"VIRTUAL CURRENCIES" AS AN "INSTRUMENT OF INVESTMENT" ACCORDING TO THE ITALIAN SUPREME COURT

The Supreme Court of Cassazione has once again made a statement on the subject of virtual currencies (Supreme Court of Cassazione, Second Criminal Section, No. 44378, of 22 November 2022), ruling that they shall be considered an "instrument of investment" when they take on the characteristics of a financial product, with the consequent application of the relevant provisions contained in the Italian Financial Act ("t.u.f.") in Articles 94 and following. The Supreme Court points out that those who offer such currencies shall raise the information obligations towards the investor to enable him to know in detail the offer and make a thoughtful choice on the characteristics of cryptocurrencies and whether they could be ascribed to the category of financial investments.

The Court's reconstruction, briefly described below, while it is clear in its reasoning and in the conclusions that it reaches, may generate some misunderstanding due to the use in some passages of non-technical terminology ("instrument of investment" is a category that does not exist in the relevant legal system, and the terms "financial instrument" and "financial product" are sometimes improperly used as synonyms).

The Supreme Court has addressed the issue of the marketing of cryptocurrencies several times in the past, most recently with Judgment No. 26807 of 17 September 2020 in which it recognized that "*the sale of bitcoin advertised as a real investment proposal is an activity subject to the requirements of Articles 91 and following, t.u.f., whereby their omission integrates the case referred to in Article 166, paragraph 1, letter c), t.u.f.*" as well as with Judgment no. 44337 of 30 November 2021 in which it was recognized that "*in the state, bitcoin can be considered a financial product when purchased for investment purposes: virtual currency, when they assume the function, i.e., the concrete cause, of an investment instrument and, therefore, of a financial product, must be regulated with the rules on financial intermediation (Article 94 and following, t.u.f.), which guarantee through a unitary discipline of special law the protection of the investment*."

In the latest reconstruction carried out with the Judgment here analysed, the Court, as it did in its previous Judgment of 2021, first analysed the typical characteristics of virtual currencies, as provided for in regulatory texts, and then examined the figures of those who operate within the virtual currency sector.

The Court bears in mind that virtual currency is defined:

- in Directive 2018/843/EU of 30 May 2018 (on the amendment to Article 3 of Directive 2015/849, the so-called Fourth AML Directive) as *"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";*

- in Legislative Decree No. 125 of 4 October 2019 (on the amendment to Article 1 of Legislative Decree No. 231 of 2007) as "*the digital representation of value, not issued or guaranteed by a central bank or public authority, not necessarily linked to a legal tender, used as a medium of exchange for the purchase of goods and services or for investment purposes and transferred, stored and traded electronically*".

Thus, as the Court also pointed out, while the definition in the European legal provisions focuses predominantly on the relationship between virtual currency and legal tender, the Italian regulations expressly place emphasis (also) on the investment purposes that can be pursued through virtual currencies.

For the sake of completeness, it should be noted that the possible investment purposes of virtual currencies are, in any case, well in the mind of the EU legislator, who in Recital 10 of the aforementioned Directive urges that virtual currencies be kept distinct from electronic money, monetary value used to perform payment transactions, gambling currencies, etc., recalling that, "*although virtual currencies can frequently be used as a means of payment, they could also be used for other purposes and find broader applications such as means of exchange, investment, store-of-value products or use in online casinos*".

Regarding the entities operating in the field of virtual currencies, the Supreme Court recalled that Legislative Decree No. 231 of 2007 regulates two different figures:

- "*service providers related to the use of virtual currency*" i.e. "*any natural or legal person who provides third parties, on a professional basis, including online, with services functional to the use, exchange, storage of virtual currency and their conversion from or into legal tender or digital representations of value, including those convertible into other virtual currencies as well as the services of issuing, offering, transferring and clearing and any other service functional to the acquisition, negotiation or intermediation in the exchange of the same currencies*" pursuant to Article 1(2)(ff) of Legislative Decree No. 231 of 2007;
- "*providers of digital wallet services*," i.e. "*any natural or legal person who provides, to third parties, on a professional basis, including online, services for safeguarding private cryptographic keys on behalf of their clients, in order to hold, store and transfer virtual currencies*" pursuant to Article 1 (2) (ff-bis) of Legislative Decree No. 231 of 2007.

Both figures were included among the so-called obliged parties in the category "other non-financial operators," pursuant to Article 3, paragraph 5, letters i) and i-bis) of Legislative Decree No. 231 of 2007. By virtue of this, they are required, pursuant to Article 17-bis of Legislative Decree No. 141 of 2010, to register in the special register kept at the Agents and Brokers Body (Organismo Agenti e Mediatori) with the related obligation to notify the Ministry of Economy and Finance.

Having reconstructed the relevant legal background, the Court analysed the manner in which the marketing of virtual currencies was materially carried out in the case under consideration to verify whether or not an abusive offer of financial products was integrated.

In the case examined, it was found that fundraising had taken place through the disbursement of bitcoins by investors for the purpose of creating a decentralized logistics services platform, and that the investors had been remunerated through the payment of other virtual currencies (LWF Coins), of variable value, which would enable participation in the platform for the use of its services.

Thus, Judgment No. 44378 focused on the definition of what the distinguishing features of "financial products" are (although it did not expressly mention this category), basing on the reconstruction developed by the Court of Verona in 2017:

a) an employment of capital, generally attributable to money or, more generally, to equity that can also correspond to a virtual currency;

b) an expectation of return;

c) a risk proper to the chosen activity, directly related to the use of capital.

The Court held that the totality of these elements could also be found in the case under consideration given that the parties involved in the investment had:

a) paid out capital (through the disbursement of bitcoins);

b) acted with the expectation of obtaining a return (consisting of the payment of other virtual currencies that would enable participation in the platform, whose value would vary depending on the time of purchase and which would acquire greater value if the project related to the platform was successful);

c) assumed a risk associated with the capital investment made.

The Court thus recognized that, upon the occurrence of the indicated characteristics, "*it follows that virtual currency must be considered as an investment instrument because it consists of a financial product, so it shall be regulated with the rules on financial intermediation (Article 94 and following, t.u.f.), which guarantee through a unitary discipline of special law the protection of the investment; therefore, those who provide said services are obliged to raise the information obligations towards the consumer, in order to allow the same to know the contents of the economic-contractual operation and to mature a meditated negotiation choice*."

In view of the above, the Court, in Judgment No. 44378 of 22 November 2022, held that the activity carried out by the person under investigation integrated the hypothesis of abusive exercise of financial activity referred to in t.u.f., Article 166 lett. (c), which precisely punishes anyone who "*offers off-site, or promotes or places by means of remote communication techniques, financial products or financial instruments or investment services or activities*", with no relevance to the fact that the investors had not filed any complaints and, on the contrary, considering that the very risk taken, of which the investors themselves were aware, reinforced the conclusion that the transaction put in place constituted a real "investment."

Paolo Iemma, Partner
Piazza dei Caprettari, 70
00186 Roma IT
Email: paolo.iemma@grplex.com

Roberta Talone, Junior Associate
Piazza dei Caprettari, 70
00186 Roma IT
Email: roberta.talone@grplex.com