# THE VIRTUAL CURRENCY REGULATION REVIEW

SECOND EDITION

**Editors**
Michael S Sackheim and Nathan A Howell

THE LAWREVIEWS

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# PREFACE

We are pleased to introduce the second 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 2018 and early 2019. As examples, in May 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 to be used to make payments by people without bank accounts and for currency conversions.

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. On 28 May 2019, the International Organizations of Securities Commissions (IOSCO) published a report titled 'Issues, Risks and Regulatory Considerations Relating to Cryptoassets'. This report provided guidance on the unique issues concerning overseeing cryptoasset trading platforms that provide onboarding, clearing, settlement, custody, market making and advisory services for investors under the umbrella of a single venue. IOSCO advised global regulators of these platforms that their goals should be to ensure that investors are protected, fraud and manipulation are prevented, cryptoassets are sold in a fair way and systemic risk is reduced – the same goals that apply to securities regulation. IOSCO also advised that national regulators should share information, monitor market abuse, take enforcement actions against cryptoasset trading platforms when appropriate and ensure that these venues are resilient to cyberattacks. In the United States, the US Securities and Exchange Commission has not yet approved public offerings of virtual currency exchange-traded funds. The US Commodity Futures Trading Commission (CFTC) has approved of virtual currency futures trading on regulated exchanges and the trading of virtual currency swaps on regulated swap executed facilities. US regulators remain concerned about potential abuses and manipulative activity concerning virtual currencies, including the proliferation of fraudulent virtual currency Ponzi schemes. In May 2019, the US Financial Crimes Enforcement Network issued guidance concerning the application of bank secrecy laws relating to financial institutions with respect to identifying and reporting suspicious activities by criminals and other bad actors who exploit convertible virtual currencies (virtual currencies whose values can be substituted for fiat currencies) for illicit purposes. The CFTC also issued an alert offering potential whistle-blower rewards to members of the public who report virtual currency fraud or manipulation to the CFTC.

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.

Whether virtual currencies will be widely and consistently in commercial use remains uncertain. However, the virtual currency revolution has now come far enough and has endured a sufficient number of potentially fatal events that we are confident virtual currency in some form is here to stay. Virtual currencies and the blockchain and other distributed ledger technology on which they are based are real, and are being deployed right now in many markets and for many purposes. These technologies are being put in place in the real world, and we as lawyers must now endeavour to understand what that means for our clients.

Virtual currencies are essentially 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'. For example, a virtual currency, which is not a fiat currency, may be regulated in the same manner as money, or in the same manner as a security or commodity. We make one general observation at the outset: there is no consistency across jurisdictions in their approach to regulating virtual currencies. That is, 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 to assemble.

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. 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 and 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. We believe optimal regulatory structures will emerge and converge over time. Ultimately, the borderless nature of these markets allows market participants to 'vote with their feet', and they will gravitate toward 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 bricks-and-mortar business. Computer servers are relatively easy to relocate; factories and workers are less so.

The second 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.

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 cryptoassets, 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 edition of the *Review* from members of the legal community throughout the world, we are confident that attorneys will find the updated second 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 second edition of the *Review*, and particularly the United States chapter.

**Michael S Sackheim and Nathan A Howell**
Sidley Austin LLP
New York and Chicago
August 2019

**Chapter 24**

# SPAIN

*Pilar Lluesma Rodrigo and Alberto Gil Soriano*[1]

## I INTRODUCTION TO THE LEGAL AND REGULATORY FRAMEWORK

In Spain, there is no legislation specific to virtual currencies, nor is any draft legislation in the pipeline. There is only one piece of draft legislation, approved by the government in February 2019, which indirectly relates to virtual currencies, although it has not yet been debated in the Spanish parliament. This draft legislation includes measures for the digital transformation of the financial system, including the legal framework for a regulatory sandbox.[2]

That said, in 2018 the Spanish securities regulator (CNMV) and the Bank of Spain issued joint advice on the risks associated with purchasing virtual currencies or investing in products tied to them,[3] and the CNMV has issued two other documents setting out its opinion and position on several matters related to virtual currencies. However, thus far in 2019, only the CNMV has issued an statement to clarify that it has not authorised any prospectus, nor has it exercised any authorisation for or power to verify any transaction in connection with cryptocurrencies.[4]

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

## II SECURITIES AND INVESTMENT LAWS

### i Classification and commercialisation of virtual currencies

The CNMV has unofficially stated that virtual currencies per se should not be considered as securities. However, it has acknowledged that the offering and commercialisation of virtual currencies can have investment law implications as follows.[5]

#### *Direct marketing*

Where virtual currencies are acquired through platforms operating on the internet (exchanges) and through cryptocurrency automatic teller machines (ATMs), the CNMV considers that investors do not actually directly own the virtual currencies, and instead only have rights

1 Pilar Lluesma Rodrigo is counsel and Alberto Gil Soriano is a senior associate at Uría Menéndez.
The authors would like to thank Alberto Gómez Fraga and Alejandro Virumbrales de Rojas for their collaboration on this chapter.

2 http://www.rdmf.es/wp-content/uploads/2018/07/Anteproyecto-sandbox-fintech.pdf.

3 https://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/18/presbe2018_07en.pdf.

4 https://www.cnmv.es/portal/verDoc.axd?t={76316281-6a21-42a5-b742-085dca1d9c7f}.

5 See CNMV considerations on cryptocurrencies and ICOs addressed to market professionals, 8 February 2018.

in relation to an unsupervised exchange or intermediary. As a consequence, purchasers are exposed to the risk of an intermediary becoming insolvent or not complying with basic rules on proper record-keeping, diligent custody and recording of assets, and the correct management of conflicts of interest.

***Contracts for differences***

Entities offering these products should be authorised by the CNMV to provide investment services and meet all reporting obligations and other applicable rules of conduct.

***Futures, options and other derivatives***

If these types of products have been authorised by a regulated supervisor, their active marketing under a public offering by market professionals to retail investors might require a prospectus approved by the CNMV or another EU authority under the passporting arrangements.

***Specific investment funds and other collective investment vehicles that invest in virtual currencies***

These types of vehicles and investment funds should be approved or registered by the CNMV. The CNMV[6] has acknowledged that, in accordance with Article 2.1 of Law 22/2014, a closed-ended collective investment scheme can invest directly in virtual currencies, but it has to be registered with the CNMV. In this regard, the CNMV has pointed out that the divestment policies of its participants or partners must meet the following requirements: divestment must take place simultaneously with respect to all investors and participants; and investors and participants must be remunerated according to the articles of association or regulations for each class of shares or participations.

This type of fund cannot be marketed to retail investors.

***Acquiring structured bonds where the underlying asset is a virtual currency***

The marketing under a public offering regime of exchange-traded products and exchange-traded notes requires the approval of the supervisors of an explanatory prospectus that has also been subject to the relevant EU passporting procedure.

### ii Initial coin offerings

The CNMV[7] understands that transactions structured as initial coin offerings (ICOs) in many cases should be treated as issues or public offerings of transferable securities given the broad definition of transferable security under Spanish law.[8]

6 See Questions and Answers for FinTech companies on activities and services that may be within the CNMV's remit, last updated 12 March 2019.

7 See CNMV considerations on cryptocurrencies and ICOs addressed to market professionals, 8 February 2018.

8 Article 2.1. of the Spanish Securities Law: 'Any patrimonial right, regardless of its name, which, because of its legal configuration and system of transfer, can be traded in a generalised and impersonal way on a financial market.'

The CNMV sets out the following factors as being relevant in assessing whether transferable securities are being offered through an ICO:

*a* tokens that assign rights or expectations of a share in the potential increase in value or profitability of businesses or projects or, in general, that they constitute or assign rights equivalent or similar to those of shares, bonds or other financial instruments governed by Spanish securities law; or

*b* tokens that entitle access to services or to receive goods or products, that they are offered referring explicitly or implicitly to the expectation that the purchaser or investor will obtain a profit as a result of their increase in value or some form of remuneration associated with the instrument, or reference is made to its liquidity or tradability on equivalent or allegedly similar markets to regulated securities markets.

However, with regard to point (b) above, if it cannot be reasonably established that there is a correlation between the expectations of a profit or an increase of value and the evolution of the underlying business or project, then the token should not be considered a financial instrument.[9]

If ICOs qualify as financial instruments, then the regulation contained in, relating to or arising from the Markets in Financial Instruments Directive II, the Prospectus Directive and the Alternative Investment Fund Managers Directive should apply to them.

Even if an ICO does not qualify as a public offer (because it is either aimed at fewer than 150 investors, or involves a minimum investment of €100,000 or a total amount of less than €5 million), if the placement is made using whatsoever form of advertising (including websites in Spanish offering the tokens), an entity authorised to provide investment services should intervene in relation to its marketing.[10] The CNMV understands that this requirement is fulfilled if the entity authorised to provide investment services intervenes:

*a* on the occasion of each individual subscription or acquisition of the securities or financial instruments as a placement agent, broker or adviser, subject to the rules applicable in each case; or

*b* by validating and supervising the offer in general and, in particular, the information provided to investors, and the placement or marketing procedure used (without an authorised entity having to intervene on the occasion of each subscription or acquisition). With regard to the validation of information, the authorised entity must ensure that the information is clear, impartial and not misleading, and that it refers to the characteristics and risks of the securities issued, as well as the company's legal, economic and financial situation, in a sufficiently detailed manner to allow the investor to make a well-informed investment decision. Likewise, the information for investors shall include a warning on the novel nature of the registry technology and on the fact that the custody of the tokens is not carried out by an authorised entity.

To date, the CNMV has not authorised any ICOs, although it has analysed several potential ICO structures. The action of the CNMV in connection with those projects on the issue of tokens, which could be equivalent to transferable securities, has been limited to confirm that in the event of complying with the requirements set out in the Spanish legislation not be

9 See CNMV Criteria in relation to ICO, 20 September 2018.

10 Article 35.3 of the Spanish Securities Law.

considered as a public offer, the transaction would not require the approval of a prospectus; nor would it be subject to verification or prior intervention by the CNMV, although the participation of an investment firm is necessary.

## III BANKING AND MONEY TRANSMISSION

The Bank of Spain, the Spanish authority responsible for banking and money transfer matters, has not issued any statement or otherwise set out its position on virtual currencies other than in the aforementioned joint warning issued with the CNMV.

According to the joint warning, and although they acknowledge that virtual currencies are occasionally presented as an alternative to legal tender, the Spanish authorities note that the former differ greatly from the latter in that their acceptance as a means of payment of a debt or other obligations is not mandatory, their circulation is very limited and their value fluctuates widely, meaning that they cannot be considered as a sound store of value or a stable unit of account.

In this regard, the advice of the European Banking Authority on crypto assets of 9 January 2019 provides that a competent authority will consider a token to be electronic money if it: is electronically stored; has monetary value; represents a claim on the issuer; is issued on receipt of funds; is issued for the purpose of making payment transactions; and is accepted by persons other than the issuer.[11]

At present, no virtual currency, including Bitcoin, is recognised by Spanish law as a digital currency, electronic money or as a payment method.

## IV ANTI-MONEY LAUNDERING

Without prejudice to the warnings issued by the Bank of Spain and the CNMV on money laundering risks regarding virtual currencies themselves and the activities related to them, there is no specific Spanish money laundering regulation (in force or in draft form) applicable to virtual currencies, and the Executive Service of the Commission for the Prevention of Money Laundering and Monetary Offences (SEPBLAC), the Spanish money laundering authority, has not expressed its view on this matter.

The implementation of the Fifth Anti-Money Laundering Directive[12] is not expected to be implemented into the Spanish legislation in the short term.

## V REGULATION OF EXCHANGES

The regulation to which an exchange is subject under Spanish law depends on whether or not the assets are traded as financial instruments and on the type of activity performed within the exchange.

Although there is no specific regulation on trading platforms for virtual currencies or other crypto assets, the CNMV[13] has indicated that to the extent that the assets traded in an exchange are not considered as financial instruments, at a very minimum they should

11 https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf.

12 Directive (EU) 2018/843 of 30 May 2018.

13 See Questions and Answers for FinTech companies on activities and services that may be within CNMV's remit, last updated 12 March 2019.

be subject to rules related to custody, registration, management of conflicts of interest between clients and transparency on fees (in addition to anti-money laundering regulations). Therefore, the CNMV recommends that these platforms voluntarily apply the principles of securities market regulations relating to the aforementioned matters to ensure the proper functioning of their activities. If they qualify as financial instruments, Spanish securities market legislation applies, which means the corresponding authorisations must be obtained, including, where appropriate, an authorisation as a trading venue (such as a regulated market, a multilateral trading system or an organised trading facility), or as an investment firm or credit institution that operates as a systematic internaliser.

However, the Bank of Spain has not given any guidance as to whether activities performed by an exchange would qualify as payment services or currency exchange services for regulatory purposes where virtual currencies are used solely for payment purposes (not as securities or similar).

To the extent that regulated markets, multilateral trading facilities (MTFs) and organised trading facilities (OTFs) located in Spain require that the instruments traded on or through them be represented in book entries, tokens cannot be traded in Spanish regulated markets, MTFs or OTFs because they cannot be represented in book entries.

## VI REGULATION OF MINERS

With the exception of the tax issues explained in Section IX, there is no regulation of miners in Spain, and the Bank of Spain and the CNMV have not expressed their views on this matter.

However, to the extent that miners would not be considered as issuers of financial instruments or electronic money, or as placing financial instruments, no licence or authorisation would be required under Spanish law to mine.

## VII REGULATION OF ISSUERS AND SPONSORS

To the extent that virtual currencies could be classed as financial instruments or as electronic money, their issuers must obtain the corresponding authorisations from the CNMV and the Bank of Spain. In terms of virtual currencies as financial instruments, see Section II.ii regarding ICOs. Neither the Bank of Spain nor the current legislation considers a virtual currency as electronic money; therefore, its issuance falls outside the scope of the Spanish legislation on electronic money institutions, although the assessment has to be made on a case-by-case basis.

The concept of sponsor does not exist under Spanish law.

## VIII CRIMINAL AND CIVIL FRAUD AND ENFORCEMENT

In recent years, fraud through improper acts of disposition relating to cryptocurrencies such as Bitcoin has been increasing. As with any other type of asset, there are certain criminal liabilities when dealing with virtual currencies, given that the conduct of a third party (such as a wealth manager) may cause a loss to the investor's equity.

First, it must be kept in mind that equity as a whole is the legal interest protected from the crime of fraud and that cryptocurrencies are a part of this equity because they are considered valuable assets. As a consequence, improper acts of disposition of cryptocurrency assets are protected under criminal law. The behaviour described is considered punishable when the requirements in Article 248 of the Criminal Code have been met. This Article sets out the ways in which the crime of fraud can be considered to have been committed.

The first of those is in Article 248.1: when the perpetrator, for financial gain and by means of deception, induces an essential error relating to the victim that produces an act of disposition of assets to his or her own detriment or to the detriment of a third party. In addition, there must be a link between the deception of the perpetrator and the act of disposition of the victim (see High Court Judgment 531/2015 of 23 September).

Article 248.1 also provides for another type of fraud in cases in which perpetrators effect a manipulation through a computer or similar device to carry out a non-consensual transfer of an asset to the detriment of the victim or a third party (High Court Judgment 860/2008 of 17 December). This is computer fraud, a type of fraud set out in Article 248.2.a) of the Criminal Code. This Article sets out the same scheme as described above but without the need for deception – which is interpreted narrowly – as it is replaced by manipulation through a computer. Where there must be a deception for there to be traditional fraud, there must be manipulation through a computer or similar device for there to be computer fraud. This implies that this crime can be committed through a range of behaviours, given the breadth of the expression 'manipulation through a computer or similar device'. Thus, for example, the offence would be committed when an individual alters an email address or bank account number or implants files that unlock a user's passwords.

Judgment 326/2019 of June 20 of the Criminal Chamber of the Supreme Court ruled on Spain's first case of fraud regarding cryptocurrencies under Article 248.1 of the Criminal Code. In this case, the Supreme Court upheld the sentence of imprisonment given to a director of a company as the perpetrator of the offence of fraud. According to the judgment, the director signed several high-level trading agreements under which he committed to manage Bitcoins that were delivered to him as a deposit, reinvest the potential dividends and, finally, at maturity, deliver the profits obtained in exchange for a commission. However, it was proven that at the time of signing those agreements, he did not intend to fulfil his obligations as he had not carried out any transactions, and his only intention was to seize the received Bitcoins and simulate the execution of the agreements.

In the judgment, the Supreme Court held that cryptocurrencies are an intangible asset and not physical money, and consequently cannot be considered as money in the legal sense. Thus, although the victim delivered cryptocurrencies (and subsequently lost them because of the fraud), the perpetrator had to pay back the equivalent value in euros of the cryptocurrencies at the time when they were delivered.

The criminal proceedings through which these crimes are prosecuted in Spain do not contain any special provision for when the disposition of assets relates to a type of cryptocurrency instead of a traditional currency. Therefore, the procedure for summary proceedings will apply if the penalty does not exceed nine years in prison.

These proceedings are divided into three phases. The first is the pretrial phase, in which the judge will try to obtain evidence to determine whether the investigated behaviour may be considered criminal and, if so, discover the identity of the perpetrator. The second is the intermediate phase, in which the prosecution and defence will draft their respective reports. The third phase is the oral trial, in which the admitted evidence is assessed.

The main procedural difficulties faced by the Spanish authorities when it comes to prosecuting these crimes are the lack of jurisdiction and competence. The anonymity with which perpetrators act, the places from which they do so (in most cases this is outside Spain) and the fact that the funds usually go to other countries prevent action being taken against them through the judicial route in Spain.

## IX TAX

Virtual currencies perform an economic function (store of value or medium of exchange), which means that their possession and use may have tax implications. In addition, they pose a higher-than-average risk of being used as a means to commit tax fraud given that it is very difficult to determine the true identity of their owners (to the point that they are almost anonymous), and that the transactions are peer-to-peer and may have a cross-border element, and therefore the ability of tax authorities to monitor them is reduced. All this has put them under the spotlight of the Spanish tax authorities, albeit the tax regime and reporting obligations regarding virtual currencies are still at an early stage.

### i Income tax and value added tax (dynamic approach)

The tax treatment of virtual currencies and their trading differs within the country, depending on the tax. From an accounting standpoint, the Spanish Accounting Board considers virtual currencies to be an intangible asset or a commercial stock, depending on their use.

To date, the Spanish tax authorities have considered that any operation (except mining) with virtual currencies constitutes a barter transaction for income tax purposes (personal income tax, corporate income tax and non-resident income tax), which means that users of virtual currencies make a capital gain or loss with any delivery of virtual currencies; and tax compliance becomes complicated and burdensome for both the taxpayer and the tax authority.

The Spanish tax authorities set out in binding tax ruling V0808-18 of 22 March that the use of virtual currencies outside of the performance of an economic activity may result in capital gains or losses at the moment in which the transaction takes place (Article 14.1.c) of Law 35/2006 of 28 November on personal income tax (the PIT Law)), with a tax rate of up to 23 per cent for individuals. According to binding tax ruling V1604-18 of 11 June, fees charged by the exchange increase and the decrease the acquisition and sale price, respectively, if they are directly related to the transaction. The first-in, first-out principle applies. The income obtained from mining is considered business income, and the applicable tax rate could be as much as 48 per cent for individuals, depending on the autonomous region where they reside. The corporate income tax rate is 25 per cent, while the non-resident income tax rate is 24 per cent (19 per cent for residents of the European Union and European Economic Area). The Spanish tax authorities also state in binding tax ruling V1149-18 of 8 May that the exit tax regulated in Article 95 *bis* of the PIT Law does not apply to virtual currencies.

As regards value added tax (VAT), the Spanish tax authorities' position, as set out in binding tax ruling V1748-18 of 18 June, is aligned with that of the European Court of Justice, which considered in *Hedqvist*[14] that virtual currencies constitute a currency in the sense of Article 135(1)(e) of the VAT Directive and are a direct means of payment; therefore, services related to those currencies (including mining) are covered by the VAT exemption granted by that Article. Consequently, input VAT will not be deductible.

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

### ii Net wealth tax and reporting obligations (static approach)

Virtual currencies, as an asset, fall under the scope of Law 19/1991 of 6 June on net wealth tax (the NWT Law) and therefore must be declared by filing Form 714 with the Spanish tax authorities by 30 June each year. According to Article 24 of the NWT Law, taxpayers must report their virtual currencies' market value in euros on 31 December. There is no official market value, so taxpayers will have to rely on the most widely used websites (such as www.coindesk.com). The Spanish tax authorities endorsed this conclusion in binding rulings V0590-18 of 1 March and V2289-18 of 3 August, among others. The net wealth tax rate can be up to 2.75 per cent, depending on the autonomous region of residence (there are some regions with a zero per cent rate).

In addition to the net wealth tax, there are three independent obligations to declare all assets held abroad worth more than €50,000 (bank accounts, securities and real estate). Taxpayers must submit Form 720 (informative report of assets and rights held abroad) by 31 March each year. To date, virtual currencies have not been considered to be securities or held in a bank account for tax purposes; therefore, it seems they need not be included in a Form 720 declaration. However, this approach will probably change in the near future. In this regard, the government made public on 19 October 2018 a draft bill on measures to prevent and fight tax evasion (the Draft Bill), including a new obligation to report the amount of virtual currencies held in Spain or abroad (through Form 720), identifying the owner and the beneficial owner; and report all transactions involving virtual currencies (acquisitions, sales, barter transactions or transfers). The legislative proposal was published for public consultation on 23 October 2018.[15]

The Annual Tax and Customs Control Plan for 2018, published in the Spanish Official Gazette of 23 January 2018, pointed out that, in the context of the prevention and suppression of smuggling, drug trafficking and money laundering, the tax authorities 'will detect and prevent the use by organised crime of the deep web to trade in any illicit goods, as well as the use of cryptocurrencies such as Bitcoin or similar as a means of payment'. In addition, the National Anti-fraud Office attempted to identify all entities that operate with virtual currencies, and sent them requests to provide specific information. Thus, the pre-filled tax forms that the Spanish authorities make available to the taxpayers each year include that the taxpayer has carried out transactions with virtual currencies.

The Spanish tax authorities are also assessing the possibility of imposing new reporting obligations, regulating 'human ATMs' (persons carrying out physical transfers of virtual currencies using apps such as Meetup[16]) and establishing a sanctioning regime for non-compliance with these reporting obligations. In fact, the Draft Bill requires: (1) wallet providers to provide information on virtual currencies balances (segregated by virtual currency), owners, authorised persons or beneficiaries of these balances; and (2) exchanges to provide information on the transactions carried out, identifying the parties involved, address, tax identification number, class and number of virtual currencies, and price and date of the transaction. These reporting obligations also apply to issuers of ICOs with tax residence in Spain.

15 http://www.hacienda.gob.es/Documentacion/Publico/NormativaDoctrina/Proyectos/Tributarios/ANTEPROYECTO%20LEY%20ATAD.pdf.

16 www.meetup.com.

However, the dissolution of the Spanish parliament and the calling of a general election in spring 2019 implied the automatic withdrawal of the Draft Bill. It is likely that the new government, formed after the general election and likely to take office in September 2019, will relaunch this initiative.

## X LOOKING AHEAD

While no specific legislation has been adopted in Spain on virtual currencies, the need for comprehensive regulation (of, inter alia, tax, consumer protection and regulatory aspects) regarding this matter has been already discussed in both Spanish legislative chambers by all political parties.

On the other hand, the Spanish supervisory bodies (the CNMV, the Bank of Spain and SEPBLAC) understand that, given the transnational nature of virtual currencies and the activities related to them (issuance, deposit, marketing, etc.), their regulation should be addressed at an international level or, at the very least, at an EU level, so that as many regulators and supervisory bodies as possible adopt and share common positions, otherwise uncoordinated regulatory approaches may prove ineffective and create incentives for regulatory arbitrage. The first step is Directive 2018/843 of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, which directly regulates virtual currencies for the first time at an EU level.

Despite the potential risks that virtual currencies pose as a consequence of their lack of regulation, both the Spanish legislator and supervisory bodies are aware of their importance and of the technological developments behind them, and they are therefore pressing for the speedy adoption of regulations and common positions on this matter.

**Appendix 1**

# ABOUT THE AUTHORS

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Pilar Lluesma Rodrigo is counsel in Uría Menéndez's Madrid office. She began her career at Uría Menéndez in 1995 and rejoined the firm in 2018, having worked in the legal department of INVERCO from 2016 to 2017.

She has 20 years of experience advising a wide range of financial entities, including credit entities, investment services firms, collective investment schemes management companies, and private equity management companies, in regulatory and financial matters.

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

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Alberto Gil Soriano joined Uría Menéndez in 2012 and is a senior associate in the tax department.

He has more than six years of experience advising resident and non-resident entities in general tax law and anti-money laundering and terrorist financing matters. He has also expertise in tax planning for high net worth individuals, in tax litigation and in local taxes. In addition, he has broad experience in tax regularisations.

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