

**LEGAL NATURE OF BITCOIN<sup>2</sup>**

The examination of juridical nature the bitcoin<sup>3</sup> is an urgent issue given two circumstances: first, no cryptocurrency legislation is in place neither in EU nor in the Polish law, and second, the bitcoin "currency" is establishing its place in trade.

In order to answer the question about the legal nature of bitcoin, its constitutive features must be defined and compared vis-à-vis civil and financial law institutions governed by legal precepts.

**1. DEFINITION**

Bitcoin is a kind of crypto-currency or virtual currency (VC). Cryptocurrencies are defined as "contractual units of interest in a distributed cryptographic accounting system"<sup>4</sup> which, "without a centralised issuer or an institution controlling their trade and independent consumption value, constitute a measure of amortising liabilities contractually agreed between the parties to a legal relationship of such value as entities accepting the amortising liabilities with cryptocurrencies are ready to award to them. In other words, the only function of cryptocurrencies is the function of the conventional medium of exchange of monetary value<sup>5</sup>.

What distinguishes bitcoin from traditional currency is the absence of a central issuer and a supervisory authority for the exchange rate of this 'currency'. In the community of network users, virtual currencies are viewed as money, since in principle they meet all its features. First, with some reservations, which follow, it fulfils the payment function. It is also a means of exchange and a

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<sup>3</sup> BitCoin, BTC.

<sup>4</sup> Tax Ruling by the Director of the Tax Chamber in Poznań of 2 September 2015 ILPP4/4512-1181/15-4/HW, Legalis

<sup>5</sup> *Ibidem*; similarly, judgment of the Court of Justice of 22.10.2015. C-264/14, Legalis; *Virtual currency schemes* report, ECB, 2015.

measure of value. On top of that, it performs the function of value storage and risk transfer to a higher extent than money (which has fuelled its spread)<sup>6</sup>.

## 2. PRIMARY ACQUISITION OF BITCOIN

Virtual currency systems are diverse. Bitcoin is a system with a two-way flow that works as any other convertible currency, with two exchange rates (buy and sell)<sup>7</sup>. It is decentralised, in other words there is no central issuer, and the users 'mine' individual units.

Virtual currencies are based on a complex system of cryptographic protocols. A bitcoin creation consists in generating a code (cipher) via the so-called excavator, that is a specific software and computer hardware with high computing power, in a peer-to-peer network<sup>8</sup>. Network users, known as miners, acting individually or in a group or with the participation of special companies, so-called server farms, provide computing power and special computer software, to check a set of transactions and add them to blockchain<sup>9</sup>.

Mining is a competitive activity in which the miner has no control over what will be connected to the blockchain and consequently who will gain bitcoin, hence mining is considered "the equivalent of a competitive gambling"<sup>10</sup>.

The acquisition of the right to bitcoin is original: the right to bitcoin is not contingent on another entity right, it arises independently of the rights of any previous owner. K. Zacharzewski applies here an analogy to the acquisition of ownerless movable property under Article 181 of the Act of 23.4.1964 Civil Code<sup>11</sup>, which is a relevant comparison<sup>12</sup>. However, the author does not draw a reasonable legal conclusion of both institutions from this similarity. It recognizes that mining (acquiring) bitcoin is a legal event, but does not constitute a declaration of will. Mining becomes then

<sup>6</sup> Ibid. T. GRUSZECKI, *Teoria pieniądza i polityka pieniężna. Rys historyczny, i praktyka gospodarcza*, Cracow 2004, p. 70.

<sup>7</sup> Cf. W. SROKOSZ, *Prawo a rozwój elektronicznych środków płatniczych w XXI wieku w: XXV lat przeobrażeń w prawie finansowym i prawie podatkowym. Ocena dokonań i wnioski na przyszłość*, ed. Z. OFIARSKI, Szczecin 2014, p. 846 et seq.

<sup>8</sup> Tax Ruling by the Director of the Tax Chamber in in Bydgoszcz of 9.07.2015. ITPB1/4511-590/15/DP, Legalis; A. PIOTROWSKA, *Bitcoin a definicja i funkcje pieniądza*, Annales UMCS 2014, Issue 3, p. 277

<sup>9</sup> A. PIOTROWSKA, *Bitcoin...*, p. 277 and therein cited D. Bradbury, *The problem with bitcoin*, Computer Fraud and Security 2013, Issue 11, pp. 5-6.

<sup>10</sup> www.bitcoin.org

<sup>11</sup> Consolidated text Journal of Laws of 2017, item 459, hereinafter referred to as "the Civil Code".

<sup>12</sup> K. ZACHARZEWSKI, *Bitcoin jako przedmiot stosunków prawa prywatnego*, Monitor Prawniczy 2014, Issue. 21, p. 1134.

similar to betraying the legal creation of a legal relationship as a result of finding an ownerless item or creating a new object from its own materials<sup>13</sup>.

At the same time, the author believes that "in the dimension of the bond law, the act of bitcoin creation is probably the closest in terms of jurisdiction - without prejudging the legal construction - to the activities involving incurring a commitment in the form of a unilateral legal act by an authorised person"<sup>14</sup>. He further argues that "the creation of bitcoin is the source of the relative subjective right of the manufacturer and creates the claim of the first (original) purchaser of bitcoin, who obtains the title to this value measure"<sup>15</sup>. At the same time, it recognises that "the bitcoin manufacturer (miner) is not a debtor of holder of the title to bitcoin in circulation", but further states that "the role of the debtor in the bond relationship of bitcoin is played by all - on a global scale - persons taking part in its unitary acquisition. However, none of these persons is individually bound to any other participant in the bitcoin creation cycle, which is ensured by the attributes of a peer-to-peer network"<sup>16</sup>.

It is hard to accept to view the act of bitcoin creation once as a legal event that does not constitute a declaration of will, once as a bond relationship, and once as a relative subjective right. In my opinion, bitcoin extraction, like the appropriation<sup>17</sup>, is a unilateral legal act, based on a bitcoin extractor declaration of intent, whose aim is to create and acquire a property right to bitcoin. No right in rem effect, however, because, as described below, bitcoin is not a thing. Therefore, there is also no question of creating a relative subjective right.

Although for technical reasons and bitcoin algorithm an individual may not on its own extract bitcoin physically, the property right arises for one of the users participating in the operation. Accordingly, bitcoin creation should be qualified as entitlement to create legal circumstances, that is to say the right to unilaterally provide for, via a declaration of intent, the creation, modification or termination of a legal relationship<sup>18</sup>.

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<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibidem*, p. 1135.

<sup>16</sup> *Ibidem*, pp. 1134 and 1135.

<sup>17</sup> Among other things: J. IGNATOWICZ, K. STEFANIUK, *Prawo rzeczowe*, 2009, p. 112; Z. RADWAŃSKI, [in:] E. DROZD, B. KORDASIEWICZ, M. PAZDAN, Z. RADWAŃSKI, A. ZIELIŃSKI, *System prawa prywatnego*, vol. 2, *Prawo cywilne - część ogólne*, issue 2, Warszawa 2008, p. 177; E. GNIEWEK, [in:] *System prawa prywatnego*, vol. 3, *Prawo rzeczowe*, issue 3, Warszawa 2013, p. 513.

<sup>18</sup> Conf. A. WOLTER, *Prawo cywilne. Zarys części ogólnej*. Warsaw 1977, p. 124; M. PYZIAK-SZAFNICKA, [in:] Z. BANASZCZYK, J. FRĄCKOWIAK, L. GÓRNICI, W. KATNER, E. ŁĘTOWSKA, P. MACHNIKOWSKI, K. OSAJDA, T. PAJOR, M. PAZDAN, T. PIETRZYKOWSKI, M. PYZIAK-SZAFNICKA, Z. RADWAŃSKI, W. ROZWADOWSKI, M. SAFJAN, M. ZIELIŃSKI, *System prawa prywatnego*, Vol. 1 *Prawo cywilne - część ogólna*, Warsaw 2012, issue 2, pp. 812-813; M. SAFJAN, [in:] Z. BANASZCZYK, A. BRZOZOWSKI, M. KŁODA, J. MOJAK, L. OGIEGŁO, M. PAZDAN, J. PIETRZYKOWSKI, W. POPIOLEK, M. SAFJAN, E. SKOWROŃSKA-BOCIAN, M.

### 3. LEGAL NATURE OF BITCOIN

#### 3.1. IS BITCOIN A DEBT?

Legal theoreticians expressed the view that bitcoin is a debt<sup>19</sup>. The concept of obligation defined in Article 353 § 1 of the Civil Code assumes bilateral legal relationship whereby one of the entities (creditor) has the right (claim) to demand performance of the obligation by the obligor (debtor). A person who has mined bitcoin is not a creditor of the obligation relationship, as no obligated person exists, to be discussed below. The content of the commitment understood in this way is also questionable. Although the performance may also consist of an omission (Article 353 § 2 of the Civil Code), it is difficult to identify the need to abolish, or indeed the consent of the participants to produce bitcoins with the omission of peer-to-peer network participants. It is also worth noting that until bitcoin is produced, none of the participants acts the debtor and creditor. Mining is a competitive activity where the participants are unable to control or predict what will be added to the block chain. Only the creation of bitcoin causes it to be registered in the so-called wallet of a network participant. The production of bitcoin cannot be regarded as performance since there is no legal basis in the form of a commitment. The right to bitcoin is therefore not a claim.

#### 3.2. IS BITCOIN A PROPERTY RIGHT?

The rights are deemed rights property rights based on a typical interest they pursue. On the basis of this prerequisite, property rights include in particular rights in rem and claims for property benefits. The following shall come under non-property rights: personal rights and non-property family rights<sup>20</sup>. In this context, bitcoin is for sure a property right<sup>21</sup>. Bitcoin may generate property value. Hence it can be and it is traded, including in legal transactions *inter vivos* and *mortis causa*. However, the issue of bitcoin inheritance raises many doubts of a practical nature. Certainly, the transition of the title to bitcoin will depend on the testator's activity and the provision of information about the wallet

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WARCIŃSKI, K. ZARADKIEWICZ, K. ZAWADA, *Kodeks cywilny. Komentarz do artykułów 1–449(10)*, vol. I, red. K. PIETRZYKOWSKI, ed. 8, Warszawa 2015, p. 269.

<sup>19</sup> K. ZACHARZEWSKI *Bitcoin jako przedmiot...*, p. 1134.

<sup>20</sup> Cf. Supreme Court decision of 28.1.2015. II CZ 87/14, LEX No 1652693.

<sup>21</sup> Similarly, K. ZACHARZEWSKI, *Bitcoin jako przedmiot*, p. 1133; J. PROKURAT, *Podatkowe aspekty...*, p. 25.

to the authorised person. Otherwise, once the testator has demised, there is no way of finding out whether the person concerned 'holds' bitcoin, as is the case of payment accounts.

### 3.3. IS BITCOIN A SUBJECTIVE RIGHT?

It is difficult to share the view that bitcoin<sup>22</sup> is a relative subjective right. A subjective right is an area to act in a specific way granted and secured by a legal precept. It shall include any number of functionally interlinked entitlements which form a part of the relevant type of legal relationship<sup>23</sup>. Bitcoin is a substantive law which, because of the direct economic interests of the rightholder, must be considered a property law.

### 3.4. IS BITCOIN A THING?

As defined in Article 45 of the Civil Code, "within the meaning of civil law things shall be construed as material parts of nature in its original state or processed, distinguished (in a natural or artificial manner) to the extent that they may be considered intrinsic good in socio-economic relations"<sup>24</sup>. Rights, including property rights, are not things either. Devoid of material existence, of a material medium, Bitcoin may not be an object<sup>25</sup>.

Therefore, bitcoin cannot be, *inter alia*, the object of a loan (Article 720 of the Civil Code), and a contract for the sale of goods or services where bitcoin is the 'consideration' is not sale (Article 535 of the Civil Code) nor exchange (Article 603 of the Civil Code)<sup>26</sup>. Such an agreement should be classified as a broad category of agreements defined as compensatory transactions, which massively develop in business trade, the closest to the so-called barter agreement. Alternatively, it may be classified as a service agreement, governed by the provisions of the contract of mandate (Article 750 of the Civil Code). The sale will be represented by an agreement to transfer bitcoin units for a specific amount of money, expressed in PLN or foreign currency<sup>27</sup>.

<sup>22</sup> K. ZACHARZEWSKI, *Bitcoin jako przedmiot...*, p. 1133.

<sup>23</sup> A. WOLTER, *Prawo cywilne. Zarys...*, p. 116; M. PYZIAK-SZAFNICKA, *System...*, Vol. 1, p. 792 and *Prawo podmiotowe*, *Studia Prawa Prywatnego* 2006, Issue 1, p. 56.

<sup>24</sup> Supreme Court Resolution of 12.4.1988, III CZP 22/88, OSNC 1989, Issue 9, p. 136, LEX No 3474.

<sup>25</sup> Analogically, K. ZACHARZEWSKI, *Bitcoin jako przedmiot...*, p. 1133.

<sup>26</sup> Unlike the swap and loan agreement: K. ZACHARZEWSKI, *Praktyczne znaczenie bitcoina na wybranych obszarach prawa prywatnego*, *Monitor Prawniczy* 2015, Issue 4, p. 187.

<sup>27</sup> Analogically, K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 187.

Parties to a bitcoin agreement are subject to the Civil Code in the scope of responsibility for its non-performance and improper performance (Article 450 et seq. of the Civil Code). Nonetheless, civil redress can be very difficult<sup>28</sup>.

### **3.5. IS BITCOIN MONEY?**

Although, as the functional theory of money assumes, anything that fulfils the function of a measure of value, object of the satisfaction or payment is money, bitcoin, which undoubtedly has all the listed features, cannot be considered such under a prescriptive approach<sup>29</sup>. Under Articles 31 and 32 of the Act of 29 August 1997 on the National Bank of Poland,<sup>30</sup> the NBP shall issue legal tender in the Republic of Poland in the form of cash (banknotes and coins denominated in zloty and grosz). With all its popularity Bitcoin, is not characterized by features fundamental to money as a legal tender: general ability to redeem liabilities and a certain value.

### **3.6. IS BITCOIN A LEGAL TENDER?**

Bitcoin does not constitute another national legal tender because, as defined by Article 2(6) of the Law of 27 July 2002 Foreign exchange law<sup>31</sup> domestic legal tender shall be PLN and securities and other documents serving as legal tender, issued in PLN (bills of exchange, cheques, traveller's cheques, letters of credit, payment orders, money orders and other bank and financial documents payable in domestic currency)<sup>32</sup>.

Neither is Bitcoin a foreign tender, this solely being foreign currencies and foreign exchange (Article 2(6) of the Foreign Exchange Act). Bitcoin is not a foreign currency that is a legal tender abroad (Article 2(10) of the Foreign Exchange Act), nor a foreign exchange that is securities and other documents serving as a tender, issued in foreign currencies (Article 2(12) of the Foreign Exchange

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<sup>28</sup> Seychelles-based company operates Bitmarket, one of the most popular trading platforms on the Polish market. Accordingly, under the rules of the portal, the law of the Republic of Seychelles shall govern any disputes arising from the use of the service.

<sup>29</sup> Not being universally acceptable, Bitcoin cannot be qualified as money in economic terms - After: A. PIOTROWSKA, *Bitcoin...*, p. 279, 281.

<sup>30</sup> Consolidated text Journal of Laws of 2013, item 908, as amended, hereinafter referred to as "NBPU".

<sup>31</sup> Consolidated text Journal of Laws of 2017, item 679.

<sup>32</sup> Similarly, J. PROKURAT, *Podatkowe aspekty obrotu walutami wirtualnymi*, Przegląd Podatkowy 2015, , Issue 3, p. 24; T. JANICKI, *Wirtualna waluta – opodatkowanie przychodów z tytułu zbycia waluty bitcoin*, Przegląd Podatkowy 2015, Issue 11, p. 9.

Act). Nor is it a 'other document serving as a legal tender' as it misses the requirement of being issued in a foreign currency.

Since bitcoin may not be recognised as a legal tender, business involving the exchange of virtual currencies is not a regulated exchange business within the meaning of the Foreign Exchange Law, consisting in the purchase and sale of foreign exchange and the intermediation in its purchase and sale (Article 2(1)(19) and Article 11(1) of the Foreign Exchange Law Act), requiring entry in the register of activities of bureaux du change and subject to the inspection of the President of the NBP (Article 33(1)(2) of the Foreign Exchange Law).

### 3.7. Is bitcoin electronic money?

Bitcoin cannot be identified with electronic money because, pursuant to Article 2(21a) of the Payment Services Act of 19 August 2011<sup>33</sup>, electronic money shall be money stored electronically or magnetically, issued, with an obligation to redeem it, to make payment transactions and accepted by entities other than exclusively the electronic money issuer<sup>34</sup>.

Bitcoin fails to meet the requirements of Article 2(2) of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC, whereby "electronic money" means "monetary value stored electronically, including magnetically, constituting the right to claim against the issuer, which is issued in exchange for funds for the purpose of making payment transactions as defined in Article 2(2) of Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions, amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC<sup>35</sup>, whereby "electronic money" means "electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the electronic money issuer;".

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<sup>33</sup>Consolidated text Journal of Laws of 2016, item 1572, as amended.

<sup>34</sup> So also K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 194; J. PROKURAT, *Podatkowe aspekty...*, p. 24; T. JANICKI, *Wirtualna waluta...*, p. 9.

<sup>35</sup> OJ 267/2009 p. 7.

In the light of the above definitions, and in accordance with Article 4(1)(5) of the Banking Law Act, electronic money is the money that is redeemable on demand by the issuer for cash, that is to say, issued under for repayment. A person entitled to bitcoin has no claim to buy bitcoin.

Unlike electronic money, bitcoin is not issued. It is created by peer-to-peer network users, no superior entity<sup>36</sup>. Users creating a chain of digital signatures cannot be considered issuers as, under Article 2(3) of Directive 2009/110/EC, 'electronic money issuer' means the entities referred to in Article 1(1), institutions benefiting from a waiver under Article 1(3) and legal persons benefiting from a waiver under Article 9 of the Directive.

When concluding a contract for an electronic money instrument, a bank or an electronic money institution shall undertake to make available to the electronic money holder in exchange for funds of the nominal value of the electronic money issued. Still, bitcoin is not issued "in exchange for cash" if it is not a vehicle for a certain amount of money<sup>37</sup>.

Establishing that bitcoin is not electronic money has consequences in the form of exclusion of bitcoin mining and trade from the Payment Services Act, including commitment of an institution operating a cryptocurrency transaction platform to provide NBP with information on the amount of issued units (Article 14c(1) of the Payment Services Act) and information obligations in the scope of delivery services related to, among other things, the content of agreements concluded with users. Platform users are not entitled to file a complaint with the authority supervising the platform operator against the operation of this entity (Article 15(1) of the Payment Services Act). The business of intermediaries in or organisers of transactions with cryptocurrencies is not subject to PFSA supervision (Article 99(1) of the Payment Services Act).

### **3.8. IS BITCOIN SCRIPTURAL MONEY?**

Bitcoin cannot be identified with the second type of the so-called non-cash money, namely scriptural money. The latter is not a legal tender but a record in the bank's ledgers and expresses the bank's commitment to pay the amount of cash corresponding to the record to the bank account holder and a claim to the bank for the payment of cash<sup>38</sup>. It is primarily used for billing purposes.

<sup>36</sup> S. NAKAMOTO, *Bitcoin: A Peer-to-Peer Electronic Cash System*, [www.bitcoin.org](http://www.bitcoin.org).

<sup>37</sup> Similarly, under French law, cf. M. MARIANŃSKI, *Problematyka kwalifikacji prawnej wirtualnej waluty we Francji*, *Państwo i Prawo* 2015, Issue 1, p. 93-94.

<sup>38</sup> P. ZAPADKA, A. MIKOS-SITEK, *Polskie prawo bankowe*, Warsaw 2009, p. 136.



Bitcoin differs from scriptural money, based on a bank record a bank customer may request that scriptural money be exchanged for banknotes or coin or that funds be transferred to another bank account. The bitcoin is disqualified as scriptural money given the requirement that the entity carrying out the settlements is a bank within the meaning of the Banking Law Act of 29 August 1997<sup>39</sup>.

### **3.9 CAN BITCOIN BE CONSIDERED A NON-MONEY MEASURE, REFERRED TO IN ARTICLE 358<sup>1</sup> § 2 OF THE CIVIL CODE?**

As in the above provision, the parties may contractually determine the amount of cash consideration as per a non-money measure. Hereunder, the contract may provide for the so-called indexation clauses (such as currency, PLN, commodity, index-related clauses). The inclusion of such a clause excludes the possibility of judicial indexation. The parties consider adverse effects of a change in the purchasing power of money, which are eliminated at least in the assumption<sup>40</sup>. By all means, foreign currency may be used as a measure<sup>41</sup>. Apparently, under Article 358<sup>1</sup> § 2 of the Civil Code within the limits of freedom of contract, bitcoin may constitute a measure in the indexation clause<sup>42</sup>.

### **3.10. IS BITCOIN A PAYMENT INSTRUMENT?**

According to Article 2(10) of the Payment Services Act, a payment instrument is 'an individualised device or a set of procedures agreed between the user and the provider and used by the user to submit a payment order', that is 'a declaration directed by the payer or payee to its provider that contain an instruction to execute a payment transaction'. (Article 2(36) of the Payment Services Act), that is. 'an act initiated by a payer or payee of placing, transferring or withdrawing funds'. (Article 2(29) of the Payment Services Act)<sup>43</sup>. In that light, bitcoin may not be regarded as a payment

<sup>39</sup> Consolidated text Journal of Laws of 2016, item 1988, as amended, hereinafter referred to as "PrBank".

<sup>40</sup> Cf. Supreme Court judgment of 22.4.2005 II CK 599/04, LEX Issue 250046.

<sup>41</sup> Cf. Supreme Court decision of 5 December 1997, I CKN 558/97, OSNC 1998, Issue 7-8, item 112, LEX no. 33121; T. WIŚNIEWSKI, [in:] T. BIELSKA-SOBKOWICZ, G. BIENIEK, H. CIEPŁA, P. DRAPAŁA, J. GUDOWSKI, M. SYCHOWICZ, R. TRZASKOWSKI, T. WIŚNIEWSKI, C. ŻUŁAWSKA, *Kodeks cywilny. Komentarz. Zobowiązania*, Vol. III, part. 1, ed. J. GUDOWSKI, Warsaw 2013, p. 65; R. MOREK, [in:] W. BORYSIK, J. GÓRECKI, M. GROCHOWSKI, K. HAŁADYJ, J. M. KONDEK, P. KSIEŻAK, B. LACKORŃSKI, G. MATUSIK, P. MIKŁASZEWICZ, R. MOREK, A. NOWACKI, K. OSAJDA, P. POPARDOWSKI, M. RACZKOWSKI, P. SOBOLEWSKI, A. ZBIEGIEŃ-TURZAŃSKA, Ł. ŻELECHOWSKI, *Kodeks cywilny. Komentarz. Vol. II. Zobowiązania*, ed. K. OSAJDA, Warsaw 2013, p. 108; A. BRZOZOWSKI, [in:] *Kodeks cywilny*, vol. I, ed. K. PIETRZYKOWSKI, p. 1137.

<sup>42</sup> After K. ZACHARZEWSKI, *Bitcoin jako przedmiot...*, p. 1133 and *Praktyczne znaczenie...*, p. 187.

<sup>43</sup> A similar definition is contained in Article 4(23) of Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC (PSD).

instrument since it does not provide access to cash by 'usurping' its own right to be a quasi-cash payment instrument.

### **3.11. CAN BITCOIN BE CONSIDERED A FINANCIAL MEASURE?**

Article 2(27b) of the Payment Services Act defines funds as monetary- and non-monetary assets of a reliably determined value and degree of liquidity enabling immediate coverage of risk or loss with monetary assets obtained from non-monetary assets. Bitcoin fails to keep the prescribed liquidity level. Nor is it a "measure" within the meaning of Article 4(15) of the PSD, which means banknotes and coins, scriptural record and electronic money as defined in Article 1(3)(b) of the Directive<sup>44</sup>.

### **3.12. DOES BITCOIN CONSTITUTE AN INSTRUMENT OF ENTITLEMENT?**

The body of comments on the legal nature of bitcoin includes view that digital records representing (incorporating) property rights arising from bitcoins are bearer instruments of entitlement, in evidence of a specific and exercisable personal civil law right, still being solely evidence of a right that does not incorporate this right as a security<sup>45</sup>.

ID cards which are not securities confirm the obligation to provide benefits (Article 921<sup>15</sup> of the Civil Code), in other words they legitimise the bearer as entitled in favour of the debtor, allow the person entitled to obtain (receive) a specific proceed from the debtor to be identified and individualised<sup>46</sup>. The above excludes recognition of bitcoin as an instrument of entitlement, since the right to bitcoin is not a claim.

### **3.13. IS BITCOIN A SECURITY?**

Bitcoin cannot be recognised as a security in any of its possible forms of existence, including dematerialisation, because it misses the requirements of Article 921<sup>6</sup> *et seq.* of the Civil Code, or those stipulated in other definitions of particular peremptory types of securities provided for in specific laws.

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<sup>44</sup> After J. PROKURAT, *Podatkowe aspekty...*, p. 25.

<sup>45</sup> [www.cytlaw.com](http://www.cytlaw.com)

<sup>46</sup> Supreme Court judgment of 16.4.2003 I CKN 202/01, Pr.Bankowe 2004, Issue 4, p. 18, LEX Issue 80255.

Bitcoin is not a security, *inter alia*, within the meaning of Article 2 (14) of the Foreign Exchange Law Act, whereby "securities shall be represented by equity securities, in particular shares and pre-emptive rights with regard to new shares and debt securities, in particular bonds issued or drawn upon in a jurisdiction in which the issuer has its registered office or in which they were issued or drawn upon". Neither was it enumerated in the catalogue of securities contained in Article 3(1)(a) and Article 3(1)(b) of the Act on Trading in Financial Instruments of 29.7.2005<sup>47</sup>. Though it is a transferable property right, it does not arise from an issue and does not incorporate the right to acquire or subscribe for securities referred to in Article 3(1)(a) of the Act on Trading in Financial Instruments.

### 3.14. CAN BITCOIN BE QUALIFIED AS A FINANCIAL INSTRUMENT?

One may determine whether bitcoin can be considered a financial instrument within the meaning of the Act on Trading in Financial Instruments, provided that the *numerus clausus* principle of securities be regarded as binding<sup>48</sup>, whilst the catalogue of financial instruments may be extended by the creation of other transferable property rights<sup>49</sup>. In order for a bitcoin to be viewed as a financial instrument other than a security, it must be established that it is covered by the full definition of the term contained in Article 2(1)(2) of the Act on Trading in Financial Instruments<sup>50</sup>.

Bitcoin must not be considered a unit in collective investment undertakings (Article 2(2)(a) of the Act on Trading in Financial Instruments). Under Article 3(3) of the Act on Trading in Financial Instruments, units in collective investment undertakings are "securities or financial instruments other

<sup>47</sup> Consolidated text Journal of Laws of 2016, item 1636, as amended, hereinafter referred to as "ObrIFinU"

<sup>48</sup> Cf. S. GRZYBOWSKI, [in:] W. CZACHÓRSKI (ed.), *System prawa cywilnego. Prawo zobowiązań – część szczegółowa*, Vol. III, cz. 2, Ossolineum 1976, p. 987; K. KRUCZALAK, *Problematyka prawna papierów wartościowych*, Gdańsk 1994, p. 14 *et al.*; M. MICHALSKI, *Zasada numerus clausus w prawie papierów wartościowych*, *Prawo Spółek* 1995, Issue 11–12, p. 62 *et al.*; A. SZUMAŃSKI, *Problem dopuszczalności prawnej emisji nowych typów papierów wartościowych. Z problematyki zasady numerus clausus papierów wartościowych w prawie polskim*, [in:] *Studia z prawa gospodarczego i handlowego. Księga pamiątkowa ku czci prof. Stanisława Włodyki*, Kraków 1996, p. 438 *et al.*; M. BĄCZYK, [in:] M. BĄCZYK, M.H. KOZIŃSKI, M. MICHALSKI, W. PYZIOŁ, A. SZUMAŃSKI, I. WEISS, *Papiery wartościowe*, Kraków 2000, p. 59–63; M. ROMANOWSKI, *Prawo o publicznym obrocie papierami wartościowymi. Komentarz*, Ed. 2, Warszawa 2003, p. 27 *et al.*. Differ.: A. CHŁOPECKI, *Czy w prawie polskim obowiązuje zasada numerus clausus papierów wartościowych*, *Przegląd Sądowy* 1994, Issue 2, p. 32; F. ZOLL, *Klauzule dokumentowe. Prawo dokumentów dłużnych ze szczególnym uwzględnieniem papierów wartościowych*, Warszawa 2004, p. 224 *et al.*; F. ZOLL, A. WACŁAWIK, *O zasadzie numerus clausus wierzycielskich papierów wartościowych. Uwagi na tle zagadnienia ochrony interesów inwestorów na rynku pożyczek masowych*, *Transformacje Prawa Prywatnego* 2003, Issue 1, p. 9 *et al.*; A. SZUMAŃSKI, [in:] M. H. KOZIŃSKI, J. ŁOPUSKI, M. ORLICKI, W. PYZIOŁ, M. ROMANOWSKI, A. SZUMAŃSKI, *System Prawa Prywatnego, Vol. 18, Prawo papierów wartościowych*, ed. A. SZUMAŃSKI, Ed. 2, Warszawa 2010, p. 133-134.

<sup>49</sup> M. MICHALSKI, *Prawo do akcji, part 2*, *Monitor Prawniczy* 1998, Issue 9, p. 345. Similarly under French law: M. MARIANAŃSKI, *Problem kwalifikacji...*, p. 96.

<sup>50</sup> The Polish definition of a financial instrument implements Article 1(3) of Directive 2003/6/EC of the European Parliament and of the Council of 3 December 2002 on insider dealing and market manipulation.

than securities representing property rights of participants in mutual investment institutions issued under relevant provisions of Polish or foreign law, including in particular units in investment funds".

Bitcoin does not constitute a money market instrument either (Article 2(2)(b) of the Act on Trading in Financial Instruments), defined in Article 3(28) of the Act on Trading in Financial Instruments as "a security or a financial instrument other than a security, issued or drawn upon under relevant provisions of Polish or foreign law, which may be traded on the money market". According to Article 3(27) of the Act on Trading in Financial Instruments, money market is a system of trading in financial instruments based solely on money claims, of which bitcoin is not a part.

Although financial instrument are defined by legally undefined terms such as option, futures, swaps and forwards, scope of the concept of financial instruments remains open, bitcoin may not be considered a derivative (Article 2(1)(2)(c) of the Act on Trading in Financial Instruments). *De lege lata* criterion for being considered a derivative is an underlying instrument in the form of a security, currency, interest rate, yield or other derivative, financial index or financial ratio, which is executed by cash delivery or settlement.

A bitcoin should not be equated with an option, future, swap or interest rate forward contract within the meaning of Article 2(1)(2)(d) of the Act on Trading in Financial Instruments. One cannot consider bitcoin another derivative with a commodity being its underlying instrument, because if considered an underlying instrument, bitcoin is not a commodity, given that it does not exist in a real sense in the market. The definition of goods that can be referred to here is contained in Article 2(6) of the VAT Act of 11 March 2004<sup>51</sup>, whereby goods include items and parts thereof, and all forms of energy<sup>52</sup>. For the same reason, bitcoin cannot be considered a derivative within the meaning of Article 2(1)(2)(e) and Article 2(1)(2)(f) of the Act on Trading in Financial Instruments.

Can bitcoin be classified as a derivative for the transfer of credit risk (Article 2(1)(2)(g) of the Act on Trading in Financial Instruments)? Certainly, a bitcoin transaction can serve this purpose. Furthermore, as claimed by the legal theory, 'all derivative rights fulfilling the function of credit hedge, irrespective of the other characteristics of such instruments, in particular their legal design or admission to trading on a regulated market' can be considered as a derivative for the transfer of credit risk. Thus, "any instrument that hedges against a change in interest rates shall be covered by Article 2(1)(2)(g) of the Act on Trading in Financial Instruments, irrespective of parallel classification as other groups of derivative rights identified by the legislator in Article 2(1)(2) of the Act on Trading in

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<sup>51</sup> Consolidated text Journal of Laws of 2016, item 710, as amended, hereinafter referred to as "VATU".

<sup>52</sup> Tax Ruling by the Director of the Tax Chamber in Warsaw of 24.6.2015 IPPP2/4512-280/15-2/BH, Legalis.

Financial Instruments (...)"<sup>53</sup>. However, as already mentioned, bitcoin is not a derived right within the meaning of Article 3(1)(b) of the Act on Trading in Financial Instruments.

In the light of Article 2(1)(2)(i) of the Act on Trading in Financial Instruments, financial instruments are also 'any other derivative relating to assets, rights, liabilities, indexes and other ratios that exhibit the characteristics of other derivative financial instruments'. Article 2(2) of the Act on Trading in Financial Instruments clarifies that "demonstrating the characteristics of other derivative financial instruments as referred to in Article 2(1)(2)(f) and Article 2(1)(2)(i) shall be construed as satisfying the conditions set out in Article 38 of Commission Regulation (EC) No 1287/2006 of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards record-keeping obligations for investment firms, transaction reporting, market transparency, admission of financial instruments to trading, and defined terms for the purposes of that Directive. The regulation provides that a contract is to be considered as having the characteristics of other financial derivatives and not being for commercial purposes if, *inter alia*, it is traded on a third-country trading platform which performs functions similar to a regulated market or a multilateral trading facility (MTF), is cleared by a clearing house or other entity performing the same functions as the central counterparty and is standardised so that, in particular, the price, lot, date of supply or other terms are mainly determined by reference to prices published from time to time, standard lots or standard dates of supply.

Article 38(3) of Regulation 1287/2006 further specifies that a derivative contract relating to an underlying shall be considered to have the characteristics of other derivative financial instruments if it satisfies the conditions set out in Article 38(1), or is cleared in cash or can be cleared in cash at the request of one or more parties, other than in the event of default or other termination event or the contract is traded on a regulated market or an MTF.

Also in light of the definition of 'derivative' in Article 2(5) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, the recognition of bitcoins as financial instruments is excluded.

This leads to the conclusion that bitcoin is not a financial instrument, and the Act on Trading in Financial Instruments fails to provide for the business of matching persons seeking to buy and sell cryptocurrencies<sup>54</sup>. Accordingly, entities operating exchange platforms are not subject to the rules of take-up and pursuit of business defined therein; they are not governed by the provisions setting out

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<sup>53</sup> K. GLIBOWSKI, *Ustawa o obrocie instrumentami finansowymi*, [in:] *Prawo rynku kapitałowego. Komentarz*. Ed. 2, ed. M. WIERZBOWSKI, L. SOBOLEWSKI, P. WAJDA, Warsaw 2014, p. 489.

<sup>54</sup> Analogically, K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 193.

the rights and obligations of the entities participating in trading and exercising supervision in this respect, and the users of exchange platforms for bitcoins and other cryptocurrencies do not enjoy the same rights and conditions of trading as are provided for them by, for example, the Forex market.

Aside of the provisions of the Act on Trading in Financial Instruments, the legal definition of derivative is contained in Article 2(18) of the Act of 27 May 2004 on Investment Funds and Alternative Investment Fund Management<sup>55</sup>. These are 'property rights whose market price depends directly or indirectly on the price or value of the securities referred to in Article 3(1)(a) of the Act on Trading in Financial Instruments, and other property rights whose market price depends directly or indirectly on the development of the market price of foreign currencies or on changes in interest rates'. The wording of the provision excludes the recognition of bitcoin as a derivative, given that its value does not depend directly or indirectly on the price or value of the underlying. Although the value of bitcoin is measured by the free market exchange rate of this crypto to traditional currencies, they are not its underlying instrument.

Article 2(19) of the Investment Fund Act defines "non-standardized derivatives", that is derivatives that are traded over-the-counter (Article 2(22) of the Investment Fund Act), and their content is or may be subject to negotiations between the parties. Though admitted to OTC, a non-standardised derivative must fulfil the condition of being dependent on the price or value of the underlying, unlike bitcoin.

Article 3(1)(23) of the Accounting Act of 29 September 1994<sup>56</sup> construes a financial instrument as "contract which gives rise to financial assets of one entity and a financial liability or an equity instrument of another entity, on condition that a contract concluded between two or more parties clearly results in economic effects, irrespective of whether the execution of contractual rights or obligations under is unconditional or conditional". Due to the definition of financial assets in Article 3.24 of the Accounting Act, which defines them as cash assets, equity instruments issued by other entities, and the contractual right to receive cash assets or the right to exchange financial instruments with another entity on favourable terms, bitcoin is not a financial instrument within the meaning of the Accounting Act.

## **15) IS BITCOIN SUBJECT TO RESTRICTIONS ON MONEY LAUNDERING?**

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<sup>55</sup> Consolidated text Journal of Laws of 2016, item 1896, as amended, hereinafter: "FundInwU".

<sup>56</sup> Consolidated text Journal of Laws of 2016, item 1047, as amended, hereinafter referred to as "the Accounting Act".

The phenomenon of the so-called money laundering comes under pivotal risk of bitcoin trading. In the light of the broadly defined subjective side of the crime in question, money laundering (Article 299 § 1 of the Act of 6.6.1997 - Criminal Code<sup>57</sup>) and the establishment that bitcoin is a property right, no doubt that the provision also covers cryptocurrencies<sup>58</sup>.

Nonetheless, the examination of the provisions of the Act of 16 November 2000 on combating money laundering and terrorist financing<sup>59</sup> shows that its application to transactions involving bitcoin is problematic<sup>60</sup>. Although this legal act applies not only to money but also to property rights, no one is supposed to report a 'suspicious' transaction. It is not possible to recognise entities operating in the form of trading platforms as so-called "obligated institutions" which must register a transaction at the moment of its conclusion (cf. Article 2(1)). Moreover, cryptocurrency exchange platforms work on the principle of enabling portal users to sell cryptocurrencies for traditional currencies. In effect, this entity's business is removed from the definition of 'foreign exchange activity' in the Act (Article 2(1)(p)). Moreover, as a rule, the Act covers transactions whose equivalent exceeds EUR 15,000 (Article 8(1)), and when determining the equivalent in EUR, the average NBP exchange rate for the relevant currency shall apply, as of transaction day, instruction day or day of placing an order to make a transaction (Article 2a). No average exchange rate applies of the Bitcoin vis-à-vis any currency. Moreover, the duty to register transactions does not apply to transactions concluded on the interbank market, which include crypto-currency transactions (Article 8(1e)(5)).

### 3.16. CAN BITCOIN BE THE SUBJECT OF OTHER OFFENCES?

By all means, it can. Interestingly, it cannot be the object of theft, which concerns seizure for the purpose of unlawful taking of someone else's movable property, computer software, energy or a card entitling to withdraw money from a banking machine (Article 278 § 1-5 of the Criminal Code). Not being money, bitcoin cannot be an object of money counterfeiting, because the provision refers to the notion of "other legal tender" referred to in Article 310 of the Criminal Code<sup>61</sup>. The features of

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<sup>57</sup> Consolidated text Journal of Laws of 2016, item 1137, as amended, hereinafter referred to as "the Criminal Code".

<sup>58</sup> Similarly, K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 195.

<sup>59</sup> Consolidated text Journal of Laws of 2016, item 299, as amended.

<sup>60</sup> The European legislator also failed to include cryptocurrency payments within the framework of the so-called fourth directive on anti-money laundering, that is Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Anti-Money Laundering Directive, AMLD 4).

<sup>61</sup> Differently, as it seems, K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 195.

a tort could be met with reference to violent extortion (Article 282 § 1 of the Criminal Code), appropriation (Article 284 § 1 of the Criminal Code) and fraud (Article 286 § 1 of the Criminal Code), which also apply to property rights. It is also obvious that interference in the bitcoin holder's portfolio may comply with the provisions of Article 287 § 1 of the Criminal Code, which covers the so-called computer fraud<sup>62</sup>.

### 3.17. IS BITCOIN TAXABLE?

In a letter to the Speaker of Diet of 28.6.2013, the Minister of Finance states that "the operation and trade in virtual currencies in the Republic of Poland does not violate Polish or EU law"<sup>63</sup>. This results in transactions involving cryptocurrencies being subject to taxation<sup>64</sup>.

According to tax authorities, bitcoin is a property right, this triggering consequences also under the Acts of 26.7.1991 on personal income tax<sup>65</sup> and 15.2.1992 on corporate income tax<sup>66</sup>.

It is assumed quite consistently that 'mining' bitcoins creates no tax liability<sup>67</sup>. Property rights income will arise from the disposal of bitcoin currency units for consideration, both those 'mined' and purchased, including their exchange into currency or the purchase of goods or services. The income will be arises from the surplus of revenues from this source over the tax-deductible costs in the tax year<sup>68</sup>.

In a slightly different way, the tax consequences of accepting 'payments' in the form of virtual currencies are presented. If the consideration for goods or services of a contracting party is defined in this form, the contract should be classified as a barter trade. The revenue will be generated by the party receiving the bitcoin payment.

Mining of bitcoins under the VAT Act<sup>69</sup> is treated in the same way. Still, bitcoin transactions are already taxable. The sale of bitcoin does not constitute a supply of goods as, under Article 2(6) of the VAT Act, goods include items, parts thereof, and all forms of energy. According to the Polish tax

<sup>62</sup> Analogically K. ZACHARZEWSKI, *Praktyczne znaczenie...*, p. 195.

<sup>63</sup> BPS/043-30-1238/13.

<sup>64</sup> Similarly J. PROKURAT, *Podatkowe aspekty...*, p. 25.

<sup>65</sup> Consolidated text Journal of Laws of 2016, item 2032, as amended.

<sup>66</sup> Consolidated text Journal of Laws of 2016, item 1888, as amended. Cf. Tax Ruling by the Director of the Tax Chamber in Warsaw of 26.6.2014, IPPB1/415-276/14-4/EC, Legalis; Tax Ruling by the Director of the Tax Chamber in Poznań of 2.10.2014. ILPB2/415-741/14-2/TR, Legalis. Broadly on the subject: T. JANICKI, *Wirtualna waluta...*, p. 9 *et seq.*

<sup>67</sup> Conf. J. PROKURAT, *Podatkowe aspekty...*, p. 26.

<sup>68</sup> T. JANICKI, *Wirtualna waluta...*, p. 9.

<sup>69</sup> J. Prokurat, *Podatkowe aspekty...*, p. 27.



authorities, bitcoin constitutes a supply of service. Whereunder, services constitute all services for consideration which do not constitute the supply of goods.

The CJEU judgment of 22 October 2015, C-264/14 *Skatteverket v. David Hedqvist*,<sup>70</sup> held that services consisting in the exchange of a virtual currency into the real currency (and vice versa) carried out for consideration are subject to the VAT exemption provided for financial services (Articles 2(1)(C), 135(1)(D), 135(1)(E) and 135(1)(F) of Council Directive 2006/112/EC of 28 November 2006 on the common system of Value Added Tax). This qualification derives from the Court's finding that the primary function of the virtual currency bitcoin is to write off liabilities, that is they are a legal tender. In the Court's view, the supply of services consisting in the conversion of traditional currencies into virtual units of bitcoin currency, and vice versa, carried out for consideration, is exempt from tax on the same basis as legal tender<sup>71</sup>. This ruling should change the approach of the Polish tax authorities, which so far have not approached bitcoin as a legal tender. However, it should be reiterated that Article 43(1)(7) of the VAT Act explicitly refers to 'legal tender'.

In the opinion of the Polish tax authorities, a 'payment' in virtual currency does not constitute a supply of goods or services and is not included in the catalogue of taxable business. It reflects the institution of debt write-off described in Article 508 of the Civil Code. On the other hand, there is no consideration for the provision of services if the contracting creditor and the debtor, under the terms of the agreement, intend to account for the resulting obligations for the supply of goods or services by means of bitcoin. Debt write-off aims to waive recovery<sup>72</sup>.

In conclusion, as a property right, bitcoin is widely traded. Nonetheless, whereas bitcoin cannot be classified as money, legal tender or financial instrument, it is not regulated. However, with numerous advantages, this 'currency' is risky to network users. Bitcoin is unstable and transactions are anonymous. This encourages default on contracts and the phenomenon of money laundering. Furthermore the risk arises, of losing invested funds as a result of bankruptcy or closure of the organiser of the transaction platform<sup>73</sup>. Until the legal nature of cryptocurrencies is regulated, its use carries a high legal risk of transactions.

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<sup>70</sup> *Legalis v. P. DUDEK, Waluta bitcoin - glossa do wyroku Trybunału Sprawiedliwości z 22.10.2015 r. w sprawie C-264/14 Skatteverket v. David Hedqvist*, European Judicial Review 2016, No. 6, p. 38 *et seq.*

<sup>71</sup> The UK tax authority adopted already a similar stance in 2006 when examining the wording of Article 135(1)(D) of Directive 2006/112/EC on the common system of value added tax - After: A. PIOTROWSKA, *Bitcoin...*, p. 281.

<sup>72</sup> Tax ruling by the Director of the Tax Chamber in Poznań of 8 January 2014 ILPP1/443-910/132/AWa, *Legalis*.

<sup>73</sup> In December 2013 the European Banking Authority issued a warning to consumers about the risks of buying, exchanging and trading in virtual currencies. In its opinion of October 2014 it held that financial institutions, being aware of this risk, should refrain from intermediating in such transactions.