



**BLOCKCHAIN**  
VLAANDEREN



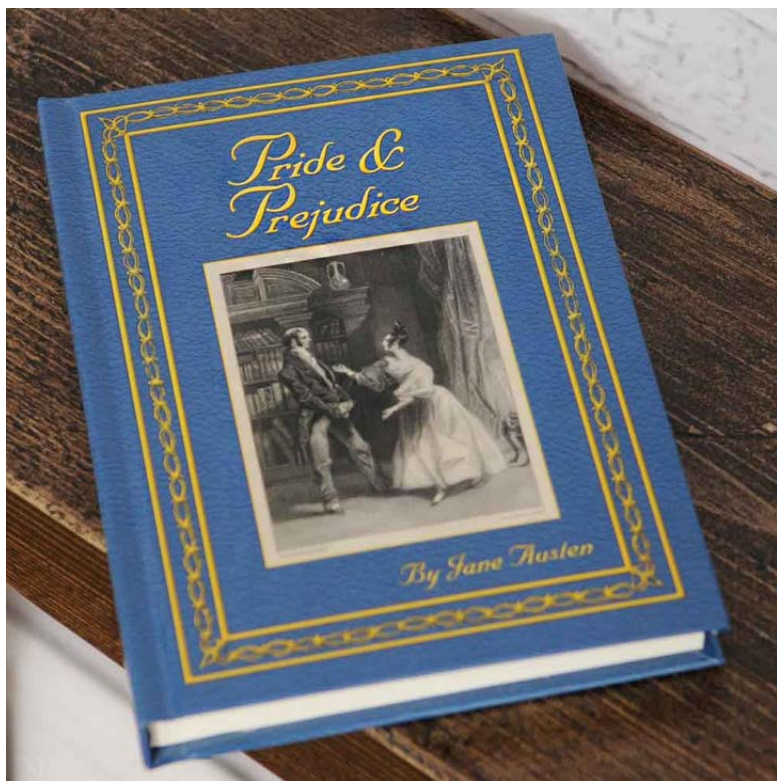
## 5 legal pitfalls

*every blockchain professional should avoid*

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15 February 2018

# Before we start ...



De vereniging heeft als doel:

Het eerlijk en gelijkwaardig respecteren en tegemoetkomen aan de waarden en noden van de twee grote taalgemeenschappen in België in al haar activiteiten.

\* Het promoten van het gebruik van bitcoin in België, door:

- het gebruik van bitcoin in de zakenwereld te promoten;
- het gebruik van bitcoin tussen particulieren te promoten;
- het opleiden en trainen van nieuwe gebruikers en geïnteresseerde partijen;
- het dienen als aanspreekpunt voor de pers;
- het ter beschikking stellen van promotiemateriaal;
- het onderhouden van een informatieve website;
- het in kaart brengen van het netwerk / de lijst van organisaties in België die bitcoin gebruiken;
- het aanmoedigen om lid te worden van de vereniging.

\* Het in contact brengen van geïnteresseerde partijen met experts in technische, financiële en wettelijke aangelegenheden met betrekking tot bitcoin.

\* Bijdragen aan de verduidelijking van wettelijke en financiële regels in België, door in naam van de leden te communiceren met de Belgische overheid en andere relevante openbare instellingen gevestigd in België.

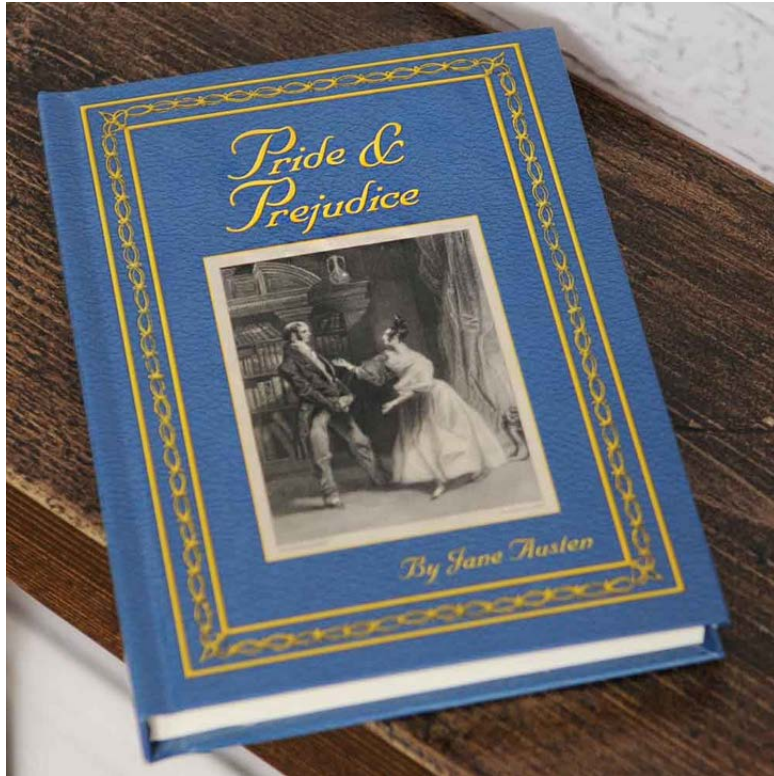
\* Vertegenwoordigen van de Belgische bitcoingemeenschap op internationale niveau's door bijvoorbeeld te participeren in een wereldwijde bitcoinstichting of gelijkaardige organisaties, en door deel te nemen aan conferenties.

\* Samenwerken voor zover nodig met organisaties die los staan van bitcoin op Europees en wereldwijd niveau.

\* Fondsen inzamelen voor de financiering van activiteiten.

De vereniging kan alle handelingen stellen die rechtsreeks of onrechtstreeks verband houden met haar doel, met inbegrip van bijkomstige commerciële en winstgevende activiteiten binnen wat wettelijk is toegelaten en waarvan de opbrengsten te allen tijd volledig zullen worden bestemd voor haar doel.

Before we start ...



We are :

- not promoting virtual currencies as an investment ;
- not anti-business ;
- not opposed to any and all regulation ;
- not a business disguised as a non-profit ;
- not only about bitcoin ;
- but also about other virtual currencies ;
- and also about the blockchain-tech in general ;
- on a mission to EDUCATE and to EXPLAIN ;
- 100% dependent on volunteers and donations.

# Contents

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- **“I’m into blockchain, not into cryptocurrencies”**
- “Anonymity of cryptocurrencies / tokens is a big problem”
- “ICOs are all scams”
- “Tax treatment is unknown and tax authorities are hostile”
- “Regulations are bad, mkay”



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*“I’m into blockchain, not into cryptocurrencies”*

blockchains = a subset of databases in general

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*F. Glatz:*

## A blockchain can be defined as...

- An immutable, append-only database
- Recording some information about the world
- Shared within a network of stakeholders
- Who agree that what is recorded in the database is true

*“I’m into blockchain, not into cryptocurrencies”*

most<sup>(\*)</sup> blockchains work with tokens

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## Tokens

- “a specific amount of digital resources which you control and can reassign control of to someone else”
- No legal definition, but “I know it when I see it”

\* = notable exceptions: R3 Corda, IBM Fabric



*"I'm into blockchain, not into cryptocurrencies"*

use of tokens

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## Tokens are used to (non-exclusive, non-exhaustive list):

- Power the blockchain (e.g. bitcoin) ;
- Record a claim on an asset (notary / registrar) ;
- Represent ownership / stake / vote (e.g. some ICOs) ;
- Execute payments, serve as an investment (e.g. bitcoin, virtual currencies).

*"I'm into blockchain, not into cryptocurrencies"*

black sheep vs. white lambs ?

## Legal definition of virtual currency (EU AMLD 5)

- "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency, and does not possess a legal status of currency or money, but is accepted by natural or legal persons, as a means of exchange, and which can be transferred, stored and traded electronically."



**TOKENS IN SCOPE !**



“I’m into blockchain, not into cryptocurrencies”

We are not a virtual currency issuer, your honour!



#### Objections / solutions (?)

- “Our blockchain was never *intended* to be used as currency, we are only a registration / voting / ... system”
- “We will include a clause in our terms and conditions which prohibits use of our tokens as a currency.”
- ...

**IMO** very difficult, if not impossible, (1) to make a legally sound distinction between “currency” blockchains and “token” blockchains; (2) to legally or technically prevent use of tokens as a “currency”

*“I’m into blockchain, not into cryptocurrencies”*

Is that bad?

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**What if:**

- Currency blockchains are subject to AML/KYC
- But your token blockchain is not ... ?
- Your token blockchain could suddenly become a big “success” ...



Virtual currencies and other token-based blockchains:  
one big happy family, facing the same challenges

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*“Anonymity is a big problem”*

Back to the definition of a blockchain

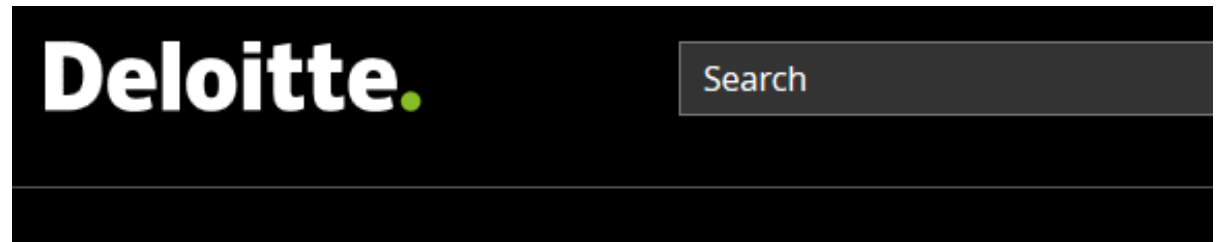
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- “An **immutable**, append-only database”
- Many blockchains do not record the identity of the participants (users, miners, observers, ...)
- **But it is in most cases trivial to “unmask” different parties**
- **Moreover, information is there for all to see, for all eternity**

When the cookie meets the blockchain:  
Privacy risks of web payments via cryptocurrencies

*“Anonymity is a big problem”*

Privacy protection ?



### III. Blockchain as a catalyst for data protection

#### IV. Potential conflicts with data protection law

The inherently tamper-proofness of blockchain databases is, from a data protection point of view, despite its potential for application as a means of enabling data protection by design, also a potential threat to the individual rights of data protection and privacy held by EU citizen.

*“Against this background, the development of and research on blockchain mechanisms remaining subsequently editable appears to be of paramount significance.”*



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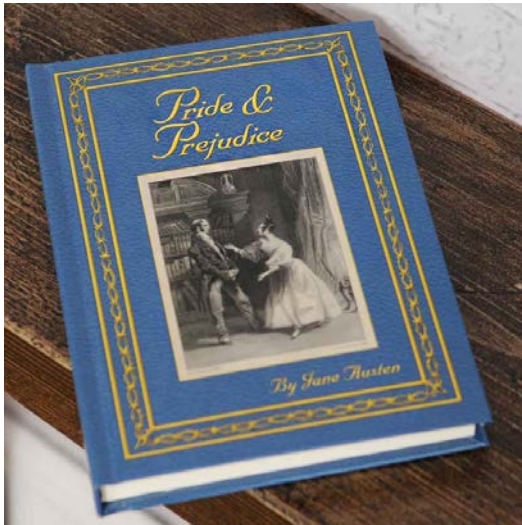
*“ICOs are all scams”*

Increasing insight

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### ***What I used to think:***

- “Walks like a duck, talks like a duck” ; “substance over form”
  - Main purpose of an ICO: to avoid securities law
- With abundant funding available, tax shelters, etc. , what “decent” company or start-up uses an ICO ?



### ***But it turns out:***

- Many legitimate reasons why a company might prefer an ICO to other sources of funding
  - Marketing
  - Abundant traditional funding: not always, not at all stages, not for everyone, not in time
  - Inherent in the platform, ...



“ICOs are all scams”

ICOs: when is it ok (in my humble opinion):

## An ICO is possible when:

- the issuer does not make any of the promises / assumes none of the liabilities inherent in traditional securities
  - **IMO** necessary and sufficient condition
  - Fulfilled when the issuer develops a platform, in which the issued token is used (but not all ICOs need to be appcoins, IMO)



Don't stop at securities law! Cross-border aspects, and:

- tax law (investors, VAT)
- AML/KYC
- ...

-> There is no such thing as a “quick and dirty” ICO

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There's no hiding from the tax authorities -> see “anonymity”

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## Full transparency : are we ready ?

- <-> privacy and GDPR ?
- proportionality ?
- fungibility and efficiency ?



## *Nil novi sub sole ...*

- Substantive tax law turns out to be quite resilient & future-proof
- E.g.:

**IRS Virtual Currency Guidance : Virtual Currency Is Treated as Property for U.S. Federal Tax Purposes; General Rules for Property Transactions Apply**

## **Fiscus belast bitcoinwinsten aan 33 procent**

**... vs the article.**

**And scholars agree for once!**

De Rulingcommissie zegt dus niet dat winsten uit de verkoop van Bitcoins nooit kunnen vallen binnen het normaal beheer van een privévermogen, en zij zegt dus ook niet dat zij nooit belastingvrij kunnen zijn. Zij zegt wel dat - wegens het inmiddels bekende speculatief karakter van de handel in virtuele munten - een handeltje in virtuele munten "doorgaans" niet behoort tot het 'normaal beheer' als door een goed huisvader.

## **The headline ...**

De fiscus geeft toe dat het soms moeilijkheden oplevert om te bepalen in welke categorie inkomsten thuishoren. Net als in de meeste andere landen heeft ook België geen aparte fiscale regelgeving rond virtuele munten. Voor bitcoinwinsten kunt u in drie categorieën vallen. Als u de bitcoins ziet als langetermijnbelegging, en de transacties binnen het normale beheer van uw portefeuille vallen, dan zijn de meerwaarden belastingvrij, net als bij andere beleggingsproducten.

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Realism

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*Technology is not neutral*

- “to decentralize” = “to upset hierarchies”
- today use as currency is controversial, and tomorrow ?
- but in the case of blockchain, it is impossible to separate “good” blockchains from “bad” blockchains

*Widespread adoption without regulation is impossible*

- How much regulation ? Depends on political perspective, democracy.
- Watch out for regulatory capture!



If we must have regulations, let it be smart regulations please

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## *Regulation should be evidence-based*

- Blockchains are transparent databases, so impact assessment of future regulations should be easier than in other domains
- Furthermore, see “anonymity”: more insight into blockchains than in events in the traditional financial sector
- **Facts and figures**: e.g. Europol Chief, 12/02/2018:  
*“about 3-4% of criminal funds in Europe are laundered through cryptocurrencies”*

# TEACH, EDUCATE, EXPLAIN

## Comparison



### Mixed signs, opaque

- Strict regulations
- Enforcement ?
- Broader Chinese financial sector ?



### Was restrictive, becoming more open

- Law enforcement has caught up (?)
- Today mainly focused on consumer protection



### Was open, becoming more restrictive

- Law enforcement has caught up (?)
- Still: fight against crime, terror, money laundering, tax evasion, etc.

Latest news from  
the US:

All told, the hearing was far from apocalyptic for regulationphobes. While it's clear that the CFTC and SEC have only scratched the surface of the kind of rule sets they'd like to put in place, their plans appeared to be overwhelmingly focused on protecting consumers from threats like rampant ICO "fraudsters" and unsafe exchanges rather than discouraging growth. For anyone interested in the long-term health and viability of virtual currencies, that should come as good news.

## Conclusion – Q&A

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