



French court clarifies the nature of bitcoins: A consumable, fungible, intangible asset

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By:

As we mentioned in our March issue, in late February France's first instance commercial Court of Nanterre, which has jurisdiction over many banks and major corporations, issued a remarkable and highly publicized ruling involving the characterization of the nature of bitcoins (BTC) under French law.

BitSpread, a FinTech company offering investments services in alternative assets, had entered into several BTC loan agreements with the French cryptoassets exchange Paymium between 2014 and 2016. As a result of the hard fork splitting BTC with bitcoin cash (BCH) that took place in August 2017, BitSpread received 1,000 BCH. A few months later, at the end of the term of the loan agreements, BitSpread returned the original BTC loan amount to Paymium. However, Paymium also demanded the transfer of the BCHs.

The court had to determine who was the owner of the BCH but, to do that, had to characterize the BTC under French civil law. In its ruling, the court found that BTCs were "consumed" when used and were "consumable assets" (i.e., like conventional currency), however they were used – whether to pay for goods or services, to exchange for foreign currency, or otherwise. Because all BTCs are based on the same computer protocol and each is regarded as equivalent to any other BTC, the court further determined that all BTCs were of the same kind and quality and should therefore be held as "fungible" – freely exchangeable or replaceable with each other.

The court seems to have made this decision by comparing BTCs with legal tender, though the opinion highlights that BTC

should not qualify as legal tender or as money. Indeed, when using borrowed money, a borrower relinquishes coins and banknotes, and will not reimburse those particular coins or banknotes (*ie*, it is not an *in specie* claim). Yet, even though banknotes could be individualized through their serial numbers, in the same way that individual BTCs could be traced, they are considered fungible since two banknotes of the same face value are generally regarded as equivalent under French law (unless the contract states otherwise).

Because of the characterization of BTCs as consumable and fungible, the French commercial court decided that the BTC loan agreements entered into between BitSpread and Paymium were subject to the French regime governing “simple loans” or “loans on fungible assets” (*prêts de consommation*), as opposed to “loans for use” (*prêt à usage*). As a consequence, BitSpread, as borrower, became the owner of the borrowed BTCs by outright transfer of title.

Further, as the owner of the BTCs, the borrower was legally entitled to receive and own the proceeds of such assets, *ie*, the BCHs resulting from the fork. This decision bears some similarities to a repurchase / stock lending relationship which, subject to any agreement providing the contrary, entitles the borrower (and not the lender) to benefit from ownership of dividends issued on the loaned stock during the term of the agreement.

Further, the agreement between BitSpread and Paymium took place before the effective date of the so-called Pacte Law. Among other things, the Pacte Law creates a legal regime governing “digital assets” and the provision of services on digital assets in the French financial markets authority (*Autorité des marchés financiers*). Under current law, in the event of a fork (*bifurcation*), owners of crypto-assets should also become owners of crypto-assets resulting from the fork, unless the written agreement between the parties specifies otherwise. However, this rule only governs relationships between an owner of crypto-assets and the custodian, and not between a lender of crypto-assets and the borrower.

The practical impact of this decision from the Nanterre court has yet to be assessed (and could well be dismissed in appeal), but practitioners are currently reviewing their standard terms and conditions to determine how this type of event should be dealt with contractually in loans on BTC as well as other types of documentation (such as repossessions or collateral agreements).

Learn more about the implications of this decision by contacting the authors.