

# CRYPTOASSETS & BLOCKCHAIN

## Portugal



# Cryptoassets & Blockchain

Consulting editors

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Quick reference guide enabling side-by-side comparison of local insights, including into the legal and regulatory framework; use of cryptoassets for investment, financing, trading and payments; cryptocurrency mining; blockchain and other distributed ledger technologies; and recent trends.

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## GENERAL LEGAL AND REGULATORY FRAMEWORK

### Legal framework

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 the 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, 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 each 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 the Bank of Portugal (the Portuguese banking and financial authority).

Under the Portuguese Anti-Money Laundering and Prevention of Terrorist Financing Law (the 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; and
- custodian wallet providers that provide services to safeguard private cryptographic keys on behalf of its customers to hold, store and transfer virtual currencies, including private cryptographic keys.

More significantly, the Bank of Portugal recently issued Notice No. 3/2021 of 23 April, which regulates the registration process of VASPs that undertake their activity within the Portuguese territory and sets out the specific formalities required to complete the registration process.

*Law stated - 18 November 2021*

### Government policy

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 has mainly been driven by significant developments in the Portuguese market in this sector in recent years, most notably the rise of tech-based companies and the steady increase in the use of cryptocurrencies in the last decade.

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 as 'technology free zones' and will be promoted and coordinated within the Portugal Digital Mission.

Additionally, Portuguese regulators tend to align with 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 has 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 (falling outside the existing EU financial services and money rules) in what overlaps with the scope of application of the proposed regulation.

*Law stated - 18 November 2021*

## Regulatory authorities

Which government authorities regulate cryptoassets and businesses transacting with cryptoassets?

The Bank of Portugal is the competent national authority in charge of the registration of VASPs for anti-money laundering and prevention of terrorist financing (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, 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 Securities Market Commission (CMVM) (the Portuguese authority of securities markets).

*Law stated - 18 November 2021*

## Regulatory penalties

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 Portuguese AMLFT rules, notably for lack of registration as a VASP with the Bank of Portugal and non-compliance with AMLFT legal and regulatory provisions in each case corresponding to administrative offences.

Penalties imposed by the Bank of Portugal are in the form of fines and additional penalties, including:

- loss of the economic benefit as a result of an 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, interdiction 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, the Bank of 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.

Further, if cryptoassets qualify as financial instruments under Portuguese law, the respective initial coin offering is subject to the legal requirements imposed by the CMVM. Accordingly, failure to have a requisite prospectus approved by the CMVM could result in a fine of a minimum of €25,000 and a maximum of €5 million, whereas failure to appoint a financial intermediary could cause the issuer to incur a fine of between €12,500 and €2.5 million.

*Law stated - 18 November 2021*

## Court jurisdiction

### 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).

With respect to appeals arising from the application of the AMLFT Law, the Court of Competition, Regulation and Supervision has jurisdiction.

*Law stated - 18 November 2021*

## Legal status of cryptocurrency

### 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.

*Law stated - 18 November 2021*

## Fiat currencies

### 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 only official fiat currency with legal tender in Portugal. The euro is accepted as means of payment at face value in all countries forming part of the euro area.



**Industry associations**

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.

Law stated - 18 November 2021

**CRYPTOASSETS FOR INVESTMENT AND FINANCING****Regulatory threshold**

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 Securities Market Commission (CMVM) (the Portuguese authority of securities markets), clarified in a formal notice dated 23 July 2018, addressed to all entities involved in initial coin offerings (ICOs), that the elements that may, in abstract, implicate the qualification of tokens as securities are namely:

1. if they can be considered 'documents' (including in dematerialised form) representative of one or more homogenous rights (fungibility) of a private and economic nature and be susceptible to 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 point, the CMVM will take into account any elements, including those made available to potential investors (which may include any information documents, such as white papers) 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: granting the right to any type of income (eg, the right to receive earnings or interest); or 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, 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, as well as any other documents that represent homogenous rights of a private and economic nature and may be traded in a market.

Law stated - 18 November 2021

**Investor classification**

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:

- an equity of €2 million;
- a total asset value of €20 million; or
- a 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'.

*Law stated - 18 November 2021*

## Initial coin offerings

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 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 the applicable sanctions) 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 a security, 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 ICO'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.

*Law stated - 18 November 2021*

## Security token offerings

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 if their inherent features fulfil the elements of a financial instrument. As such, if a security token falls under the definition of securities, as provided for in the Portuguese Securities Code, 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 apply, as applicable, whether the offering is framed as a public offering or private placement.

*Law stated - 18 November 2021*

## Stablecoins

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

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.

*Law stated - 18 November 2021*

## Airdrops

### 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.

*Law stated - 18 November 2021*

## Advertising and marketing

### 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. The 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.

*Law stated - 18 November 2021*

## Trading restrictions

### 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.

*Law stated - 18 November 2021*

## Crowdfunding

### 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 those that 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 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 entered into force on 10 November 2021 and applies to all member states of the European Union, including Portugal. It partially derogates the Portuguese Crowdfunding Law in respect of overlapping matters.

*Law stated - 18 November 2021*

## Transfer agents and share registrars

### What laws and regulations govern cryptoasset transfer agents and share registrars?

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

*Law stated - 18 November 2021*

## Anti-money laundering and know-your-customer compliance

### 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 Law (the 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 the Bank of Portugal and comply with anti-money laundering and prevention of terrorist financing (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 AMLFT Law, by becoming an 'obliged entity', VASPs are 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:

More significantly, the Bank of Portugal recently issued Notice No. 3/2021 of 23 April, which regulates the registration process of VASPs that undertake their activity within the Portuguese territory and sets out the specific formalities required to complete the registration process.

*Law stated - 18 November 2021*

### **Sanctions and Financial Action Task Force compliance**

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 European 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.

*Law stated - 18 November 2021*

## **CRYPTOASSET TRADING**

### **Fiat currency transactions**

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

The Portuguese Anti-Money Laundering and Prevention of Terrorist Financing Law (the 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 anti-money laundering and prevention of terrorist financing (AMLFT) provisions and register with the Bank of Portugal (in accordance with the registration process regulated under the Bank of Portugal's Notice No. 3/2021, of 23 April). 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 the Bank of Portugal is necessary to provide financial intermediation, payment or e-money services in Portugal).

*Law stated - 18 November 2021*

## Exchanges and secondary markets

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, existing securities and markets laws apply.

*Law stated - 18 November 2021*

## Custody

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' (VASP); 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 the Bank of Portugal (in accordance with the registration process regulated under Notice No. 3/2021 of 23 April) and comply with the AMLFT rules that are applicable to them.

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

*Law stated - 18 November 2021*

## Broker-dealers

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 the Bank of Portugal (in accordance with the registration process regulated under Notice No. 3/2021, of 23 April) and comply with the AMLFT rules that are applicable to them.

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

*Law stated - 18 November 2021*

## Decentralised exchanges

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 a VASP, in that they provide exchange services on behalf of clients between one or more cryptoassets.

*Law stated - 18 November 2021*

## Peer-to-peer exchanges

### 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 VASP for the purpose of application of the AMLFT Law that must be registered with Bank of Portugal and comply with AMLFT rules.

*Law stated - 18 November 2021*

## Trading with anonymous parties

### Does the law permit trading cryptoassets with anonymous parties?

Portuguese law does not prohibit trading cryptoassets with anonymous parties; however, VASPs are now required to register with the Bank of Portugal (in accordance with the registration process regulated under Notice No. 3/2021, of 23 April) and comply with AMLFT laws. Anonymous cryptocurrency transactions will become less likely as VASPs are required to conduct 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.

*Law stated - 18 November 2021*

## Foreign exchanges

### 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 the Bank of Portugal. In addition, if the foreign cryptocurrency exchange permits regulated instruments to be exchanged, its regulatory framework must be assessed considering securities and markets laws.

*Law stated - 18 November 2021*

### 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.

*Law stated - 18 November 2021*

## Taxes

### 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.

*Law stated - 18 November 2021*

## **CRYPTOASSETS USED FOR PAYMENTS**

### **Government-recognised assets**

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 the Bank of Portugal and there is no government proposal to provide legal backing to cryptocurrencies in Portugal.

*Law stated - 18 November 2021*

### **Bitcoin**

Does Bitcoin have any special status among cryptoassets?

Bitcoin does not have any special regulatory treatment in Portugal.

*Law stated - 18 November 2021*

### **Banks and other financial institutions**

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.

*Law stated - 18 November 2021*

## **CRYPTOCURRENCY MINING**

### **Legal status**

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.

*Law stated - 18 November 2021*



## Government views

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.

*Law stated - 18 November 2021*

## Cryptocurrency mining licences

Are any licences required to engage in cryptocurrency mining?

There are no licensing requirements for the activity of mining.

*Law stated - 18 November 2021*

## Taxes

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 Court of Justice of the European Union.

*Law stated - 18 November 2021*

## BLOCKCHAIN AND OTHER DISTRIBUTED LEDGER TECHNOLOGIES

### Node licensing

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.

*Law stated - 18 November 2021*

### Restrictions on node operations

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

Currently, there are no specific restrictions 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:

- 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, including private cryptographic keys.

*Law stated - 18 November 2021*

## **DAO liabilities**

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

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

*Law stated - 18 November 2021*

## **DAO assets**

**Who owns the assets of a DAO?**

There is no 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.

*Law stated - 18 November 2021*

## **Open source**

**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.

*Law stated - 18 November 2021*

## **Smart contracts**

**Are smart contracts legally enforceable?**

It is important to distinguish between a smart contract in itself (computer program) and a smart legal contract. A smart contract does not have a legal personality, is not capable of acting as a 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 inherent blockchain technology.

In addition, Decree-Law No. 7/2004 reinforces the principle of contractual freedom (article 25), except in respect of the following e-contracts:

- family law and succession;
- those that require the intervention of courts;
- public entities or other entities that exercise public powers;
- real estate contracts, with the exception of leasing; and
- deposits and guarantees if not included in the core professional activity.

*Law stated - 18 November 2021*

## Patents

### 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 programs. 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 aforementioned criteria.

*Law stated - 18 November 2021*

## UPDATE AND TRENDS

### Recent developments

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

It is expected that there will be an increase in the number of VASP registration processes with the Bank of Portugal under the Portuguese Anti-Money Laundering and Prevention of Terrorist Financing Law (No. 83/2017) of 18 August and the Bank of Portugal's Notice No. 3/2021 of 23 April, through which the Bank regulates such registration processes, creating favourable conditions for the steady growth of the market.

*Law stated - 18 November 2021*

## Jurisdictions

	<b>Australia</b>	Piper Alderman
	<b>Austria</b>	Schoenherr
	<b>India</b>	AZB & Partners
	<b>Japan</b>	Mori Hamada & Matsumoto
	<b>Liechtenstein</b>	Niedermüller Rechtsanwälte   Attorneys at Law
	<b>Luxembourg</b>	CMS Luxembourg
	<b>Mexico</b>	Ramos, Ripoll & Schuster
	<b>Portugal</b>	Morais Leitão, Galvão Teles, Soares da Silva & Associados
	<b>Singapore</b>	RHTLaw Asia LLP
	<b>South Korea</b>	Bae, Kim & Lee LLC
	<b>Switzerland</b>	MLL Meyerlustenberger Lachenal Froriep Ltd
	<b>Taiwan</b>	Lee and Li Attorneys at Law
	<b>Turkey</b>	SRP Legal
	<b>USA</b>	Nelson Mullins Riley & Scarborough LLP