



# LEGAL TECHNOLOGY TRANSFORMATION

## A PRACTICAL ASSESSMENT

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## BITCOIN AND CRYPTOCURRENCIES. TAX LAW RELATED PROFILES

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SUMMARY: 1. Preliminary remarks. – 2. Blockchain. Data management system. – 3. Some general considerations about cryptocurrencies. – 4. Bitcoin, virtual currency. Multiplicity of meanings. – 5. Ripple, a “semi-centralized” virtual currency. – 6. Ethereum. Fast secure transactions. – 7. Fiscal regime applicable to virtual currency transactions. Tax issues. – 8. Cryptocurrencies used for illegal purposes such as money laundering and terrorist financing. Connection between money laundering and tax offences.

### 1. *Preliminary Remarks*

A process of growing integration of international markets and of the trade of goods, services and financial transactions entails an ever-growing number of operators whose attention turns to global perspective horizons<sup>1</sup>. Such internationalisation determines an opening of the different economies as a result of the increase in cross trade activities, movements of capital, new knowledge and techniques. Within the framework of such an innovative scenario it is worth remembering that in order to certify certain important activities man has always relied on the intervention of third party entities: banks in case of money transfers; notaries in case of purchase and sale of real estate or assets in general; central authorities for the validation of an indefinite list of particular operations and transactions.

By the end of the first decade of the new millennium the new technological intuition, or maybe the need to get rid of such third party entities, had inspired a person – or rather a group of software engineers whose identity is still unknown, but use the name Satoshi Nakamoto – to conceive and design a software environment system allowing the certification of certain transactions without the intervention of the above entities, persons or central authorities: a system controlled by mathematical/computer algorithms, available for everyone to cooperate to the validation of the entered information.

The purpose was the creation of a distributed software environment having the functions of a public notary, the so-called Distributed Ledger Technology (DLT). The following figure shows the infrastructural logical configuration of the DLT.

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<sup>1</sup> In relation to the development of this occurrence, G. de la Dehesa, *Winners and losers in globalization* (Oxford 2005); G. M. Milesi-Ferretti and P. Lane, *Financial globalization and exchange rates*, (1 January 2005) IMF Working Paper N. 5/03 2005; M. Obstfeld and A. M. Taylor, *Global capital markets: integration, crisis and growth* (Cambridge 2004). J. Eatwell and L. Taylor, *Global finance at risk: the case for international regulation* (New Pr 2001); K. Okina, M. Shirakawa and S. Shiratsuka, ‘Financial market globalization: present and future’ (1999) 17 *Monetary and Economic Studies* 1; S. Strange, *Madmoney* (Manchester University Press 1998).

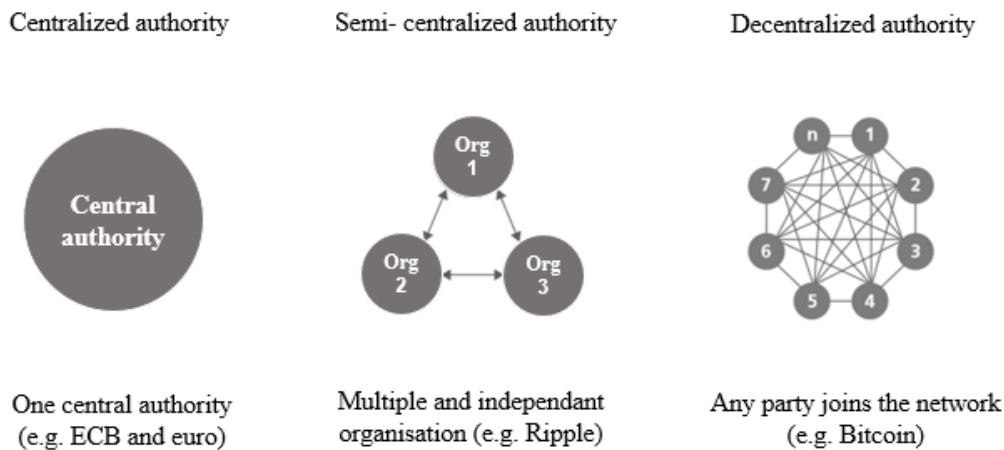


Fig. 1: Structures of currencies and cryptocurrencies. Re-worked after a chart by Joshua Baron, Angela O'Mahony, David Manheim, Cynthia Dion-Shwarz, National Security Implications of Virtual Currency (Rand Corporation 2015)

Cryptocurrencies, especially bitcoins, represent an application of the above. To date there are more than 2000 virtual currencies<sup>2</sup> though the present paper will deal essentially with the blockchain and some of the main cryptocurrencies.

## 2. Technology, ethics, and law

The blockchain is a particular management system of information based on the above-mentioned infrastructure called Distributed Ledger Technology. The DLT is to be considered as a sort of data base whose data is not stored in a single “point” but over a number of computers or sets of computers, called nodes, connected to each other through the internet. The main characteristics<sup>3</sup> that have encouraged the spread of DLT environments are:

- scalability and robustness, i.e. the possibility to add or remove nodes without affecting the functional body of the network;
- open-sourcing, i.e. the software ability not only to tolerate any alteration of the source code, but above all to give the possibility to observe and evaluate the reliability of the software itself (cooperation in the correction of errors and protection from malware);
- absence of the intervention of any trusted entities or persons to certify the activities managed by the system;
- non-repudiation of the information entered in the system; and
- in relation to cryptocurrencies, “pseudo-anonymity” and traceability online of the transactions, as well as prevention of double-spending.

In short, the word “blockchain” is self-explanatory as its functioning is based on the management of a “chain of blocks”: it is a digital register of transactions processed on the network in which such transactions are recorded individually in a section of the DLT called “block”. On a regular basis the block is “closed”, that means that in that specific section of the DLT no further transactions can be inserted nor those already

<sup>2</sup> These data are taken from one of the most reliable sites according to the field experts, *CoinMarketCap*.

<sup>3</sup> O. Calzone, ‘Bitcoin e distributed ledger technology’ (28 February 2017).

entered are susceptible to be modified. Such functional approach is identical for all blockchains used in the different applications, even showing some specific features with respect to different cryptocurrencies.

Each new block contains the digital signature of the previous block and the sequence of blocks constructs the chain. Such chain is visible on the network and can be freely consulted and downloaded by everyone. When modifying the data, the duration of the transaction processing can be affected in compliance with security requirements: in fact, the blockchain takes into account the whole available chronology, so that operations in DLT can be fairly slow.<sup>4</sup>

The “peer-to-peer” blockchain technology<sup>5</sup> can be applied in numerous fields.<sup>6</sup> In fact, it can potentially substitute for all central institutions through a distributed horizontal open network thus replacing all intermediary entities, third parties, controllers, central institutions, and having processes managed by a network of blocks that validate operations.

Bitcoin and cryptocurrency blockchains are accessible and “publicly visible”, while consortium blockchains are typically “private” and accessible only by the participating institutions.<sup>7</sup> During the last few years, such consortia have developed their activities, especially those dealing with the financial sector, specifically interested in exploiting the blockchain technology in basically all industrial areas.

The technology represented by the blockchain in recent years has been analyzed also by the traditional institutional actors, to the purpose of analyzing all its potential applications and at the same time trying to control the implicit threat underlying such disruptive technology.

Central banks worldwide are concerned in monitoring the development of cryptocurrencies and blockchains in all their possible applications within the FinTech sector. For instance, while such new technologies started to spread, the Bank of Italy has firstly set up a dedicated multidisciplinary working group (representing all institutional, research and IT functions) in order to analyze all initiatives dealing with blockchains in the national market, verify their consistency with the current regulatory framework and identify the possible legislative gaps and relevant potential risks. In 2020 the Bank of Italy has constituted the FinTech Committee, which is nothing more than the evolution and institutionalisation of the above interdisciplinary working group, which represents the strategic pivot whose target is to encourage digitalisation in Italy (especially on the occasion of the last pandemic emergency and in view of other future

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<sup>4</sup> It must be considered that VISA is able to process tens of thousands of transactions per second, PayPal some hundreds, while as far as virtual currencies are concerned, the bitcoin can process 7 transactions per second, Ethereum 20 and Ripple some thousands.

<sup>5</sup> In the peer-to-peer network, the inter-connected nodes are equal peer and function as client and server at the same time.

<sup>6</sup> In the last few years, many business applications have been developed exploiting the blockchain technology. Among the most popular there are those that guarantee the traceability of food; goods tracking; the completion of certifications; gaming; accounting; management of transactions, knowledge, creation of value; voting systems; legal/notary services.

<sup>7</sup> Public Blockchain: it is an open editable blockchain (upon consent given by the majority of the nodes), using consensus mechanisms like the proof-of-work and proof-of-stake systems. Consortium and private blockchains: the consensus can be centralized or controlled by certain nodes, and their validation and public visibility can be restricted, *La tecnologia blockchain: nuove prospettive per i mercati finanziari* (Banca d'Italia 2016).

‘black swan’ events), to widen the implementation of institutional offices relying on the new technologies, support families and the financial system through digital leverage, as well as to strengthen the cooperation with the other public entities on the national, European and international levels.

Taking into account the essential interrelationships existing between cryptocurrencies and the traditional banking system and, on the other hand, the potential positive effects of blockchain technology (e.g. reduction in operating costs, greater spread of information and better performance of the markets), the intention of the legislator is to encourage innovation without weakening the necessary activities of control and protection of the system, also preserving the reconciliation of the involved parties’ interests.<sup>8</sup> With the evolution of the regulatory framework, also under the EU impetus, there will shortly be a change in the system of payments that will renew and expand this sector and its players alongside with the spread of the blockchain technology.

### *3. Some general considerations about cryptocurrencies*

Within the complex changing “ecosystem” of cryptocurrencies, the bitcoin (being a pioneer in the sector) has the largest market share even though recently decreasing in its popularity by reason of the new alternative cryptocurrencies Ripple and Ethereum that are now proving a significant increase in capitalisation.

There are many other kinds of cryptocurrencies that mainly replicate the basic logic of bitcoin adapting and privileging some features over others, often depending on the pre-eminent needs of certain niches of users that have to be satisfied (e.g. speed in transactions, higher anonymity, etc.). In the following sections we will refer only to three cryptocurrencies that, to date, are among the most used: Bitcoin, Ripple and Ethereum.

The tool that allows one to complete the purchase and sale of goods, services or cryptocurrencies is called *wallet*. The main function of the wallet is to securely hold the user's private key, create transactions that are sent to the network and collect incoming and outgoing transactions, highlighting the balance available to the user. The wallet can be physical (a sort of USB stick or a simple sheet of paper showing the relevant “bitcoin address” which can be either alphanumeric and a QR code) or software (mobile application, PC program or a program on the network). The bitcoin address is the equivalent of the IBAN of the traditional banking system, so that in order to be allowed to receive bitcoins it is necessary to give a bitcoin address.

### *4. Bitcoin, a virtual currency. Multiplicity of meanings*

At the beginning of 2020, the bitcoin was still the most widespread virtual currency. Born in 2008 from the theorisation of the person or persons using the pseudonym of Satoshi Nakamoto and operational since 2009, the bitcoin uses cryptographic schemes for the creation and transfer of money outside the system governed by central authorities, financial and banking intermediation and any inflationary process. In fact, it is a distributed digital currency, created from a decentralized peer-to-peer network.

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<sup>8</sup> I. Visco, ‘La tecnologia blockchain: nuove prospettive per i mercati finanziari’, in *La tecnologia blockchain: nuove prospettive per i mercati finanziari* (Banca d’Italia 2016).

Nonetheless, the word “bitcoin” has several meanings as specified hereunder:

- The protocol: these are instructions on how to build the blockchain, how it is to be analyzed, how to assemble transactions and features that make a transaction valid;
- The network: it is the peer-to-peer network that connects the nodes whose function is to carry messages managed by the protocol;
- The currency: bitcoin is normally written with the lowercase initial and is the original unit of the Bitcoin network, constituted by 21 million bitcoins in circulation. The bitcoin is the main unit of measurement, and each one is divisible into 100,000,000 parts called “satoshi”.<sup>9</sup>
- The open-source implementation: it is the original open-source project, written in computer language, which implements the protocol. From the website <[bitcoin.org/en/download](http://bitcoin.org/en/download) it> is possible to obtain the source code freely and without cost.

The bitcoin network is managed peer-to-peer directly by its users, who contribute to the smooth operation in a decentralized manner for the “certification/closing” activities of the blocks. The algorithm that is at the base of the bitcoin software allows the creation of only 21 billion bitcoins. It is estimated that there are about 18.4 million units in circulation for a total value of approximately 160 billion dollars.

Bitcoins are created through the so called “bitcoin mining” that consists in the resolution of complex calculations, sometimes sharing the computing power of many computers in “bitcoin farms” or by “cloud mining”, i.e. renting computing power; such use of resources is remunerated by the issuance of some units of cryptocurrency whose amount, initially fixed in 50 bitcoins, is halved every four years approximately, in parallel with the decreasing amount of the virtual currency issued. People or entities that perform bitcoin mining are commonly called “miners”; their function is essential for a new block of transactions to be added to the blockchain and for the control, validation, and encryption operations to be completed.

Generally, crypto value networks reward the calculation of the correct hash with a predetermined amount of currency, which is also an incentive for the users who make their computing power available for transaction security. Since there is no centralized entity responsible for the remuneration of certification activities, it is the system itself that provides for the remuneration of those who handle the blockchain management operations. This function allows for each closed block a certain number of bitcoins to be given to the entity that closes the block. The management protocol of the closing of the block provides for the halving of the bitcoin reward value every 210,000 blocks. Under the operating rules of the bitcoin blockchain, this condition occurs about every 4 years. The last one was on 12 May 2020.

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<sup>9</sup> C. Richard, *Learning bitcoin* (Packt Publishing 2015), 9.

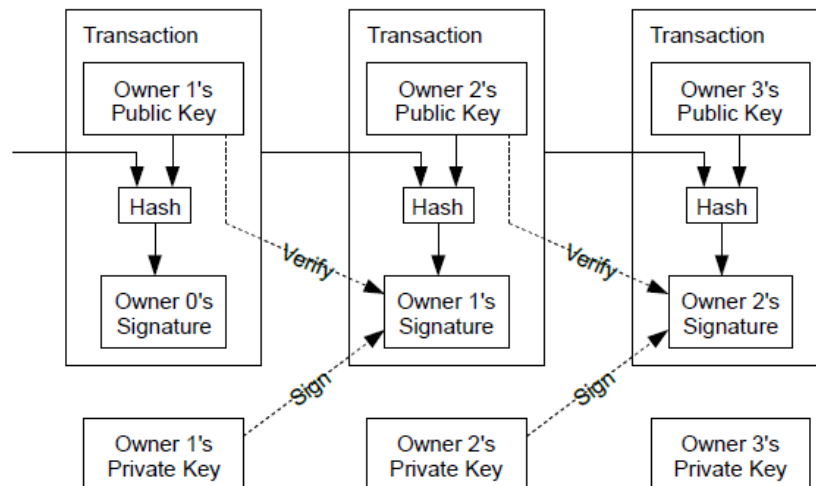


Fig. 2: Bitcoin transactions – Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008)

The bitcoin is based on a distributed consensus algorithm using the proof-of-work mechanism (PoW). An alternative way to validate transactions is to allow nodes to hold a certain amount of money for a certain time (coinage) to be used as collateral for the transaction eventually certified; this is the proof-of-stake that does not require complex calculations (likewise for the bitcoin) to validate transactions in the ledger. Such mechanism is used by Ripple, that has become recently the second most used cryptocurrency after the bitcoin, whose blockchain is the basis of a payment system.

In Italy, in a context particularly prone to the use of cash, cryptocurrencies are still moderately popular, even if it must be said that they are more and more frequently used in different commercial sectors, such as clothing, restaurants, in the e-commerce, and even cab services and real estate business.

Nevertheless, the strong growth of the use of bitcoins (BTC), which was not expected nor predictable, has highlighted some critical points, in particular the limits shown by the decentralized certification chain of transactions and the limits of the capacity of the blocks (one megabyte per block). With the substantial increase in the number of transactions, such characteristics have entailed longer delays in the processing of these transactions and higher commissions: these are elements that slow down the spread use of bitcoins.

##### 5. Ripple, a "semi-centralized" virtual currency

Ripple (XRP) was created in 2012 and has now become one of the main cryptocurrencies after bitcoin. Ripple's characteristic, as shown in Figure 1<sup>10</sup> is being "semi-centralized" with respect to the presence of a central authority (not necessarily public), because it is connected to a network in which there are some nodes that act as validators, in other words certify transactions, and at the same time guarantee efficiency and short delays of processing. Ripple's blockchain has been conceived with the aim of making intercontinental payments fast, eliminating a series of intermediaries and delays

<sup>10</sup> J. Baron, A. O'Mahony, D. Manheim and C. Dion-Shwarz, *National Security Implications of Virtual Currency* (Rand Corporation 2015), 9.

typical of the traditional systems, and its technological infrastructure currently allows different types of assets to be exchanged.

The method of validation of the distributed ledger is certified by major telecommunication companies and by academic bodies (including the Massachusetts Institute of Technology). This has awoken the interest of many credit and financial institutions in a considerable way. In order to guarantee the consistency of the data of currency movements banks, or authorities must set up an adequate security system, involving some costs: the adoption of the Distributed Ledger Technology simplifies these activities and enhances their effectiveness. Ripple can rely on an increasing support from traditional credit institutions, since many banks and international financial institutions belong to RippleNet, a global decentralized network of banks and payment institutions using the blockchain bearing the same name<sup>11</sup>. The banking circuit that has adopted Ripple is at present evaluating the possibility of using the infrastructure also for the management of a new payment card system.

#### 6. *Ethereum. Fast and secure transactions*

Ethereum was developed in 2014, its security features are more accurate if compared to those of bitcoins and has a peer-to-peer sharing structure where information is managed on multiple nodes at the same time making it more complicated for hackers to penetrate and modify data.

Ethereum's blockchain is very successful thanks to its optimal trade-off between security and speed of the transaction process and has become the reference platform for several start-ups, well beyond the mere cryptocurrency payment processing industry,<sup>12</sup> in particular for the potential offered by smart contracts whose conception is not new but largely extending to different fields since the development of blockchain technologies.

The main features of the Ethereum environment allow cryptocurrencies to be used not only in case of traditional transfers of virtual currency. Two further particular activities can be processed:

- a) Fundraising: ICO (Initial Coin Offer) is a mechanism according to which a company, in order to finance its projects, relies on certain Ether lenders whose intervention is both an investment and a sort of “fidelity card” through which the lenders can receive the benefits generated by the company that launched the ICO
- b) Smart contracts: the so-called “smart contracts” use the Ethereum underlying logic in order to implement software procedures that manage the relationships between users, taking into account a whole series of parameters that characterize a contract, i.e. negotiation, execution, partial or total exclusion of a contractual clause. All this without the need of the intervention of a public notary to formalize the system operation. There are two types of smart contract:

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<sup>11</sup> ABI, *Banche italiane avviano sperimentazione blockchain* (4 June 2018).

<sup>12</sup> Among others, applications like uPort, whose object is to replace the identity cards issued by the state authority with a certified digital identity, and GridPlus, used to track power consumption to the purpose of cutting the cost of energy bills.



- Smart Code Contract: it has no legal value, and its use is limited to the management of each status of a process to be controlled. Each status is a transaction of the process, and all the transactions are stored in the blocks.
- Smart Legal Contract: it has a purely legal content. When certain conditions of the process under analysis occur, the system starts certain particular actions.

### 7. *Fiscal regime applicable to virtual currency transactions*

Possession of bitcoins and cryptocurrencies must be declared to the tax authorities by entering the information in section RW of the tax return. In fact, by judgment No. 1077 of 27 January 2020,<sup>13</sup> the Regional Administrative Tribunal (TAR) of Lazio rejected the appeal lodged by the concerned associations<sup>14</sup> challenging the decision according to which “virtual currencies” are to be subjected to the fulfilment of the obligations in relation to the so-called tax monitoring referred to in Law Decree No. 167 of 28 June 1990. The fulfilment of such obligation is in fact imposed by the Inland Revenue through the publication of the guidelines for the compilation of the 2019 tax return form for natural persons although in the absence of any act providing for this obligation.<sup>15</sup>

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<sup>13</sup> See Regional Administrative Tribunal (TAR) Lazio (Sect. II – 3), judgment No. 1077 of 19 November 2019 – 27 January 2020. The judgment stems from the appeal brought by some associations against the 2019 income declaration forms (tax year 2018) which provided for the inclusion of virtual currencies within the tax monitoring obligations.

<sup>14</sup> These associations (as for example ASSOBIT) spare no efforts to promote the widest spread of the Blockchain technology and represent the interests and instances of all those who carry out activities related or attributable to it (such as, for example, the development, production, distribution, marketing of related software and hardware, relevant services such as trust deposits, management of wallets, exchange or purchase and sale of cryptocurrency, etc.). The above associations challenge the judgment for the following reasons. Nullity ex Art. 21-septies of Law No. 241/1990 of the contested measure for absolute lack of authority by the Administration to provide for the introduction of the described tax regime to “virtual currencies” according to the provisions of Art. 23 of the Constitution and Art. 1 of Law No. 212 of 27 July 2000 (the subjection of virtual currencies to tax declaration obligations referred to in the contested measures would be the result of the exercise of an administrative power without any primary rank legislative authority). Infringement and/or misapplication of Art. 1 of Presidential Decree No. 322 of 22 July 1998 – Breach of law - of Articles 5 and 7 of Law No. 212 of 27 July 2000 (the so-called Charter of Taxpayer Rights) and misuse of powers for failure to state reasons, misrepresentation of facts and lack of proper preliminary investigation (lack of a formal measure of approval or modification of the tax return model; violation of the taxpayer’s right to be duly informed). Infringement and / or misapplication of Articles 1 and 4 of Law Decree No. 167 of 28 June 1990 (so-called decree on “tax monitoring”), Art. 9 of Law Decree No. 917 of 22 December 1986 (so-called “T.U.I.R.” – *Consolidated Law on Income Tax* – [Translator’s note]) and Art. 1, paras. 2, 3 and 5, of Law Decree No. 231 of 21 November 2007 (so-called “Consolidated Law Anti-Money Laundering”), as amended by Law Decree No. 90 of 25 May 2017 (transposing Directive (EU) 2015/849 of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, so-called “Fourth AML Directive”). Annulment of the contested measures because contrary to European law, subject, if necessary, to a preliminary ruling as provided by Art. 267 TFEU.

<sup>15</sup> The applicant associations assume that the virtual currencies, first among all the bitcoins, are digital recordings stocked in ledgers (“blockchains”) whose distributed and shared copies remain in all computers or devices connected to the network they belong to; moreover, virtual currencies are nothing less than empty virtual boxes eventually available to be filled with data and transmitted to other users. Furthermore, virtual currencies have been positively recognized by Italian Law thanks to Law Decree No. 90 of 25 May 2017; in the transposition of the Fourth AML Directive (Directive (EU) 2015/849),

In addition, the applicant associations maintain that the measures they challenge are illegitimate also on the ground of the illogicality and unreasonableness of the operated assimilation, for tax purposes, of virtual currencies to foreign investments and financial activities<sup>16</sup>. In this regard, the above associations represent a series of motivations: (i) virtual currencies are not included in the typical list of incomes referred to in Art. 6 of the T.U.I.R., (ii) the mode of preservation is not referable to a “geographical” concept of possession<sup>17</sup> and, finally, (iii) the providers of the services concerning the use of virtual currency are not comparable to financial operators.<sup>18</sup>

However, the judges<sup>19</sup> note that the Inland Revenue by Interpellation No. 956-39 of 2018<sup>20</sup> had already expressed the concept that possession of virtual currencies must be declared. Therefore, the instructions take over and formalize a pre-existing orientation.<sup>21</sup> In any case, it appears conclusive the regulatory amendment to Law Decree No. 167/1990, made through Law Decree No. 90/2017 (with regard to the fight against money laundering) which has explicitly included the use of “virtual currencies” among the relevant operations to be subjected to monitoring.<sup>22</sup>

Also from this further point of view, therefore, it is confirmed that these “instructions” are not an innovation of the tax system, but rather a sign of the change in the monitoring regime implemented as a result of Law Decree No. 90/2017.<sup>23</sup>

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the legislator has introduced a definition of “virtual currency” recalling the one contained in the Commission’s proposed amendment, thus anticipating the transposition of Directive (EU) 2018/843 (so-called Fifth Anti Money Laundering Directive) dated 30 May 2018.

<sup>16</sup> In this connection, please refer to «*Virtual currency schemes – a further analysis*» (2015) a report by ECB in which it is established that for regulatory purposes virtual currencies do not fit the legal definition of tender currencies, being no creditor obliged to accept payment in virtual currency to discharge a debtor of its debt. Furthermore, the European Court of Justice, by a judgment dated 22 October 2015 (case C-264/14) in relation to a case of intermediation carried out through exchange transactions between virtual and legal tender currencies, established their non-validity with respect to VAT purposes.

<sup>17</sup> The blockchain as such is a shared distributed “virtual ledger” that keeps track of all messages received by every individual user of the system. Its essential feature is therefore its “aterritoriality” since the availability of the virtual currencies coincides with the possession of a “private key”, essential for their transfer (which key, in turn, is a unique “cryptographic code”) which cannot be considered as a “storage” in a physical place.

<sup>18</sup> See Art. 3, para. 5, of Law Decree No. 231/2007 (modified by Art.1 of Law Decree No. 90/2017).

<sup>19</sup> The judges maintain that the action of the applicant associations aiming at the annulment of the contested measures by which the Inland Revenue has subjected the “cryptocurrencies” or digital currencies to administrative taxation is legally groundless, also due to the impossibility to assimilate the character and the nature of such currencies to income of financial nature. In particular, it is exactly for this reason that they are not included in the list of Art. 6 of the T.U.I.R. (Presidential Decree 917/1986).

<sup>20</sup> See Interpellation No. 956-39 of 2018. This orientation corresponded to what was perceived by legal theory (and more precisely in the comments to the 2018 tax obligations relevant to 2017).

<sup>21</sup> Ibid.

<sup>22</sup> Basically, the regulatory innovation expressly submits to monitoring the use of virtual currencies and establishes that both financial and non-financial operators are subject to the same monitoring.

<sup>23</sup> The judges point out that it is a matter of specific regulatory interventions aimed at giving a formal classification to the categories of transactions performed using virtual currency, helping to define the relevant applicable regime especially for the purposes of monitoring and for the prevention of money laundering, but with obvious repercussions also in terms of tax liability. In fact, such classification is not limited to define virtual currencies money as a “means of exchange”, but expressly contemplates the possibility that through its use a number of operations of “purchase of goods and services” or “investments” can be completed, transposing that ductile characteristic of the “digital representations of values” – which allows to convey more types of operations and exchanges. Moreover, from the point of

After all, the admittance of the notion of “functionality” of virtual currency involves its liability to taxation not because it is a financial means in itself, but because of the different purposes that the use of virtual currency makes possible (financial purposes or purchase of goods and services, as the case may be). As a consequence, the guidelines of the Inland Revenue expressed in Resolution No. 72/E of 2 September 2016<sup>24</sup> and in the Interpellation No. 956-39/2018 are not inconsistent with the “instructions” object of the annulment action in question.

With reference to the tax treatment strictly applicable to transactions linked to virtual currencies, as specified by the Inland Revenue with the aforementioned Resolution No. 72/2016, we cannot ignore what the Court of Justice of the EU stated in its judgment of 22 October 2015, Case C-264/14. In particular, it is thereby clarified that the activity of intermediation of traditional currencies with bitcoin carried out professionally and on a regular basis involves VAT as well as IRES (*Corporate Income tax*) and IRAP (*Regional Income Tax*) liabilities.<sup>25</sup>

On the contrary, in the case that natural persons hold bitcoins (or other virtual currencies) outside their business activity, the general principles regulating operations with traditional currencies are applied. As a consequence, movements of virtual currency do not give rise to taxable income in the absence of speculative purposes, unless a different income is generated because the transferred currency derives from withdrawals from wallets (electronic portfolios), whose average stock exceeds a

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view of the legislation, Law Decree No. 90/2017 and Directive (EU) 2018/843 of 30 May 2018 have completed the scenario. Such Law Decree and Directive include a formal definition of virtual currency as a “means of exchange” (Art. 1, para. 2, let. q) of Law Decree No. 231/2007, as amended by Art. 1 of Law Decree No. 90/2017).

Moreover, in the final wording after the amendments made in the course of the case to Article 1 of Law Decree No. 231/2007 by Law Decree No. 125 of 4 October 2019 (therefore subsequent to the contested measure, but still relevant to guide the interpreter), “virtual currency” is “the digital representation of value, not issued or guaranteed by a central bank or public authority, not necessarily linked to a legal tender currency, used as a means of exchange for the purchase of goods and services or for investment purposes and transferred, stored and traded electronically”.

Under subparagraph (s), the words “means of payment” define the following: “[...] every other available instrument that allows to transfer, move or acquire, also electronically, funds, values or financial resources”; finally, at subparagraph (ff) the “providers of services related to the use of virtual currency” are “every natural or legal person that supplies to third parties professional services functional to the use, exchange, custody of virtual currencies and their conversion from or into currencies having legal tender”.

<sup>24</sup> We recall the principles expressed by the Court of Justice of the EU (Case C-264/14, *Skatteverket v David Hedqvist*, judgment of 22 October 2015) that, in relation to indirect taxes (VAT), specified that “transactions consisting in the exchange of traditional currency against units of virtual bitcoin currency [...] constitute services for consideration”. Therefore, taking into account Art. 135, para. 1, let. a) of Directive 2006/112/EC, it is “clear that the bitcoin has no other purpose but that of a means of payment, and it is accepted for that purpose by some operators”. Therefore, these operations, as far as VAT is concerned, are to be qualified as exempt (Art. 10, para. 1, no. 3, Presidential Decree No. 633/72). For the purposes of direct taxation, the Inland Revenue considers that the taxpayer “must declare the income deriving from the intermediation activity of purchase and sale of bitcoins, net of the related costs inherent to this activity”.

<sup>25</sup> Subject to the obligations of adequate customer verification, as well as registration and reporting requirements provided for by Law Decree No. 231 of 21 November 2007.

countervalue of EUR 51,645.69 for at least seven consecutive working days in the tax period.<sup>26</sup>

In other words, the Inland Revenue has specified that the bitcoin is similar to any currency and therefore the same regulations apply to private individuals who engage in speculative activity in the monetary field. This regulation establishes that only the activities of private citizens who hold for at least seven consecutive days in a year an amount in currency for a countervalue equal to or exceeding EUR 51,000 can be considered speculative activity (thus generating taxable income).<sup>27</sup>

#### 8. *Cryptocurrencies used for illegal purposes such as money laundering and terrorist financing. Connections between money laundering and tax offences*

As a different approach, the G20 member countries (20 March 2018) refuse to consider bitcoins and other cryptocurrencies as national sovereign currencies. Moreover, they are aware of the risk that such cryptocurrencies may be used for illegal purposes, such as money laundering and terrorist financing,<sup>28</sup> just because of their “crypto” nature. The elimination of anonymity, characteristic that may encourage illegal behaviours, could be a first attempt to solve the highlighted problems.

The management of cryptocurrency is still the object of different views invoking stricter or lighter regulations of the sector. It is therefore necessary, in this general context in which the States have not yet found a unified position, to implement a new regulatory framework.

On the other hand, the growing globalisation of finance opens the way to criminal behaviours, generally identifiable mainly in money laundering.<sup>29</sup> In this perspective, the effects are not reflected only in the economic sphere, since such illegal operations risk to affect negatively also factors of growth and social development of the States.<sup>30</sup> It is

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<sup>26</sup> Pursuant to Art. 67, para. 1, let. *c-ter*) of T.U.I.R. In this context, in consideration of the fact that in the previous petitions the taxpayer had merely asked whether the spot transactions were subject to taxation but omitted to give any indication of the real average stock of all its wallets, in addition to what specified by the Inland Revenue in its replies to the previous petitions it is clarified that should such stock have exceeded the countervalue in Eur of 51.645.69 for at least seven continuous working days in the tax year 2016, also the exchange transactions carried out in that tax period would be subject to taxation in compliance with the combined provisions of Art. 67, para. 1, let. *c-ter*), and para. 1-*ter*, of the Consolidated Law on Income Taxes approved by Presidential Decree No. 917 of 22 December 1986.

<sup>27</sup> In this case the capital gain must be recorded and declared. However, private investors do not “file their balance sheet” at the end of the year, so the capital gains (26% of the gains or capital gain) will be recognized only at the time when the bitcoins shall be sold.

<sup>28</sup> See, *inter alia*, the qualification of international terrorism introduced by Law Decree No. 144 of 27 July 2005, providing for urgent measures to combat international terrorism (converted into Law No. 155 of 31 July 2005).

<sup>29</sup> In this context of globalisation of the economy, the provision of valid and effective international control bodies is therefore fundamental, together with adequate prevention and contrast instruments. In fact, it is often a matter of financial flows from criminal activities introduced into the legal economy in order to conceal their illegal origin.

With reference to the distorting effects of money laundering on market mechanisms, see, World Bank, Governance, the World Bank’s experience, Washington, 1994; UNDP (United Nations Development Programme), *Human development report*, Washington, 1991.

<sup>30</sup> In this regard, see Bank of Italy, *Comunicazione UIF del 23 aprile 2012 – Schemi rappresentativi di comportamenti anomali ai sensi dell’art. 6, co.7, lett. b) del d.lgs. No.231/2007. Operatività connessa con le frodi fiscali internazionali e con le frodi nelle fatturazioni* <<https://uif.bancaditalia.it/normativa/norm->

no coincidence that criminal practices<sup>31</sup> determine a drop in general economic levels, and financial instability can lead to the progressive impoverishment of entire segments of the population, especially in those weaker systems that have placed excessive reliance on international finance.<sup>32</sup>

In this context, the relationship between money laundering and tax crimes is the core subject-matter of an intense debate of legal theory, also following recent innovative case-law material. In this regard, the judges of the merits on the ground of previous case-law were inclined to exclude the possibility to represent a relation existing between money laundering and tax crimes. Indeed, it was maintained that tax fraud could not constitute a valid prerequisite condition to money laundering activities, due to the concrete impossibility of identifying the nature and size of the illicit proceeds.<sup>33</sup> Therefore, it was affirmed the principle according to which the assumed offence of money laundering could “only consist of crimes that produce an evident and tangible enrichment of the perpetrator of the crime. An enrichment that must be physically locatable” and therefore, “isolable [...] and recognizable within the assets of the author of the unlawful behavior”, referring, in this regard, to the “identifiability” of the proceeds “as interpreted by civil law”.

However, following the implementation of the aforementioned Directives of 2001 and 2005 – with consequent extension of the number of the predicate offences – and the FATF's Forty Recommendations (February 2012), the crime of money laundering has been included within the serious offences, including tax offences. The same Directive (EU) 2015/849 expressly identifies all tax offences concerning direct and indirect taxes among the criminal activities “relevant” to money laundering.

Therefore, in view of the changed EU and international contexts, the national legislator has taken steps to revise the regulatory framework on the subject, highlighting the systematic connection between money laundering, self-laundering<sup>34</sup> and tax offences.

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indicatori-anomalia/COMUNICAZIONE\_UIF\_DEL\_23\_Aprile\_2012.pdf>. Following the update of the anomaly indexes, it should be noted that there is a close relationship between tax evasion and money laundering; low tax countries are the most subjected to such unlawful behaviours.

<sup>31</sup> See U.S. Presidential Commission on Organized Crime, *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering* (1984) and taken up in legal theory from: D. Masciandaro and A. Mantica, ‘Evoluzione del sistema pagamenti internet e cybericiclaggio: prime riflessioni’, in F. Bruni and D. Masciandaro (eds), *Mercati fiduciari e riciclaggio. L'Italia nello scenario internazionale* (EGEA 1998), 57 ff.

<sup>32</sup> See also Senato della Repubblica, *Problematiche connesse al riciclaggio nell'ambito dei disegni di Legge n. 733 e collegati in materia di sicurezza pubblica*. Testimonianza del Governatore della Banca d'Italia Mario Draghi (15 July 2008). With negative consequences on the reputation of the financial institutions in terms of adherence to standards of honesty and compliance with standards and ethical codes by operators, M. Draghi, *L'azione di prevenzione e contrasto del riciclaggio* (Banca d'Italia 2007).

<sup>33</sup> Legal theory, L. Tosi and A. Toppan, *Lineamenti di diritto penale dell'impresa* (CEDAM 2017); E. Della Valle, ‘Le operazioni inesistenti nell'ordinamento penal-tributario’ (2015) *Rassegna tributaria* 433; S. Giavazzi, ‘I reati societari e fiscali quali reati-presupposto del riciclaggio’, in S. Giavazzi and M. Arnone (eds), *Riciclaggio e imprese. Il contrasto alla circolazione dei proventi illeciti* (Vita e Pensiero 2011), 108 ff; P. Ielo, ‘Reati tributari e riciclaggio: spunti di riflessione alla luce del decreto sullo scudo fiscale’ (2010) *Rivista* 231 10; F. Hinna Danesi, ‘Proventi da frode fiscale e riciclaggio’, in C. G. Corvese and V. Santoro (eds), *Il riciclaggio del denaro nella legislazione civile e penale* (Giuffrè 1996), 283 ff. See, also, G. Flora, ‘Sulla configurabilità del riciclaggio di proventi da frode fiscale’ (1999) *Foro Ambrosiano* 44.

<sup>34</sup> See A. Gullo, ‘Autoriciclaggio e reati tributari’ (2018) *Diritto Penale Contemporaneo* <<https://archivioldpc.dirittopenaleuomo.org>>; L. Deaglio, ‘Autoriciclaggio e reati tributari: lo scontro

As it is formulated at present, Art. 648 bis of the Italian Criminal Code does not contain the previous mandatory specification regarding the predicate offences, but its object has been developed so as to include also the “substitution or transfer of money, goods or other benefits” and all behaviors that may hinder the identification of their criminal origin.

By adding the specification “other benefits” as a last provision in relation to “money and goods”, the rule aims to prevent that such benefits generating unlawful profit may “elude” criminal repression.<sup>35</sup>

On the other hand, the wording “other benefits” is so broad that it includes everything that has an economically appreciable value, such as the *res* that automatically increase the assets of the wrongdoer, or any type of fraudulent activity aimed at preventing the impoverishment of assets.<sup>36</sup>

As highlighted by the recent case-law, the historical evolution of the rule and its literal wording<sup>37</sup> leads to believe that all fraudulent crimes (and, therefore, also tax frauds) are included among the predicate offences. In this regard, it is necessary to consider how tax frauds<sup>38</sup> (including those carried out at international level) and money laundering are functionally linked crimes. In many instances, in fact, tax evasion represents the instrument used to constitute funds to be reinserted into the economic circuit or to facilitate criminal conducts.<sup>39</sup>

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dottrinale in punto di compatibilità’, in A. Rossi and S. Quattrocchio (eds), *Autoriciclaggio. La sistematica punitiva* (Editoriale Scientifica 2017), 103; P. R. Cordeiro Guerra, ‘Reati fiscali e autoriciclaggio’ 2016 *Rassegna tributaria* 321; M. Maugeri, ‘L'autoriciclaggio dei proventi dei delitti tributari’, in E. Mezzetti and P. Piva (ed.), *Punire l'autoriciclaggio: come, quando e perché*, (Giappichelli 2016), 102 ff.

<sup>35</sup> See Art. 3, para. 4, let. f), Directive (EU) 2015/849, 20 May 2015. See also Art. 3, para. 1, Law No. 186/2014 that has also introduced the crime of self-laundering in our system.

<sup>36</sup> See Court of Cassation (Criminal Section II), judgment of 15 February 2012, No. 6061, and judgment of 30 January 2018, No. 11836. For the purpose of the identification of the crime of money laundering, the Judges of the Supreme Court of Cassation deem that it is of essence only “to reach the logical proof of the illegal origin of the benefits of the transactions carried out”.

<sup>37</sup> On the issue, the decision of the Court of Cassation No. 6061/2012 (n 37), according to which the wording “other benefit” is so broad that it must include all those benefits that have an “economically appreciable value”, with the consequence of including “not only those elements that increase the assets of the actor but also everything that is the result of those fraudulent activities thanks to which it is possible to prevent the assets from suffering from impoverishment”, see Court of Cassation No. 6061/2012 (n 37); in accordance with Court of Cassation (Criminal Section II), judgment of 11 November 2014, No. 47436. See also Court of Cassation (Criminal Section II), judgment of 18 April 2018, No. 17235.

<sup>38</sup> F. D’Arcangelo, ‘Frode fiscale e riciclaggio’ (2011) *Rivista dei dottori commercialisti* 334; I. Caraccioli, ‘Il riciclaggio di denaro proveniente da frode fiscale’ <[www.odcec.torino.it/public/elaborati/to21.doc](http://www.odcec.torino.it/public/elaborati/to21.doc)>.

<sup>39</sup> In this regard, see Bank of Italy, *Comunicazione UIF del 23 aprile 2012* (n 31), in compliance with Art. 6, para. 7, let. b) of Law Decree No. 231/2007 – *Operations connected with international tax fraud and billing fraud*, 23 April 2012. Following the update of the anomaly indexes, it is to be noted that there is a close relationship between tax evasion and money laundering; the main vehicle is represented by low-tax countries.