The Era of Mass Data Litigation

Users protection in the cryptocurrencies world

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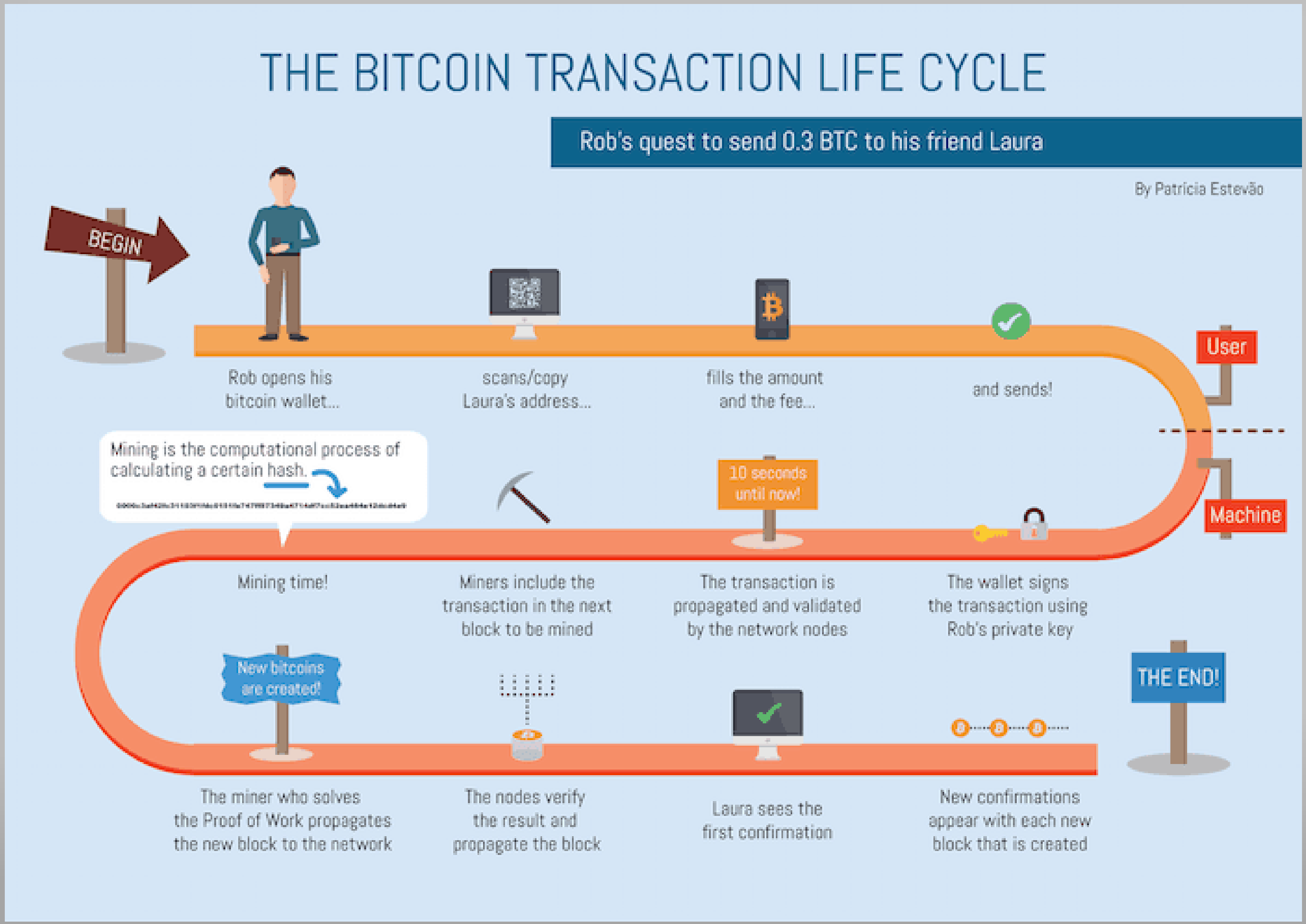
Cryptocurrency is nowadays a term well known worldwide

After the peak of January 2018, when the global market capitalization of cryptocurrencies reached the 800 billion dollars, the value is today stable just above 100 billion dollars

Despite the great diffusion of crypto -or virtual- currencies it is hard to get a unique, clear and unambiguous legal definition of them, hence many different countries and authorities have given different qualifications.

Legal status is not just a theorical matter but actually affects the type of protection that can be offered to the user

How it works



THE BITCOIN TRANSACTION LIFE CYCLE
Rob's quest to send 0.3 BTC to his friend Laura
By Patrícia Estevão
BEGIN
Rob opens his bitcoin wallet...
scans/copy Laura's address...
fills the amount and the fee...
and sends!
User
Machine
Mining is the computational process of calculating a certain hash.
10 seconds until now!
Mining time!
Miners include the transaction in the next block to be mined
The transaction is propagated and validated by the network nodes
The wallet signs the transaction using Rob's private key
New bitcoins are created!
THE END!
The miner who solves the Proof of Work propagates the new block to the network
The nodes verify the result and propagate the block
Laura sees the first confirmation
New confirmations appear with each new block that is created

General definition

- Digital representation of value
- not issued or guaranteed by a central bank or a public authority
- not necessarily attached to a legally established currency
- is accepted as a means of exchange and which can be transferred, stored and traded electronically

Can cryptocurrencies be defined as money?

The lack of legal tender prevents the definition of cryptocurrencies as money

Basic characteristic of money is the capacity of extinguishing debt or, in other words, that the payment can’t be refused.

Cryptocurrencies instead can be refused, the whole system is based on confidence of the user that the value he bought could be accepted in the future and used to buy goods, or to get money back

Monetary-like behavior

Money functions:

1) medium of exchange
2) unit of account
3) store of value

Cryptocurrencies perform partially all three

Can cryptocurrencies be defined as an investment product?

Many people bought cryptocurrencies in order to get a capital gain delivered by the spikes of their price

but

that is not enough to define them as an investment product

Can cryptocurrencies be defined as an investment product?

As an example Italian regulation, defining what is an investment product specifies that “*payment instruments are not financial instruments*”

so

that the coexistence of their multiple possible uses prevents the qualification as investment product according to the Italian regulation.

Can cryptocurrencies be defined as an investment product?

Contrariwise, the German Federal Financial Supervisory Authority, in 2013 qualified cryptocurrencies as financial instruments

but

in 2018 a Court contradicted the BaFin authority affirming that cryptocurrencies are not financial instruments.

The Court denied that cryptocurrencies could be defined as currency in the classical sense but merely as means of payment accepted only by certain economic operators, and they have no predictable stable value so could not form the basis for comparing various goods or services. Therefore, the conceptual requirements relating to units of account were not fulfilled.

Can cryptocurrencies be defined as goods?

Cryptocurrencies are surely not material goods

but

their qualification as immaterial goods also can be not obvious

Can cryptocurrencies be defined as goods?

Under Italian regulation, rights over immaterial goods are limited by a closed system that, to date, does not include virtual currencies

Contrariwise, in the United States the Internal Revenue Service, the tax authority, has qualified them as "intangible property“

Furthermore, since 2015, the U.S. Commodity Futures Trading Commission (CFTC) claims that cryptocurrencies are commodities and, in 2018, many Federal Courts confirmed it

Cryptocurrencies critical issues and risks

- Crime prevention
- Tax fraud
- Transaction security

Critical issues and risks

Crime prevention

The anonymity entails risk of “black market” transactions, money laundering, terrorist financing and other relevant criminal activities

Authorities all over the world, prescribe transparency ad impose in different ways licenses or authorizations in order to avoid or limit anonymity

Critical issues and risks

Crime prevention

- the Italian national tax agency Agenzia delle Entrate stated that cryptocurrency trading activity shall be considered financial intermediary for the purposes of anti-money laundering legislation.
- In US many States have adopted restrictive regulations. The most famous is the s.c. BitLicence, adopted by New York State Department of Financial Services in 2015, which caused the Great Bitcoin Exodus, when many companies decided to move from New York to States more “bitcoin friendly”

Critical issues and risks

- Tax fraud

The absence of specific regulations and the intangible and transnational nature of cryptocurrencies entails high risk of tax avoidance

Critical issues and risks

Tax fraud

European Court of Justice in 2015 affirmed that the exchange of traditional currency for units of virtual currencies and vice versa, in return for payment, constitute the supply of services for consideration within the meaning of VAT Directive and that these transactions are exempt from VAT, like legal tender currencies exchange.

Critical issues and risks

Tax fraud

Arguing from the ECJ statement, Italian tax authority affirmed the taxability of income components deriving from the cryptocurrency exchange activity carried out in Italy

Critical issues and risks

Transaction security

- User protection from hacking
- Information about cryptocurrencies nature and volatility of their value
- guarantees in case of loss

Possible answers

Pragmatic approach

Overcome traditional schemes and search for the best regulation leaving aside dogmatic definitions

Possible answers

EU Report on virtual currencies (2016/2007(INI))

"*The key to smart regulation in such an environment of dynamic innovation is for the regulator to develop sufficient capacity, including technical expertise. Pre-emptive and heavy-handed regulation that would stifle growth should and can be avoided. But such a smart regulatory regime based on analytical excellence and proportionality must not be confused with light-touch regulation: rapid and forceful regulatory measures need to be part of the toolkit in order to address risks before they become systemic if and when appropriate*."