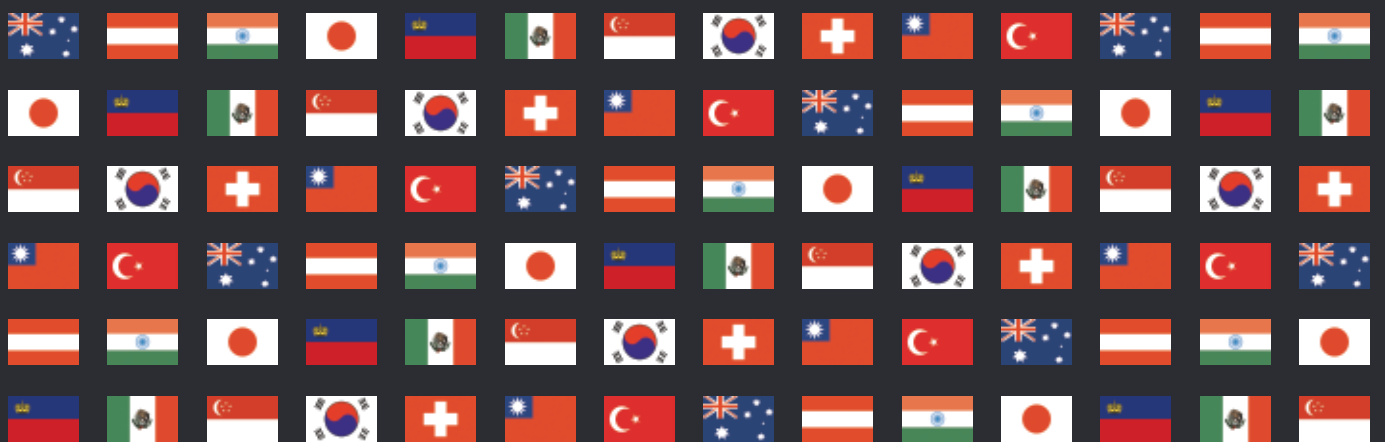


Cryptoassets & Blockchain 2021



Portugal

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GENERAL LEGAL AND REGULATORY FRAMEWORK

Legal framework

1 | What legal framework governs cryptoassets? Is there specific legislation governing cryptoassets and businesses transacting with cryptoassets?

At present, there are no specific laws or regulations that govern cryptoassets and businesses transacting with cryptoassets (with the exception of the legal framework applicable to anti-money laundering and prevention of terrorism). Hence, cryptoassets are not prohibited and investors are allowed to purchase, hold and sell such assets. Nevertheless, depending on the asset class (eg, securities or financial instruments), means of distribution and formation of the contract (eg, e-commerce) and type of counterparty (eg, consumers), existing laws and regulations may apply, directly or analogously, in addition to general provisions of law that apply by default to any situation underpinned by a contract. Therefore, a case-by-case analysis of each cryptoasset must be conducted to have a clear picture of every possible applicable law or regulation that may be warranted in that particular context.

For businesses transacting with cryptoassets it is important to note that, as a result of 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, virtual asset service providers (VASPs) that undertake activity in Portugal are subject to a mandatory registration requirement with Banco de Portugal (the Portuguese banking and financial authority).

Under Portuguese Anti-Money Laundering and Prevention of Terrorist Financing (AMLFT) Law (approved by Law No. 83/2017 of 18 August), VASPs are:

- providers engaged in exchange services between virtual assets and fiat currencies;
- providers engaged in exchange services between one or more forms of virtual assets;
- services that provide the transfer of virtual assets from one address or wallet to another;
- custodian wallet providers that provide services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies.

Government policy

2 | How would you describe the government's general approach to the regulation of cryptoassets in your jurisdiction?

Cryptoassets are closely followed in the financial technology industry by the Portuguese government and the relevant regulatory authorities. This is mainly 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.

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 (the Portugal Digital Mission), which sets the main goals of the Portuguese digital agenda. The envisaged Portuguese regulatory sandbox should be overarching to include any areas where technology should be given a freer testing field and will be designated 'technology free zones', and will be promoted and coordinated within the Portugal Digital Mission.

Additionally, Portuguese regulators tend to align to the position of the European Union's supervisory authorities in this context and have largely subscribed to the public warnings and interpretations made by EU bodies as the economy in cryptoassets developed. The European Union's financial digital agenda is partly underpinned by the European Commission's proposal for a regulation on markets in cryptoassets that, if approved, will unify the rules applicable to cryptoassets in the European Union in what overlaps with the scope of application of the proposed regulation.

Regulatory authorities

3 | Which government authorities regulate cryptoassets and businesses transacting with cryptoassets?

Banco de Portugal is the Portuguese competent national authority in charge of the registration of VASPs for AMLFT purposes and for overseeing compliance with the applicable laws and regulations on the prevention of money laundering and terrorist financing.

Otherwise, there is no specific government authority that regulates cryptoassets and businesses transacting with cryptoassets, except that depending on the asset class, if cryptoassets qualify as financial instruments or securities, then the relevant securities markets and investment services laws may apply to the instruments and its issuers, and business activities with these cryptocurrencies may be subject to the supervision of the Portuguese authority of securities markets, the Portuguese Securities Market Commission.

Regulatory penalties

4 | What penalties can regulators impose for violations relating to cryptoassets?

The only direct sanctions applicable to natural or legal persons that provide services related to cryptoassets are in the context of AMLFT rules, notably for lack of registration as a VASP with Banco de Portugal and non-compliance with AMLFT legal and regulatory provisions in each case corresponding to administrative offences.

Penalties imposed by Banco de Portugal are in the form of fines and additional penalties, including loss of the economic benefit as a result of the administrative offence; up to two years' temporary cessation of business; up to three years' temporary interdiction of the profession or activity and, in the case of supervised entities, of holding board, managing or top positions; and publicity of the final administrative decision or final court sentence. In addition, fines can be aggravated to double the economic benefit resulting from the administrative offence, if determinable and higher than the legal fine limit.

The legal minimum and maximum amounts of fines vary depending on the level of severity of the administrative offence and the type of agent (natural or legal person). For serious administrative offences (eg, lack of VASP registration) fines can be set between a minimum of €2,500 for natural persons and €5,000 for legal entities, and a maximum €1 million for both natural and legal persons. The same amount applies for non-serious administrative offences, except that the maximum amount of the fine is reduced by half.

In addition, Banco de Portugal may also cancel the registration of the entity as a VASP in the case of a serious or repeated violation of legal or regulatory provisions related to the AMLFT.

Court jurisdiction

5 | Which courts have jurisdiction over disputes involving cryptoassets?

In principle, judicial courts have jurisdiction to hear disputes involving cryptoassets, but determining the competent court will always depend on a case-by-case analysis of the specific dispute (eg, if it is a private dispute or judicial review of an administrative offence proceeding).

Legal status of cryptocurrency

6 | Is it legal to own or possess cryptocurrency, use cryptocurrency in commercial transactions and exchange cryptocurrency for local fiat currency in your jurisdiction?

In principle, from the user's perspective there are no restrictions on owning, possessing or using cryptocurrency in Portugal, including to exchange cryptocurrency for fiat currency.

In Portugal, cryptocurrencies do not have legal tender and thus do not qualify as fiat currency, nor are they treated as 'money' or, in principle, 'electronic money'. Therefore, their acceptance as an alternative means of payment in commercial transactions or for the purposes of exchanging for fiat currency has a contractual nature that derives solely from private agreement between participants of cryptocurrency transactions.

Exceptionally, in respect of electronic money, the European Banking Authority in its report of 9 January 2019 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.

Fiat currencies

7 | What fiat currencies are commonly used in your jurisdiction?

Pursuant to Council Regulation (EC) No. 974/98 of 3 May, as amended, the Euro is the official fiat currency with legal tender in Portugal. The Euro shall be accepted as means of payment at face value in all countries forming part of the euro area.

Industry associations

8 | What are the leading industry associations addressing legal and policy issues relating to cryptoassets?

The leading industry associations addressing legal and policy issues relating to cryptoassets are the Portuguese Blockchain and Cryptocurrency Association and, with a more general focus, Portugal Fintech.

CRYPTOASSETS FOR INVESTMENT AND FINANCING

Regulatory threshold

9 | What attributes do the regulators consider in determining whether a cryptoasset is subject to regulation under the laws in your jurisdiction?

While there is no specific law governing cryptoassets, depending on the asset class, cryptoassets can qualify as financial instruments or securities. The Portuguese Securities Code, approved by Decree-Law No. 486/99 of 13 November has a wide concept of securities and the Portuguese authority of securities markets, the Portuguese Securities Market Commission (CMVM) clarified the elements that may, in abstract, implicate the qualification of tokens as securities, namely: (1) if they can be considered 'documents' (including in dematerialised form) representative of one or more homogenous rights (fungibility) of private and economic nature and be susceptible of being traded in a market; and (2) 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 – for example, 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: (1) to grant the right to any type of income (eg, the right to receive earnings or interest); or (2) undertaking certain actions, by the issuer or a related entity, aimed at increasing the token's value. Under Portuguese law, the definition of 'financial instrument' includes securities, as well as derivatives, money market instruments and any other financial instrument defined as such by Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014, on markets in financial instruments, as amended.

Investor classification

10 | How are investors in cryptoassets classified and treated differently?

There is no categorisation of investors in cryptoassets. However, depending on the asset class certain existing categorisations can still apply, including the concept of 'consumer' (individuals who act for purposes other than their business or professional activity), and, for securities and financial instrument tokens, the notion of 'professional investors' corresponding to, among other things, credit institutions, investment firms, insurance companies, collective investment undertakings and their management entities, other authorised and regulated financial institutions, and legal entities that fulfil two of the following criteria: (1) a share capital of €2 million; (2) total asset value of €20 million; or (3) net turnover of €40 million, and non-professional investors corresponding to any natural or legal person who does not fall within the scope of 'professional investor'.

Initial coin offerings

11 | What rules and restrictions govern the conduct of, and investment in, initial coin offerings (ICOs)?

At present, there are no specific rules that govern the conduct of and the investment in ICOs. Notwithstanding this, consumer protection laws can apply (eg, consumers rights in e-commerce, unfair terms and unfair business-to-consumer practices), and, if cryptoassets qualify as financial instruments or securities, the relevant national and EU laws apply, including, inter alia, those related to the issuance, representation and transfer of securities, public offerings (if applicable), marketing of financial instruments, information quality requirements and market abuse rules.

The CMVM states that where a token does not qualify as securities, its issuer should avoid the use of any expressions commonly used in the context of public offerings of securities, such as 'investor', 'investment', 'secondary market' and 'admission to trading' (including in the initial coin offering's documentation, such as a white paper).

Finally, the CMVM issued a statement instructing market participants to inform them of any token offering made out of Portugal prior to its occurrence so that it may undergo a preliminary screening to confirm that it is not an offering of securities or financial instrument tokens.

Security token offerings

12 | What rules and restrictions govern the conduct of, and investment in, security token offerings (STOs)?

STOs are most likely to be considered analogous to securities or financial instruments under Portuguese law as part of their inherent features. As such, if a security token falls under the definition of securities, as provided for in the Portuguese Securities Code, then the STO qualifies as an offering of securities, and, in most cases, a prospectus must be drafted and submitted, along with any marketing materials, for the CMVM's approval. In this situation, all provisions of the Portuguese Securities Code, approved by Decree-Law No. 486/99 of 13 November, can potentially apply, as applicable, whether the offering is framed as a public offering or private placement.

Stablecoins

13 | What rules and restrictions govern the issue of, and investment in, stablecoins?

Currently, there is no specific regulation in place in Portugal governing the issue of and investment in stablecoins. Notwithstanding this, stablecoins can have different classifications and a case-by-case analysis must be undertaken to determine whether existing legal frameworks apply, including, for example, payment services, consumer protection and securities laws.

Airdrops

14 | Are cryptoassets distributed by airdrop treated differently than other types of offering mechanisms?

There are no specific rules addressing airdrop offerings in Portugal. However, this activity may have to be assessed in conformity with existing rules applicable to consumers rights.

Advertising and marketing

15 | What laws and regulations govern the advertising and marketing of cryptoassets used for investment and financing?

General marketing rules apply to all companies that advertise to customers in Portugal. The Marketing Code (approved by Decree-Law No. 330/90 of 23 October) outlines the main requirements for marketing

activities in Portugal. These include the general principles that advertisement must be true, complete and not misleading to consumers. Marketing of cryptoassets should also follow rules regarding unfair terms, as provided for in Decree-Law No. 57/2008 of 26 March, which transposes Directive 2005/29/EC of the European Parliament and of the Council of 11 May, concerning unfair business-to-consumer commercial practices in the internal market.

In addition, if cryptoassets qualify as securities, all relevant marketing rules of securities apply.

Trading restrictions

16 | Are investors in an ICO/STO/stablecoin subject to any restrictions on their trading after the initial offering?

There are no specific rules on investment in ICOs/STOs/stablecoins, and investors are not subject to any trading restrictions after the initial offering.

Crowdfunding

17 | How are crowdfunding and cryptoasset offerings treated differently under the law?

Crowdfunding is regulated in Portugal pursuant to Law No. 105/2015 of 24 August, but there are no specific rules governing cryptoasset offerings (other than as may result from existing laws and regulations in respect of certain asset classes).

In accordance with the Portuguese crowdfunding law, managing entities of (equity or loan) crowdfunding platforms must be registered with the CMVM and comply with certain obligations (including in respect of access to information relating to the offers and conflicts of interest). In respect of each offer, the beneficiaries of the offer must provide information to the platform and its investors, such as financial information of the beneficiary and description of the project to be financed and its risks (including in a template document of key investor information).

Furthermore, investments in crowdfunding are limited to €3,000 per offer and €10,000 per year, except in the case of legal entities, professional investors and natural persons with annual personal income above €70,000. Crowdfunding offers are limited to €1 million per year (in one or more offers), except that for offers exclusively addressed to legal entities or professional investors, the limit is €5 million.

Additionally, the European Union has recently enacted Regulation (EU) 2020/1503, of the European Parliament and of the Council of 7 October 2020, on European crowdfunding service providers for business (the Crowdfunding Regulation).

The Crowdfunding Regulation only applies to entities established in the European Union and that are authorised to provide crowdfunding services. The scope of application of the Crowdfunding Regulation expressly excludes crowdfunding financing to consumers and crowdfunding financing offers exceeding €5 million in a year. The Crowdfunding Regulation will only enter into force on 10 November 2021 at which time it will immediately apply to all member states of the European Union, including Portugal, and will partially derogate the Portuguese crowdfunding law in respect of the matters that overlap with the Crowdfunding Regulation.

Transfer agents and share registrars

18 | What laws and regulations govern cryptoasset transfer agents and share registrars?

No specific regulation governing cryptoasset transfer agents and share registrars apply in Portugal.

Anti-money laundering and know-your-customer compliance

19 | What anti-money laundering (AML) and know-your-customer (KYC) requirements and guidelines apply to the offering of cryptoassets?

The Portuguese Anti-Money Laundering and Prevention of Terrorist Financing (AMLFT) Law (approved by Law No. 83/2017 of 18 August) introduced a mandatory registration requirement for all virtual asset service providers (VASPs) that undertake their activity in Portugal.

The following VASPs that deal with cryptoassets, in the name and on behalf of a client, must register with Banco de Portugal and comply with AMLFT obligations:

- providers engaged in exchange services between virtual assets and fiat currencies;
- providers engaged in exchange services between one or more forms of virtual assets;
- services that provide transfer of virtual assets from one address or wallet to another; and
- custodian wallet providers that provide services to safeguard private cryptographic keys on behalf of their customers, to hold, store and transfer virtual currencies.

According to the Portuguese AMLFT Law, by becoming an 'obliged entity' VASPs will be subject to all AMLFT obligations included therein that are applicable to them, including but not limited to:

- policy and procedures that adequately identify and deal with AMLFT risks;
- internal organisation that clearly identifies the responsibilities of the managing board, channels of reporting and AMLFT competence and functions (including a money laundering reporting officer or similar function);
- record keeping that is compatible with AMLFT obligations (eg, KYC, incident management and reporting of suspicious transactions); and
- a risk-based approach to KYC, including:
 - customer identification and due diligence;
 - level of information and documentation obtained for KYC;
 - risk classification of customers; and
 - periodic confirmation or update of customer data.

Sanctions and Financial Action Task Force compliance

20 | What laws and regulations apply in the context of cryptoassets to enforce government sanctions, anti-terrorism financing principles, and Financial Action Task Force (FATF) standards?

Enforcement of government sanctions, anti-terrorism financing principles and FATF standards are embedded, as relevant, in the AMLFT Law; Law No. 97/2017 of 23 August, which regulates the application and execution of restrictive measures approved by the United Nations or the Europe Union and establishes the penalties legal framework for their breach; Law No. 52/2003 of 22 August, which establishes measures to combat terrorism; Law No. 5/2002 of 11 January, which establishes measures to combat organised crime and financial crime; and the Portuguese Penal Code, approved by Decree-Law No. 48/95 of 15 March.

CRYPTOASSET TRADING

Fiat currency transactions

21 | What rules and restrictions govern the exchange of fiat currency and cryptoassets?

The Portuguese Anti-Money Laundering and Prevention of Terrorist Financing (AMLFT) Law (approved by Law No. 83/2017 of 18 August) requires that entities that provide exchange services between virtual currencies, and between virtual currencies and fiat currencies, in the name and on behalf of clients, must comply with general AMLFT provisions and register with Banco de Portugal. Additionally, if cryptoassets are considered to be securities, financial instruments or e-money, other rules and requirements apply (eg, a licence from the Portuguese Securities Market Commission or Banco de Portugal is necessary in order to provide financial intermediation or payment services in Portugal).

Exchanges and secondary markets

22 | Where are investors allowed to trade cryptoassets? How are exchanges, alternative trading systems and secondary markets for cryptoassets regulated?

There is no specific regulation on secondary markets for cryptoassets in Portugal.

If cryptoassets are qualified as securities or financial instruments, then existing securities and markets laws apply.

Custody

23 | How are cryptoasset custodians regulated?

Cryptoasset custodians are subject to the AMLFT Law as they fall under the scope of the definition of virtual asset service provider; notably, custodian wallet providers that provide services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies. Therefore, they must register with Banco de Portugal and comply with AMLFT rules that are applicable to them.

If cryptoassets are qualified as securities or financial instruments, then existing securities and markets laws also apply.

Broker-dealers

24 | How are cryptoasset broker-dealers regulated?

Cryptoasset broker-dealers are considered obliged entities under the AMLFT Law as they fall under the scope of the definition of virtual asset service provider (ie, they provide services on behalf of clients that transfer virtual assets between wallets or addresses). Therefore, they must register with Banco de Portugal and comply with AMLFT rules that are applicable to them.

If cryptoassets are qualified as securities or financial instruments, then existing securities and markets laws also apply.

Decentralised exchanges

25 | What is the legal status of decentralised cryptoasset exchanges?

Decentralised cryptoasset exchanges (DEX) are construed upon DLT and blockchain only, and in principle there is no centralising legal entity or person that manages the exchange. However, it may not always work in a fully decentralised way, which means the AMLFT Law may apply in certain cases, if there is a central entity to the DEX falling under the definition of virtual asset service provider, in that they provide exchange services on behalf of clients between one or more cryptoassets.

Peer-to-peer exchanges

26 | What is the legal status of peer-to-peer (person-to-person) transfers of cryptoassets?

Peer-to-peer exchanges of cryptoassets are not, in principle, regulated under Portuguese law. However, entities providing transfer services for cryptocurrencies on behalf of a natural or legal person from one address or wallet to another is a virtual asset service provider for the purpose of application of the AMLFT Law that must be registered with Banco de Portugal and comply with AMLFT laws.

Trading with anonymous parties

27 | Does the law permit trading cryptoassets with anonymous parties?

Portuguese law does not outright prohibit trading cryptoassets with anonymous parties; however, virtual asset service providers (VASPs) are now required to register with Banco de Portugal and comply with Portuguese AMLFT laws. Anonymous cryptocurrency transactions will become less likely as VASPs are required to do KYC and know-your-transaction due diligence on their clients. The obligation to undertake identification and due diligence are triggered whenever a business relationship is set up, in one or more single transactions with virtual assets above €1,000, if there is suspicion of AML or financing of terrorism, or if there is suspicion of the falsehood of the identification information previously provided.

Foreign exchanges

28 | Are foreign cryptocurrency exchanges subject to your jurisdiction's laws and regulations governing cryptoasset exchanges?

If a foreign cryptocurrency exchange directs its activity to the Portuguese market in a manner that qualifies as undertaking the activity in Portugal, it should register as a VASP with Banco de Portugal. In addition, if the foreign cryptocurrency exchange permits regulated instruments to be exchanged, then its regulatory framework must be assessed considering securities and markets laws.

29 | Under what circumstances may a citizen of your jurisdiction lawfully exchange cryptoassets on a foreign exchange?

A Portuguese citizen is free to exchange cryptoassets in any foreign exchange.

Taxes

30 | Do any tax liabilities arise in the exchange of cryptoassets (for both other cryptoassets and fiat currencies)?

In respect of personal income tax, the Portuguese Tax Authority has provided a ruling in response to a binding information request (in procedure 5717/2015 of 27 December 2016) that, as a general rule, natural persons should not be taxed in respect of gains derived from the sale of cryptocurrencies, except if they correspond to the individual's main recurrent professional or economic activity, in which case the income obtained from that activity could be subject to Portuguese tax. In respect of value-added tax (VAT), the Portuguese Tax Authority confirmed the precedent from the Court of Justice of the European Union (Case C-264/14, *Skatteverket v David Hedqvist*) 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.

CRYPTOASSETS USED FOR PAYMENTS**Government-recognised assets**

31 | Has the government recognised any cryptoassets as a lawful form of payment or issued its own cryptoassets?

There are no cryptocurrencies backed by the Portuguese government or Banco de Portugal, and there is no government proposal to provide legal backing to cryptocurrencies in Portugal.

Bitcoin

32 | Does Bitcoin have any special status among cryptoassets?

Bitcoin does not have any special regulatory treatment in Portugal.

Banks and other financial institutions

33 | Do any banks or other financial institutions allow cryptocurrency accounts?

To date, Portuguese banks and other financial institutions do not offer the possibility of having cryptocurrency accounts.

CRYPTOCURRENCY MINING**Legal status**

34 | What is the legal status of cryptocurrency mining activities?

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

Government views

35 | What views have been expressed by government officials regarding cryptocurrency mining?

We are not aware of any public view regarding cryptocurrency mining by government officials.

Cryptocurrency mining licences

36 | Are any licences required to engage in cryptocurrency mining?

There are no licensing requirements for the activity of mining.

Taxes

37 | How is the acquisition of cryptocurrency by cryptocurrency mining taxed?

The Portuguese Tax Authority has provided a ruling to a binding information request (in procedure 14436 of 3 July 2019) where it took the view that cryptocurrency mining operations are exempt from VAT, following Case C-264/14, *Skatteverket v David Hedqvist*, of the European Court of Justice.

BLOCKCHAIN AND OTHER DISTRIBUTED LEDGER TECHNOLOGIES**Node licensing**

38 | Are any licences required to operate a blockchain/DLT node?

Blockchain or DLT node operations are not specifically regulated and, consequently, do not require any licence at this moment in Portugal.

However, the European Commission presented a proposal for regulation on a pilot regime for market infrastructures based on DLT

on 24 September 2020. The proposal aims to allow a common use of DLT technology in the trading and post-trading of cryptoassets that qualify as financial instruments. The European Commission states that the limited use of DLT technology is caused by regulatory obstacles and legal uncertainty as most market infrastructures (eg, trading venues or central securities depositories) do not use DLT in performing their services, and the absence of a DLT-based secondary market limits the efficiency gains and the sustainable development of a primary market for financial instruments in cryptoasset form. The European Commission's proposals delegate on the European Securities and Markets Authority and each of the national competent authorities the responsibility of maintaining a register of DLT market infrastructure in operation.

Restrictions on node operations

39 | Is the operation of a blockchain/DLT node subject to any restrictions?

Currently, there are no specific restrictions solely in relation to the operation of a blockchain or DLT node from a sanctions, AML and KYC point of view. Portuguese AML laws apply to virtual asset service providers only, which are defined as (1) providers engaged in exchange services between virtual assets and fiat currencies; (2) providers engaged in exchange services between one or more forms of virtual assets; (3) services that provide transfer of virtual assets from one address or wallet to another; and (4) custodian wallet providers that provide services to safeguard private cryptographic keys on behalf of their customers, to hold, store and transfer virtual currencies.

DAO liabilities

40 | What legal liabilities do the participants in a decentralised autonomous organisation (DAO) have?

There is no specific regulatory treatment in Portugal of DAO. In every DAO, a case-by-case assessment must be conducted to determine which liabilities are imposed to the relevant participants.

DAO assets

41 | Who owns the assets of a DAO?

There is not straightforward answer to this question. DAOs are determined by blockchain protocols and are run independently and automatically through smart contracts. Therefore, the types of assets and rights over assets held by a DAO depend on the underlying code of the relevant blockchain on which it runs.

Open source

42 | Is DLT based on open-source protocols or software treated differently under the law than private DLT?

There are no Portuguese laws specifically addressing DLT based on open-source protocols or software and private DLT.

Smart contracts

43 | Are smart contracts legally enforceable?

It is important to distinguish between a smart contract in itself (computer programme) and a smart legal contract. A smart contract does not have legal personality, is not capable of acting as contractual counterparty, is not able to own digital assets or acquire any other legal rights and is not subject to liability.

A smart legal contract corresponds to a legal transaction, completed through digital means, with a common and binary language concluded through an interface accessible to the parties (front end)

whose execution is performed by one or more smart contracts (back end) stored in the blockchain. This means that certain legal acts or legal transactions can be made using smart contracts (eg, receiving and transmitting orders or instructions, checking consensus, performing obligations without being a party, applying penalties and the ability to self-execute), but the smart contract is not a legal contract in itself.

Under Portuguese law, a contract can be formed by any means where there is a consensus between two or more different parties that creates a relationship between the parties of a legal nature, except if there is a legal requirement for the form of a specific contract. Therefore, smart legal contracts do not introduce any novelty on the existing principle of formation of contract, but they do differ significantly from traditionally accepted forms of contract as they are underpinned by smart contracts and the inherit blockchain technology.

In addition, Law No. 7/2004 reinforces the principle of contractual freedom (article 25), except in respect of the following e-contracts: (1) family law and succession; (2) those that require the intervention of courts; (3) public entities or other entities that exercise public powers; (4) real estate contracts, with the exception of leasing; and (5) deposits and guarantees if not included in the core professional activity.

Patents

44 | Can blockchain/DLT technology be patented?

In Portugal, software creation is protected by Decree-Law No. 252/94 of 20 October, as amended from time to time, that originally transposed into national law Directive 91/250/EEC of 14 May on the legal protection of computer programmes. Therefore, in principle, software is not directly protected by patent but by copyright and does not require registration. However, it is possible to exceptionally patent software if it is deemed to be a novel solution implying an inventive step that produces a tangible technical effect. As blockchain and DLT are based in software, the answer will depend on a case-by-case assessment in line with the above-mentioned criteria.

UPDATE AND TRENDS

Recent developments

45 | Are there any emerging trends, notable rulings or hot topics related to cryptoassets or blockchain in your jurisdiction?

Blockchain technology is slowly being implemented in a significant number of projects 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 investing in cryptocurrencies.

With the recent transposition of 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, and amending Directives 2009/138/EC and 2013/36/EU and the introduction of the virtual assets service providers (VASP) registration for anti-money laundering and prevention of terrorism purposes, it is expected that there will be an increase in the number of VASP registration processes under Law No. 83/2017 of 18 August (the Portuguese AML law) with Banco de Portugal, creating favourable conditions for the steady growth of the market.

Coronavirus

46 | What emergency legislation, relief programmes and other initiatives specific to your practice area has been implemented to address the pandemic? Have any existing government programmes, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

The Portuguese government approved a long list of exceptional rules to address the covid-19 pandemic. There are no specific measures in the context of cryptocurrencies or blockchain businesses, and a lot of the focus of financial assistance and relief was targeted to the industry sectors and activities that were most affected by covid-19 and to micro, small and medium-sized firms. In any case, the criteria to apply for the available programmes is very specific, and therefore a case-by-case analysis must be made in each case.



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