

A bit(coin) out of control

The legal nature of cash, deposit money and
cryptocurrencies

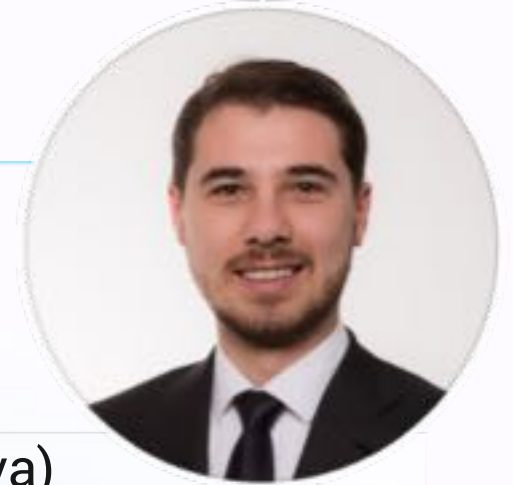


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Bits and bytes – Salt of the 21th century?

- Salt, gold and silver, coins and banknotes – historically used for value-storage and means of payment
- Digital age: money began to dematerialize
- Cryptocurrencies being the latest invention



What is money?

Economic perspective

- Storage of a certain value
- Simplifies the exchange of goods
- Specific accounting units for each currency
- Widely accepted medium of exchange



Economic perspective

Money is the generally accepted means of exchange and payment with specific currency units on which the society as a whole has agreed upon.



Legal perspective

- Major EU provisions regarding money*
 - **Treaty on the Functioning of the European Union (TEU)**
 - **E-Money Directive 2009/110/EC**
 - **Cross-Border Payments Regulation 2009/924/EC**
 - **Single Euro Payments Area (SEPA) Regulation 2012/260/EU**
 - **Payment Services Directive 2015/2366/EU**

* See https://ec.europa.eu/info/law/law-topic/eu-banking-and-financial-services-law_en for an Overview of money specific EU legislation



Legal perspective

- Art. 4 point (25) Payment Services Directive:

„‘funds’ means banknotes and coins, scriptural money or electronic money as defined in [the E-Money Directive]“



Legal perspective

- Protocol No. 4 TEU (Statute of the European System of Central Bank and of the European Central Bank):

„Art. 16 **Banknotes**

*In accordance with Article 128(1) of the TEU, the **Governing Council [of the ECB]** shall have the **exclusive right to authorise the issue of euro banknotes** within the Union. The ECB and the national central banks may issue such notes. **The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Union.**“*



Legal perspective

- Major provisions regarding money in Germany
 - Payment Services Supervision Act (ZAG)
 - Bundesbank Act (BBankG)
 - **German Civil Code (BGB)**



Legal perspective

- Major provisions regarding money in Germany
 - Payment Services Supervision Act (ZAG)
 - ⇒ Implementing EU Payment Services Directive and EU E-Money-Directive
 - Bundesbank Act (BBankG)
 - ⇒ Section 14 Subsection 1: Euro = Legal tender
 - German Civil Code (BGB)
 - ⇒ Sections 244 ff., 270, 288, 291, 488, 935 BGB



Legal perspective

- Each provision has a specific understanding of money and the purpose it serves
- Explicit definition would have to consider all possible meanings of money
- Legal definition of money is burdened on the judges within their decisions



Legal perspective

- Federal Court of Justice (BGH), **concrete definition of money:**

“Any means of payment certified by a domestic or foreign State or a body, authorized by it and intended for circulation in public without regard to a general obligation to accept.”

(BGH, NJW 2013, 2888)



Legal perspective

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- Even Euro collectors coins, officially *accepted* as means of payment, might not be considered money



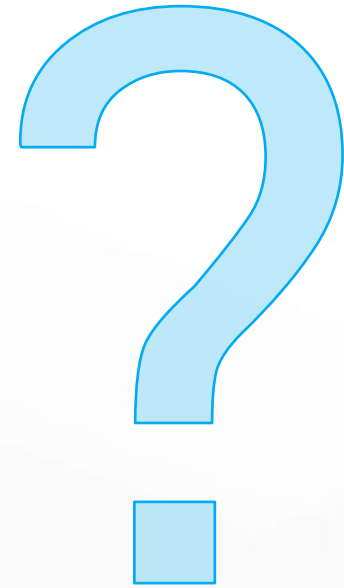
Legal perspective

- **Abstract definition of money:**
 - **concrete-functional, economic characteristics**
 - generally accepted means of exchange and payment
 - with specific currency units
 - **normative acceptance by law**
 - intended means of payment
 - suitable for steady long-term use in the general public under the specific provisions



Why does it matter?

Why is it so important,
if a means of payment
is considered „money“



Cash and deposit money

Cash (banknotes and coins)

- Readily available for immediate physical exchange
- Notes (= banknotes and coins) are monetized by official means of a sovereign act
- Banknotes and coins in Euro are legal tender in Europe



Cash (banknotes and coins)

- Acceptance as means of payment is stipulated by law: Art. 16 Protocol No. 4 TEU, Section 14 Subsection 1 BBankG, Sections 244 ff. BGB etc.) – **concrete definition**
- They can be directly utilized as means of compensatory in case of damages (in Germany: Sections 249, 253 BGB)



Deposit money

- Credited to a bank account; readily available for immediate wire transfer or withdrawal at an ATM
- Replacement for cash money
- Derives from a monetary debt in form of the initial deposit of cash or the transfer of a debt based on money debt



Deposit money

- Though only banknotes and coins in their physical form are considered legal tender (Art. 16 Protocol No. 4 TEU, Section 14 Subsection 1 BBankG), **deposit money**
 - (1) adheres to the concrete-functional, economic characteristics of money and
 - (2) is an intended means of payment that is suitable for steady long-term use in the general public
- Thus, deposit money is **also considered money** under the **abstract definition** of money



Cryptocurrencies

Cryptocurrencies



- Transferrable via wire transfer
- Represent a monetary value
- Means of payment
- Exchange platforms to offer legal tender in exchange for cryptocurrencies are available



- European Court (Case C-264/14, Paragraph 24):

*„It must be held, first, that the ‘**bitcoin**’ virtual currency with bidirectional flow, which will be exchanged for traditional currencies in the context of exchange transactions, cannot be characterised as ‘tangible property’ within the meaning of Article 14 of the VAT Directive, given that [... it] **has no purpose other than to be a means of payment.**“*

Cryptocurrencies: Money within the abstract definition of money?



- Significant differences to deposit money:
 - usually there is a lack of fungibility
 - not accepted by the general public as means of payment (only contractual bound parties plus a few natural or legal third parties)
 - not a replacement for cash but the whole currency / financial system instead



- Significant differences to deposit money:
 - usually there is a lack of fungibility
 - not accepted by the general public as means of payment (only contractual bound parties plus a few natural or legal third parties)
 - not a replacement for cash but the whole currency / financial system instead
 - not tied to a monetary debt; no claim against a credit institution / issuer



- European Court (Case C-264/14, Paragraph 25):
*„... the same is true for **traditional currencies**, since it **involves money which is legal tender**“*
- By distinguishing bitcoin as a “virtual currency” (being a “means of payment”) from money (as a legal tender), the Court seems to assume that virtual currencies are not considered “money” from a legal standpoint

Are cryptocurrencies „E-Money“ then?



- E-Money Directive (2009/110/EC), Recital 8:

*„The **definition of electronic money** should cover electronic money whether it is held on a payment device in the electronic money holder’s possession or stored remotely at a server and managed by the electronic money holder through a specific account for electronic money. That definition **should be wide enough to avoid hampering technological innovation and to cover not only all the electronic money products available today in the market but also those products which could be developed in the future.**“*



- E-Money Directive (2009/110/EC), Art. 2 No. 2:

*„**‘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;“*



- Art. 11 Section 2 E-Money Directive (2009/110/EC) states:

„Member States shall ensure that, upon request by the electronic money holder, electronic money issuers redeem, at any moment and at par value, the monetary value of the electronic money held.“

Cryptocurrencies in Germany

Legal nature of cryptocurrencies

Legal nature of cryptocurrencies in Germany

- No physical representation – only the transaction history is stored
 - ⇒ **Not tangible goods** („Sachen“), Section 90 BGB
- No specific issuer nor a claim against a specific natural or legal person
 - ⇒ **Not a legal claim** („Forderung“), Section 398 BGB



Legal nature of cryptocurrencies in Germany

- Units of cryptocurrencies are being rewarded to a “miner” for his efforts to solve a specific task solely by utilizing his computing power
 - ⇒ **No protection as intellectual property** (only the underlying cryptocurrency concept is protected)
- Cryptocurrency units are legally “unknown” – not clear, how to classify them
 - ⇒ **Maybe**, a protection as “**another right**” under **Section 823 Subsection 1 BGB** assigned to the holder of units of cryptocurrencies could be argued



Legal nature of cryptocurrencies in Germany

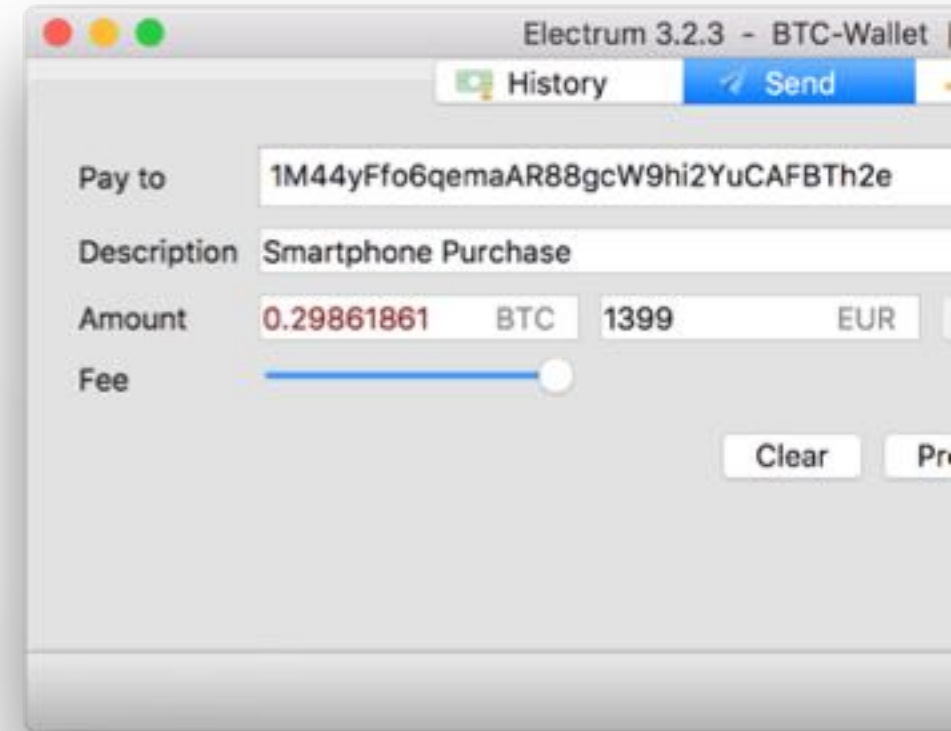
- Especially in **case of negligence** by a third party (e.g. accidental data corruption of the Blockchain resulting in the loss of cryptocurrency units), the holder of cryptocurrency units might have no claim against the third party
- **Risk of losing all cryptocurrency units without compensation** by the negligent party



Transfer of cryptocurrencies from a legal perspective

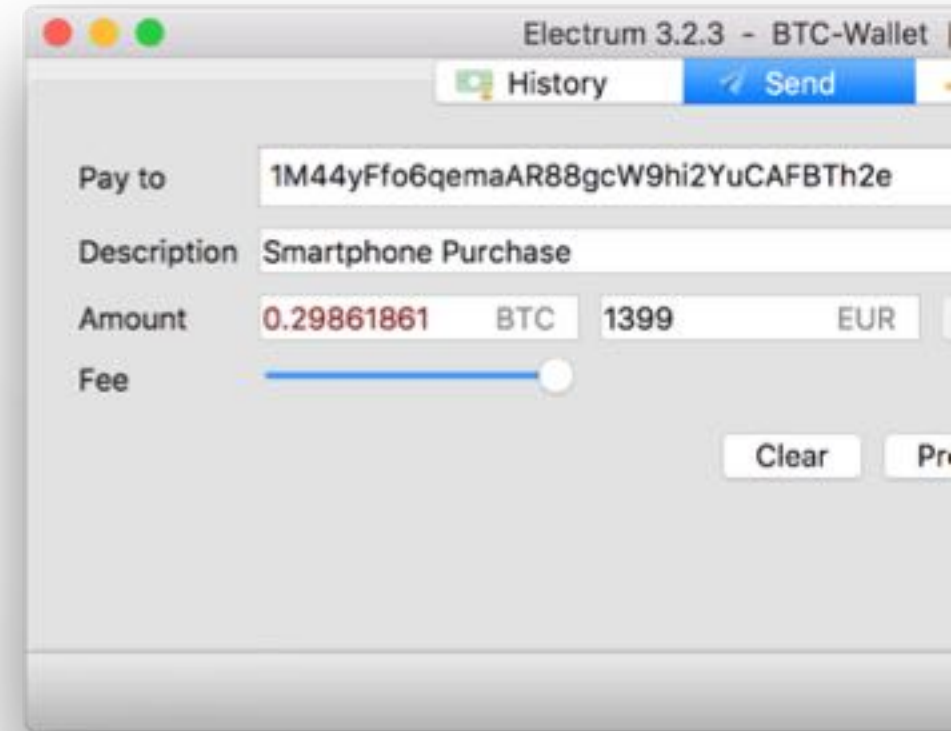
Transfer of cryptocurrencies from a legal perspective

- The applicable law to a transfer of cryptocurrency units is determined by the nature of the contract
- The nature of the contract on the other hand is determined by the subject and purpose of the contract



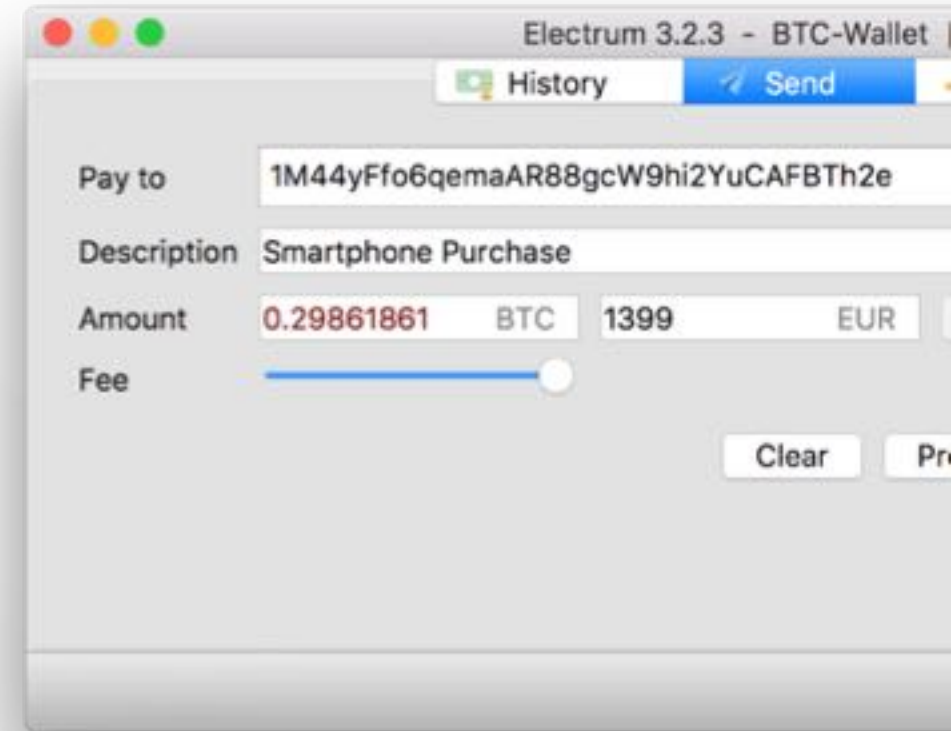
Transfer of cryptocurrencies from a legal perspective

- Cryptocurrency shall
 - be bought from another person using legal tender:
 - ⇒ Contract to sell rights or other objects (Section 453 BGB)
 - be created by another person:
 - ⇒ Contract to produce work (Section 631 BGB)
or
 - ⇒ Service Contract (Section 611 BGB)



Transfer of cryptocurrencies from a legal perspective

- Cryptocurrency shall
 - be used as means of payment to pay for goods:
 - ⇒ Exchange of goods (Section 480 BGB) or
 - ⇒ Contract to sell tangible goods, rights or other objects (Sections 433, 453 BGB)



Conclusion and Outlook

Conclusion and Outlook

- A lot of confusion about Blockchain technology and legal handling of cryptocurrencies
- For cryptocurrencies to reach the mainstream and day-to-day businesses, many obstacles need to be removed
- Legislative bodies should clarify the legal nature of cryptocurrencies and stipulate specific provisions to protect the values stored within a cryptocurrency

Thank you very much for your attention!

Feel free to contact me for any further questions:



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