

# Blockchain & Cryptocurrency Regulation

# 2021

Third Edition

Contributing Editor: **Josias N. Dewey**

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# Global Legal Insights Blockchain & Cryptocurrency Regulation

2021, Third Edition

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## PREFACE

**A**nother year has passed and virtual currency and other blockchain-based digital assets continue to attract the attention of policymakers across the globe. A lack of consistency in how policymakers are addressing concerns raised by the technology is a major challenge for legal professionals who practice in this area. Perhaps equally challenging is keeping up with the nearly infinite number of blockchain use cases. In 2017 and 2018, it was the ICO craze. In 2019, the focus shifted to security tokens. In 2020, decentralized finance (or DeFi) attracted over several billion dollars' worth of investment. So, while ICOs are still being offered and several groups continue to pursue serious security token projects, we should expect DeFi to draw scrutiny from regulators, such as the U.S. Securities and Exchange Commission (SEC). Once again, legal practitioners will be left to counsel clients on novel issues of law raised by the application of laws and regulations enacted long before blockchain technology existed.

Of course, capital raising is only one application of the technology. Bitcoin, which remains the king of all cryptocurrencies, was intended to serve as a form of digital money. Arguably, it is this use case that has seen the most attention from governments around the world. The European Union enacted more stringent anti-money laundering (AML) regulations impacting virtual currency exchanges operating in the EU. U.S. regulators and state government officials continue to enforce money transmitter statutes and BSA regulations applicable to money services businesses. In the U.S., the state of New York, which was once thought to have over-regulated the industry out of doing business in the state, is now attracting applications from blockchain companies to become state-chartered trust companies. The charter may provide relief to virtual currency exchanges and similar businesses seeking to avoid the nearly 50-state patchwork of licensing statutes.

Institutional and large enterprise companies continue to expand into the space. It is no longer just FinTechs and entrepreneurial clients who need counsel on blockchain-related matters. Whether a small start-up or Fortune 100 company, clients need counsel in areas beyond compliance with government regulation. In some cases, intellectual property rights must be secured, or open source licenses considered to the extent a client's product incorporates open source code. Blockchain technology adopted by enterprise clients may involve a consortium of prospective network users, which raises joint development issues and governance questions.

As with the first two editions, our hope is that this publication will provide the reader with an overview of the most important issues across many different use cases and how those issues are impacted by laws and regulations in several dozen jurisdictions around the globe. And while policymakers continue to balance their desire to foster innovation, while protecting the public interest, readers of this publication will understand the current state of affairs, whether in the U.S., the EU, or elsewhere in the world. Readers may even discover themes across this book's chapters that provide clues about what we can expect to be the hot topics of tomorrow and beyond.

Josias N. Dewey  
Holland & Knight LLP

## FOREWORD

Dear Industry Colleagues,

On behalf of the Enterprise Ethereum Alliance (“EEA”), I would like to thank Global Legal Group (“GLG”) for bringing to life an explication of the state of regulation in the blockchain and cryptocurrency sector, with its third edition publication of *Blockchain & Cryptocurrency Regulation*. GLG has assembled a remarkable group of leaders in the legal industry to analyse and explain the environment in front of us, and the EEA members and participants were pleased to contribute to the publication.

We stand at the beginning of an industry, and the depth and breadth of the contributors from leading law firms across the world only serve to highlight the growing interest and fascination with accelerating the adoption of blockchain technology. We thank each of the authors for taking the time to compose their chapters and for the expertise they demonstrate. We hope readers will find this publication useful.

The EEA is the industry’s first member-driven global standards organisation whose mission is to develop open, blockchain specifications that drive harmonisation and interoperability for businesses and consumers worldwide. The EEA’s world-class Enterprise Ethereum Client Specification, Off-Chain Trusted Compute Specification, and forthcoming testing and certification programs, along with its work with the Token Taxonomy Initiative, will ensure interoperability, multiple vendors of choice, and lower costs for its members – hundreds of the world’s largest enterprises and most innovative startups. For additional information about joining the EEA or the Token Taxonomy Initiative, please reach out to [membership@entethalliance.org](mailto:membership@entethalliance.org) and [info@tokentaxonomy.org](mailto:info@tokentaxonomy.org).

Sincerely,

Aaron Wright

Chairman, EEA Legal Advisory Working Group

# GLOSSARY

**Alice decision:** a 2014 United States Supreme Court decision about patentable subject matter.

**Cold storage:** refers to the storage of private keys on an un-networked device or on paper in a secure location.

**Copyright licence:** the practice of offering people the right to freely distribute copies and modified versions of a work with the stipulation that the same rights be preserved in derivative works down the line.

**Cryptocurrencies:** a term used interchangeably with virtual currency, and generally intended to include the following virtual currencies (and others similar to these):

- Bitcoin.
- Bitcoin Cash.
- DASH.
- Dogecoin.
- Ether.
- Ethereum Classic.
- Litecoin.
- Monero.
- NEO.
- Ripple's XRP.
- Zcash.

**Cryptography:** the practice and study of techniques for secure communication in the presence of third parties, generally involving encryption and cyphers.

**DAO Report:** report issued in July, 2017 by the U.S. Securities and Exchange Commission, considering and ultimately concluding that The DAO (*see below*) was a security.

**Decentralised autonomous organisation (“The DAO”):** a failed investor-directed venture capital fund with no conventional management structure or board of directors that was launched with a defect in its code that permitted someone to withdraw a substantial amount of the \$130,000,000 in Ether it raised.

**Decentralised autonomous organisation (“a DAO”):** a form of business organisation relying on a smart contract (*see below*) *in lieu* of a conventional management structure or board of directors.

**Digital assets:** anything that exists in a binary format and comes with the right to use, and more typically consisting of a data structure intended to describe attributes and rights associated with some entitlement.

**Digital collectibles:** digital assets that are collected by hobbyists and others for entertainment, and which are often not fungible (e.g., CryptoKitties) (*see Tokens*, non-fungible).

**Digital currency:** a type of currency available only in digital form, which can be fiat currency or virtual currency that acts as a substitute for fiat currency.

**Digital currency exchange:** a business that allows customers to trade cryptocurrencies or digital currencies for other assets, such as conventional fiat money, or one type of cryptocurrency for another type of cryptocurrency.

**Digital/electronic wallet:** an electronic device or software that allows an individual to securely store private keys and broadcast transactions across a peer-to-peer network, which can be hosted (e.g., Coinbase) or user managed (e.g., MyEtherWallet).

**Distributed ledger technology (“DLT”):** often used interchangeably with the term *blockchain*, but while all blockchains are a type of DLT, not all DLTs implement a blockchain style of achieving consensus.

**Fintech:** new technology and innovation that aims to compete with traditional financial methods in the delivery of financial services.

**Initial coin offering:** a type of crowdfunding using cryptocurrencies in which a quantity of the crowdfunded cryptocurrency is sold to either investors or consumers, or both, in the form of “tokens”.

**Initial token offering:** *see Initial coin offering*.

**Internet of Things:** a system of interrelated computing devices, mechanical and digital machines, objects, animals or people that are provided with unique identifiers and the ability to transfer data over a network without requiring human-to-human or human-to-computer interaction.



**Licences, software:** the grant of a right to use otherwise copyrighted code, including, among others:

- Apache.
- GPLv3.
- MIT.

**Mining, cryptocurrency:** the process by which transactions are verified and added to the public ledger known as the blockchain, which is often the means through which new units of a virtual currency are created (e.g., Bitcoin).

**Money transmitter (U.S.):** a business entity that provides money transfer services or payment instruments.

**Permissioned network:** a blockchain in which the network owner(s) decides who can join the network and issue credentials necessary to access the network.

**Platform or protocol coins:** the native virtual currencies transferable on a blockchain network, which exist as a function of the protocol's code base.

**Private key:** an alphanumeric cryptographic key that is generated in pairs with a corresponding public key. One can verify possession of a private key that corresponds to its public key counterpart without exposing it. It is not possible, however, to derive the private key from the public key.

**Private key storage:**

- *Deep cold storage:* a type of cold storage where not only Bitcoins are stored offline, but also the system that holds the Bitcoins is never online or connected to any kind of network.
- *Hardware wallet:* an electronic device capable of running software necessary to store private keys in a secure, encrypted state and structure transactions capable of being broadcast on one or more blockchain networks. Two popular examples are Ledger and Trezor.

**Protocols:** specific code bases implementing a particular blockchain network, such as:

- Bitcoin.
- R3's Corda.
- Ethereum.
- Hyperledger Fabric.
- Litecoin.

**Public network:** blockchain that anyone can join by installing client software on a computer with an internet connection. Best known public networks are Bitcoin and Ethereum.

**Qualified custodian:** a regulated custodian who provides clients with segregated accounts and often places coins or tokens in cold storage (*see above*).

**Robo-advice/digital advice:** a class of financial adviser that provides financial advice or investment management online, with moderate to minimal human intervention.

**Sandbox (regulatory):** a programme implemented by a regulatory agency that permits innovative start-ups to engage in certain activities that might otherwise require licensing with one or more governmental agencies.

**Security token:** a token intended to confer rights typically associated with a security (e.g., stock or bond), and hence, are generally treated as such by regulators.

**Smart contract:** a piece of code that is written for execution within a blockchain runtime environment. Such programmes are often written to automate certain actions on the network, such as the transfer of virtual currency if certain conditions in the code are met.

**Tokens:** a data structure capable of being fungible (ERC-20) or non-fungible (ERC-721) that is capable of being controlled by a person to the exclusion of others, which is typically transferable from one person to another on a blockchain network.

**Utility token:** a token intended to entitle the holder to consume some good or service offered through a decentralised application ("dApp").

**Vending machine (Bitcoin):** an internet machine that allows a person to exchange Bitcoins and cash. Some Bitcoin ATMs offer bi-directional functionality, enabling both the purchase of Bitcoin as well as the redemption of Bitcoin for cash.

# Portugal

Filipe Lowndes Marques & Mariana Albuquerque  
Morais Leitão, Galvão Teles, Soares da Silva & Associados

## Government attitude and definition

Blockchain technology in general, and cryptocurrencies in particular, are 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. Particularly in recent years, these technologies have been brought to public attention largely due to the 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.

The most recent institutional developments include the approval of Ministerial Resolution 29/2020, dated 5 March 2020, which sets the framework principles for the creation of a Portuguese regulatory sandbox, and the approval of Ministerial Resolution 31/2020, dated 5 March 2020, which establishes the Portuguese Digital Mission Structure, which sets the main goals of the Portuguese digital agenda. The envisaged Portuguese regulatory sandbox should be overarching to include any area where technology should be given a freer testing field and will be designated by the terminology “Technology Free Zones” (from the Portuguese expression *Zonas Livres Tecnológicas*), and will be promoted and coordinated within the Portugal Digital Mission.

Blockchain technology is slowly being implemented in a significant number of projects in early stages of development, but is yet to have mainstream usage in private or public organisations. 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 and also considering that there is a large base of Portuguese users participating in cryptocurrency transactions and/or investing in cryptocurrencies.

For the purpose of this chapter, cryptocurrencies can be broadly defined along the European Central Bank (ECB)’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”.<sup>1</sup> Other useful constructions have been developed by the European Securities and Markets Authority (ESMA) in its advice on ICOs and crypto-assets (January 2019)<sup>2</sup> and in a study requested by the European Parliament’s Special Committee on Financial Crimes, Tax Evasion and Tax Avoidance (June 2018).<sup>3</sup>

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, in principle,

“electronic money”. In this respect, the European Banking Authority (EBA) in its report of 9 January 2019<sup>4</sup> has identified limited cases where cryptocurrencies can be considered “electronic money” as defined in Directive 2009/110/EC (EMD2), provided they match the criteria set in EMD2.

Nonetheless, cryptocurrencies are largely seen as an alternative payment method with a contractual nature that results from a 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 that have successfully launched government-backed cryptocurrency, there is no public governmental proposal to provide legal backing to cryptocurrencies. Cryptocurrencies are thus not backed by the Portuguese government or 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 in Portugal and demonstrates 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 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 ECB and the EBA. We highlight, *inter alia*, Banco de Portugal’s publications that have included a warning focused on Bitcoin (November 2013), where it cited the ECB’s study, Virtual Currency Schemes (October 2012) (in which the ECB noted that it would be closely monitoring this phenomenon with a view to studying any necessary regulatory responses),<sup>5</sup> and a warning to consumers regarding the potential risks in using cryptocurrencies (October 2014).<sup>6</sup> 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, of certain risks entailed in cryptocurrencies.

In the same manner, the CMVM has published a warning to investors, in line with other European regulatory authorities such as ESMA, alerting them to the potential risks of

ICOs in order to raise awareness of these risks (November 2017),<sup>7</sup> and has also issued a notice relating to a specific ICO for the issuance of Portuguese token Bityond (May 2018),<sup>8</sup> 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. A notice has also been issued to alert consumers to the risks of cryptocurrency (e.g. Bitcoin, Ether and Ripple), notably inadequate information and lack of transparency (July 2018).<sup>9</sup>

In 23 July 2018, the CMVM issued a formal notice addressed to all entities involved in ICOs<sup>10</sup> 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 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 can 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 13 November, 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 or 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 EBA (the Bank of Portugal's Recommendation).<sup>11</sup>

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 ICOs qualifying as financial instruments may be subject to regulation under EU law,<sup>12</sup> as of 9 January 2019, ESMA has published advice on ICOs and crypto-assets.<sup>13</sup> 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 (AIFM) 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 that 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 development 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 or 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 a 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 expressions 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 described under “Cryptocurrency regulation” above, the purchase and sale of cryptocurrencies *per se* are 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, the Transparency Directive, MiFID II and the AIFM 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 three official rulings in the context of certain requests for binding information relating to cryptocurrencies: one in the context of personal income tax (December 2016);<sup>14</sup> and the other two in the context of value-added tax (VAT) (January and July 2019).<sup>15</sup> 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 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 2019 official rulings, the Portuguese Tax Authority confirmed the 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 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.



## Money transmission laws and anti-money laundering requirements

The Portuguese law on anti-money laundering and combatting terrorist financing<sup>16</sup> (AML Law) imposes a general undertaking to obliged entities of risk management in the use of new technologies or products that are prone to favour anonymity.<sup>17</sup> 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,<sup>18</sup> 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 cryptocurrency 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 also driven by concerns of 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.<sup>19</sup> 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 Bitcoin 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; however, 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 combatting terrorist financing laws. It should also be 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 deadline for the transposition of the fifth Anti-Money Laundering Directive (AMLD 5),<sup>20</sup> additional obligations in relation to cryptocurrency exchanges and custodian wallet providers are expected to come into force soon. The transposition deadline of AMLD 5 was 10 January 2020, and there is currently a legislative proposal in the Portuguese Parliament for the transposition of this legal act. The proposal introduces a legal concept of "virtual asset" that encompasses the digital representation of

value that is not necessarily linked to a legally established currency and that does not have the legal status of fiat currency, but which is accepted by natural or legal persons as a means of exchange or of investment and which can be transferred, stored and traded electronically. If approved, the new legal act establishes – as expected – that cryptocurrency exchanges that accept fiat currency and custodian wallet providers will become subject to the AML Law. Furthermore, this proposal foresees that these entities must register with Banco de Portugal.

### Promotion and testing

The Portuguese government had initially launched a think tank with the objective of generally promoting and fostering fintech – mostly by identifying and targeting entry barriers – with the ultimate aim to implement a regulatory “sandbox” with the aid of the Portuguese financial regulators. Now, with the publication of the Ministerial Resolutions referred to above and the creation of the Portuguese Digital Mission Structure, the launch of a Portuguese regulatory sandbox is closer to being achieved.

Additionally, both the CMVM and Banco de Portugal have 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, ICOs, 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 that 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, the 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 the activities of those companies. Portugal Fintech also manages the Portugal Fintech Report, which is an annual report that contains data regarding the Portuguese fintech ecosystem and its development, and the Fintech House, launched in January 2020, which is a fintech hub.

### 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 from the user’s perspective (for cryptocurrency businesses we note that this will change slightly as a result of the transposition of AMLD 5 into Portuguese legislation), 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 fact that these instruments are not yet mainstream for consumers, 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 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.

### **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 and negotiable instruments, provided they are located, or deemed to be located, in Portugal) included in the deceased's 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**

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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](https://www.esma.europa.eu/sites/default/files/library/esma50-157-1391_crypto_advice.pdf).
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4. *Cf.* EUROPEAN BANKING AUTHORITY, EBA Report with advice for the European Commission on crypto-assets, 9 January 2019, available at <https://eba.europa.eu/>.
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  9. *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>.
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  12. *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](https://www.esma.europa.eu/sites/default/files/library/esma50-157-828_ico_statement_firms.pdf).
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  19. *Cf.* EUROPEAN BANKING AUTHORITY, EBA Opinion on “virtual currencies” (EBA/Op/2014/08), 4 July 2014, available at <https://www.eba.europa.eu/>.
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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) and covered bonds issuances and working on several IPOs of state-owned companies.

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