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The taxation of cryptoassets is far from straightforward. Even if we assume that most tax authorities ultimately want to replicate the tax treatment of equivalent traditional assets, there are a number of factors which make the taxation of cryptoassets particularly complex.

Firstly, the wide array of cryptoassets that exist means that working out how to classify a particular cryptoasset often requires considerable unpacking of the features of that specific cryptoasset to determine its traditional equivalent – and in some cases there may in fact be no neat traditional equivalent. Applying the existing rules to particular categories of cryptoassets, or establishing new rules, can therefore be nigh on impossible as there will often be assets that straddle different categories and the rapid evolution of such assets means the categorisation can quickly become out of date.

With the vast range of cryptoassets comes a multitude of uses. Further, the same asset can be held by different people for different purposes. For example, a cryptoasset could be used as a means of payment by one person and as an investment by another. The result is that they could come within the scope of numerous different taxes in a given jurisdiction. This makes legislating separately for such assets, which are constantly changing, a potentially endless task. This may well be the reason, at least in part, that many jurisdictions who have engaged with the issue of taxation of cryptoassets have opted to issue guidance on how normal tax rules apply to such assets, rather than attempting to legislate in this sphere.

The question of which jurisdiction has taxing rights over a cryptoasset, which typically exist on a distributed ledger, is a matter which has not been fully resolved. In the absence of internationally agreed principles for the taxation of such assets, the potential for different jurisdictions to take contradictory and overlapping positions is high.

Furthermore, transactions in cryptoassets are notoriously difficult for tax authorities to track given that their very nature means they can be held and transferred without interacting with traditional financial intermediaries, making it challenging for tax authorities to rely on existing mechanisms for ensuring tax compliance. On this last point, the OECD and the EU are now taking steps to tackle this issue on a multilateral level.

In this briefing, we consider a snapshot of some multinational and national approaches to addressing some of these issues and finally consider a few VAT points that have arisen.

The OECD and the CARF

Back in 2020, the OECD prepared a report on Taxing Virtual Currencies as part of their wider work looking at the tax challenges arising from digitalisation as part of BEPS Action 1. The report considered a wide range of cryptoassets that existed at the time, but the focus was on virtual currencies or exchange tokens (referred to in this briefing as ***cryptocurrencies***), reflecting the fact that, at that time, these were the most prevalent form of cryptoasset and the ones most commonly addressed by tax authorities. This in itself demonstrates the difficulties of keeping pace with this market. For instance, in the report there is merely a nod to DeFi as an "emerging issue" in 2020 and no mention of NFTs. The report also deals primarily with the taxation of individuals, whereas a growing trend in recent years has been the increasing use of cryptoassets by corporates and crypto-native hedge-funds and other investment vehicles, of which there is little mention in the report.

Acknowledging the complexities of shoehorning the taxation of cryptoassets into existing tax rules which vary considerably from jurisdiction to jurisdiction, the report does not attempt to make recommendations on how virtual currencies should be taxed. Rather the OECD urged policymakers (amongst other things) to:

(i) provide guidance on how such assets fit within existing tax frameworks, ideally covering the treatment of major taxable events – to

promote clarity and certainty for taxpayers, and noting the need to update and adapt this frequently as technology and assets develop;

(ii) consider how this fits with the bigger picture, eg is the proposed tax treatment consistent with the tax treatment of other assets, is there coherence with the broader regulatory framework;

(iii) consider how to support improved compliance (as to which see below); and

(iv) consider how the tax treatment might align with or undermine other policy objectives, for instance moving towards a cashless economy.

On improving compliance, the OECD achieved a major breakthrough in October 2022, with the launch of the Cryptoasset Reporting Framework (or CARF). Our blog considers this in more detail, but broadly, the CARF provides a mechanism for the reporting of tax information on cryptoassets that will be automatically exchanged between tax authorities. The new rules come hand in hand with changes to the existing Common Reporting Standard (***CRS***) which will be expanded to include certain cryptoassets. One key element of the CARF is that, unlike the CRS, it does not rely on traditional financial intermediaries, but rather applies to cryptoasset service providers (i.e. individuals or entities that effectuate cryptoasset transactions). The key challenge will of course be getting countries to implement these rules, but it does appear in the interests of national administrations to improve tax compliance in this area and this development was welcomed by the G20 in the Leaders' Declaration in November 2022.

The EU and DAC 8

The EU certainly believes it is important to take action on cryptoasset compliance. In December 2022, Commissioner Gentilioni unveiled the Commission's legislative proposal for a Directive amending the Directive on Administrative Cooperation (2011/16) (***DAC8***). The proposal expands the reporting and exchange of information between tax authorities within the European Union to cryptoasset service providers (authorised in a Member State pursuant to the Markets in Cryptoassets Regulation (***MiCAR***) which, at the time of writing, has yet to be published in the Official Journal) and cryptoasset operators (who are not regulated by a Member State and therefore may be resident outside the EU, but would, under these new rules, be required to register and report to a Member State) to the extent that they have customers resident in the EU exchanging or transferring relevant cryptoassets.

The rules are intended to be consistent with the OECD's CARF rules and the proposed changes to the CRS. The rules are intended to provide a level playing field, between traditional financial assets and cryptoassets and as between domestic and cross-border transactions involving EU residents. What is less clear is how the EU would enforce these rules in relation to operators that are resident outside the EU and not regulated by a Member State.

The draft text will be submitted to the European Parliament for consultation and to the Council for adoption. The directive anticipates that the new reporting requirements would take effect from 1 January 2026.

Austria

Austria has introduced specific legislation to deal with the taxation of cryptoassets, more specifically cryptocurrencies. As part of the Environmentally Responsible Tax Reform (*Ökosoziale Steuerreform*), from March 2022, both (i) current income from cryptocurrencies and (ii) income from realised capital gains in cryptocurrencies form part of the income from capital assets category subject to the special income tax rate of 27.5 per cent. (In terms of scope, the "cryptocurrency" definition is based on the Austrian regulatory definition and covers both publicly offered cryptocurrencies as well as stablecoins).

In terms of the former category of current income from cryptocurrencies, this includes remuneration for the provision of cryptocurrencies (including "lending" or consideration in the context of a DeFi process and mining but excludes certain operations such as staking, where cryptocurrencies are transferred free of charge or for insignificant consideration or where the transfer is the result of a hard fork in the underlying distributed ledger). On the second category, income from realised capital gains, this includes income from the disposal of cryptocurrencies for fiat currency or in exchange for other assets or services, but, according to published guidance, does not include the exchange of one cryptocurrency for another.

Income from cryptocurrencies generated after 31 December 2023 will be subject to Austrian withholding tax (at 27.5 per cent) to be retained by certain Austrian debtors (*Schuldner*) or Austrian service providers (*Dienstleister*) to the extent that they credit cryptocurrencies or settle transactions from which capital gains are realised. It is possible to opt for taxation at the progressive rate and a limited possibility for losses to be offset against other income from capital.

The above rules apply in relation to the taxation of individuals, whereas corporates subject to Austrian unlimited tax liability remain subject to general taxation rules in relation to cryptoassets (subject to taxation at 25 per cent, to be reduced to 24 per cent in 2023 and 23 per cent in 2024). The rules also do not cover other kinds of cryptoassets such as NFTs and "asset tokens" underpinned by real assets, such as securities or property. These products are taxed

according to general tax regulations, depending on nature of the tokens concerned. Similarly, there are no specific stamp duty rules, so general principles would have to be applied.

Belgium

In Belgium, there is no special tax regime for cryptoassets, meaning that general tax principles in relation to income tax apply. In this respect, some guidance can be derived from a number of published tax rulings.

The focus of attention, so far, has been the tax treatment of gains realised by individuals in transactions with cryptocurrencies. Here, the rather difficult distinction needs to be made between gains derived as part of a professional (trading) activity, which are taxed at progressive tax rates of up to 50 per cent (plus local surcharges); gains derived from transactions which are considered outside "the normal management of a private estate", which are taxed at 33 per cent (plus local surcharges); and gains derived from transactions which are considered within "the normal management of a private estate", which are fully exempt. Initially, the position of the Belgian Minister of Finance and the Belgian ruling commission was that income derived from cryptocurrencies, if it did not qualify as professional income, should be considered as outside "the normal management of a private estate", seemingly treating such transactions as *per se* speculative in nature. However, the position has evolved and today, it is accepted that the question as to whether such transactions fall within the scope of the "normal management of a private estate" is a factual assessment that needs to be assessed case by case.

In recent years, rulings have been made which confirm that income derived from the transfer or conversion of cryptocurrencies may qualify as fully exempt. For instance, a private investor who follows a "buy and hold" strategy and invests in cryptocurrencies with its private savings (no external financing) and for a relatively modest part of its total investment portfolio (less than 25 per cent), is more likely to be considered fully exempt from tax on gains from the conversion or transfer of cryptocurrencies. The same principles should typically apply if NFTs are traded.

For corporates, gains or losses from transactions in cryptoassets normally form part of the taxable base and are taxed at the standard rate of 25 per cent (or, subject to certain conditions, the reduced rate of 20 per cent on the first €100,000 of taxable profits). However, for regulated investment companies, gains or losses from transactions with cryptoassets normally do not form part of the corporate tax base.

France

Similarly, in France, the legislator has chosen to focus on the taxation of cryptocurrencies and fungible tokens (other than security tokens) held by individuals. Under the French Personal Income Tax (***French PIT***) rules, cryptocurrencies (other than those having the status of legal tender in at least one jurisdiction, which creates some uncertainty in relation to bitcoin since El Salvador and the Central African Republic have granted the status of legal tender to this cryptocurrency) and fungible tokens (other than security tokens) are considered to be "digital assets" with specific rules as set out below.

For individuals, the sale of cryptocurrencies and fungible tokens (other than security tokens) for fiat currencies gives rise to a capital gain or loss for the difference between the acquisition price and the transfer price of the cryptocurrency or fungible token (other than a security token). If such transactions are merely occasional, this is subject to French PIT at 12.8 per cent and social levies at 17.2 per cent (although for sales on or after 1 January 2023 it will be possible to opt for taxation at the progressive rate). For habitual cryptocurrency trading with a speculative intent, any net gain is taxed as industrial and commercial income and subject to the progressive scale of French PIT. From 1 January 2023, this will be taxed as non-commercial income, although this would still be subject to the progressive scale. Capital gains and losses from mining are also taxed as non-commercial income.

The exchange of one cryptocurrency or fungible token (other than a security token) for another benefits from rollover relief provided the trading activity is occasional. For professional traders, this favourable treatment does not apply and they are subject to French PIT on income deriving from such activity.

Individuals must report their income in a specific appendix to their tax returns and must declare their foreign crypto accounts in a specific form.

French transfer taxes should not apply to the transfer or exchange of cryptocurrencies or fungible tokens (other than security tokens).

The corporate income tax treatment of cryptocurrencies and security tokens held by legal persons, as well as the tax treatment of cryptoassets other than cryptocurrencies and non-security tokens (such as utility tokens or NFTs) held by natural and legal persons is based on general tax principles (with some questions arising as to whether some NFTs may qualify as "digital assets" for the purposes of the tax regime for individuals set out above). The reliance on general principles does however create grey areas as there is no French statute or guidance clarifying how transactions on such cryptoassets should be taxed.

Germany

For the most part, the German approach has been to address the taxation of cryptoassets through administrative guidance rather than legislation. The one exception is the Annual Tax Act 2022 which, from 1 January 2023 onwards, broadly aligns the German withholding tax treatment of interest payments on electronic debt securities (covering certain cryptoassets) to the treatment of payments on physical debt securities.

The German Federal Ministry of Finance guidance sets out how general tax principles apply to a range of cryptoasset scenarios. In particular, capital gains generated by a corporation from the disposal of cryptoassets are taxable, regardless of whether the consideration is cash or other cryptoassets (with the EUR market value of the cryptoasset received being used to determine the capital gain).

Mining and forging cryptocurrencies are treated as an acquisition with the acquisition costs based on market price. Initial Coin Offerings (***ICOs***) can provide either equity or debt (determined under general principles). The transfer of cryptoassets in the context of an ICO is treated as a taxable disposal.

Consideration received from cryptoasset lending transactions is treated as taxable income (again if cryptoassets are used as consideration, the income is based on the value of that cryptoasset converted into fiat currency at market price).

Income generated by private individuals from cryptoassets either qualifies as income from services or disposal of private assets (which is principally only subject to tax if the disposal occurs within one year of the acquisition), or income from a commercial business (if the activity exceeds certain thresholds). If an employer provides an employee with cryptoassets, then this can qualify as income from employment. In contrast, income from the disposal of cryptoassets should not qualify as capital investment income and therefore should not be subject to withholding tax. Moreover, income or capital gains from cryptoassets realised by foreign resident taxpayers (not having any physical presence in Germany) should not typically be subject to German income tax.

Italy

Until the approval of the 2023 BL (as defined below), Italian tax law did not include specific rules in relation to cryptoassets. Absent any such provision, with regard to the taxation of individuals in relation to cryptocurrencies, the Italian Tax Authorities (the ***ITA***) applied the tax rules set out for the purchase and sale of foreign currencies.

The 2023 Budget Law (the ***2023 BL***) provides for a new tax framework applicable to the income realised on "cryptoassets" (which are defined as "*a digital representation of value or rights which may be transferred and stored electronically, using distributed ledger technology or similar technology*", in line with the MiCAR).

Under the 2023 BL, income realised by individuals on cryptoassets (exceeding EUR2,000) comes within a new category of financial income. Taxable events include, broadly, income from the disposal of cryptocurrencies for fiat currency or in exchange for other assets (including NFTs) or services but should not include the exchange of one cryptocurrency for another (as long as the two cryptocurrencies have the same features and functions). Other taxable events include the refund or the holding (for consideration) of cryptoassets. The scope of the new provisions could be clarified by future guidance to be issued by the ITA. Special rules are also being introduced to cure possible past tax violations, to step-up the tax base of cryptoassets, and to bring the holding of cryptoassets within the tax monitoring rules .

The 2023 BL also includes specific provisions that apply to corporate entities, whereby positive or negative changes in value of cryptoassets should not form part of a corporate's taxable income until any gain or loss is crystallised. The illustrative report on the 2023 BL specifies that this rule should however not apply to the measurement of receivables or debts to be settled with cryptoassets. For corporates, the exchange of cryptoassets for other goods (including other cryptoassets), or for fiat currency should be a taxable event for corporate income tax purposes: with the difference between the consideration received and the relevant tax base forming part of the taxable income.

Finally, the 2023 BL extends the 0.2 per cent annual stamp duty to the holding of cryptoassets.

Netherlands

There is no specific cryptoasset regime in the Netherlands. There is however some guidance from the Ministry of Finance in the context of parliamentary discussions on the income tax treatment of cryptoassets and some guidance from the Dutch tax authorities on the VAT treatment of bitcoin (as to which see the VAT section below).

If a company supplies goods or provides services where the consideration is paid in cryptocurrency, such consideration must be exchanged into its equivalent in EUR. The converted amount is considered to be revenue and is relevant for determining the taxable profit and therefore the Corporate Income Tax due on such profit.

If a company owns cryptocurrencies as of the balance sheet date, their valuation should be done according to sound business practice (*goedkoopmans gebruik*) at the lower of (i) the nominal value or (ii) the fair market value.

Spain

In Spain, there is no special tax regime for cryptoassets, however, the Spanish tax authorities have issued several tax rulings that address the tax treatment of cryptoassets. Notably, the sale of cryptocurrencies in exchange for fiat currencies or other cryptoassets gives rise to a capital gain or loss and is not exempt from Spanish Personal Income Tax (***Spanish PIT***). In the case of an exchange of cryptoassets, the difference in the market value of the cryptoassets being used to determine the capital gain. Where the transfer of cryptocurrencies is in the context of economic activity, the income would be treated as income from economic activities for Spanish PIT purposes and corporate income tax rules and certain special rules would apply to determine the relevant income. Staking activity is not considered an economic activity for Spanish PIT purposes. Income obtained from staking activities qualifies as a transfer of a person's own capital to third parties (similar to an interest) under the Spanish PIT, although is not subject to withholding tax.

Although the Spanish tax authorities have not specifically ruled on the corporate tax treatment of cryptocurrency transactions, the expectation is that income or loss from such transactions should form part of the taxable base of the relevant company and be taxed at the general rate of 25 per cent.

Spanish wealth taxes may also be relevant, with rulings being made that cryptocurrencies must be treated in the same way as foreign currencies and so declared at their fair market value in EUR. For other cryptoassets (such as NFTs or tokens) it is necessary to analyse these on a case by case basis to apply the appropriate valuation rule to calculate the taxable base.

United Kingdom

In the UK, HMRC has published guidance on the taxation of cryptoassets in its Cryptoassets Manual. The overarching principle that comes through this is that it is necessary to understand the nature of the relevant cryptoasset and then work out what it is that the taxpayer is doing with the asset in order to determine the appropriate tax treatment.

The guidance states that HMRC does not consider that any current types of cryptoassets are money or currency and therefore for corporates would not fall within the loan relationship rules, rather a cryptoasset is likely to be a capital gains tax asset or an intangible asset (depending on the accounting treatment). It will also be necessary to consider whether any activity amounts to trade (and taxed as income) or as an investment (taxed as a chargeable gain), which HMRC states will depend on factors such as the degree of activity, organisation, risk and commerciality. Cryptoassets given to employees as employment income may be subject to income tax and National Insurance contributions.

In Summer 2022, HMRC consulted on the tax treatment of cryptoasset loans and staking in the context of DeFi, looking at whether the tax treatment of such transactions could be better aligned with the underlying economics. One concern raised was that the UK tax system can treat DeFi loans and staking as disposals for capital gains purposes. However, the consultation noted that many users consider that when they lend or stake their tokens, they retain ownership and therefore being subject to a chargeable gain on disposal (potentially leading to a dry tax charge) potentially means there is a disparity in treatment compared to the lending or borrowing of traditional financial assets such as shares. We await the outcome of this consultation.

In terms of stamp taxes, HMRC guidance indicates that existing exchange tokens would not be likely to meet the definition of stock or marketable securities or chargeable securities and so the transfer of such assets would be outside the scope of UK stamp taxes. However, where exchange tokens are given as consideration (e.g. for shares or land that are in scope of UK stamp taxes), this would be money or money's worth and therefore the transaction would potentially be chargeable to SDRT or SDLT.

United States

The US does not have a specific cryptoasset tax regime but provides guidance under Revenue Ruling 2019-24, IRS Notice 2014-2 and IRS FAQs. The US generally treats cryptoassets as property and general US tax principles on property transactions apply. Provided the cryptoassets are held as capital assets, they give rise to capital gains or losses under general US tax principles. Unlike individuals, corporates do not receive preferential tax rates on long-terms capital gains in the US.

As in many of the other jurisdictions considered above, exchanging cryptoassets for fiat currency or other cryptoassets would generally be taxable in the US.

Cryptoasset transactions are subject to information reporting to the same extent as other property transactions under general US tax principles (eg the fair market value of cryptoassets as wages is subject to US federal income tax withholding, Federal Insurance Contributions Act (***FICA***) tax and Federal Unemployment Tax Act (***FUTA***) tax and must be reported on IRS Form W-2. The IRS has not provided guidance on foreign asset reporting requirements for cryptoassets under FATCA or cryptoasset transactions in the context of like-kind exchanges (i.e. the exchange of one type of cryptoasset for another similar kind of cryptoasset).

The US application of transfer taxes to cryptoassets is unclear. Their classification as property does not

address whether a particular asset is a commodity, security, financial contract or something else.

Value Added Tax (VAT)

The EU VAT Committee has produced various working papers analysing different aspects of cryptoasset transactions. It has acknowledged the complexities involved here in terms of the variety of cryptoassets and their rapid evolution. However, some general principles have emerged, although the focus to date has primarily been on the VAT treatment of cryptocurrencies. One of the most influential decisions in this area is that of the CJEU in case C-264/14 **Hedqvist**. In that case, the CJEU ruled that the exchange of bitcoins for traditional currency is a taxable supply of services exempt from VAT pursuant to Article 135(1)(e) of the VAT Directive, on the basis that cryptoassets should be treated as traditional currencies as regards exchange services. As a result, in most jurisdictions, the exchange of fiat currency for cryptoassets is treated as VAT exempt. The UK, Belgium, the Netherlands and Spain rely on this decision to mean that fees in relation to services provided by cryptocurrency exchanges are exempt under the 'money dealing' exemption from VAT.

In general, supplies or services for which consideration is made in cryptocurrencies are treated in the same way as other supplies or supplies for conventional currencies.

Supplies without remuneration (such as an airdrop) should also be seen as outside the scope of VAT and mining if no transaction fee is involved. Even where there is an incentive paid for mining, in the UK, Austria and Spain, the lack of a service recipient for the mining activity puts it outside the scope of VAT and in Spain the tax authorities have also specifically confirmed that miners are not seen as entrepreneurs.

Although the VAT treatment of the storage and transfer of cryptoassets e.g. in digital wallets has not been clarified in many jurisdictions, the German Federal Ministry of Finance has confirmed that wallet providers are not exempt from VAT to the extent that they charge a fee. This is consistent with the Commission's view that supplies by digital wallet providers, where the main function is to connect users and miners, should qualify as input services and not be exempt (see VAT Committee Working paper 1037).

Spain is one of the few jurisdictions to have ruled on the VAT treatment of NFTs, finding that for VAT purposes, these are neither currencies nor fungible assets. The sale of NFTs could be classified as electronically supplied services which, if deemed to be carried out in Spain, would be subject to VAT at the general rate of 21 per cent. In Belgium, a similar approach has been confirmed by the Minister of Finance on the basis that NFTs should be treated as a digital collector's item or a digital work of art, rather than a means of payment.

Looking ahead

The rapidly evolving nature of cryptoassets and the increasing uses to which they are being put makes it hard to predict how tax systems will respond. It seems the tax rules are already somewhat behind the curve, with very few jurisdictions tackling the taxation of cryptoassets other than cryptocurrencies (such as NFTs) even in guidance.

This seems an area ripe for international coordination, and perhaps with the OECD's CARF and DAC 8 opening up more information to tax authorities on how cryptoassets are being used and by whom, this may be a catalyst for further change in this area.

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