

Blockchain & Cryptocurrency Regulation

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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 Portuguese Digital Mission Structure.

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. We note that, as further described below, both Banco de Portugal and the Portuguese government have already put in place some specific measures to regulate crypto-assets at some point, in line with the European regulatory framework, particularly regarding measures to protect against money laundering and/or terrorist financing (AMLFT).

For the purpose of this chapter, cryptocurrencies can be broadly defined along the European Central Bank’s (ECB) 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 ICOs 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 status 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 2019⁴ 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 and 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),⁵ and a warning to consumers regarding the potential risks in using cryptocurrencies (October 2014).⁶ 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.

More significantly, Banco de Portugal has recently issued Notice No. 3/2021, of 24 April, in which it regulates the rather recent registration of virtual asset service providers (VASPs) that undertake their activity within the Portuguese territory, resulting from the transposition of Directive (EU) 2018/843, 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, and amending Directives 2009/138/EC and 2013/36/EU into Portuguese law, notably to the Portuguese AMLFT framework, approved by Law No. 83/2017, of 18 August (Portuguese AML Law).

Meanwhile, 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),⁷ and has also issued a notice relating to a specific ICO for the issuance of Portuguese token Bityond (May 2018),⁸ 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).⁹

On 23 July 2018, the CMVM issued a formal notice addressed to all entities involved in ICOs¹⁰ 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.

Cryptocurrency regulation

At present, there are no specific laws or regulations that govern the issuance of cryptocurrencies (except the rules established in the Portuguese AML Law). Hence, cryptocurrencies are not prohibited, and investors are allowed to purchase, hold and sell these assets.

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).¹¹

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 whether 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,¹² as of 9 January 2019, ESMA has published advice on ICOs and crypto-assets.¹³ 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 (MiFID II) (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".

Also, as mentioned above, for businesses transacting with crypto-assets, it is important to note that since the transposition of Directive (EU) 2018/843, 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, and amending Directives 2009/138/EC and 2013/36/EU into the Portuguese AML Law, the following persons (whether natural or legal) will have to be registered with Banco de Portugal prior to commencing their activity in Portugal: (i) providers engaged in exchange services between virtual assets and fiat currencies; (ii) providers engaged in exchange services between one or more forms of virtual assets; (iii) providers of services that allow the transfer of virtual assets from one address or wallet to another; and (iv) providers of custodian wallet services (which allow the safeguarding of private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies).

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

Despite rumours, so far 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);¹⁴ and the other two in the context of value-added tax (VAT) (January and July 2019).¹⁵ 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 EU VAT harmonisation.

Money transmission laws and anti-money laundering requirements

As previously mentioned, the Portuguese AML Law¹⁶ introduced a mandatory registration requirement for all VASPs that undertake their activity within the Portuguese territory. The registration procedure is to be established in accordance with article 112-A of the Portuguese AML Law and Banco de Portugal's Notice No. 3/2021, of 24 April 2021, which establish the obligation of: (i) providers engaged in exchange services between virtual assets and fiat currencies; (ii) providers engaged in exchange services between one or more forms of virtual assets; (iii) providers of services that allow the transfer of virtual assets from one address or wallet to another; and (iv) providers of custodian wallet services (which allow the safeguarding of private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies) to be registered prior to engaging in their activity.

The following entities are considered to operate within Portuguese territory: (a) Portuguese companies (incorporated in Portugal); (b) entities with permanent establishment in Portugal; and (c) entities that are obliged to open an activity with the Portuguese tax authorities. We further note that this understanding of what it means to “*operate within the Portuguese territory*” is not, however, expressly set out in the law, so there may be the risk that Banco de Portugal changes its view in the future.

Banco de Portugal has been the competent authority in registering and verifying compliance with the applicable legal and regulatory provisions governing the prevention of money laundering and terrorist financing by the abovementioned persons, being, as of this moment, according to the public list published by Banco de Portugal, three registered entities.

According to the Portuguese AML Law, as VASPs are now considered “obligated entities”, the general undertaking of risk management in the use of new technologies or products

that are prone to favour anonymity is mandatory. This means that, under Portuguese law, VASPs are legally required to monitor, analyse and document the specific procedures to address any specific risks of money laundering and terrorist financing.

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 Portuguese 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 the Portuguese AML Law.

It should be made clear, however, that in relation to VASPs, Banco de Portugal's competence is limited to AMLFT issues and does not extend to prudential, behavioural or other areas of supervision.

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 clearer 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, except where they are qualified as securities. However, as mentioned in “Money transmission laws and anti-money laundering requirements” above, VASPs operating within the Portuguese territory are required to obtain prior registration with Banco de Portugal, as provided for in the Portuguese AML Law and in Banco de Portugal’s Notice No. 3/2021, of 24 April 2021.

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.

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 the Portuguese AML Law, 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

1. *Cf.* EUROPEAN CENTRAL BANK, Virtual currency schemes – a further analysis, February 2015, available at https://www.ecb.europa.eu/pub/pdf/other/virtualcurrency_schemesen.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.* EUROPEAN BANKING AUTHORITY, EBA Report with advice for the European Commission on crypto-assets, 9 January 2019, available at <https://eba.europa.eu/>.
5. *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>.
6. *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>.
7. *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>.
8. *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>.
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>.
10. 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=>.
11. *Cf.* BANCO DE PORTUGAL’s Circular Letter No. 11/2015/DPG, dated 10 March 2015, Recommendation relating to buying, holding and selling virtual currencies, available in Portuguese at <https://www.bportugal.pt/sites/default/files/anexos/cartas-circulares/11-2015-dpg.pdf>.
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.

13. See endnote 2 above.

14. *Cf.* AUTORIDADE TRIBUTÁRIA E ADUANEIRA, Binding Information provided in process No. 5717/2015, dated 27 December 2016.

15. *Cf.* AUTORIDADE TRIBUTÁRIA E ADUANEIRA, Binding Information provided in process No. 14763, dated 28 January 2019 and in process No. 14436, dated 3 July 2019.

16. Law No. 83/2017, of 18 August, transposing Directives 2015/849/EU of the European Parliament and of the Council of 20 May, and 2016/2258/EU of the Council of 6 December.

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