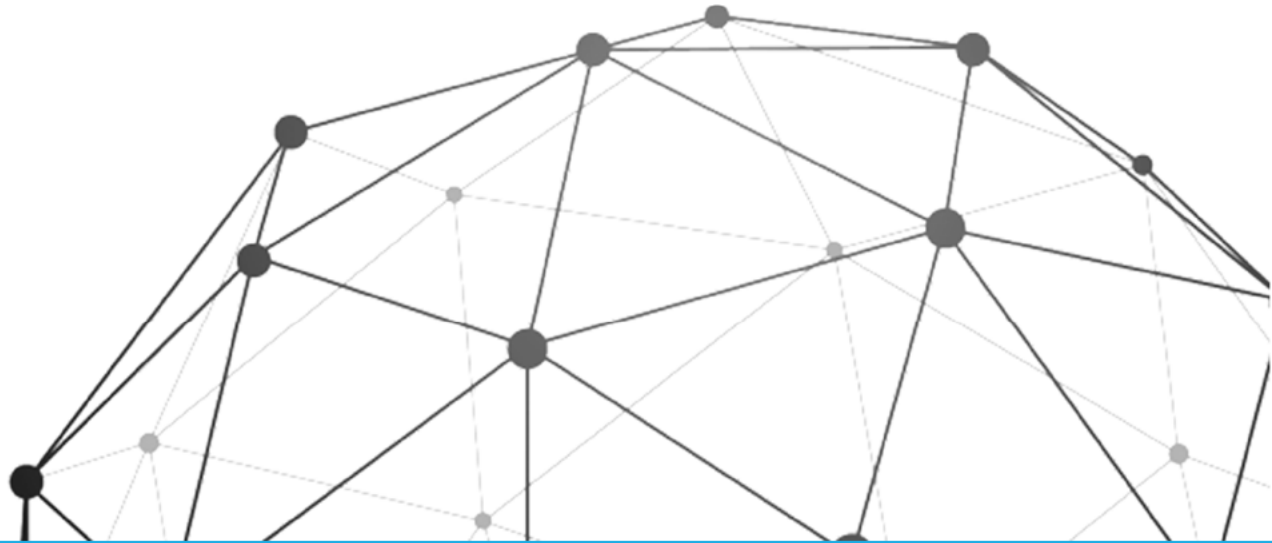


taxation of cryptocurrencies

A COMPARATIVE PERSPECTIVE



Speakers



Prof. dr. Bart Peeters

- bart.peeters@uantwerpen.be



attorney Thomas Spaas

- consysta.com
- +32 3 808 71 44

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Introduction

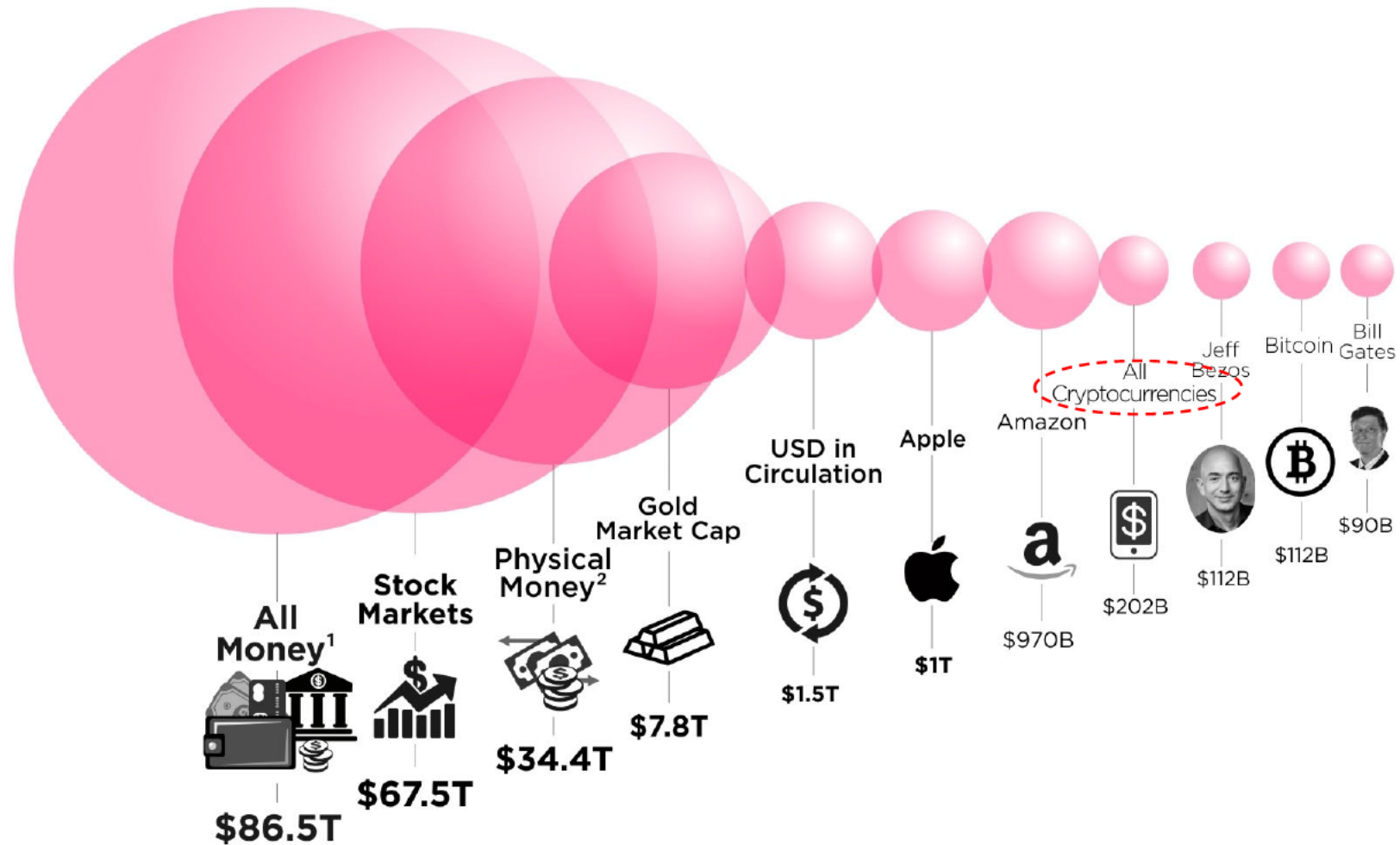
Blockchain: quick recap



Token taxonomy

Utility token	Security token	Payment token = cryptocurrency
<p>A pre-paid voucher for (future) services</p>	<p>A token that walks and talks like a security (e.g. equity, bond)</p>	<p>Means of payment</p>
<ul style="list-style-type: none"> • Closely tied to the issuing blockchain / network /app • Not intended as a general currency • Owner is not a passive investor, but a (potential) participant in the system • No claims on an issuer 	<ul style="list-style-type: none"> • Equity / debt characteristics • Security token is not essential for the functioning of a product / service, mainly or exclusively used for funding • Holders are investors that have claims on the issuers 	<ul style="list-style-type: none"> • "a digital <i>representation of value</i> that is neither issued by a central bank or public authority nor necessarily attached to a fiat currency, but is used as a means of exchange and can be transferred, stored or traded electronically" (European Banking Authority) • AKA "virtual currency" • NOT "electronic money" • Broad scope of 'holders'

Putting the World's Money into Perspective



* All figures are shown as of latest available data on September 17th, 2018

Article & Sources:

<https://howmuch.net/articles/worlds-money-in-perspective-2018>
<https://coinmarketcap.com>
<https://www.forbes.com>
<https://www.federalreserve.gov>
<https://www.cia.gov>

¹ All Money = money in any form including bank or other deposits as well as notes and coins.

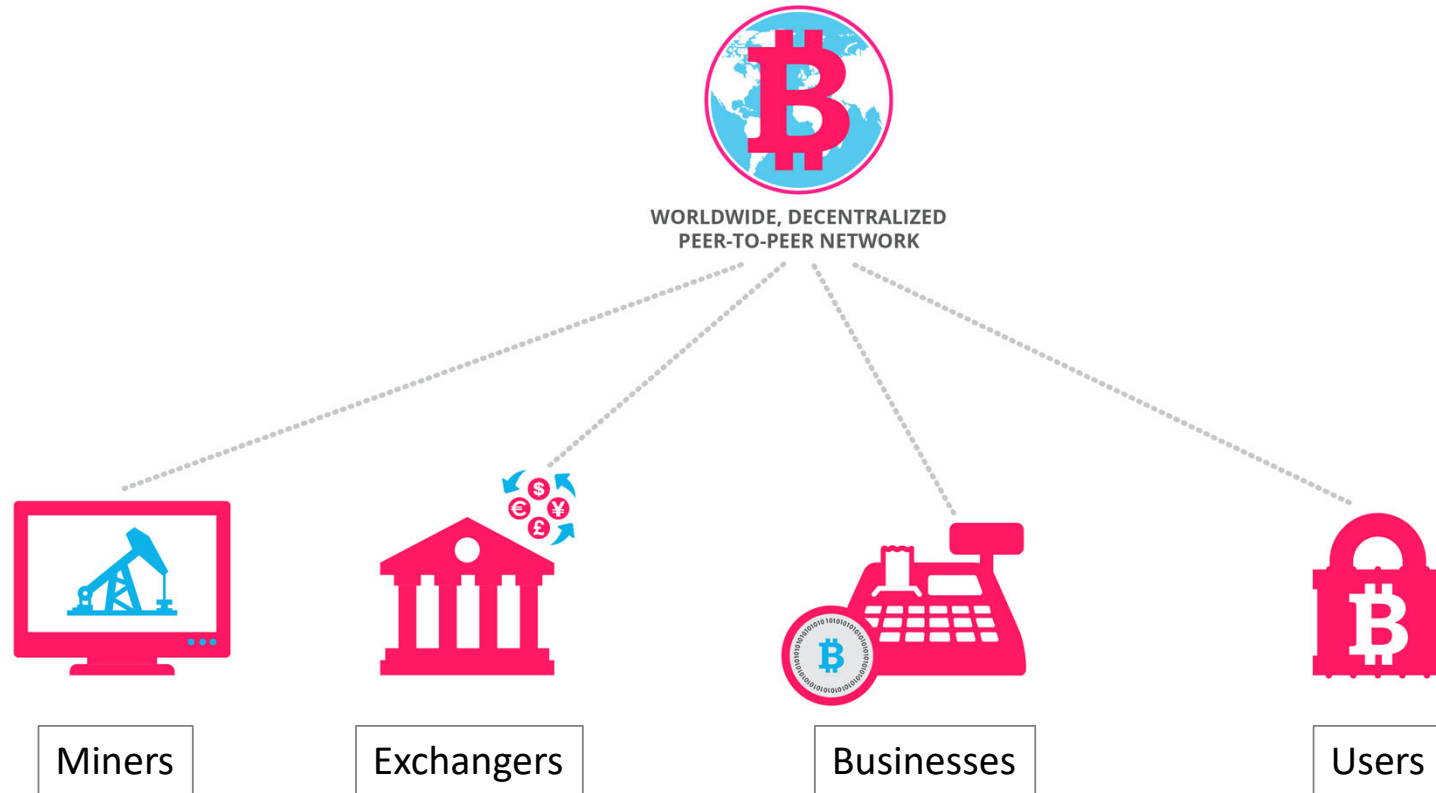
² Physical Money = money in forms that can be used as a medium of exchange, generally notes, coins, and certain balances held by banks.

Different crypto-currencies

- #Cryptocurrencies: 2073
- #Markets: 15654
- Market Cap: \$131 039 359 465 (vs. 202B on 17 September 2018)
- 24h Vol: \$13 685 423 341
- BTC Dominance: 53.6%

(Source: <https://coinmarketcap.com/coins/views/all/>
as of 3 December 2018: 15:00 PM)

Successful cryptocurrency ecosystem has different types of participants



Different types of “income” in a cryptocurrency ecosystem

	Miners	Exchangers	Businesses	Users
Ecosystem role	Infrastructure providers	Ecosystem gateways	Economic agents	Consumers / savers
Activity	Provide payment system infrastructure and operations	Allow exchange against -traditional currencies -other tokens (-same token ?)	Are paid with cryptocurrency in exchange for goods or services	Hold savings in or pay goods/services using cryptocurrency
“Income”	Are rewarded with units of cryptocurrency UNITS	Charge a fee on each exchange FEE	Receive a cryptocurrency income as consideration for delivered goods / services INCOME	May derive capital gains -upon conversion of cryptocurrency or -upon payment with cryptocurrency CAPITAL GAIN

Different types of involved key players

	Miners	Exchanges	Businesses	Users
Ecosystem role	Infrastructure providers	Exchanges	Economic agents	Consumers / savers
Activity	Provide payment system infrastructure and operations	Allow exchange against -traditional currencies -other tokens (-same token ?)	Are paid with cryptocurrency in exchange for goods or services	Hold savings in or pay goods/services using cryptocurrency

*But also:

- Coin inventors
- Coin offerors

*But also:

- Trading platforms
- Wallet providers

Tax aspects

Tax aspects of crypto-currencies

Although being an undeniable existing “phenomenon”
=> very difficult to grasp under existing legislation

-Direct taxes: legal recognition of ‘**acquired income**’ required

=> What kind of income ?

=> When is the income being acquired ?

-Indirect taxes: What movements/activities are being recognized to
trigger a possible taxation

=> What are ‘economic activities’ => are these ‘financial services’ ?

=> Can cryptocurrencies be inherited ?

=> Could it qualify as ‘financial transactions’ (Cf. FTT)?

Tax aspects of crypto-currencies

Substantial lack of particular legislation: high LEGAL UNCERTAINTY

- => Necessity to apply existing legislation in a particular rapidly evolving context
 - ➔ no application 'in analogy to' ?? STRICT INTERPRETATION

- => Requesting legal certainty from tax administrations ?
 - ➔ In Belgium only allowed in case of a real *anticipated* decision (before 'a' transaction is set)

- => Solution for further doubts ? No clear jurisprudence (yet)

Direct tax aspects of crypto-currencies

- Direct taxes: legal recognition of '*income*' required
 - "unit" obtained by a miner
 - "fees" for exchanging cryptocurrencies
 - "cryptocurrency income" when delivering goods/services
 - ➔ income from a professional activity
(moveable income => in case of payment in cryptocurrency for other activity)
 - "capital gains" upon conversion by a user ➔ MOST DIFFICULT CATEGORY
 - ➔ professional income, private asset management or ... ??
- ➔ 'Income' in kind ??
 - Evaluation at 'real value' when the 'income' is obtained
(compare with art. 20bis and 36 BITC)

Direct tax aspects of crypto-currencies

-Direct taxes: *when* is 'income' obtained ?

-at the time of conversion in a fiat currency ?

vs. at time of any conversion ?

vs. at the ending of a taxable period ?

(compared to the value at the beginning
of a taxable period: latent capital gain)

Direct taxes: Belgian qualification of income

NON-professional context

- Non-speculative capital gains on cryptocurrency outside any professional activity are tax exempt (losses are not tax deductible).
(art. 90, 1° BIT)
“normale verrichtingen van beheer van een privé-vermogen bestaande uit onroerende goederen, portefeuillewaarden en roerende voorwerpen”
- Net speculative capital gains are taxed at 33% plus local surcharges.
(art. 90, 1° jc 171, 1°, a) BITC
But taxation on everything or only additional speculative part ?
(Cf. So-called Baltus-doctrine of Supreme Court 30 November 2006)
Losses are deductible for five consecutive years
(art. 103, §1 BITC)



Direct taxes: Belgian qualification of income

Professional context

- For professional individual investors, the net gains may be taxable as professional income (subject to progressive rates, plus local taxes and social security contributions). (art. 24/25 BITC)
 - => other professional income follows same principles
 - => losses are deductible (art. 78 BITC)

- For companies subject to the ordinary corporation tax regime all profits are included in the taxable profits and losses are deductible. (art. 183, 185 and 206 BITC)

Direct taxes: Belgian timing issues

Movable income has to be 'paid or granted'

Other income has to be 'established or presumed'

(art. 204 R.D. in execution of BITC)

-Belgian advanced agreement commission:

seems to recognize potential taxable profits in any case of **conversion**
(to other cryptocurrency as well as toward fiat currencies)

→ any conversion in a past taxable period makes it impossible to ask the
commission about qualification



BUT: Adv.-Gen. Court of Cassation Henkes in Mercuriale of 2018

=> sympathizes with statement of legal scholars to wait for conversion in non
cryptocurrency given the high volatility of cryptocurrencies

Belgian advanced agreement commission

=> In a search for legal certainty:

established a list with 17 questions to provide for a tax qualification of the capital gains realized in case of a conversion of cryptocurrencies

-Rulings can no longer be asked if activities of a tax period should already have been declared

→ So no more rulings if “already one singular conversion” has taken place during a previous tax period ??

-Otherwise: 17 questions, but no clear decision tree.

→ Value of an answer to a particular question stays unclear

Cf. <https://www.ruling.be/nl/downloads/vragenlijst-cryptomunten>
(Dutch and French version)

Belgian advanced agreement commission

Examples:

-Ruling nr. 2017.852 of 5 December 2017:

- capital gains realized by a student throughout a self-developed application automatically buying and selling bitcoins
- qualified as **speculative income** in a non-professional context

-Reference to another ruling in its annual report of 2017

(<https://www.ruling.be/nl/downloads/jaarverslag-2017>, p. 36)

- Buying of cryptocurrencies from 2014 to 2016 and selling in 2017
high invested amounts, frequent buying, inherent risk for losses
- qualified as **speculative income** in a non-professional context

Belgian advanced agreement commission

Examples:

-Ruling nr. of 16 October 2018: (not yet published)

→ School teacher invested in 2016 and 2017 a few times in buying cryptocurrencies and held everything
=> in 2018 he wants to converse his cryptocurrencies to EUR for the initially invested amount

→ Capital gains are considered as **'non speculative capital gains'**

-Many requests are being withdrawn during 'prefiling'

=> negative outcome not being awaited for

→ income not necessarily declared in tax declaration

Direct taxes: Australia

- Cryptocurrency is considered as an asset and is subject to capital gains tax (CGT).
- Exception: when the cryptocurrency is a **personal use asset**, i.e. if it is **not** acquired, kept or used
 - as an investment
 - in a profit-making scheme
 - in the course of carrying on a business.
- If cryptocurrency sell is a part of a business (individual / company), then the profits can be considered as an ordinary (individual/company) income.
- Source: <https://www.ato.gov.au/General/Gen/Tax-treatment-of-crypto-currencies-in-Australia---specifically-bitcoin/>



Direct taxes: Germany

- Cryptocurrencies will generally be regarded as an asset for tax purposes.
- If held as a private asset, capital gains are only subject to tax if the acquisition and sale take place within one year. Profits from lending are generally taxable as income.
- If held as business assets, all profits will be subject to tax, including trade tax.
- Payments made in cryptocurrencies are treated as a sale of the cryptocurrency and lead to the tax consequences described above.
- Mining of cryptocurrencies can be subject to tax as business income, depending on the circumstances.
- Sources:
 - Decree of Hamburg's finance ministry of 11 December 2017 (Az. S 2256-2017/003-52);
 - discussion between parliamentary state secretary, Dr. Michael Meister, and Lisa Paus (BÜNDIS 90/DIE GRÜNEN) of 5 January 2018
 - *Oberfinanzdirektion Nordrhein-Westfalen*, 20 April 2018.



Direct taxes: Switzerland

- In Switzerland, the individual cantons, the Swiss states, are obligated to levy income tax and wealth tax on the total property (assets and rights with a cash value) of taxpayers that are resident in their canton. Tax rates vary between the individual cantons.
- Cryptocurrencies are treated like foreign currencies for tax purposes.
 - Except for professional traders (and companies), capital gains are, as a general rule, **tax exempt**.
 - Cryptocurrencies are also subject to wealth tax. Holders of bitcoin or other cryptocurrencies are taxed at the rate determined by the tax authorities on December 31 of the fiscal year. This rate is a recommendation for the cantonal tax authorities.
- Source: Tätigkeitsbericht 2017 Eidgenössische Steuerverwaltung ESTV,
https://www.estv.admin.ch/dam/estv/de/dokumente/estv/ESTV_Taetigkeitsbericht_2017.pdf.download.pdf/ESTV_Taetigkeitsbericht_2017_d.pdf



Direct taxes: United Kingdom

- For individuals, held as an investment it will be regarded as a taxable asset for capital gains taxation.
- Individuals who are professionally trading in cryptocurrencies will be subject to tax on their profits as business income.
- In specific circumstances, profits from highly speculative transactions, akin to gambling, may not be subject to taxation (nor losses relievabale).
(NB completely opposite approach to Belgium)
- For companies subject to corporation tax, the profits or losses on exchange movements between currencies (including cryptocurrencies) are taxable as income.
- Source: Revenue and Customs Brief 9 (2014): Bitcoin and other cryptocurrencies ,
<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>



Direct taxes: United States

- Cryptocurrencies are treated as personal property (not currency) and are therefore taxed as capital assets.
 - Capital gains from selling cryptocurrency for fiat currency (e.g. USD) or using cryptocurrency to purchase goods or services are subject to capital gains tax.
- (NB: pay cup of coffee with bitcoin? Calculate CGT)
- Cryptocurrencies that are obtained from mining are taxable as income at their fair market value at the time they are received.
 - Mining equipment can be deducted as a legitimate business expense.
 - Source: IRS notice 2014-21, <https://www.irs.gov/pub/irs-drop/n-14-21.pdf>



Direct taxes: general conclusions

- Most / all countries tax cryptocurrency transactions / holdings
-based on their existing tax rules
- Most jurisdictions have not elaborated specific crypto-tax-regimes
- However, applying existing rules to cryptocurrency can be problematic:
 - US: even small transactions give rise to CGT (makes cryptocurrencies unusable as means of payment)
 - Belgium: some guidance from administration, but ‘second best solution’
 - New phenomena: forks, airdrops, proof-of-stake “interest”, ... : unresolved issues

Direct taxes: general conclusions

Generally considered taxable events:

- Selling cryptocurrency for fiat currency (i.e. USD, EUR, JPY, etc.)
- Trading cryptocurrency for other cryptocurrency (although remarks in Belgian context)
- Using cryptocurrency to buy a good or service
- Receiving cryptocurrency as a result of a fork or from mining

Generally not considered taxable events:

- Buying cryptocurrency with fiat currency
- Transferring cryptocurrency from one wallet that you own to another wallet that you own

Indirect tax aspects of crypto-currencies

-Indirect taxes: taxation *triggered* because of a particular *fact*

- goods/services are delivered/provided against payment

- goods are being donated in life

- value is inherited

- Financial transaction is executed

- ...

➔ What if 'such triggering fact' happens with a cryptocurrency ??
Is it 'money', a 'moveable good' or something else ?

Crypto-currencies and VAT

VAT = European VAT directive (Dir. 2006/112/EG)
being implemented in domestic tax law of EU Member States

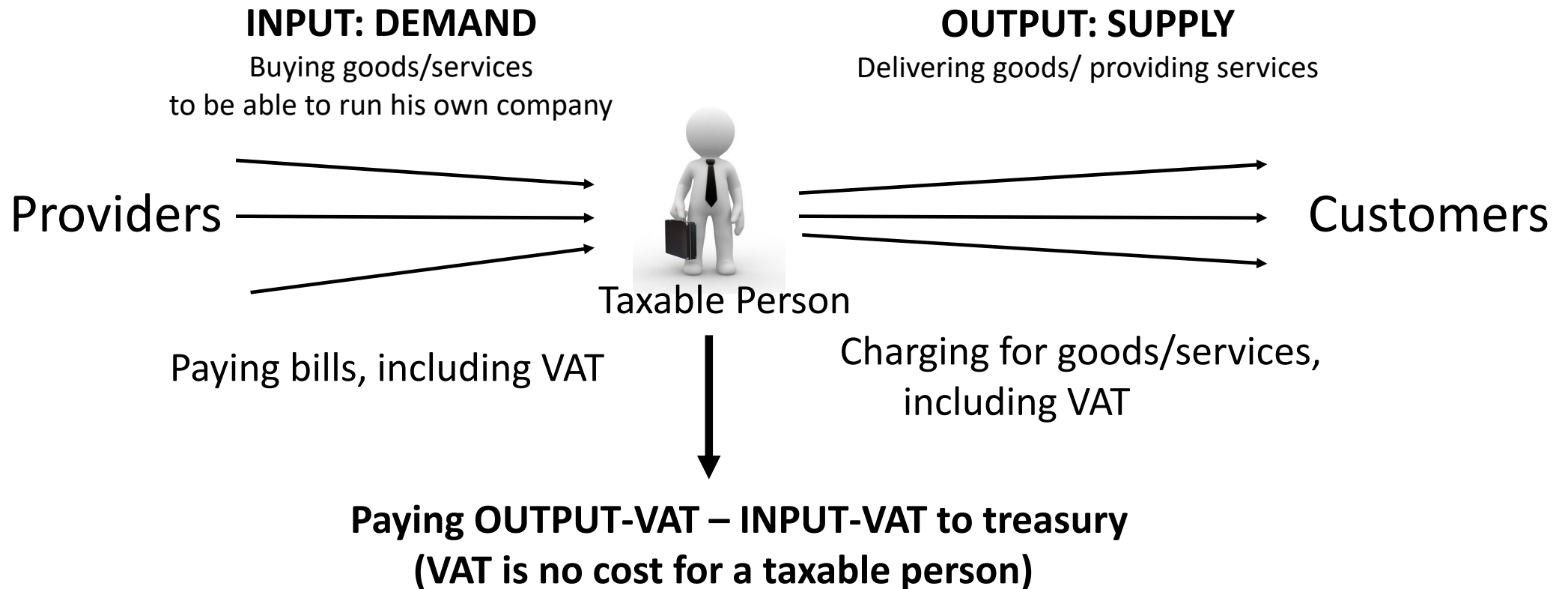
VAT applies to

- delivering goods	} for consideration in exercise of an economic activity
- providing services	

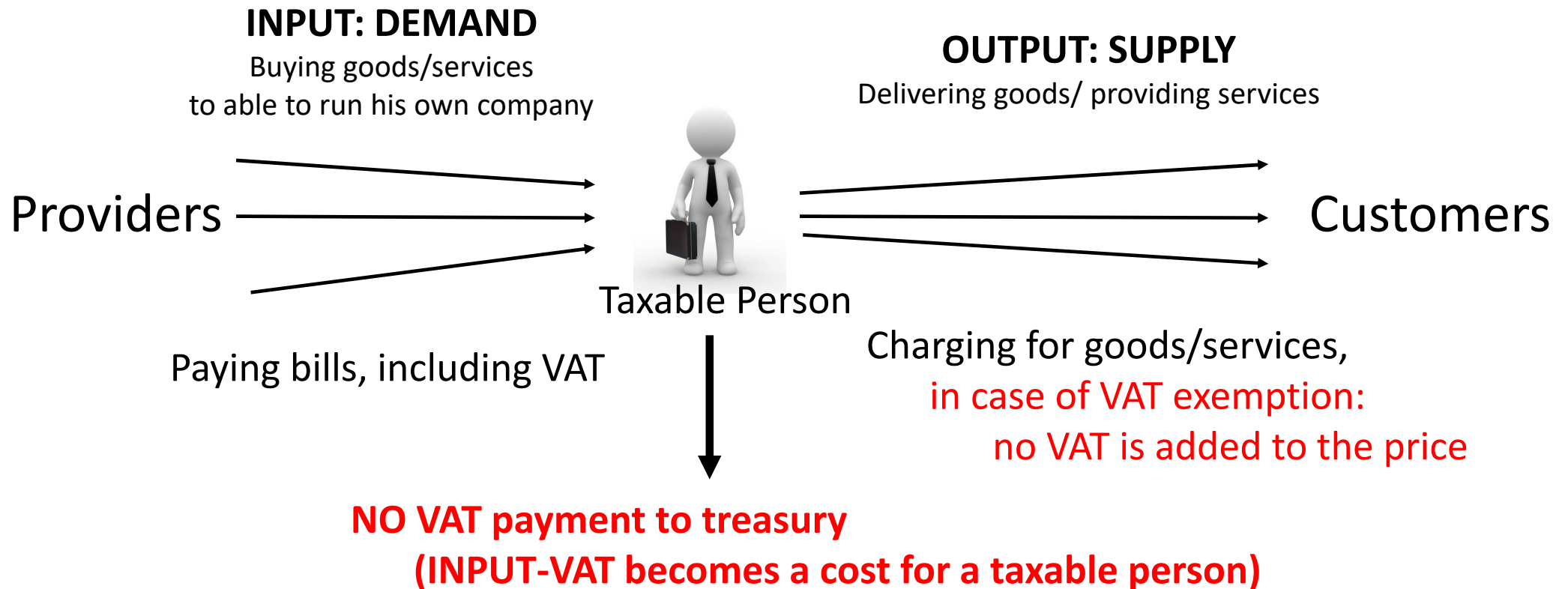
Taxable person = *“any person who, independently, carries out in any place any economic activity, whatever the purpose or results of that activity”*

“Any activity of producers, traders or persons supplying services, including mining and agricultural activities and activities of the professions, shall be regarded as ‘economic activity’ “(art. 9 DIR)

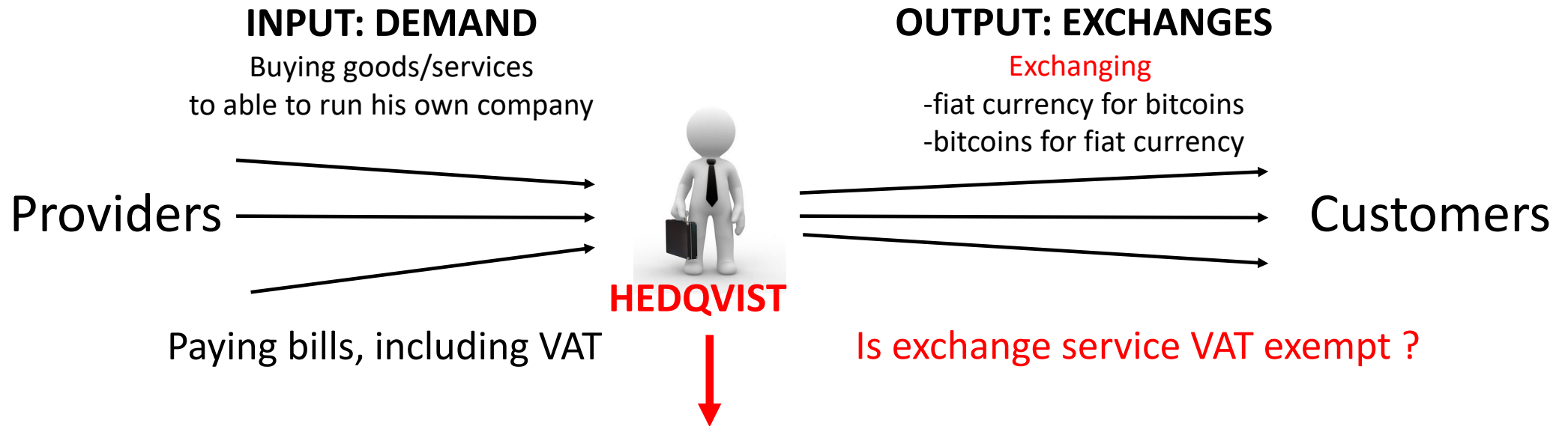
Crypto-currencies and VAT



Crypto-currencies and VAT



Crypto-currencies and VAT



Advanced ruling confirmed tax exemption: No VAT should be paid to the Swedish treasury
=> Tax administration appealed against ruling
=> Asking Court of Justice for a preliminary ruling

Crypto-currencies and VAT

CJEU 22 October 2015, C-264/14, Skatteverket v. David Hedqvist

1) Cryptocurrency is not a good.

Exchanging is qualified as a supply of services

=> Even though there is no separate payment, it can be qualified as a remunerated supply of services.

➔ HEDQVIST is a taxable person for VAT purposes

=> Can the same be said for **other involved key players** in the cryptocurrency system ?

➔ Probably yes !

Crypto-currencies and VAT

- 2) Exchanges are **no** “*transactions involving deposit and current accounts, payments, transfers, debts, cheques and other negotiable instruments*” (art. 135, §1, d) DIR)
=> exemption for services or instruments that operate as a way of transferring money
➔ This exemption does not cover transactions that involve ‘money’ itself

Exchanges are “*transactions involving currency and bank notes and coins used as legal tender*” (art. 135, §1, e) DIR)

=> linguistic versions of the Directive differ

=> interpretation in light of its context referring to ‘financial transactions’

“Transactions involving non-traditional currencies, ..., in so far as those currencies have been accepted by the parties to a transaction as an alternative to legal tender and have no purpose other than to be a means of payment, **are financial transactions**” (cons. 49)

Crypto-currencies and VAT

- 2) Exchanges are **no** “*transactions in shares, interest in companies or associations, debentures and other securities*” (art. 135, §1, f) DIR)
=> “It is common ground that the ‘bitcoin’ virtual currency is neither a security conferring a property right nor a security of a comparable nature” (Cons. 55)

Therefore:

➔ Exchanges are VAT-exempt services based on art. 135, §1, e) DIR

=> Can the same be said for **other activities** in the cryptocurrency system ?

➔ Does it consider a way of transferring money (art. 135, §1, d) DIR) ?
(contextual interpretation required ?)

Crypto-currencies and VAT

Belgian Minister of Finance

(Parliamentary question r. 7021 of 17 November 2015, Dispa)

→ bitcoins are **no legal means of payment**

HOWEVER

→ Exchanges in bitcoin

Negotiation by third parties

}

are **VAT exempt services**

(art. 44, §3, 9° VAT Code)

→ Therefore: conclusion with regard to VAT cannot be transposed as such to other Belgian (tax) legislation !!!

Unsolved questions: think before you tax

- Status of cryptocurrencies under property law (goederenrecht/droit des biens) : unknown
 - => Can you “own” a bitcoin? How to prove ownership ?
 - => Can it be seen as ‘a multilateral agreement that is automatically enforced through smart contract technology’ ?
- ‘Money’ as legal tender implies that another party can be obliged to accept
 - => actually not the case for cryptocurrencies
 - => hardly integrated in financial law concepts

De lege ferenda

The scattered US approach(es)



THE SECURITIES AND EXCHANGE COMMISSION (SEC)

An independent federal agency responsible for protecting investors from fraud schemes.
Primary overseer of the U.S. securities markets.

How does it view crypto? **Securities.**



THE COMMODITY FUTURES TRADING COMMISSION (CFTC)

An independent federal agency that protects market participants from frauds.
Regulator of futures and option markets in the U.S.

How does it view crypto? **Commodities.**



THE FINANCIAL CRIMES ENFORCEMENT NETWORK (FINCEN)

A bureau of the U.S. Department of the Treasury.
Analyzes financial transactions in order to fight money laundering, terrorist financing, and other financial crimes.

How does it view crypto? **Money.**



THE INTERNAL REVENUE SERVICE (IRS)

A bureau of the U.S. Department of the Treasury
that collects taxes and enforces tax laws.

How does it view crypto? **Properties.**



THE US OFFICE OF FOREIGN ASSETS CONTROL (OFAC)

An agency of the U.S. Treasury Department.
Enforces economic sanctions in support of U.S. national security and foreign policy.

How does it view crypto? **Money, or fiat currencies.**

The EU approach

- Direct taxes: power to tax is in the hands of the Member States, with the EU having only limited competences.
 - But: state aid (?)
- (Indirect taxes: VAT)
- Definition of virtual currency in AMLD5
 - “virtual currencies” means 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.
- Virtual currencies may also be covered by EU legislation on alternative investment funds, payment services and e-money (future: crowdfunding directive).
- Not considered a financial instrument under MIFID-directive.

EU: level playing field (?) // VAT approach

Report to the European Parliament

Virtual currencies and central banks monetary policy: challenges ahead

Monetary Dialogue July 2018

The economists who attempt to dismiss the justifications for and importance of VCs, considering them as the inventions of “quacks and cranks” (Skidelsky, 2018), a new incarnation of monetary utopia or mania (Shiller, 2018), fraud,³³ or simply as a convenient instrument for money laundering, are mistaken. VCs respond to real market demand and, most likely, will remain with us for a while.

Policy makers and regulators should not ignore VCs, nor should they attempt to ban them. Both extreme approaches are incorrect. VCs should be treated by regulators as any other financial instrument, proportionally to their market importance, complexity, and associated risks. Given their global, trans-border character, it is recommended to harmonise such regulations across jurisdictions.

Investment in VCs should be taxed similarly to investment in other financial assets.

EU: is tax / regulatory competition still alive? // Brexit

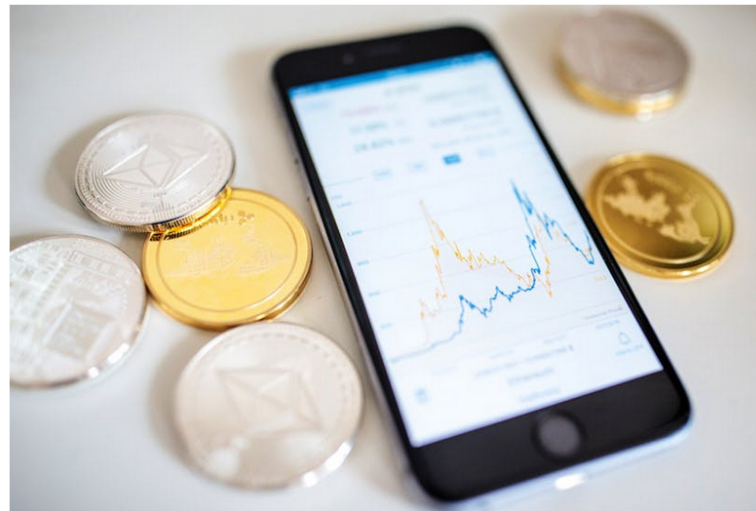
- Bruegel, a Brussels-based think tank, wrote in a report prepared for the ministers' meeting that "limiting the exposure of financial institutions" to crypto-currencies would be "sensible."
- It also said that it could be useful to try different national solutions in the EU before moving to a more harmonized approach with a single supervisor in charge.



LEADING ARTICLE

Who's afraid of cryptocurrency?

The Spectator



Conclusions

Conclusions

- Cryptocurrency: recent phenomenon surrounded with a high level of uncertainty
 - ➔ functioning
 - not based on trust in a third party (financial services provider)
 - based on full transparency of a public history linked to IP Accounts
- Uncertainty also exists in domestic legislation as no exhaustive regulation is provided
 - => whereas functioning of the system is based on trust of its participants, it remains ones own responsibility to participate
 - => however, activities also trigger 'relations with/consequences towards' public authorities
 - ➔ need for further legal certainty
 - new court cases can be expected
 - clear plea for legislative action



Any further questions ?