Blockchain & Cryptocurrency Regulation

2020

Second Edition

Contributing Editor
Josias N. Dewey

LSTA

CONTENTS

Preface Josias N. Dewey, *Holland & Knight LLP*

Foreword Aaron Wright, *Enterprise Ethereum Alliance*

Glossary The Editor shares key concepts and definitions of blockchain

Industry

Promoting innovation through education: The blockchain industry, law enforcement and regulators work towards a common goal
Jason Weinstein & Alan Cohn, *The Blockchain Alliance* 1

The loan market, blockchain, and smart contracts: The potential for transformative change
Bridget Marsh, *LSTA* & Josias N. Dewey, *Holland & Knight LLP* 5

A year of progress – the Wall Street Blockchain Alliance and the ongoing evolution of blockchain and cryptoassets
Ron Quaranta, *Wall Street Blockchain Alliance* 14

General chapters

Blockchain and intellectual property: A case study
Joshua Krumholz, Ieuan G. Mahony & Brian J. Colandreo
Holland & Knight LLP 18

The custody of digital assets – 2020
Jay G. Baris, *Shearman & Sterling LLP* 35

Cryptocurrency and other digital assets for asset managers
Gregory S. Rowland & Trevor I. Kiviat, *Davis Polk & Wardwell LLP* 52

The yellow brick road for consumer tokens: The path to SEC and CFTC compliance. An update
David L. Concannon, Yvette D. Valdez & Stephen P. Wink,
Latham & Watkins LLP 64

Custody and transfer of digital assets: Key U.S. legal considerations
Michael H. Krimminger, Colin Lloyd & Sandra Rocks,
Cleary Gottlieb Steen & Hamilton LLP 88

An introduction to virtual currency money transmission regulation
Michelle Ann Gitlitz & Michael J. Barry, *Blank Rome LLP* 101

Cryptocurrency compliance and risks: A European KYC/AML perspective
Fedor Poskriakov, Maria Chiriaeva & Christophe Cavin,
Lenz & Staehelin 119

The potential legal implications of securing proof of stake-based networks
Angela Angelovska-Wilson, *DLx Law* &
Evan Weiss, *Proof of Stake Alliance* 133

Legal issues surrounding the use of smart contracts
Stuart Levi, Alex Lipton & Cristina Vasile,
Skadden, Arps, Slate, Meagher & Flom LLP 155

U.S. Federal Income Tax implications of issuing, investing and trading in cryptocurrency
Mary F. Voce & Pallav Raghuvanshi, *Greenberg Traurig, LLP* 171

Stablecoins: A global overview of regulatory requirements in Asia Pacific, Europe, the UAE and the USA
David Adams & Jesse Overall, *Clifford Chance LLP*
Jason Rozovsky, *R3* 182

Blockchain and the GDPR: Co-existing in contradiction?
John Timmons & Tim Hickman, *White & Case LLP* 202

General chapters	*Smart contracts in the derivatives space* Jonathan Gilmour & Vanessa Kalijnikoff Battaglia, *Travers Smith LLP*	220
	Distributed ledger technology as a tool for streamlining transactions Douglas Landy, James Kong & Jonathan Edwards, *Milbank LLP*	232
Country chapters		
Argentina	Juan M. Diehl Moreno & Santiago Eraso Lomaquiz, *Marval, O'Farrell & Mairal*	245
Australia	Peter Reeves, *Gilbert + Tobin*	251
Austria	Ursula Rath & Thomas Kulnigg, *Schoenherr Attorneys at Law*	263
Bermuda	Mary V. Ward & Adam Bathgate, *Carey Olsen Bermuda Limited*	271
Brazil	Martim Machado & Julia Fontes Abramof, *CGM Advogados*	282
British Virgin Islands	Clinton Hempel & Mark Harbison, *Carey Olsen*	288
Canada	Simon Grant, Kwang Lim & Matthew Peters, *Bennett Jones LLP*	294
Cayman Islands	Alistair Russell & Dylan Wiltermuth, *Carey Olsen*	308
China	Jacob Blacklock & Shi Lei, *Lehman, Lee & Xu*	316
Cyprus	Karolina Argyridou, Prodromos Epifaniou & Akis Papakyriacou, *Verita Legal K. Argyridou & Associates LLC*	326
Estonia	Priit Lätt, *PwC Legal Estonia*	332
France	Christophe Perchet, Juliette Loget & Stéphane Daniel, *Davis Polk and Wardwell LLP*	344
Germany	Dr Stefan Henkelmann & Lennart J. Dahmen, *Allen & Overy LLP*	355
Gibraltar	Joey Garcia & Jonathan Garcia, *ISOLAS LLP*	367
Guernsey	David Crosland & Felicity Wai, *Carey Olsen (Guernsey) LLP*	376
Hong Kong	Yu Pui Hang (Henry Yu), *L&Y Law Office / Henry Yu & Associates*	387
India	Anu Tiwari & Rachana Rautray, *AZB & Partners*	401
Ireland	Maura McLaughlin, Pearse Ryan & Caroline Devlin, *Arthur Cox*	407
Japan	Taro Awataguchi & Takeshi Nagase, *Anderson Mōri & Tomotsune*	414
Jersey	Christopher Griffin, Emma German & Holly Brown, *Carey Olsen Jersey LLP*	424
Korea	Jung Min Lee, Samuel Yim & Joon Young Kim, *Kim & Chang*	433
Liechtenstein	Dr Ralph Wanger, *BATLINER WANGER BATLINER Attorneys at Law Ltd.*	440
Malta	Malcolm Falzon & Alexia Valenzia, *Camilleri Preziosi Advocates*	445
Mexico	Miguel Ángel Peralta García, Pedro Said Nader & Patrick Seaver Stockdale Carrillo, *Basham, Ringe y Correa, S.C.*	455
Montenegro	Marija Vlajković & Luka Veljović, *Moravčević Vojnović i Partneri AOD Beograd in cooperation with Schoenherr*	463
Netherlands	Björn Schep, Willem Röell & Christian Godlieb, *De Brauw Blackstone Westbroek*	466
Portugal	Filipe Lowndes Marques, Mariana Albuquerque & João Lima da Silva *Morais Leitão, Galvão Teles, Soares da Silva & Associados [Morais Leitão]*	476
Russia	Vasilisa Strizh, Dmitry Dmitriev & Anastasia Kiseleva, *Morgan, Lewis & Bockius LLP*	486

Serbia	Bojan Rajić & Mina Mihaljčić, *Moravčević Vojnović i Partneri AOD Beograd in cooperation with Schoenherr*	494
Singapore	Franca Ciambella & En-Lai Chong, *Consilium Law Corporation*	500
South Africa	Angela Itzikowitz & Ina Meiring, *ENSafrica*	512
Spain	Alfonso López-Ibor, Pablo Stöger & Olivia López-Ibor, *Ventura Garcés López-Ibor*	519
Switzerland	Daniel Haeberli, Stefan Oesterhelt & Alexander Wherlock, *Homburger AG*	524
Taiwan	Robin Chang & Eddie Hsiung, *Lee and Li, Attorneys-at-Law*	536
United Arab Emirates	Abdulla Yousef Al Nasser, Flora Ghali & Nooshin Rahmannejadi, *Araa Group Advocates and Legal Consultants*	543
United Kingdom	Stuart Davis, Sam Maxson & Andrew Moyle, *Latham & Watkins LLP*	554
USA	Josias N. Dewey, *Holland & Knight*	565
Venezuela	Luisa Lepervanche, *Mendoza, Palacios, Acedo, Borjas, Páez Pumar & Cía. (Menpa)*	575

Portugal

Filipe Lowndes Marques, Mariana Albuquerque & João Lima da Silva
Morais Leitão, Galvão Teles, Soares da Silva & Associados [Morais Leitão]

Government attitude and definition

Blockchain technology in general, and cryptocurrencies in particular, are some of the most closely followed topics in the financial technology industry amongst the Portuguese government and the relevant regulatory authorities, along with prevailing fintech trends in other jurisdictions. In particular, in the last five years these technologies have been brought to public attention largely due to the dramatic increase in the value of Bitcoin, the rise in the number of initial coin offerings (ICOs) globally, and their market capitalisation. This focus is also driven by some significant developments that the Portuguese market has seen in recent years in this sector, most notably the rise of tech-based companies and the steady increase in the use of cryptocurrencies in the last decade.

Notwithstanding, in Portugal, blockchain technology has not been implemented in a significant number of services and is yet to have a relevant impact on either private or public organisations. In fact, to date in Portugal, most blockchain technology has been used in the issuance of tokens, including in the context of ICOs. For these reasons, the government and regulatory authorities have been invested in studying blockchain technology and cryptocurrencies with a view to creating favourable conditions for the establishment and development of the sector, while protecting all market participants' interests.

For the purpose of this chapter, cryptocurrencies can be broadly defined along the European Central Bank's definition – to which the Portuguese authorities have largely subscribed – as a "digital representation of value, not issued by a central bank, credit institution or e-money institution, which in some circumstances can be used as an alternative to money".[1] Other useful constructions have been developed by the European Securities and Markets Authority (ESMA) in its advice on Initial Coin Offerings and Crypto-Assets (January 2019)[2] and in a study requested by the European Parliament's Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance (June 2018).[3]

In Portugal, cryptocurrencies do not have legal tender and thus do not qualify as fiat currency, nor are they treated as "money" (whether physical or scriptural) or "electronic money". Nonetheless, they are largely seen as an alternative payment method with a contractual nature that results from private agreement between participants of cryptocurrency transactions and with intrinsic characteristics that somewhat replicate some of the core traits of traditional money: storage of value; unit of account; and medium of exchange. Taking this into consideration, contrary to other countries that have been developing trials for government-backed cryptocurrencies, including those which have successfully launched government-backed cryptocurrency, there is no public governmental

© Published and reproduced with kind permission by Global Legal Group Ltd, London

proposal to provide legal backing to cryptocurrencies. Cryptocurrencies are thus not backed by the Portuguese government and *Banco de Portugal* (Portugal's central bank).

Cryptocurrencies can also be seen under a different light concerning their functionality. In this context, there has been recognition of other types of tokens, such as utility tokens and security tokens, commonly marketed through ICOs. These may be differentiated by their distinctive function, since the former are largely linked to consumption and the latter to investment. For this reason they encompass or give rise to many other rights, including, among others, the right to receive a product or service or economic rights. In 2018, the Portuguese government actually issued a token – GOVTECH – which was used to cast votes by allocating those tokens to competing projects, thereby replicating investment choices, in a technological competition sponsored by the Portuguese government. The initiative was the first of its kind and goes to show the Portuguese government's willingness to apply the technology (although still in a risk-free setting).

In light of the above, these new technologies have inevitably drawn the attention of the relevant regulatory authorities, most notably the Portuguese banking authority (*Banco de Portugal*), the Portuguese securities authority (*Comissão do Mercado de Valores Mobiliários* or CMVM) and the Portuguese insurance and pension funds authority (*Autoridade de Supervisão de Seguros e Fundos de Pensões* or ASF).

Banco de Portugal, in its capacity as both central bank and national competent authority for the supervision of credit and payment institutions, has shown a clear interest in cryptocurrencies, notably from the perspective of consumer/investor protection, but has otherwise clarified that it will not take any immediate steps to regulate cryptocurrencies, having adopted instead a watchdog approach to the phenomenon and its development.

Nevertheless, since 2013, *Banco de Portugal* has issued a number of public statements and warnings in relation to cryptocurrencies, in line with the regulatory practices of other central banks of the eurozone and European regulatory authorities, such as the European Central Bank (ECB) and the European Banking Authority (EBA). We highlight, *inter alia*, *Banco de Portugal*'s publications which have included a warning focused on Bitcoin (Nov. 2013), where it cited the European Central Bank's study, *Virtual Currency Schemes* (Oct. 2012) (in which the ECB noted that it would be closely monitoring this phenomenon with a view to studying any necessary regulatory responses)[4], and a warning to consumers regarding the potential risks in using cryptocurrencies (October 2014).[5] *Banco de Portugal* has since also created a dedicated page headed 'virtual currencies' on its website, where it warns consumers, on the one hand, and credit institutions, payment institutions and electronic money institutions, on the other hand, on certain risks entailed in cryptocurrencies.

In the same manner, CMVM has published a warning to investors, in line with other European regulatory authorities, such as ESMA, alerting investors to the potential risks of ICOs in order to raise awareness to these risks (November 2017)[6] and has also issued a notice relating to a specific ICO for the issuance of Portuguese token Bityond (May 2018),[7] stating that it did not consider it a security and, accordingly, Bityond was not subject to the CMVM's supervision or compliance with securities laws and a notice alerting consumers to risks of cryptocurrency (*e.g*. Bitcoin, Ether and Ripple), notably inadequate information and lack of transparency (July 2018).[8]

In 23 July 2018, the CMVM issued a formal notice addressed to all entities involved in ICOs,[9] regarding the legal qualification of tokens. The CMVM stressed the need for all entities involved in ICOs to assess the legal nature of the tokens being offered under the

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ICOs, in particular their possible qualification as securities with the application of securities laws as a consequence. In this context, the CMVM noted that tokens can represent very different rights and credits, and be traded in organised markets, thus concluding that tokens can be qualified, on a case-by-case basis, as (atypical) securities under Portuguese law, most notably considering the broad definition of securities provided under the Portuguese Securities Code, approved by Decree-Law no. 486/99, of November 13, as amended.

Notwithstanding, there still has not yet been any legislative impulse from either the Portuguese Government or Parliament or from any other regulatory authority with specific laws or regulations in relation to cryptocurrencies, which therefore remain vastly unregulated from a systemic and teleological perspective.

Cryptocurrency regulation

As previously mentioned, at present, there are no specific laws and regulations applicable to cryptocurrencies in Portugal, including in relation to their issuance and transfer. Hence, cryptocurrencies are not prohibited and investors are allowed to purchase, hold and sell cryptocurrencies.

Nevertheless, on 10 March 2015, *Banco de Portugal* issued a recommendation urging banks and other credit institutions, payment institutions and electronic money institutions, to abstain from buying, holding or selling virtual currency due to the risks associated with the use of virtual currency schemes identified by the European Banking Authority (the Bank of Portugal's Recommendation).[10] Pursuant to this recommendation, most of the aforementioned institutions in Portugal have stopped accepting any orders to process payments made to and by cryptocurrency platforms and exchanges, such as Coinbase, which in practice have restricted its clients to purchasing or selling cryptocurrencies through these platforms and exchanges.

In relation to other types of tokens in Portugal, the same can be said as there are also no specific regulations applicable to other forms of virtual tokens.

However, one cannot say that there is a regulatory vacuum in this context, since existing laws will need to be assessed on a case-by-case basis to determine if they apply to a particular ICO, token or related activity. In this regard, the laws applicable to tokens will vary greatly depending on the specific characteristics of each token.

Thus, from a legal framework perspective, the main concern when analysing an ICO and the respective tokens, will be to determine whether the ICO represents a utility token or a security token.

ICOs that aim to offer tokens that represent rights and/or economic interests in a specific project's results, use of software, access to certain platforms or virtual communities or other goods or services, may hypothetically overlap with consumer matters and become subject to certain regulations regarding consumer protection.

ICOs that aim to offer tokens that represent rights and/or economic interests in a pre-determined venture, project or company, such as tokens granting the holder a right to take part in the profits of a venture, project or company or even currency-type tokens, may potentially be qualified as securities and cross over to securities' intensively regulated world, becoming subject to existing securities regulations, most notably regulations applicable to public offerings of securities and/or securities trading venues. In this respect, it should be noted that subsequent to ESMA's position, in November 2017, stating that

© Published and reproduced with kind permission by Global Legal Group Ltd, London

ICOs qualifying as financial instruments may be subject to regulation under EU law,[11] as of 9 January 2019, ESMA has published advice on Initial Coin Offerings and Crypto-Assets.[12] Notably, under the heading "Regulatory implications when a crypto-asset qualifies as a financial instrument", ESMA provides advice on the potential application of, notably, the Prospectus Directive (Directive 2003/71/EC, as amended), the Transparency Directive (Directive 2013/50/EU), the Markets in Financial Instruments Directive (Directive 2014/65/EU), the Market in Financial Instruments Regulation (Regulation (EU) No. 600/2014) and respective implementing acts, the Market Abuse and Short-Selling Regulation (Regulation (EU) No. 596/2014 and Regulation (EU) No. 236/2012), the Settlement Finality Directive (Directive 2009/44/EC), the Central Securities Depository Regulation (Regulation (EU) No. 909/2014) and the Alternative Investment Fund Managers Directive (Directive 2011/61/EU).

It is also worth noting that, within the context of the information published regarding Portuguese cryptocurrency Bityond, mentioned above, the CMVM has already publicly stated that a token which allows its users to (i) participate in surveys related to the development of an online platform, and (ii) further donate tokens to the online platform for the develop of new tools, is not qualified as a financial instrument, i.e. is not a security token, and therefore is not subject to securities law and the supervision of the CMVM.

Additionally, in its formal notice addressed to entities involved in ICOs, dated 23 July 2018, and mentioned above, the CMVM clarified the elements that may, in abstract, implicate the qualification of security tokens as securities, namely: (i) if they may be considered documents (whether in dematerialised or physical form) representative of one or more rights of private and economic nature; and (ii) if, given their particular characteristics, they are similar to typical securities under Portuguese law. For the purpose of verifying the second item, the CMVM will take into account any elements, including those made available to potential investors (which may include any information documents – e.g. white paper), that may entail the issuer's obligation to undertake any actions from which the investor may draw an expectation to have a return on its investment, such as: (a) to grant the right to any type of income (e.g. the right to receive earnings or interest); or (b) undertaking certain actions, by the issuer or a related entity, aimed at increasing the token's value.

The CMVM thus concludes that if a token is qualified as a security and the respective ICO is addressed to Portuguese investors, the relevant national and EU laws shall apply, including, *inter alia*, those related to: the issuance, representation and transmission of securities; public offerings (if applicable); marketing of financial instruments for the purposes of MiFID II; information quality requirements; and market abuse rules. Finally, should the ICO qualify as a public offering, the CMVM further clarifies that a prospectus should be drafted and submitted, along with any marketing materials for the ICO, to the CMVM for approval, provided that no exemption applies in relation to the obligation to draw a prospectus. Lastly, in this notice the CMVM also alerts that where a token does not qualify as a security, its issuer should avoid the use, including in the ICO's documentation, of any expressions that may be confused with expression commonly used in the context of public offerings of securities, such as "investor", "investment", "secondary market" and "admission to trading".

Sales regulation

Considering the lack of exclusive regulation in relation to cryptocurrencies in Portugal, as

© Published and reproduced with kind permission by Global Legal Group Ltd, London

described under "Cryptocurrency regulation" above, the purchase and sale of cryptocurrencies *per se* is also not specifically regulated.

However, to the extent that a token sale may be qualified as, for example, an offer of consumer goods or services or an offer of securities to the public, the relevant existing laws and regulations on, respectively, (i) consumer protection (including national laws that transposed, among others, Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services, Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market), and (ii) securities and financial markets (including national laws that transposed, among others, the Prospectus Directive, Transparency Directive, MiFID II and AIMFD Directive), may apply by default, including their sanctions regime, subject to, in any case, an individual assessment. In these cases, both consumer protection law and securities law provide a number of obligations that must be complied with during and after the sale process. Therefore, existing regulations on the sale of consumers' goods or services and of securities can apply to certain types of tokens on a case-by-case basis, in accordance with an "as-applicable principle".

Taxation

In Portugal, there is no specific regime that deals exclusively with the taxation of cryptocurrencies. Nonetheless, the Portuguese Tax Authority has published two official rulings in the context of certain requests for binding information relating to cryptocurrencies; one in the context of personal income tax (December 2016),[13] and the other in the context of value added tax (February 2018).[14] In the absence of other laws and regulations that may clarify the taxation regime of cryptocurrencies, these rulings have an important weight and will work as precedents in relation to how the Portuguese Tax Authority will look into cryptocurrency and cryptocurrency-related activities when interpreting existing tax provisions and deciding whether or not a certain fact or action should be subject to Portuguese tax (corporate, individual, VAT or stamp duty). In any event, as these were given in the context of requests for binding information, the Portuguese Tax Authority may revoke these rulings in the future.

In the 2016 official ruling, the Portuguese Tax Authority analysed the possible classification of cryptocurrencies within certain types of income that are subject to Portuguese tax, notably capital gains, capital income and income from business activities, and decided that, as a general rule, natural persons should not be taxed in respect of gains derived from the valuation of cryptocurrency or sale of cryptocurrencies, except that, in the case of sale of cryptocurrencies, if they correspond to the individual's main recurrent activity, income obtained from such activity could be subject to Portuguese tax. It should also be noted that this was only a partial decision that did not elaborate on other types of income derived from other cryptocurrency-related activities (e.g. mining and farming activities).

In the 2018 official ruling, the Portuguese Tax Authority received a request to issue an opinion on the application or exemption of value added tax (VAT) to cryptocurrencies exchanges. The Portuguese Tax Authority invoked precedent from the Court of Justice of the European Union (Case C-264/14, *Skatteverket v. David Hedqvist*) to argue that although cryptocurrencies, such as for example Bitcoin, were analogous to a 'means of payment' and therefore subject to VAT, they were exempt by application of VAT exemption rules, which should be consistent across EU Member States considering existing VAT EU harmonisation.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Money transmission laws and anti-money laundering requirements

The Portuguese law on anti-money laundering and combating terrorist financing[15] (AML Law) imposes a general undertaking to obliged entities of risk management in the use of new technologies or products which are prone to favour anonymity.[16] This means that, under Portuguese law, obliged entities are legally required to monitor the risks of money laundering and terrorist financing arising pursuant to the use of new technologies or developing technologies, whether for new products or existing ones,[17] and, before launching any new products, processes or technologies, they will have to analyse any specific risks of money laundering or terrorist financing related to it, and to document the specific procedures adopted for their risk mitigation.

In addition, obliged entities must undertake identification procedures and customer due diligence whenever there is an occasional transaction of more than €15,000, as well as reinforce their identification procedures and customer due diligence when they identify an additional risk of money laundering or terrorist financing in business relationships, in occasional transactions or in the usual operations of the customer. Pursuant to the AML Law, an additional risk is presumed to exist in products or operations that favour anonymity, in new products or commercial activities, in new distribution mechanisms and payment methods and in the use of new technologies or developing technologies, whether for new products or existing ones. This has obvious implications for cryptocurrencies and cryptocurrency-related activities (including cryptocurrencies exchanges) in case those operations intersect with the activities and operations of entities that are covered by obligations imposed by anti-money laundering and combatting terrorist financing, since obliged entities should reinforce their identification procedures and customer due diligence when participating in any related operation.

In the banking sector, the Bank of Portugal's Recommendation, mentioned above, was driven also by concerns with the risks of money laundering, terrorist financing and other financial crime arising pursuant to the overall predominance of anonymity and lack of intermediaries that would communicate suspicious activities to the authorities.[18] This recommendation followed a previous warning to consumers issued in October 2014, as mentioned above, that was made in response to the fact that certain automated teller machines (ATMs) in Portugal, which were not integrated in the Portuguese payment system, were enabling exchange between bitcoins and euros.

Banco de Portugal's stance in respect of cryptocurrencies does not affect other market participants such as consumers, investors and other entities that wish to, respectively, hold, invest or develop cryptocurrencies, but it goes a long way towards reducing the participation of banks and other credit institutions, payment institutions and electronic money institutions that are traditional 'obliged entities' for the purposes of anti-money laundering and combating terrorist financing laws. It should be also noted that insofar as operations in cryptocurrencies are not undertaken by obliged entities (as legally defined), compliance with and enforcement of anti-money laundering and terrorist financing laws should be diluted, as cryptocurrencies and related activities are confined to virtual platforms and private relations.

Furthermore, considering the publication of AMLD 5,[19] additional obligations in relation to cryptocurrencies exchanges and custodian wallet providers are expected to come into force after 10 January 2020, when Member States, including Portugal, are required to implement and bring into force laws transposing AMLD 5.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Promotion and testing

The Portuguese government has launched a think-tank with the objective of promoting and fostering fintech generally – mostly by identifying and targeting entry barriers. The ultimate aim of the think-tank is to implement a regulatory 'sandbox' with the aid of the Portuguese financial regulators. Within the objectives of the think-tank, cryptocurrencies have been listed as one of the priorities.

Additionally, both the CMVM and *Banco de Portugal* have developed specific spaces for fintech on their webpages, http://www.cmvm.pt/en/ and https://www.bportugal.pt/en/, respectively, which include, *inter alia*, information regarding distributed ledger technology, initial coin offerings and tokens.

These fintech spaces were created with the intent to facilitate the provision and exchange of information and dialogue between these regulators and developers or sponsors of new financial technologies which cross over with the areas of regulatory competence of the CMVM and *Banco de Portugal*, and also to clarify the regulatory framework applicable to the same. These objectives are obtained mainly by having a dedicated contact within the CMVM and *Banco de Portugal* that deals solely with issues relating to fintech, and by being active in promoting conferences and workshops aimed at investors and the public in general with a formative and educational goal.

In 2018, a non-profit organisation, Portugal Fintech, and *Banco de Portugal*, CMVM and ASF joined efforts to create "Portugal FinLab – where regulation meets innovation", which created a direct communication platform for emerging tech companies working in Fintech-related subjects, incumbents and Portuguese regulators to engage and to provide guidance on a more clear path of action in terms of the application of the existing regulatory framework to those companies' activities.

Ownership and licensing requirements

As mentioned in "Cryptocurrency regulation" above, in Portugal there are no specific restrictions or licensing requirements when it comes to purchasing, holding or selling cryptocurrencies, except where they are qualified as securities.

Furthermore, insofar as cryptocurrencies are not qualified as financial instruments, advisory services that are made exclusively in relation to and the exclusive management of cryptocurrency portfolios are not subject to the same investment services laws and regulations as those applicable to securities. Thus, these types of activities, when undertaken solely in relation to cryptocurrencies, are not subject to any licensing requirements.

However, traditional advisory services and management services require licensing and are subject to the CMVM's supervision.

One thing to note is that, given the relative novelty of some of these instruments, the overall regulatory uncertainty and even some regulatory pushback (e.g. the Bank of Portugal's Recommendation), underpinned by the already existing and overarching obligations applicable to the provision of investment services, it is not at all likely for the time being that traditional investment advisors, including, among others, credit institutions and fund managers, will recommend or invest in cryptocurrencies.

Mining

There are no restrictions in Portugal on the development of mining of cryptocurrencies and the activity itself is not regulated.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Border restrictions and declaration

In Portugal there are no border restrictions or obligations to declare cryptocurrency holdings.

Reporting requirements

There is no standalone reporting obligation in case of cryptocurrency payments above a certain threshold, except in the case of transactions that may involve an obliged entity covered by anti-money laundering and terrorist financing laws, in which case such entity will have to report suspicious transactions or activities irrespective of the amounts involved.

Estate planning and testamentary succession

There is no precedent, specific rules or particular approach regarding the treatment of cryptocurrencies for the purposes of estate planning and testamentary succession in Portugal.

Notwithstanding, certain aspects of estate planning and testamentary succession should be highlighted. Inheritance tax does not exist in Portugal, but stamp duty may apply to certain transfers of certain assets (e.g. immovable property, movable assets, securities, negotiable instruments, provided they are located, or deemed to be located in Portugal) included in the deceased estate in case of succession.

However, in the absence of a legal amendment or binding information from the Portuguese tax authorities, it may be argued that the drafting of the relevant legal provisions does not expressly foresee assets such as cryptocurrencies, thus excluding the same from the scope of application of stamp duty, which *de facto* mitigates the need for estate planning with respect to cryptocurrencies. Estate planning and testamentary succession must therefore be analysed on a case-by-case basis, considering all variables involved.

* * *

Endnotes

1. *Cf.* European Central Bank, *Virtual currency schemes – a further analysis*, February 2015, available at https://www.ecb.europa.eu/pub/pdf/other/virtualcurrencyschemesen.pdf. See also the definition of virtual currency included in the fifth AML Directive (Directive (EU) 2018/843).
2. *Cf.* European Securities and Markets Authority, "Advice, Initial Coin Offerings and Crypto Assets", dated 9 January 2019, available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf.
3. *Cf.* Robby Houben, Alexander Snyers, "Cryptocurrencies and blockchain. Legal context and implications for financial crime, money laundering and tax evasion", study at the request of the European Parliament's Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance, dated June 2018, available at http://www.europarl.europa.eu/cmsdata/150761/TAX3%20Study%20on%20cryptocurrencies%20and%20blockchain.pdf.
4. *Cf.* Banco de Portugal's public statement regarding Bitcoin, dated 22 November 2013, available in Portuguese at https://www.bportugal.pt/comunicado/esclarecimento-do-banco-de-portugal-sobre-bitcoin.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

5. *Cf*. Banco de Portugal's warning regarding the risks associated with cryptocurrencies, dated 3 October 2014, available in Portuguese at https://www.bportugal.pt/comunicado/alerta-aos-consumidores-para-os-riscos-de-utilizacao-de-moedas-virtuais.
6. *Cf*. CMVM's warning regarding the risks associated with ICOs, dated 3 November 2017, available in English at http://www.cmvm.pt/en/Comunicados/Comunicados/Pages/20180119.aspx.
7. *Cf*. CMVM's notice regarding the cryptocurrency Bityond, dated 17 May 2018, available in Portuguese at http://www.cmvm.pt/pt/Comunicados/Comunicados/Pages/20180517a.aspx.
8. *Cf*. CMVM's notice regarding risks of "virtual currencies", dated 5 July 2018, available in Portuguese at http://www.cmvm.pt/pt/CMVM/CNSF/ConselhoNacionalDeSupervisoresFinanceiros/Pages/20180705.aspx.
9. CMVM's notice addressed to all entities involved in ICOs, dated 23 July 2018, available in Portuguese at http://www.cmvm.pt/pt/Comunicados/Comunicados/Pages/20180723a.aspx?v=.
10. *Cf*. Banco de Portugal's Circular Letter no. 11/2015/DPG, dated 10 March 2015, *Recommendation relating to the buying, holding and selling virtual currencies*, available in Portuguese at https://www.bportugal.pt/sites/default/files/anexos/cartas-circulares/11-2015-dpg.pdf.
11. *Cf*. European Securities and Markets Authority, Statement "ESMA alerts firms involved in *Initial Coin Offerings* (ICOs) to the need to meet relevant regulatory requirements", dated 13 November 2017, available at https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf.
12. See endnote 2 above.
13. *Cf*. Autoridade Tributária e Aduaneira, Binding Information provided in process no. 5717/2015, dated 27 December 2016.
14. *Cf*. Autoridade Tributária e Aduaneira, Binding Information provided in process no. 12904, dated 15 February 2018.
15. Law no. 83/2017, of August 18, transposing Directives 2015/849/EU, of the European Parliament and of the Council, of May 20, and 2016/2258/EU, of the Council, of December 6.
16. *Cf*. Article 15 of Law no. 83/2017.
17. *Cf*. Article 36 (5) and Annex III of Law no. 83/2017.
18. *Cf*. European Banking Authority, *EBA Opinion on 'virtual currencies'* (EBA/Op/2014/08), 4 July 2014, available at https://www.eba.europa.eu/.
19. Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing.

© Published and reproduced with kind permission by Global Legal Group Ltd, London

Filipe Lowndes Marques
Tel: +351 213 817 400 / Email: flmarques@mlgts.pt
Filipe Lowndes Marques joined the firm in 2001. He is the coordinator of the banking and finance department and the restructuring & insolvency department. Filipe has worked since 1995 in the area of loan and bond finance, representing lenders and borrowers, including restructurings of existing financings. In the project finance sector, he has worked on several types of project, including bridges, motorways, power plants, wind and solar farms, football stadia, LNG terminals and natural gas concessions.
He has also been active in the field of capital markets, having advised on several securitisation transactions (including the first securitisation transaction under the new law and the first synthetic securitisation), covered bonds issuances and worked on several IPOs of state-owned companies.
His investment fund team was considered by *Chambers Europe* as "Portugal's top practice in investment funds".

Mariana Albuquerque
Tel: +351 213 817 400 / Email: msalbuquerque@mlgts.pt
Mariana Albuquerque joined the firm in 2014. She is a member of the banking and finance team and of Team Genesis.
She develops her work primarily in the area of banking and finance law, with a special focus on compliance by providing legal advice and consultancy with regard to the regulation and supervision of banks and other financial institutions, in payment services, in securitisation transactions, in negotiating derivatives and other financial instruments, in structured finance, in corporate finance and project finance transactions.
As a member of Team Genesis, Mariana Albuquerque works primarily with Fintech- and Regtech-related subjects.

João Lima da Silva
Tel: +351 213 817 400 / Email: jlsilva@mlgts.pt
João Lima da Silva joined the firm in September 2014. He is a member of the banking and finance team, as well as of the private equity & investment funds team.
João develops his work primarily in the area of banking and finance law, with special focus in structure finance, project finance, debt restructuring, debt issues, credit facilities and non-performing loans transactions. João also regularly works in transactions involving investment funds and provides legal advice to management companies.
He also provides legal advice with regard to compliance and the regulation and supervision of banks and other financial institutions, most notably in the investment and payment services sector.

Morais Leitão, Galvão Teles, Soares da Silva & Associados
[Morais Leitão]

Rua Castilho 165, 1070-050 Lisbon, Portugal
Tel: +351 213 817 400 / URL: www.mlgts.pt/pt

© Published and reproduced with kind permission by Global Legal Group Ltd, London

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **Alternative Real Estate Investments**
- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Commercial Real Estate**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Merger Control**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**

Strategic partner: