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FROM TAXATION TO COMPREHENSIVE REGULATION OF CRYPTOASSETS¹

Abstract.....	1	III. Taxation of cryptoassets as the first step towards the regulation.....	4
I. Introduction.....	1	IV. From taxation to comprehensive regulation in the EU and USA.....	9
II. The legal status of cryptoassets in North Macedonia.....	2	V. Lessons for North Macedonia.....	10
		VI. Conclusions.....	12

Abstract

The rapid development of decentralized finances, new cryptoassets like NFTs, as well as state-backed projects like CBDCs in China, the USA and the EU, make it increasingly important for every country to establish a clear legal framework for cryptoassets and digital currencies. Such rules are not just necessary for a country to keep up with technological advancements, but also in order to prevent illegal activities like fraud, tax evasion and money laundering. While numerous jurisdictions have already introduced comprehensive legislation on cryptoassets, countries like North Macedonia have still elected to, for the most part, abstain from participating in the global discourse. However, important aspects of regulation unavoidably are country specific. Therefore a functioning system cannot be established by only imitating foreign solutions. Thus, first regulatory steps must be established starting from a national perspective, before the more complex adaptation of, for example, European regulation can be conducted. In order to incite the discussion on a regulatory framework for cryptoassets in North Macedonia, this paper describes how various other jurisdictions approached cryptoasset regulation. It especially focuses on the tax laws of the respective countries, as all analyzed legal systems have in common that taxation is amongst the first issues considered by national legislators. By defining taxable bases, taxpayers and realization events, authorities, in fact, determine key aspects of the legal treatment of cryptoassets. Exactly these aspects can then in a later stage be used as starting point for future legislation.

Keywords: *cryptoassets, cryptocurrency, CBDC, tax, financial regulation*

I. INTRODUCTION

The regulation of cryptocurrencies has become an increasingly important topic across the world. Recent innovations, starting from decentralized finances (De-Fi), new forms of cryptoassets like non fungible tokens (NFTs) up to various national projects to establish central

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bank digital currencies have shown that the regulation of cryptoassets becomes an increasingly important topic. Despite the significant global interest in cryptoassets, there is however no unique solution for a global legal framework for cryptocurrencies or other cryptoassets. Even though the current market capitalization of the cryptocurrency market has reached up to 2.5 trillion-dollar², there is no global consensus on the treatment and even legality of cryptocurrency transactions. In general, we can divide countries into four categories: (1) countries that have not taken any measures to regulate cryptocurrency, (2) countries that have regulated only the tax aspect of cryptocurrency, (3) countries that have prohibited the use of cryptocurrency in part or in full, and (4) countries that have recognized cryptocurrencies as a form of currency and hence decided to regulate them as such.³

North Macedonia falls largely in the first group. While some aspects of the tax treatment have been determined, there have been certain warnings against the use of cryptocurrencies, but they are currently neither prohibited nor recognized by the law of North Macedonia⁴. In contrast, have leading trade partners of North Macedonia, in particular, the European Union embraced cryptocurrencies and proposed in-depth regulation that protects individual privacy, prevents illegal activities and ensures consumer rights⁵. Countries like North Macedonia that have chosen for the most part to avoid regulating cryptocurrency are in a challenging position, as recognition and regulation are increasingly becoming the norm. Important aspects of regulation unavoidably are country specific so that a coherent national framework cannot be exclusively created by imitating foreign solutions⁶. Thus, regulation has to start from a national perspective, before the more complex adaptation of, for example, European regulation can be conducted.

In order to incite the discussion on a regulatory framework for cryptoassets in North Macedonia, this paper describes how multiple other jurisdictions approached cryptoasset regulation. The paper looks into the regulation of capital gains taxation in Germany, the United Kingdom, the USA, Croatia and Germany. It especially focuses on the tax laws of the respective countries, as all analyzed legal systems have in common that taxation is amongst the first issues considered by national legislators. By defining the “taxable basis”, “taxpayer” and “realization event”, authorities, in fact, determine key aspects of the legal treatment of cryptoassets. Exactly these aspects can then in a later stage be used as starting point for future legislation. In the following text, we will look at the various approaches that different legal systems within the EU and outside of it took. We especially look at the early phases of cryptocurrency regulation, in which the legal systems were in a comparable situation to North Macedonia today. This allows in combination with a comprehensive analysis of the current state of regulation in North Macedonia to suggest potential guidelines for advancement of cryptoasset regulation.

II. THE LEGAL STATUS OF CRYPTOASSETS IN NORTH MACEDONIA

The National Bank of the Republic of North Macedonia (NBRNM) suggest that the Macedonian legal system currently does not recognize the term "cryptoasset". The NBRNM elaborates that cryptoassets are a specific type of intangible asset based on blockchain

² Source: <https://coinmarketcap.com/> (accessed 1.5.2021).

³ Tu, K. V., Meredith, M. W., (2015) Rethinking Virtual Currency Regulation in the Bitcoin Age, Washington Law Review, Vol. 90:271, p. 301.; Šime Jozipović, Marko Perkušić and Andrej Ilievski: CRYPTOCURRENCIES AS (I)LEGAL TENDER IN NORTH MACEDONIA AN THE EU. Iustinianus primus law review, Volume 11 Issue 2 Year 2020, p. 1 f.

⁴ National Bank of the Republic of North Macedonia: Q&As about cryptoassets <https://www.nbrm.mk/prashanja-i-odgovori-za-kripto-sredstvata-en.nspix>.

⁵ See for example Proposal for a Regulation of the European Parliament and of the Council on Markets in Cryptoassets, and amending Directive (EU) 2019/1937 COM/2020/593 final.

⁶ See below the different positions that the analysed legal systems took on the status of cryptocurrencies and other cryptoassets.

technology that is neither issued nor guaranteed by a central bank. It furthermore highlights that cryptoassets are not money and their supply does not depend on the needs of the economy or monetary system⁷. An important aspect of cryptocurrencies in particular, according to the NBRNM, is that they exist in digital form and do not have a specific appearance in any physical form like banknotes or coins. This allows them to be placed in a digital wallet on a computer, laptop, external storage device and/or smartphone and to be easily transferred via the internet⁸. Furthermore, the NBRNM warns that cryptoassets are not a legal tender in North Macedonia as according to current regulations, payments should be made in the domestic currency – the Macedonian denar⁹. This is especially important as due to their complexity and anonymity, cryptoassets transactions are considered to have a higher risk of being used for money laundering and terrorist financing. That however does not mean that cryptoasset transactions are illegal. Cryptoassets are at the moment simply not regulated¹⁰. While the convergence towards the EU obviously is leading to liberalization in this area, cryptocurrencies have not been explicitly covered by those developments and even though the *acquis communautaire* partially regulates cryptocurrencies and other cryptoassets, European law is, except in cases of special agreements, only binding for EU member states. Similar to other jurisdictions, it, therefore, makes sense to first look into the tax regulation that would be applicable to cryptoassets, in order to identify the factors that will play key roles in defining them under Macedonian law.

As we will present in the following text, an initial legal basis for the regulation of cryptoassets can be established from their categorization from a domestic tax law perspective. Having in mind the definition of cryptoassets provided by NBRNM, it is difficult to anticipate the exact tax status of income related to cryptoassets. The Law on Personal Income Tax (PIT Law) does not explicitly mention cryptoassets as a separate category. While many cryptoasset related tax issues should be considered, two main situations must be covered¹¹. The first is the treatment of transactions in which cryptocurrencies are only used as a means of payment instead of the denar, euro or other means of payment. For example, a business allows payment from foreign sources in bitcoin instead of a denar. In this case, one has to determine if this transaction is based on a sales contract which is the exchange of goods for money or a barter contract that governs the exchange of one good for another. The second question concerns the change in the value of a cryptoasset over time. For example, an individual buys 0,1 bitcoin for 100 000 denars and sells it later that year for 150 000 denars.

For the first question, it is essential to define what role cryptoassets play in transactions, in order to determine how they should be treated from personal income taxation and business income taxation perspective. The second question on the other hand requires determining under which category of income any enrichment from the increase in value of cryptoassets could fall. Currently, Macedonian PIT Law is still based on a flat tax rate regime until 31 December 2022. Therefore a 10% tax rate is applicable on an individual's income from work, self-employment income, income from royalties and industrial property rights, income from the sale of own

⁷ What are cryptoassets? <https://www.nbrm.mk/ns-newsarticle-sto-se-kripto-sredstva-en.nspix>.

⁸ What do cryptoassets look like? <https://www.nbrm.mk/ns-newsarticle-kako-izgledataat-kripto-sredstvata-en.nspix>.

⁹ Is it possible to pay in cryptoassets in the Republic of North Macedonia?

<https://www.nbrm.mk/ns-newsarticle-dali-moze-da-se-plaka-so-kripto-sredstva-vo-republika-severna-makedonija-en.nspix>; Paragraph 1 of article 2 of the Law on the Use of the Currency of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia“ No. 26/1992)

¹⁰ Is investing in cryptocurrencies abroad legal and what is the treatment of these transactions in payment operations abroad? <https://www.nbrm.mk/ns-newsarticle-dali-e-legalno-vlozuvaneto-vo-kripto-sredstva-vo-stranstvo-i-kakov-tretman-imaat-ovie-transakcii-vo-platniot-promet-so-stranstvo-en.nspix>.

¹¹ Additional questions concerning the treatment of cryptocurrency mining, hard forks, ICOs, de-fi transactions etc. could also be considered as well in a future analysis. Such an extensive analysis would however go beyond the scope of this paper.

agricultural products, rental income, income from capital, capital gains, and insurance income, as well as other taxable income not categorized separately under the law¹². In contrast, the applicable tax rate on the gains realized from games of chance is 15%¹³. Gambling winnings are the income that the taxpayer earns by participating in games of chance regulated by the Law on Games of Chance and Fun Games.¹⁴ As such regulation does not exist in relation to cryptoassets, it would be difficult to categorize cryptoassets under this category. However, a categorization of income from gains realizing by trading cryptoassets as income from capital gains or other income both could be plausible.

Capital gain is defined as the difference between the sale and purchase price when selling or exchanging real estate, securities, shares issued by an investment fund, participation in the capital, other movable and intangible property.¹⁵ Cryptoassets could be considered a form of intangible property, which is under the PIT Law defined as property in the Context of the Article means property without physical content which can be identified¹⁶. The term “other income” represents a fallback category, which includes any income that is not considered as income under the other categories of the PIT Law, but simultaneously is not exempt from taxation through certain special provisions of the law.¹⁷ Under this category falls for example the income realized from the sale of useful solid waste, the income realized with electronic commerce through the internet, the income from marketing internet services, etc.¹⁸ In order to determine under which category cryptoassets should fall under Macedonian (tax) law, we will first compare various approaches chosen by a diverse group of countries in the following text. The examples of the chosen jurisdictions can serve as valuable data points from which we will then draw parallels to the Macedonian tax system.

III. TAXATION OF CRYPTOASSETS AS THE FIRST STEP TOWARDS THE REGULATION

A first step for the establishment of a functional legal framework in any field of law usually comprises of defining essential terms – the subjects and objects of regulation. These elements play an especially important role in tax law where legal certainty is an indispensable individual (taxpayer) right. Tax law by its nature impedes the subjective rights of individuals. In order to protect legitimate taxpayer interests, the rights and obligations of individuals in this area,

¹² Law on Amending and Supplementing of the Law on Personal Income tax (“Official Gazette of the Republic of North Macedonia“ No. 275/2019) Paragraph 1 of Article 24.

¹³ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Paragraph 3 of Article 11.

¹⁴ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Article 64.

¹⁵ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Paragraph 1 Article 58.

¹⁶ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Paragraph 2 Article 58.

¹⁷ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Paragraph 1 Article 71.

¹⁸ Law on Personal Income tax (“Official Gazette of the Republic of Macedonia“ No. 241/2018, “Official Gazette of the Republic of North Macedonia“ No. 275/2019 “Official Gazette of the Republic of North Macedonia“ No. 290/2020, “Official Gazette of the Republic of Macedonia“ No. 85/2021) Paragraph 2 Article 71.

therefore, must be clearly outlined¹⁹. In this following text, we define the key drivers of cryptocurrency tax regulation and answer essential questions about when, how and to which extent cryptocurrency transactions should be taxed. To achieve this we based the following analysis on a comparative methodology that covers the legal systems of Germany, the USA, the UK and Croatia. We analyze the technical nature of cryptocurrencies as aspects of property²⁰ and contract law²¹ and the resulting challenges for effective tax assessment and collection.

In order to take into account the differences amongst tax systems, we make a distinction between global tax systems and schedular tax systems; in this regard, the treatment of two cryptocurrencies under the (global) US-tax system is compared to (schedular) tax systems of EU-countries - Germany and Croatia and a European non-EU country – the UK. While gains created from the speculation on those highly volatile assets can easily be categorized for tax purposes under a global tax system, within a schedular tax system the categorization aspect becomes much more challenging as gains from the trading of cryptocurrencies may not fit into any specific income category of certain tax systems.

a. Taxation of cryptoassets in the USA

For federal tax purposes, the Internal Revenue Service (IRS) treats virtual currency in general as property, and so the general tax principles applicable to property transactions apply to transactions with virtual²² currency.²³ The IRS also points out that their Notice on cryptocurrencies only refers to a convertible virtual currency, and then defines convertible virtual currency as every virtual currency that has an equivalent value in real currency or that acts as a substitute for real currency. The IRS uses bitcoin as an example of a convertible virtual currency. The IRS explained in the notice that the reason why bitcoin in the United States is not taxed as a foreign currency is that it has no legal remedy (it is not considered legal tender) in any country of the world²⁴, so it cannot be considered a foreign currency in the classical sense. While today some countries do accept cryptocurrencies as legal tender²⁵, the IRS still refers to the Notice and the position that cryptocurrency is considered property²⁶.

For a more comprehensive description of convertible virtual currencies, the IRS refers to the Financial Crimes Enforcement Network (FinCEN) Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies.²⁷

¹⁹ Walter Summersberger, Matthias Merz, Harald Jatzke and Markus Achatz: Außenwirtschaft, Verbrauchsteuern und Zoll im 21. Jahrhundert Festschrift für Hans-Michael Wolfgang, Reiner Brandl, Peter Pichler: Der Grundsatz der Rechtsicherheit in der Rechtsprechung des EuGH zur Mehrwertsteuer-Richtlinie, 579, p. 579.

²⁰ On the issues of classification of cryptocurrencies as property Terlau, M. Begriffsbestimmungen, Anwendungsbereich u Casper, M., Terlau, M., (2014), str. 104; Alexander Djazayeri: Die virtuelle Währung Bitcoin - Zivilrechtliche Fragestellungen und internationale regulatorische Behandlung, jurisPR-BKR 6/2014 Anm. 1, Str. 4 f.

²¹ On the classification of cryptocurrencies as contracts for example Terlau, M. Begriffsbestimmungen, Anwendungsbereich u Casper, M., Terlau, M., (2014), str. 104.

²² Including cryptocurrencies as a subcategory.

²³ Internal Revenue Service, Notice 2014-21, 2014-16 I.R.B. 938, available at: <http://www.irs.gov/pub/irs-drop/n-14-21.pdf>.

²⁴ This was true at the time of the notice, but since then the IRS has not updated its opinion on this issue.

²⁵ See recent developments in El Salvador: Hanke, Steve & Hanlon, Nicholas & Chakravarthi, Mihir, 2021. "Bukele's Bitcoin Blunder," *Studies in Applied Economics* 185, The Johns Hopkins Institute for Applied Economics, Global Health, and the Study of Business Enterprise. Available at: <https://ideas.repec.org/p/ris/jhisae/0185.html>.

²⁶ See: IRS letter 6174a available at: https://www.irs.gov/pub/notices/letter_6174-a.pdf

²⁷ Financial Crimes Enforcement Network (FinCEN) Guidance on the Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies (FIN-2013-G001, March 18, 2013), available at: <https://www.fincen.gov/sites/default/files/shared/FIN-2013-G001.pdf>.

The Guidance was confirmation that virtual currencies are not illegal in the USA, and it helped define some of the legal entities in transactions with cryptocurrencies such as users,²⁸ exchanger,²⁹ and administrator.³⁰

After the IRS Notice confirmed that in the USA cryptocurrency as a type of virtual currency would be considered property and not foreign currency, the question about what kind of tax on purchased cryptocurrencies should be paid was still unanswered. A milestone in the tax categorization of cryptocurrencies was reached when the question of sales taxes in cryptocurrency transactions³¹ was answered. The answer to that question came from the New York State Department of Taxation and Finance³². The state department took the position that although parties that trade with cryptocurrency conclude a barter agreement, they will not pay sales tax that follows a barter agreement, because to tax virtual currencies they will be considered intangible property and as such, they are not susceptible to a sales tax. Such a tax status as intangible property, however, does not affect the capital gains taxation within the global tax system of the USA, as capital gains are not limited to corporal assets. Thus, capital gains are taxed based on the increase in value from the moment one acquires an asset until the moment the person disposes of the asset.

b. Taxation of cryptoassets in the UK

The United Kingdom is amongst the countries that have not taken any measures to specially regulate cryptocurrency early on but rather relied on existing solutions and an adequate application of common law principles. Furthermore, the Bank of England avoided for a long time giving any official statement about virtual currencies.³³ However, the tax treatment of cryptocurrencies was amongst the first issues discussed and has been developed continuously through the HMRC internal manual³⁴.

In particular, for tax purposes, certain elements have been defined early on. Her Majesty's Revenue and Customs (HMRC) states that cryptocurrencies have a unique identity and cannot, therefore, be directly compared to any other form of investment activity or payment mechanism.³⁵ Taxation of bitcoin transactions in the United Kingdom was dependent on the type of activities for which the cryptocurrency is used as well as the features of parties involved in the activity itself, and the taxes that could apply to such transactions are corporate tax, income tax and capital gains tax.³⁶ The HMRC also stated that depending on the facts, a transaction may be so highly speculative that it is not taxable or any losses relievab

28 FinCEN Guidance defines a user as a person that obtains virtual currency to purchase goods or services.

29 It defines an exchanger as a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency.

30 It defines an administrator as a person engaged as a business in issuing (putting into circulation) a virtual currency and who has the authority to redeem (to withdraw from circulation) such virtual currency.

31 Čičin-Šain, N., (2017) Taxing bitcoin, Zbornik PFZ. 67, (3-4) 655-693, p. 661.

32 New York State Department of Taxation and Finance, Technical memorandum TSB-M-14(5)C, (7)I, (17)S Corporation Tax Income Tax Sales Tax December 5, 2014, Tax Department Policy on Transactions Using Convertible Virtual Currency, available at: https://www.scribd.com/document/249610308/Tax-Department-Policy-on-Transactions-Using-Convertible-Virtual-Currency-7i-17s?ad_group=&campaign=Skimbit%2C+Ltd.&content=10079&irgwc=1&keyword=ft750noi&medium=affiliate&source=impactradius.

33 Law Library of Cong., Regulation of Bitcoin in Selected Jurisdictions (2014), available at: http://www.loc.gov/law/help/bitcoin-survey/index.php?locl=bloglaw#_ftn140.

34 Available at: <https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual>.

35 Policy paper, Revenue and Customs Brief 9 (2014), Bitcoin and other cryptocurrencies, available at: <https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies>.

36 Čičin-Šain, N., o. c. p. 678.

statement, it compares transactions with cryptocurrencies with gambling or betting wins, which are not taxable and gambling losses cannot be offset against other taxable profits.³⁷ Today, the tax treatment of cryptoassets is more refined. Capital gains taxation follows recognition principles on gains and losses, and similar exemptions to other types of assets do apply³⁸.

c. Taxation of cryptoassets in Germany

Like in many other countries, in Germany the first categorization of cryptocurrencies was related to tax issues. The German Ministry of Finance has issued an opinion in which it does not consider bitcoin electronic money³⁹ or foreign currency but rather a measuring unit (Rechnungseinheit).⁴⁰ Due to volatility, limited acceptance and the missing of a direct link to any states monetary system, cryptocurrencies cannot be considered money in a classical sense. However, due to their purpose as a medium of exchange, private individuals can use cryptocurrencies in a way comparable to money, as long as all involved parties agree to it.⁴¹ Such a civil law concept puts cryptocurrencies closer to the concept of private money. Therefore, we can come to the conclusion that for tax purposes, cryptocurrency may be considered foreign currency and therefore could be taxed in such a way. That means that the income/profit which users gain in a time period of one year will be considered taxable income, while the income/profit that users gain for selling cryptocurrencies one year after they acquired them will be tax-free.⁴²

d. Taxation of cryptoassets in Croatia

Similar to the examples above, the Croatian National Bank and the Croatian Tax Administration published their opinion/report about virtual currencies. Comparable to the situation in the US, cryptocurrencies are explained through the prism of the broader term of virtual currencies. The Croatian National Bank defines virtual currencies as a digital display of values that can be considered as a specific type of property that its holders are willing to keep and/or electronically exchange and which are sporadically used for payments, consistent with the belief that such currencies have real value.⁴³ The Croatian National Bank also issued a warning, pointing out certain issues regarding virtual currencies: (1) the central bank is not supervising businesses

37 Policy paper, Revenue and Customs Brief 9 (2014), Bitcoin and other cryptocurrencies, available at: <https://www.gov.uk/government/publications/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies/revenue-and-customs-brief-9-2014-bitcoin-and-other-cryptocurrencies>.

38 <https://www.gov.uk/hmrc-internal-manuals/cryptoassets-manual/crypto22100>

39 Bitcoin is not electronic money because it does not achieve a direct claim towards the issuer of electronic money on which the users have rights according to § 1a st. 3. Law on supervision of payment services. Alexander Djazayeri: Die virtuelle Währung Bitcoin - Zivilrechtliche Fragestellungen und internationale regulatorische Behandlung, jurisPR-BKR 6/2014 Anm. 1, Str. 4; Rechtsprobleme von Bitcoins als virtuelle Währung, Zeitschrift für Bankrecht, 29, 2014, 1357, Str. 1360 f.

40 The Ministry of Finance gave that kind of response on inquiry from parliamentary representative Frank Schaffler, available at: <http://www.frankschaeffler.de/bitcoin-alle-an-fragen-und-antworten-im-volltext/>.

41 Benjamin Beck: Bitcoins als Geld im Rechtssinne NJW 2015, 580, p. 585.

42 Čičin-Šain, N., o. c. p. 663. and 677.

43 According to the Croatian National Bank, they based their definition in accordance with the Opinion of the European Banking Authority, available at: <https://www.eba.europa.eu/documents/10180/657547/EBA-Op-2014-08+Opinion+on+Virtual+Currencies.pdf>; <https://www.hnb.hr/-/sto-su-virtualne-valute>.

with virtual currencies,⁴⁴ (2) investing in virtual currency is a high-risk investment,⁴⁵ (3) virtual currencies still have very little influence on payments and the money market,⁴⁶ and (4) virtual currencies currently do not represent any risk for the monetary policy of the Croatian National Bank.⁴⁷ This warning was updated recently, especially concerning the dangers of innovations in this field and consumer protection issues⁴⁸.

The Croatian Tax Administration, in its opinion from May 7, 2015, responded to the question of whether transactions, including mediation, relating to virtual currencies such as bitcoin, are exempt from VAT payments. After consulting with the Croatian National Bank, the Tax Administration concluded that bitcoin can be considered as a portable instrument (which allows fulfilment of a financial obligation) and that bitcoin transactions can be considered exempt from VAT payment obligations.⁴⁹ In its opinion, the Croatian Tax Administration mentions a case from the European Court of Justice in which the Court had to decide about the payment of value-added tax on transactions involving the conversion of traditional currencies into cryptocurrency. The Swedish Supreme Administrative Court filed a petition for a preliminary ruling in that case (Hedqvist C-264/14). The European Court of Justice concluded that transactions involving non-traditional currencies that are not money that is used as legal tender in one or more countries still represent financial transactions, provided transaction participants accept this currency as an alternative means of payment in respect of statutory payments. From this decision, we can conclude that for VAT payments, the Court considers bitcoin as money, and therefore it is excluded from VAT payments anticipated in article 135 paragraph 1 item 5 of the VAT Directive.⁵⁰ On this decision, the Croatian tax authorities further built their positions with regard to all other types of tax treatments⁵¹.

In its second opinion from March 19, 2018, the Croatian Tax Administration gave a more detailed opinion, in which it explained the taxation of virtual currencies. The tax Administration gave answers to many of the issues that have troubled cryptocurrency users. With such a detailed opinion from the Croatian Tax Administration, Croatia has become one of the few countries in the world where the taxation of virtual currencies is explained in detail to its taxpayers.

In that opinion, the Croatian Tax Administration expresses that the purchase and sale of virtual currencies must be documented with credible documents. Those documents can be validated by online platforms like decentralized stock exchange, online retailer, etc. or exchange through which the purchase/sale of virtual currency etc. was executed. Here the purchased and sale

44 Virtual currency is not a legal instrument of payment in the Republic of Croatia nor foreign currency or foreign payment instrument, and that is why supervision of virtual currency does not fall under the deregulation of the Croatian National Bank.

45 They emphasize that a special operational risk exists in the use of virtual currency wallets and platforms for their exchange, and they also point out that there is no insurance against virtual currency investments in the case that an organization or individual who issues virtual currency or trades with them goes bankrupt or disappears.

46 To emphasize that they refer to the statistics of the European Central Bank, according to which in 2016 the total number of daily non-cash payment transactions in the European area was 484 million, while on December 14, 2017, there were only 490 thousand transactions with bitcoin worldwide, and that was historically the largest daily transaction number with bitcoin. available at: <https://www.ecb.europa.eu/press/pdf/pis/pis2016.pdf?be9989f6bd72483ebe27d8dfae1f0362>; <https://www.hnb.hr/-/sto-su-virtualne-valute>.

47 Croatian National Bank, available at: <https://www.hnb.hr/-/sto-su-virtualne-valute>.

48 Publication of the Croatian National Bank: Rizici povezani s kriptoinovinom, 7.7.2021. available at: <https://www.hnb.hr/-/rizici-povezani-s-kriptoinovinom>.

49 Ministry of Finance, Tax Administration, opinion from May 7, 2015, available at: https://www.porezna-uprava.hr/HR_publikacije/Lists/mislenje33/Display.aspx?id=19252.

50 Čičin-Šain, N., o. c. p. 672.

51 Opinion of the Croatian tax administration class 410-01/17-08/29, nr.513-07-21-01/18-4, Zagreb, 19.03.2018

value will be determined according to those documents.⁵² The taxpayers must keep records of each purchased and the financial asset sold.⁵³ In the case of a purchase of virtual currency directly from another natural person, it must be documented by a contract or other credible document. Within such a document the following elements must be contained: (1) personal data of the buyer and seller, (2) subject of purchase/sale, (3) date of purchase/sale, (4) amount, price and number of units that are purchased/sold, and (5) method of payment.⁵⁴

IV. FROM TAXATION TO COMPREHENSIVE REGULATION IN THE EU AND USA

As we have shown in the previous comparative law analysis, the legal nature of cryptocurrencies has regularly first been determined for tax purposes. Multiple countries have defined the tax status of cryptocurrency income and cryptocurrency transactions. This is no wonder when considering the importance of clarity in the area of taxation, as well as the speculative nature of cryptocurrencies. While the primary goal of the introduction of blockchain technology was the creation of safe, anonymous and cost-efficient financial transactions⁵⁵, the volatility and rise in popularity of cryptocurrencies have fueled their use as vehicles for speculation. Therefore, the tax status of cryptoassets was especially relevant in the area of capital gains taxation. Clarification of the status of cryptoassets was either the result of case law or opinions of tax authorities and central banks.

While the question of the legal status of cryptocurrencies certainly is the basis for any tax assessment, it is still just a starting point from which multiple other questions have to be answered. Therefore, starting from the tax status of cryptocurrencies, new regulation emerged that was better suited to apply to various particularities of this new asset category. Many countries across the globe, like the USA, developed their cryptocurrency regulations based on the experiences from cryptocurrency taxation⁵⁶. Countries like Germany and Croatia are however in a different position. While they have the freedom to define the majority of civil law and tax law concerning cryptocurrencies, some aspects of cryptoasset regulation are defined on the supranational level of the European Union.

The European Union has taken steps to become a globally relevant centre for innovation in the field of blockchain technology as can be seen through the European Blockchain Partnership. This project aims at creating a pan-European regulatory sandbox in cooperation with the European Commission for data portability, business-to-business data spaces, smart contracts, and digital identity. The project goes beyond payment systems and covers issues like healthcare,

⁵² In exceptional cases, if the value of a bitcoin or any other cryptocurrency cannot be determined from a credible document, the market value can be determined by the average value of a particular cryptocurrency relative to one of the fiat currency on the day of purchase/sale according to the trading data of some of the largest cross-currency exchanges, such as OKEx, Binance, Gemini, Kraken, GDAX, Coinbase and others., Ministry of Finance, Tax Administration, opinion from March 19, 2018, available at: https://www.porezna-uprava.hr/HR_publikacije/Lists/mislenje33/Display.aspx?id=19590.

⁵³ So that the Tax Administration can accurately determine the value of the realized capital gain and thus correctly calculate the income tax. Exceptionally, if more than one transaction of the same property was executed in a single day, compilation data may be kept for that day., Ministry of Finance, Tax Administration, opinion from March 19 2018, available at: https://www.porezna-uprava.hr/HR_publikacije/Lists/mislenje33/Display.aspx?id=19590.

⁵⁴ Investors, for example, can use websites such as LocalBitcoins, where they can find a buyer close to them and buy bitcoin from him or her in cash, but in that case, both the buyer and the seller must keep a certificate of the purchased sale., Ministry of Finance, Tax Administration, opinion from March 19 2018, available at: https://www.porezna-uprava.hr/HR_publikacije/Lists/mislenje33/Display.aspx?id=19590.

⁵⁵ Halaburda, H. i Sarvary, M. (2016), *Beyond Bitcoin, The economics of digital currencies*, Palgrave Macmillan.

⁵⁶ See Inozemtsev M.I. (2021) Digital Assets in the United States: Legal Aspects. In: Ashmarina S., Mantulenko V., Vochozka M. (eds) *Engineering Economics: Decisions and Solutions from Eurasian Perspective*. ENGINEERING ECONOMICS WEEK 2020. Lecture Notes in Networks and Systems, vol 139. Springer, 516 f.

energy and the environment, which should be addressed within the sandbox.⁵⁷ The EU has besides this sandbox approach also drafted comprehensive legislation on cryptoassets. The Anti Money Laundering Directive regulates certain payment aspects and aims at ensuring transparency of cryptoasset transactions⁵⁸. The Markets in Crypto-assets regulation goes even further and defines various types of cryptoassets and regulates the actions of key actors in this space.⁵⁹ Creating comprehensive legislation across the Union follows from the tasks and competencies of EU bodies. Under EU primary law it is their mission to adopt measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market⁶⁰. As cryptoassets by nature are digital assets traded/used across borders, it is a clear prerogative to regulate aspects of cryptocurrencies relevant for the functioning of the internal market. As a result, EU member states have to align their legislation with EU law.

This is however easier for countries like Germany and Croatia that have already recognized cryptoassets as an independent asset category and regulated the aspects that fall under their national jurisdiction. As both countries had already determined the legal status of cryptocurrencies in line with early ECJ case law and their civil law jurisdictions, both countries can implement European law without significant difficulties. Countries with close ties to the EU and the euro like North Macedonia are in a similar position as member states. Even though the implementation of EU regulation is not obligatory for those countries, their strong economic ties with the EU represent a clear incentive to create complementary solutions. Moreover, the blockchain partnership represents an excellent opportunity for countries like North Macedonia to participate⁶¹ in the work at the forefront of blockchain technology innovation.

V. LESSONS FOR NORTH MACEDONIA

Due to the strong trade relationship between North Macedonia and the EU as well as the recent developments concerning central bank-backed projects, North Macedonia will likely have very strong incentives to adopt a large part of EU blockchain-related regulation in the future. As the examples above have shown, EU member states like Croatia and Germany have already established rules concerning the status of cryptocurrencies and determined that the investment in and use of cryptoassets is legal. The fact that the civil law role of cryptocurrencies is not exactly defined and that multiple enforcement and control mechanisms still are not developed far enough to efficiently cover the cryptoasset space makes it difficult for North Macedonia to adapt to EU legislation and effectively participate in the global discourse. It is furthermore illusory to expect taxpayers to comply with their obligations under tax law under the current regime. For this to change, two important steps must be taken.

First, the state would have to regulate the cryptoasset space to protect consumers and businesses before expecting them to be responsible taxpayers. There indeed exist examples where the state taxes income generated from activities that are not regulated and controlled by the state, for example, income from illegal activities. However, when it comes to activities that

⁵⁷ See <https://digital-strategy.ec.europa.eu/en/policies/regulatory-framework-blockchain>.

⁵⁸ Directive (EU) 2018/843 of the European Parliament and the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU (Text with EEA relevance), PE/72/2017/REV/1, OJ L 156, 19.6.2018, p. 43–74

⁵⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on Markets in Crypto-assets, and amending Directive (EU) 2019/1937/COM/2020/593 final

⁶⁰ Article 114, Treaty on the Functioning of the European Union, OJ C 115, 9.5.2008, p. 94–95.

⁶¹ North Macedonia is currently not considering work on its own CBDC or other blockchain-based projects: <https://www.nbrm.mk/ns-newsarticle-kakva-e-ulogata-na-narodnata-banka-vo-vrska-so-kripto-sredstvata-en.nspk>.

are not prohibited and that concern a reasonably large number of subjects, it should normally be the responsibility of the state to create a framework to protect these subjects. This should especially be true when the state levies taxes on the income generated from those activities. It is not just a constitutional responsibility of the state to protect the right to conduct businesses, ensure access to institutions and establish the rule of law but it is also economically reasonable. As long as the state does not protect the legitimate interests of subjects conducting activities in the cryptoasset space, it can be expected that the participants in the space will oppose the payment of taxes.

Second, one has to consider that the lack of effective monitoring and enforcement, further disincentives taxpayer compliance. Without collaboration with the key participants in the cryptoasset space, especially with wallet providers and cryptocurrency exchanges, governments will have difficulties ensuring compliance. Governments that ban cryptocurrencies have limited access to individual transaction data of cryptocurrency exchanges. This in fact makes tax evasion harder to identify and the monitoring of transactions difficult. It furthermore shifts the behaviour of taxpayers. Low enforcement efforts concerning a certain type of income will impact the behaviour of taxpayers. Liquid assets, which can easily be shifted from one asset type to another, will be affected by such actions. This can actually lead to the move from traditional (taxable) investments in stocks or bonds into cryptoassets. Especially when a legal system does not contain a large number of preferential tax treatments for different assets, any legitimate or illegitimate benefit granted to a certain category will create an influx into such investments⁶². Therefore it becomes even more important to develop clear rules concerning the treatment of cryptoassets under tax- and civil law.

i. Taking first steps in North Macedonia – matching cryptoassets with existing asset types

Based on our analysis we can draw numerous comparisons to the legal system of North Macedonia. The USA did not recognize cryptocurrencies as foreign currency as they until recently were not considered legal tender in any part of the world. In essence, this means that the transfer of cryptocurrency in the USA is not considered “payment” but a transfer of assets. Therefore the exchange of one cryptocurrency for another, or the purchase of a tangible asset in exchange for cryptocurrency is considered a barter contract with cryptocurrencies being intangible assets. Germany and Croatia in contrast consider cryptocurrencies similar to a type of private money or financial asset. After debates of the comparability of cryptoassets as investing and gambling, the UK also followed suit.

The tax system of the USA is highly sophisticated and based on a global approach. Those are both factors that differ strongly from the Macedonian system. The approach taken by tax authorities in the USA can therefore not be copied directly. This is especially true, as some basic premises like cryptocurrency not being legal tender anywhere in the world, are no longer true. Furthermore, a comparison of profits from cryptocurrency trading with profits from games of chance are also hard to justify. While the example of the UK has shown that such ideas existed, they were abandoned in favour of including cryptassets in the normal system of capital gains taxation.

As North Macedonia has implemented a VAT system, one can draw comparisons to ECJ case law when deciding how cryptocurrencies should be a treatment when used as payment. While the decisions of the ECJ are not binding for courts in North Macedonia one can assume that the outcome before a Macedonian court would not be different due to the similarities of European and Macedonian law in this field. However, when it comes to capital gains taxation, it would be difficult to consider cryptocurrencies straight-out to be money, with the exception of bitcoin

62 Philip Baker, Mark Bowler-Smith: Ch. 11, The United Kingdom in Michael Littlewood, Craig Elliff: Capital Gains Taxation, a Comparative Analysis of Key Issues, Elgar 2017, p. 344.

as it has based on some viewpoints become a foreign currency. However, there has been an increasing consent to treat cryptoassets in general similar to other financial assets like securities. Such an approach would not violate Macedonian law and in fact, be very similar to the position taken by Croatian tax authorities. It would furthermore guarantee that after the flat tax rate regime is phased out, cryptoassets are treated comparable to other investment vehicles. Therefore it is necessary to look into the status of cryptocurrencies as potential securities or means to acquire securities⁶³.

The comparative law analysis has proven that the need for effective anti-money laundering regulation played an important role in shaping cryptoasset definitions together with tax considerations. According to the previous elaboration, the Macedonian legal framework, cryptoassets still do not define the legal status of cryptoassets, crypto tokens or NTF's. However, the recently published draft amending the Law on Prevention of Money Laundering and Financing of Terrorism contains the definition of virtual assets⁶⁴.

The draft defines "virtual assets" as digital securities or rights that can be stored, traded or transmitted electronically using distributed ledger technology or any similar technology and may be used for exchange or investment purposes⁶⁵. They however explicitly do not include digital records of fiat currencies or money within the meaning of the law which are legal tender, securities and other financial assets in accordance with the law⁶⁶. If the draft becomes law, this would strongly imply that cryptoassets and other virtual assets are a form of intangible property, which is under the PIT Law defined as property in the context of the article means property without physical content which can be identified. This would put cryptoassets under the umbrella of digital securities, in which case profits from cryptoasset trading would be taxable as capital gains.

Such a classification would be comparable to the Croatian classification. This would in turn be only logical as the North Macedonian legal and tax system has much in common with the Croatian one. Therefore we can conclude that cryptoassets as part of the broader category of virtual assets are to be treated as a form of securities. An exception would however be CBDCs – central bank digital currencies, which are actual legal tender and thus fall under the definition of foreign currencies. The only grey area exists with regard to the most popular cryptocurrency – bitcoin, which could be considered to be comparable to a CBDC since it became legal tender in at least one country.

VI. CONCLUSIONS

The pace at which cryptoassets are being developed makes their comprehensive regulation in today's globalized world increasingly important. North Macedonia has chosen to largely avoid the regulation of cryptoassets due to previous limitations on foreign securities investments and the various consumer and investor risks that are associated with this new asset class. In contrast to this, leading global economies like the USA and the European Union are investing significant resources into fostering the development of blockchain technology as well as cryptoasset innovation. Especially new regulatory efforts will make it necessary for countries that have strong economic ties with the EU, like North Macedonia, to consider multiple aspects of

⁶³ Šime Jozipović, Marko Perkušić and Andrej Ilievski: CRYPTOCURRENCIES AS (I)LEGAL TENDER IN NORTH MACEDONIA AND THE EU. *Iustinianus primus law review* Volume 11 Issue 2 Year 2020

⁶⁴ Draft amending the Law on Prevention of Money Laundering and Financing of Terrorism, available at: https://ener.gov.mk/Default.aspx?item=pub_regulation&subitem=view_reg_detail&itemid=60126

⁶⁵ Draft amending the Law on Prevention of Money Laundering and Financing of Terrorism Paragraph 20 Article 2.

⁶⁶ . Draft amending the Law on Prevention of Money Laundering and Financing of Terrorism Paragraph 20 Article 2.

cryptoasset regulation. Anti-money laundering is certainly one of the first issues that will have to be addressed. However, as our analysis has shown, the Republic of North Macedonia has, after this step, already established the most necessary elements to classify cryptoassets from tax law and subsequently a civil law perspective. Cryptoassets are a special type of intangible property under the PIT law. They are identifiable, exist in digital form and can be traded online. While they are for the most part, not a currency, they represent a means of exchange. Transactions in which traditional cryptocurrencies are used, could in the light of the European legal tradition and the case-law of the ECJ, be considered sales contracts. Due to the increasing complexity of emerging cryptoassets, such a statement should however not be generalized but used as starting point for any further analysis. The current state of regulation, if applied correctly on cryptoassets, offers therefore a stable foundation for further regulation and adaptation to external standards.

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