⁸ Tomić, K., 2018, „Blockchain tehnologija, pametni ugovori i njihova implementacija u industriji osiguranja“, *Zbornik radova Pravo i praksa osiguranja –izazovi, nove tehnologije i korporativno upravljanje*, str.133-144.

⁹ In relation to Bitcoin business, the Austrian Financial Market Authority (FMA) explicitly states in its report that "Bitcoin is not unregulated." A similar rationale should apply to other virtual currencies. <https://www.fma.gv.at/en/cross-sectoral-topics/fintech-navigator/bitcoin-co/> (the last visit to website on February 23, 2020).

In this regard, the existing taxation system in Austria applies to the taxation of transactions in virtual currencies. For example, in the case of the sale of Bitcoin within one year from the date of purchase, there is an obligation to pay personal income tax (*Einkommensteuer*) because this type of purchase is considered speculative. On the other hand, virtual currency mining falls under the commercial activity (*gewerbliche Tätigkeit*) in which new value is created. This activity falls under taxation like any other creation of new values. Trade in virtual currencies can be viewed as trade in any other goods, and to perform the activity of trade it is necessary that a legal entity or a natural person – an entrepreneur meets the general conditions for performing the activity. Cryptocurrency mining imposes obligations to obtain a license to conduct trading activities. This is related to the much more complex question of whether cryptocurrencies should be viewed as commodities or currencies. If we look at cryptocurrencies as currencies, mining with cryptocurrencies would be an illegal banknote production activity over which the state has a monopoly. It would be more correct to view cryptocurrencies, as commodities and mining cryptocurrencies, as a trading activity because there is no source that claims that cryptocurrencies are completely illegal and that it is a violation of monopoly¹⁰.

On the other hand, in FR Germany there is still no specific regulatory framework for virtual currencies and virtual assets, and instead the laws are used that regulate the financial sector. Different types of virtual currencies, virtual financial assets, innovative technologies and services fall under the law regulating the capital market, banking, financial services, anti-money laundering and other laws¹¹. The classification of virtual currencies by a certain type of money in FR Germany has the consequence that virtual currencies are considered like foreign currencies. Therefore, income or profit from the sale of virtual currencies within one year from the acquisition of the currency is considered taxable income. Income or profit from the sale or purchase of virtual currency after one year from the purchase of currency¹².

German law does not provide for a general ban on the issuance, crypto mining, delivery and trading of virtual currencies. However, in cases of investments and transactions in virtual currencies, the provisions related to licensing are applicable. From a technical legal perspective, in 2013 the German financial supervisory authority *BaFin* (*Bundesanstalt für Finanzdienstleistungsaufsicht*) classified virtual currencies as financial instruments in Article 1 Paragraph 1. within the German Banking Act (*Kreditwesengesetz*) Virtual currencies fall into the subcategory of so-called "Units of Measurement" (*Rechnungseinheiten*), which are a special national category of financial instruments and which are not based on EU law.

Observing the surrounding countries, Slovenia has gone the furthest in terms of the legal regulation of this area. Thus, according to the standard classification, the cryptocurrency mining in Slovenia is one of the activities of data processing and related activities, whilst trade in cryptocurrencies is classified among other unclassified supporting business activities. Digital currencies can be purchased over 300 locations through the "Elipay" Platform and they have recently started doing business in Croatia. Also, there are online services in Serbia where you can buy and

¹⁰ Tomić, K., 2020, Pravno reguliranje virtualnih valuta u Austriji i ostalim zemljama članicama Europske unije, *op. cit.*, str. 370-384.

¹¹ Arsov, A., 2017, „Bitcoin as an Innovative Payment Currency in Germany: Development of the e-Gold Standard“, *Journal of International Business Research and Marketing*, Volume 2, Issue 2, pp. 33-42.

¹² Čičin-Šain, N., 2017, „Oporezivanje bitcoina“, *Zbornik Pravnog fakulteta Zagreb*, Vol. 67, No. 3-4, str. 655-693.

sell cryptocurrencies, and they also have ATMs in several cities such as Belgrade, Novi Sad, Nis, Subotica and Indija, where cryptocurrency is bought and sold for cash.

One of the main issues that arise in connection with the use of virtual currencies in everyday life is certainly the issue of paying taxes in the process. It should be noted that in answering this question, the challenge is how to categorize the virtual currencies and specific activities that are related to cryptocurrencies for tax purposes. This is important because profit from mining or selling cryptocurrencies will be categorized as income or capital gain and will affect the type of tax as well as determination of the tax base¹³. For example, some European Union countries have categorized cryptocurrencies differently for tax purposes: Bulgaria – taxed as a financial asset, Denmark – subject to personal income tax, Spain – subject to corporate income tax, United Kingdom – corporations and companies pay corporate income tax, individuals pay capital gain tax etc.

III. Current Situation In Bosnia And Herzegovina

In Bosnia and Herzegovina, i.e. on different authority levels there is no law or any other kind of regulation that specifically regulates cryptocurrencies, nor recognizes their status as money. Also, there is currently no law in the procedure that would specifically regulate this area. Also, there is currently no pending law procedure that would specifically regulate this area. However, trading and possession of cryptocurrencies is not illegal, i.e. the acquisition and holding of cryptocurrencies, as well as their trading, is not prohibited in Bosnia and Herzegovina, but is simply not defined. Therefore, all natural or legal persons who decide to do business with cryptocurrencies in BiH, they operate at their own risk.

At the same time, cryptocurrencies are present in Bosnia and Herzegovina and an increasing number of companies are connecting buyers and sellers of cryptocurrencies precisely due to the lack of legal regulations. In this regard, in 2017, the first non-profit educational forum Crypto.ba was established. On the other hand, the first crypto exchange in Bosnia and Herzegovina was established in mid-2018, and it is BCX (*Balkan Crypto Exchange*) situated in Banja Luka. This is the first platform in Bosnia and Herzegovina for buying, selling, exchanging, trading, storing and managing digital assets i.e. cryptocurrencies¹⁴.

If viewed from a legal angle, cryptocurrency is subject to the division of things as *res in commercio* – a thing that is the subject of legal affairs; *res incorporales* – as a virtual, incorporeal thing, and as *res mobiles* – a movable thing. It is of a financial nature, and by selling / exchanging it on the market, natural and / or legal persons gain a certain financial benefit. Regarding the legal nature of cryptocurrencies, and analyzing the possible accounting treatment of cryptocurrencies, it should be emphasized that in accordance with International Accounting Standards, cryptocurrencies can not

¹³ The Law Library of Congress, *Regulation of Cryptocurrency Around the World*, June 2018, pp. 2-3.

¹⁴ It is also interesting to mention is that the largest cryptocurrency dispute in the region, and perhaps beyond, is currently being conducted before the District Commercial Court in Banja Luka. Namely, the company "Bitminer Factory" from Gradiška is demanding from "Unicredit Bank" Banja Luka one hundred million dollars (about 180 million marks) because the company believes that the Bank is the main culprit for the failure of the project based on "blockchain" technology, which this company intended to implement in Republic of Srpska. In the particular case, UniCredit Bank a.d. Banja Luka unilaterally closed the account of the company "Bitminer Factory" with the explanation that in accordance with the business policy they do not do business with companies that deal with cryptocurrencies.

be considered cash (according to IAS 7), can not be considered a financial instrument (according to IAS 32), can not be considered property, plant or equipment (according to IAS 16) and can not be considered inventories (according to IAS 2)¹⁵. However, cryptocurrencies can be viewed as intangible assets¹⁶. For example, International Accounting Standard – IAS 38 defines intangible assets as non-monetary assets without identifiable physical substance.

With regards to that, and from the perspective of corporate income tax when disposing of intangible assets or their retirement/decommissioning, the difference between the book value of an asset at the moment of its derecognition and the net inflow resulting from the disposal of the intangible asset, shall be deemed as a gain or loss. Booking is carried out by crediting the corresponding account where the intangible assets are recorded (and possibly debiting the corresponding allowance account) and the corresponding disposal receivables (e.g. domestic trade receivables etc.), and the difference is credited or debited to the other income account group or other expense account group. The Organisation, in accordance with IAS 38, should assess whether the lifetime of an intangible asset is limited or unlimited. Although companies in both FBiH and RS are treated with two different corporate tax laws¹⁷, there is essentially no tax difference for companies, based on their headquarters.

Considering the value added tax, it should be noted that the provisions of Article 3 of the Law on Value Added Tax¹⁸ stipulate that the subject of VAT are supplies of goods and services (hereinafter: supply of goods and services) which a taxpayer, within the performance of his economic activities, makes for consideration within the territory of Bosnia and Herzegovina, as well as the importation of goods into Bosnia and Herzegovina. According to the provision of Article 4, Paragraph 1 of the Law, the supply of goods, within the meaning of this Law, is the transfer of the right to the disposal of items (hereinafter: goods) to the person who may dispose of these goods as owner. According to the provisions of Article 8, Paragraph 1 of the Law, the supply of services, within the meaning of this Law, are any operations and actions carried out within the performance of an economic activity, which does not constitute a supply of goods referred to in Articles 4 – 7 of this Law. Cryptocurrencies, in their essence, represent virtual money, which is not approved by the competent state authorities i.e. do not represent legal tender. Having in mind the above provisions of the Law governing the subject of VAT taxation, as well as the essence of cryptocurrencies, the sale of virtual currency is not subject to taxation, since the fee earned on that basis does not constitute a fee for taxable supply of goods or services. Namely, in its essence, the sale of cryptocurrencies has the same character as the sale of value vouchers, based on which voucher holders can buy goods or receive services. Moreover, the purchase of cryptocurrencies does not represent an advance payment, since the purchase of cryptocurrencies does not represent a fee for certain future turnover of goods and services (when selling cryptocurrency it is not known which

¹⁵ <https://unija.com.bs/kriptovalute-u-bosni-i-hercegovini/> pristup decembar 2020.godine.

¹⁶ Compare: Bolotaeva O.S., Stepanova, A.A., Alekseeva, S.S., 2019, „The Legal Nature of Cryptocurrency“, International science and technology conference Earth and Environmental Science, 272 (2019) 032166, pp. 1-5.

¹⁷ Corporate Income Tax Law of the Republic of Srpska („Official Gazette of the Republic of Srpska“, No.: 94/ 2015, 1/2017 and 58/2019). Corporate Income Tax Law of the Federation BiH („Official Gazette of the FBiH“, No.: 15/ 2016 and 15/2020).

¹⁸ Law on Value Added Tax in Bosnia and Herzegovina („Official Gazette of the BiH“, No. 9/2005, 35/2005, 100/2008 and 33/2017).

goods or services will be delivered, at what tax rate will be taxed etc.). VAT treatment is not affected by whether the cryptocurrency is sold in Bosnia and Herzegovina or abroad¹⁹.

It is to be stressed that a similar view was taken by the European Court of Justice on October 22, 2015, when answered the question in regard the VAT taxation of the service of exchanging traditional currency for cryptocurrency and vice versa, answering the Swedish court's question whether these transactions can be exempted from the taxation of VAT prescribed by national legislation as well as the exceptions to the EU VAT Directive 2006/112 / EC in which it took the view that certain provisions of Article 135 of the Directive should be interpreted in such a way that such supplies do not fall within the scope of those provisions.

It should be emphasized that a similar understanding was taken by the European Court of Justice when on October 22, 2015 it answered the question of value added tax on the service of exchanging traditional currency for cryptocurrency and vice versa, answering the question of the Swedish court whether these transactions can be classified as exemptions from VAT prescribed by national law and exemptions from the EU VAT Directive 2006/112 / EC in which it took the view that certain provisions of Article 135 of the Directive should be interpreted in such a way that such supplies of services do not fall within the scope of those provisions.

The Personal Income Tax Law, neither in the Federation of BiH, nor in the Republika Srpska, does not explicitly prescribe the method of taxation, and in connection with possible legal and tax treatments and the framework of income from the sale of cryptocurrencies²⁰. However, bearing in mind the extent of general provisions of these laws, it is possible that this type of income might be classified under the income most analogous to it.

Thus, for example, according to the provisions of the Personal Income Tax Law in the Federation of BiH, cryptocurrencies can not be considered income from capital because the Law specifies the categories of income that are considered income from capital, and cryptocurrencies can not be classified under any of category. Also, this type of income can not be considered as capital gains. On the other hand, the Personal Income Tax Law in the Republic of Srpska prescribes somewhat more categories of taxation. However, taking into account all of the above, income from the sale of cryptocurrencies, from the aspect of the Law on taxation of personal income of the citizens, could most closely be subject to taxation from non-self-employed activities i.e. other income at a rate of 10%. In that connection, this type of income would be included in the sum of income that is subject to taxation by the annual personal income tax of citizens.

IV. Concluding remarks

The legal system of a country is a system of rules and norms that regulate the behavior of citizens and which seeks to cover the most diverse life situations of its citizens. Therefore, the generality of certain norms in that system guarantees the possibility to bring under them the widest possible number of real events. However,

¹⁹ <https://unija.com/bs/kriptovalute-u-bosni-i-hercegovini/> website visited in December 2020..

²⁰ Personal Income Tax Law of the Republic of Srpska Srpske („Official Gazette of the Republic of Srpska“, No.: 60/ 2015, 5/2016, 66/2018 and 105/2019). Personal Income Tax Law of the Federation BiH („Official Gazette of the FBiH“, No.: 10/2008, 9/2010, 44/2011, 7/2013 and 65/2013).

the fact that something is not regulated by positive legal regulations does not affect the existence and development of it in the real world. The situation is the same with virtual currencies.

Some research indicates that the response of countries in the world in relation to the appearance of virtual currencies ranges from countries that completely ban their use (Egypt, Iraq, Morocco, Pakistan etc.), through countries that try to through existing tax legislation (e.g. Austria, Germany, Finland, Italy, Poland, Romania, Spain etc.) or legislation in the area of prevention of money laundering and financing of terrorist activities (Czech Republic, Estonia, Luxembourg) resolve this issue, to countries that enact special laws to regulate this area and fully support the use of virtual currencies in everyday life, and even develop their own or regional virtual currencies (e.g. Ireland, Lithuania, China).

Currently in Bosnia and Herzegovina, at all authority levels, there is no special legal framework for regulating transactions made in cryptocurrencies, which define their concept and status. Therefore, due to the lack of regulation, cryptocurrency payment takes place in a market that is in some way beyond the reach of the tax authorities, because the laws on personal and corporate income tax do not regulate this area in a precise way in Bosnia and Herzegovina. Also, the Law on Prevention of Money Laundering and Terrorist Financing is currently not harmonized with the so-called the 5th EU Directive in this area. However, a cross-sectoral working group has been established which in the coming period should, in accordance with commitments arising under Negotiating Chapter 4 in the process of EU integration, propose amendments in line with the Directive or adoption of a new piece of legislation²¹.

Firstly, in this regard, it would be good to define the concept of blockchain technology and cryptocurrencies at various levels of government in Bosnia and Herzegovina and then specifically regulate them since they represent this new fact in the real world, that is, our everyday life that should be covered by the legal system. Until then, the existing tax legislation should certainly be applied.

In the event of future standardization, issues related to decentralization and anonymity should certainly be taken into consideration, in the sense that there are no intermediaries in transactions related to virtual currencies, that transactions do not contain personal data, and that the competent authorities cannot currently monitor transactions or stop the conclusion of transaction. In this regard, it is necessary to regulate this area in accordance with the adopted standards of the European Union for the prevention of money laundering and financing of terrorist activities, in a way that the identity of traders is known, and that trading platforms exercise due supervision over their clients.

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²¹ Law on money laundering and financing of terrorist activities („Official Gazette of the BiH“ No. 47/14 and 67/16)

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