

# Legal aspects of virtual payments



## Agenda

---

- What is money?
- Legal classification of virtual payments
  - Aspects of contract law
  - Aspects of financial supervision
  - Tax aspects
- Mining



## What is money?

---

### **Virtual payments – a currency?**

- From exchange to money economy
- From primitive money to coinage
- From coinage to paper money
- From paper money to bank deposit money
- From bank deposit money to electronic money
- From electronic money to virtual payments?



## Virtual payments and legal means of payment

---

### Money in law – aspects of civil law

Sec. 433 Para. 2 German Civil Code:

*„The buyer is obliged to pay the agreed purchase price to the seller and to accept the purchased item..“*

- Money debt is formative for sales contract, fulfillment regularly through cash payment
- One may not fulfill contracts of sale through virtual payments, because crypto currency is no money.



## Virtual payments and legal means of payment

---

### What is money?

*State-approved means of exchange, store of value power, unit of account - there is no uniform concept of money, however, neither in German nor in European law.*

### What are legal means of payment?

*Means of payment that must be accepted by law in a currency area by everyone for the legally effective performance of a service owed.*

### What is electronic money?

*Electronic money is an electronically stored monetary value in the form of a claim against an issuer which is issued in exchange for payment of an amount of money and which can be exchanged back into legal tender.*

### What is bank deposit money?

*Monetary claim against a credit institution, provided that the sight deposits may be called up at any time and can be exchanged for legal cash at any time*



## Legal classification of virtual payments

---

### 1. Means of payment in the sense of civil law/German Civil Code?

- Basically means of exchange, store of value power (?), unit of account
- However, neither state-approved nor generally accepted
- No claim against a state or an issuer
- No right to conversion to legal means of payment/cash, so that no right to embodiment exists
- Conclusion: Money function, but no means of payment within the meaning of the German Civil Code
- PROBLEM: what if agreed payment is a virtual payment?



## Legal classification of virtual payments

---

How may an agreement for "Payment with Bitcoins" be evaluated?

- Due to the absence of the status of money, no agreement on payment of a monetary debt within the meaning of the German Civil Code
- BUT: Exchange transaction within the meaning of Sec. 480 German Civil Code
- The subject of an exchange transaction may not only be things and rights, but economic goods of any kind (e.g. a place at university).
- The exchange contract according to Sec. 480 German Civil Code, to which the provisions of the sales contract apply accordingly, is therefore the appropriate contract type for the payment of goods or services with Bitcoins.



## Legal classification of virtual payments

---

### 2. Financial regulatory assessment of Bitcoins

- In the opinion of BaFin, Bitcoins are financial instruments (units of account) within the meaning of Sec. 1 Para.11 Sentence 1 no. 7 of the German Banking Act
- The purchase or mining of Bitcoins for private purposes such as payment is just as free of permission as private speculation transactions or the offering of wallets.





## Legal classification of virtual payments

---

However, banking and financial services performed with Bitcoins may be subject to authorisation, in particular:

- for commercial exchange and bill transactions (Private trading within the meaning of Sec.1 Para. 1a Page 2 No. 4 German Banking Act)
- Mining-Pools (collective mining and subsequent sale) (Placement business, acquisition brokerage or proprietary trading pursuant to Sec.1 Para. 1a Page 2 No. 1 c, No. 2 or 4 German Banking Act)
- Platforms on which third parties trade Bitcoins (Financial commission business pursuant to Sec. 1 Para. 1 Page 2 No. 4 German Banking Act)



## Legal classification of virtual payments

---

### 3. Tax classification of virtual payments

#### a) Income taxes (Personal income or corporate tax)

- Income from business operations, provided that income with virtual payments from an independent sustainable activity (e.g. mining, not only for private purpose)
- Interest income in the case of transfer against payment to third parties
- Private disposals (speculative transactions) if holding period < 12 months



## Legal classification of virtual payments

---

### 3. Tax classification of virtual payments

b) Value Added Tax - Private transactions among Bitcoin users are tax-free.

- Conversion of legal means of payment into virtual payments and vice versa are tax-free in the opinion of the European Court of Justice (judgment of October 22, 2015, RS C-264-/14)
- Delivery of Bitcoins against payment is other service in the sense of the VAT act and therefore subject to VAT.

c) Balancing

- Problem: Valuation at acquisition cost? High volatility



## The Mining of Bitcoins

---

### Classification of mining according to civil law

- Analogy with sec. 950 German Civil Code
  - „ *Whoever manufactures a new movable object by processing or altering one or more materials, acquires ownership of the new object, unless the value of the processing or altering is considerably lower than the value of the material..*“
- Analogy with secs.1,7 German Copyright Act
  - The creation of new values is nothing special in the legal system.



## The mining of Bitcoins

---

### Regulatory classification of mining

BaFin leaflet of December 22, 2011

*„ As means of payment certain value units <...> such as the bitcoins <...> are excluded <...> from the facts of electronical money, even if they have the same economic function as electronical money and represent the actual potential of privately generated means of payment from the point of view of money creation. <...>.*

**However, only the creation of such value units and** *their use as means of payment are exempt in this respect.*



## Outlook

---

### **Demand of the Blockchain Federal Association, among others:**

- Germany to play a pioneering role in Europe
- Increase in BaFin capacities
- Research on the issue of crypto-Euro
- Introduction of "digital" securities (stocks, GmbH shares)



## Team

### Dr. Diethelm Baumann

Attorney-at-Law, Certified Banking and Capital Markets  
Law Counsel

#### Experience

Dr. Diethelm Baumann regularly advises both national and international clients in all aspects of banking and financial regulatory law as well as business law with a focus on financial service providers and the aviation industry. He also works in-house for the Deutsche Bank AG.

#### Contact

Ohmstraße 22,  
80802 München

T: +49 (0) 89 38 39 95-0

F: +49 (0) 89 38 39 95-99

E: [diethelm.baumann@weitnauer.net](mailto:diethelm.baumann@weitnauer.net)

#### Languages

English, French



---

# Weitnauer

Presentation  
The Lightning Network  
25 April 2018

---

[weitnauer.net](http://weitnauer.net)

