Regulatory Approaches to Cryptoassets in Selected Jurisdictions

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Comparative Summary

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I. Introduction

The Law Library of Congress has previously produced two major multinational reports related to the regulation of cryptocurrencies. The first, published in January 2014, surveyed statements issued by government authorities regarding Bitcoin and similar cryptocurrencies in 41 jurisdictions.[1] That report demonstrated that the debate over how to regulate cryptocurrencies was still in its infancy, with authorities primarily warning the public about the risks of acquiring or transacting with cryptocurrencies.

The second report, published in June 2018 and covering 130 countries, revealed that many more jurisdictions had issued statements and guidance regarding cryptocurrencies, and that some countries had enacted or were considering regulations or legislative amendments in certain areas.[2] This included, for example, clearer indications of the tax treatment of cryptocurrencies, the application of anti-money laundering and counter-financing of terrorism (AML/CFT) laws to cryptocurrency exchanges and other businesses engaged in cryptocurrency activities, and new warnings to consumers regarding the risks of investing in cryptocurrencies. The broad survey of the policies of 130 countries was accompanied by detailed reports on fourteen jurisdictions.[3]

The following report covers 46 jurisdictions, including the European Union (EU), and focuses primarily on regulatory approaches to cryptoassets created through blockchain, or distributed ledger technology (DLT), in the context of financial market and investor protection laws. It also contains updated information regarding the application of tax and AML/CFT laws to cryptocurrencies in the countries covered. Additional countries not covered in this report may also have taken actions in one or both of these areas, but were not included due to there being no existing policies, or new or pending laws, related to financial regulation and oversight of cryptocurrency activities. Some countries may also have issued more recent public warnings than those included in the 2018 report.

The report shows that a number of countries are currently applying existing legislation to cryptoassets that have the characteristics of securities or other financial products or instruments, with regulators providing guidance on this issue. However, around a dozen countries have enacted legislation that specifically governs cryptoassets and the entities that deal with them, including exchange platforms and businesses providing custodian services. In addition, a

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[1] LAW LIBRARY OF CONGRESS, REGULATION OF BITCOIN IN SELECTED JURISDICTIONS (Jan. 2014), https://www.loc.gov/law/help/bitcoin-survey/.

[2] LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD (June 2018), https://www.loc.gov/law/help/cryptocurrency/world-survey.php .

[3] LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY IN SELECTED JURISDICTIONS (June 2018), https://www.loc.gov/law/help/cryptocurrency/index.php.

number of other countries are at various stages of developing legislation on cryptoassets, including in relation to establishing requirements for initial coin offerings (ICOs).

Although not covered in the report, we note that the Strategic Hub for Innovation and Financial Technology of the US Securities and Exchange Commission has recently issued information on the potential application of federal securities law to ICOs, indicating that the digital assets offered through an ICO should be assessed based on their particular characteristics.[4] Previously, in 2015, the Commodity Futures Trading Commission (CFTC) first found that virtual currencies are commodities under the Commodity Exchange Act.[5] The CFTC's jurisdiction is therefore implicated "when a virtual currency is used in a derivatives contract, or if there is fraud or manipulation involving a virtual currency traded in interstate commerce."[6]

II. Application of Financial Markets and Services Laws

Legislation governing financial markets, products, and services in various countries include requirements related to registration, licensing, and the disclosure of information to investors, such as through a prospectus. Relevant financial services in the area of cryptocurrencies may include, for example, exchanges, custodial services, advisory services, and brokering.

A. Application Dependent on Characteristics of Particular Cryptoasset

The financial regulatory authorities in a number of countries covered in this report have formally stated that existing financial market, products, and services laws are applicable to cryptocurrencies and/or to ICOs if the relevant tokens have certain characteristics. The authorities have published guidance on determining the applicability of the laws on a case-by-case basis. The jurisdictions that have taken this approach include Australia, the Bahamas, Canada, Denmark, Finland, Germany, Israel, Jersey, Liechtenstein, Lithuania, New Zealand, Singapore, Sweden, Switzerland, Taiwan, and the United Arab Emirates (UAE) (with respect to the Abu Dhabi Global Market). The United Kingdom (UK) is currently consulting on guidance in this area. In addition, it appears that a similar approach would be taken in the Cayman Islands, although no official guidance has been published.

Several of the relevant authorities have established "innovation hubs" or "sandboxes" to assist entities in the financial technology (fintech) sector navigate regulations and to encourage or enable innovation. This includes Australia, Canada, Hong Kong, and Switzerland, with such an entity also proposed in Israel.

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[4] *Framework for "Investment Contract" Analysis of Digital Assets*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/corpfin/framework-investment-contract-analysis-digital-assets (last updated Apr. 3, 2019), *archived at* https://perma.cc/82FC-CTB7.

[55] *See* LABCFTC, COMMODITY FUTURES TRADING COMMISSION, A CFTC PRIMER ON VIRTUAL CURRENCIES 11 (Oct. 17, 2017), https://www.cftc.gov/sites/default/files/idc/groups/public/documents/file/labcftc_primer currencies100417.pdf, *archived at* https://perma.cc/2ASM-W3JN.

[6] *Id.*

B. Specific Extension of Securities Laws to Cryptoassets

A few jurisdictions have specifically brought cryptocurrencies into the regulatory framework applicable to financial products and services through regulations or official statements. This includes Hong Kong, Israel (where "virtual currency" is included in the definition of "financial asset"), Luxembourg (which has officially recognized tokenized securities as securities), and Malaysia (where recent regulations bring all digital assets and tokens created by blockchain within the securities regulatory framework, with specific requirements applying for the registration of digital asset platforms).

III. Specific Laws on Cryptoassets

Several countries have recently enacted specific laws or regulations that govern various activities related to cryptoassets, including exchanges and wallets. These cover matters such as technical requirements, governance structures, risk management, information disclosure, and other investor protection issues. There has been some regulation specific to ICOs, and this is an area in which several countries are currently considering possible regulatory approaches.

The following countries have enacted new laws or regulations specifically on cryptocurrency businesses or activities: Anguilla (in relation to tokens that are not considered securities), Belarus (where the regulations are applicable to residents of a government-established technology park), Bermuda, Gibraltar (in relation to DLT services, with officially regulated blockchain exchanges established), Indonesia (in relation to recognizing cryptocurrencies as commodities that can be subject to futures trading), Malta, Mauritius (in relation to custodian services), Mexico, Singapore (in relation to payment services), UAE, Uzbekistan, and Venezuela (including the establishment of a national cryptocurrency).

The following countries are currently at various stages of considering proposals for specific legislation related to cryptoassets: Australia (recently consulted on possible ICO regulation), the Bahamas (proposed payment instruments legislation), France (currently considering an ICO bill plus additional regulations), Germany (considering proposals to regulate blockchain securities, non-security ICOs, and DLT), Gibraltar (regulation of ICOs and tokens), Israel, Italy (considering a bill containing restrictions on token anonymization), Japan, Liechtenstein, Malaysia (in relation to ICOs), Philippines (ICOs), South Africa, Switzerland, and Ukraine.

Ireland appears to be at an earlier stage in this process, having established a working group to monitor developments and consider whether policy recommendations are required. The UK has also established a task force and is working on developing relevant proposals for consultation.

In addition, the EU is currently reviewing whether existing financial legislation applies to cryptoassets and ICOs and whether regulatory action is needed. There are currently divergent approaches in the EU Member States, and the European Securities and Markets Authority has indicated that it supports the introduction of EU-wide rules to ensure investor protection.

IV. Regulation of Cryptoassets Not Considered Securities

Where cryptoassets are not considered securities or other financial products, government authorities have indicated that other types of laws may be applicable, or have stated more broadly that such cryptoassets are unregulated. For example, general consumer protection legislation is applicable in relation to cryptocurrency activities in Australia, Canada, Finland, and New Zealand. In other jurisdictions, payment services laws may be applicable, which requires entities to be licensed in order to perform certain activities. This includes the EU, France, Japan, Singapore, and the UK. In Italy, some cryptocurrency businesses may be treated as money exchange operators.

Jurisdictions that have indicated that non-security cryptocurrencies, such as utility tokens, and ICOs offering such tokens, are generally unregulated include Brazil, Gibraltar, Isle of Man, Jersey, Spain, and the UAE. China and Indonesia appear to have taken a stronger approach, essentially banning the use of all cryptocurrencies as a means of payment and prohibiting financial institutions from dealing in cryptocurrencies (except in relation to futures trading in Indonesia). However, other laws of general application, such as property and contract law, may be applicable to cryptoassets in China.

V. Custodianship

Some of the new cryptocurrency laws referred to above contain requirements specifically applicable to entities that provide cryptoasset custodial or storage services, such as technical measures for protecting assets, transactions, and client information. This includes, for example, Bermuda, Indonesia, Mauritius, Norway, and the UAE. Specific measures proposed in other countries, such as Liechtenstein, also contain provisions setting out the obligations of providers of custodial services.

In Venezuela, the government has established the Crypto Assets Treasury with responsibility for the custody, collection, and distribution of cryptoassets in accordance with presidential instructions.

In other jurisdictions, cryptoasset custodial services may be considered a regulated financial service, with standard rules applying under the relevant legislation. This includes Australia (if the relevant assets are considered a financial product), Canada (where regulators expect certain technical measures), and Switzerland (if the tokens are considered financial instruments).

VI. Application of AML/CFT Laws

Several of the countries covered in the report apply existing AML/CFT laws to entities that deal with cryptoassets, including the Cayman Islands (although this may depend on the nature of the particular assets), Israel, Lithuania (which is also considering regulatory changes in this area), Mauritius (in relation to custodian services), New Zealand, Norway, Philippines, Singapore, Sweden (depending on the nature of the assets involved), and Switzerland.

A number of other jurisdictions have made specific legislative changes to bring cryptoasset activities under the relevant laws. This includes Australia, Belarus, Bermuda, Canada, France,

Gibraltar, Isle of Man, Italy, Malaysia, Malta, Norway, Japan, Jersey, Liechtenstein, Taiwan, the UAE, and Uzbekistan. Relevant legislative changes are currently being considered in the UK. The EU has also amended its Anti-Money Laundering Directive in order to bring wallet providers and exchange platforms within its scope. These changes are in the process of being implemented through legislative changes in the EU Member States.

VII. Taxation

The tax authorities of several countries covered by this report have published guidance on the application of income or capital gains tax rules to cryptocurrency activities, including Australia, Brazil, Canada, Denmark, Ireland, Israel, Italy (in relation to corporate tax), Japan, Jersey (in relation to corporate tax), Lithuania, Luxembourg, New Zealand, Norway, and Switzerland.

France has enacted specific provisions regarding the taxation of cryptocurrencies, while there is a current bill in South Africa that covers this issue, as well as in Ukraine, where an extended tax break is proposed. Other countries that have stated that cryptocurrencies are not subject to tax include Belarus (in relation to residents of the government-established technology park), Gibraltar (although exchanges must pay corporate income tax), and Uzbekistan.

The application of value-added tax or goods and services tax has also been considered in several countries, with authorities stating that existing exemptions apply to the buying and selling of cryptocurrencies. This includes Australia (unless the entity involved in the transaction is a business) and EU Member States, following a European Court of Justice ruling on this issue.

Anguilla

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SUMMARY Anguilla has enacted legislation to regulate the issuance of utility tokens that do not fall under securities law. The Anguilla Utility Token Offering Act (AUTO Act) provides that only qualified companies registered with the Anguilla Financial Services Commission may issue utility tokens. In order to register, a significant amount of disclosure must be made, and once registered, the companies must follow the anti-money laundering legislation of Anguilla to ensure that utility tokens are not used in an unlawful manner.

I. Introduction

The Anguillan government has taken a proactive approach towards cryptocurrencies. In 2018, the government enacted the Anguilla Utility Token Offering Act (AUTO Act). The AUTO Act is one of the first in the world to establish a registration process for first offerings of utility tokens that are not securities.[1] The objective of the AUTO Act is to provide an easy to use framework for the registration of, and disclosure of information by, issuers of utility tokens, with clear rules and a small levy charged to issuers.

II. Approach to Assets Created Through Blockchain

The AUTO Act provides a a set of rules applicable to issuers of tokens that do not have the features of a security and therefore fall outside the existing financial services regulatory framework.[2] The Act creates

> a simple but effective standardized registration and disclosure protocol for blockchain projects wishing to issue utility tokens. The government's goal is to strike a sound balance between meeting the information requirements of the purchasing public, and creating an accelerated but prudent process to meet the needs of the fast-moving blockchain industry.[3]

The AUTO Act was co-authored by an Anguillan finance and tax lawyer and a US finance and blockchain lawyer, who stated:

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[1] Anguilla Utility Token Offering Act 2018, No. 4/2018 (AUTO Act), https://www.fsc.gov.ai/documents/Document Library/Legislation/AUTO Act (enactment).pdf, *archived at* https://perma.cc/F8YV-EW2W.

[2] *Government of Anguilla Announces World's First Blockchain Token Offering Registration Process for "Utility Token Offerings,"* THE ANGUILLAN (May 14, 2018), http://theanguillian.com/2018/05/government-of-anguilla-announces-worlds-first-blockchain-token-offering-registration-process-for-utility-token-offerings/, *archived at* https://perma.cc/L69R-3JHX.

[3] *Id.*

> In drafting this Act, we saw that tokens that were in effect "securities" in Anguilla are required to comply with the same Anguillan and international regulatory regime as all other securities offerings. However, there remained a large swathe of non-security tokens with no clear guidance as to how they should be offered to the public. Therefore, we focused our efforts on creating a safe and effective regulatory framework for non-security token offerings.[4]

The aim of the AUTO Act is to provide clear guidance for both issuers of cryptocurrencies and the public that wishes to purchase them:

> The objective is a simple but effective standardized registration and disclosure protocol for blockchain projects wishing to issue utility tokens. The government's goal is to strike a sound balance between meeting the information requirements of the purchasing public, and creating an accelerated but prudent process to meet the needs of the fast-moving blockchain industry.[5]

A. Financial Regulation and Consumer Protection

The AUTO Act regulates initial blockchain[6] utility token offerings conducted in, or from within, Anguilla.[7] An initial utility token offering is defined as "an initial offer to the public to subscribe for the purchase of utility tokens to be issued by an issuer made by the issuer to any person who is not connected to the issuer."[8]

The AUTO Act provides that only qualified companies[9] registered under the AUTO Act by the Anguilla Financial Services Commission (the Commission) may undertake an initial or secondary utility token offering.[10] The application for registration must include a US$10,000 application fee;[11] a statement that contains specified information, including the type and scope of business the applicant will carry out; a statement about the scope of the initial token offering; the white paper providing detailed information about the tokens; and the financial, technical, and human

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[4] *Id.*

[5] *Id.*

[6] Blockchain is defined in section 1(1) of the AUTO Act as "a continuously growing list of decentralised digital records that are linked and secured using cyptography."

[7] Section 1(2) of the AUTO Act states "a person is considered to be undertaking an initial or secondary utility token offering in or from within Anguilla if the person is resident in Anguilla, organised or incorporated under the laws of Anguilla or representing to be undertaking an initial or secondary utility token offering in or from within Anguilla."

[8] AUTO Act § 1(1).

[9] Section 1(1) of the AUTO Act defines "qualified company" as: "a company incorporated under the International Business Companies Act, R.S.A. c. 120, the Companies Act, R.S.A. c.C65 or the Limited Liability Company Act, R.S.A. c. L65 or such other entity prescribed by regulations[.]"

[10] AUTO Act § 2.

[11] Anguilla Utility Token Offering (Application Process) Regulations 2018, SI 2018/19, sched. 3, http://www.fsc.org.ai/documents/Document Library/Legislation/Anguilla Utility Token Offering (Application Process) Regulations, 2018.pdf *archived at* https://perma.cc/YQ28-9RTB.

resources available to the applicant.[12] The Commission has stated there are exclusions to the types of tokens that it will register:

> The Commission will not register an issuer to undertake a utility token offering that is intended to enable access to any of the following online businesses: gambling, pornography, trading in securities, foreign exchange contracts, binary options, contracts for differences and similar instruments, or any business prohibited by the laws of Anguilla.[13]

As noted above, the AUTO Act was created to provide a framework for tokens that are not securities and thus do not fall under the financial services framework. The AUTO Act defines a token as "any cryptographically secured digital representation of a set of rights, including smart contracts, provided on a digital platform and issued or to be issued by an issuer." "Utility token" is defined as

> any token that –
> (a) does not, directly or indirectly, provide the holder(s) thereof, individual or collectively with the other holder(s), any of the following contractual or legal rights –
> (i) ownership or equity interest in the issuer or in any person or pool of assets,
> (ii) entitlement to a share of profits, losses, assets or liabilities of the issuer or any other person or pool of assets (other than, in the event of liquidation or dissolution of the issuer, to receive a portion of (but not in excess of) the original subscription price paid for the utility token in the initial utility token offering ("Limited Return Rights")),
> (iii) legal status as a creditor (other than with respect to Utility Token Features, or with respect to Limited Return Rights), or
> (iv) entitlement to receive distributions of profits, revenues, assets or other distributions from the issuer or any other person or pool of assets other than with respect to Limited Return Rights; and
> (b) has or will have in the future, upon launch of the issuer's Utility Token Platform, one or more Utility Token Features;
>
> "Utility Token Features" means the contractual right for a holder thereof to utilise a token to –
> (a) have access to, become a member of, or become a user of a Utility Token Platform developed and managed, or proposed in the issuer's white paper to be developed and managed, by the issuer;
> (b) use as the sole or preferred (by economic discount, preferred access, preferred use or otherwise) purchase, lease or rental price for the products and/or services provided or proposed to be provided by or in the Utility Token Platform developed and managed, or proposed in the issuer's white paper to be developed and managed, by the issuer; or

[12] AUTO Act § 5.

[13] Anguilla Financial Services Commission, Procedure for Registering an Issuer under the Anguilla Utility Token Offering Act, 2018 (AUTO Act") (2019), https://www.fsc.gov.ai/documents/Document Library/Guidelines/AUTO Act - Process_Application for Registering AUTO Issuer (final 2019).pdf, *archived at* https://perma.cc/JJA9-PSAS.

> (c) use as a means of voting on matters relating to the governance, management or operation of the Utility Token Platform developed and managed, or proposed in the issuer's white paper to be developed and managed, by the issuer;[14]

In order to be approved to undertake an initial utility token offering, the qualified company must publish disclosure documents. These are aimed at providing transparency and clarity for the consumer. These documents must include the structure of the company; business status; a detailed description of the project; the technical and legal description of the tokens offered; current ownership of the tokens; how the proceeds will be used; plans to protect the offering proceeds; anti-money laundering measures; and the risk factors to purchase tokens. The white paper must include, at a minimum, the following information:

> (a) the objectives of the issuer;
> (b) subscription restrictions;
> (c) risk factors of the issue;
> (d) minimum and maximum subscription, if applicable, for subscribers;
> (e) the corporate structure and location, including ownership structure of the issuer and any affiliated companies that collectively will develop, manage and operate the blockchain project(s) operated or to be developed and operated using the proceeds from the initial or secondary utility tokens offering;
> (f) officers and directors of the issuer including relevant backgrounds;
> (g) description of technical functionality of utility tokens proposed to be offered;
> (h) the contractual and legal rights provided by the utility tokens being offered;
> (i) where the initial utility token offering will be offered or restricted from being offered;
> (j) the total amount of utility tokens that may be issued in the initial or secondary offering or in the future by the issuer;
> (k) the initial utility token offering timeline, including any discounts provided to purchasers on the price of offering based on time, amount, auction or other staged investment;
> (l) any actual or projected cap on the total amount offered in the initial offering;
> (m) detailed use of proceeds from the initial or secondary offering, especially any material payments that will be made to affiliates of the issuer;
> (n) any rights or obligations of the holders of tokens to have their tokens redeemed by the issuer or affiliates;
> (o) all proposed uses of the tokens within the blockchain project or platform owned or to be developed by the issuer;
> (p) the mechanism of the initial utility token offering issue;
> (q) a description of the AML/KYC compliance requirements applicable to the offering and how they will be addressed;
> (r) any plan for holding offering proceeds in escrow, both prior to the closing of the offering and for purposes of staged releases subsequent to closing, including conditions for release;
> (s) security measures to be adopted including measures for protection against hacking or diversion of subscriber funds or value;
> (t) any other material information that the issuer reasonably determines to be necessary for a potential subscriber to understand

[14] AUTO Act § 1(1).

(i) the business or proposed business of the issuer and its affiliates,
(ii) the operation of the proposed blockchain project and
(iii) the management structure of the issuer.[15]

Upon registration, the issuer is liable to pay a fee of US$20,000 where maximum subscription proceeds are set at US$100 million or less, and US$30,000 for those that are set at more than US$100 million.[16]

In order to ensure the AUTO Act is kept up to date, the Distributed Ledger Technology Advisory Committee was established to advise the Commission on any amendments that it recommends should be made to the AUTO Act.[17]

B. Anti-Money Laundering Law

The AUTO Act places an obligation on the issuer of utility tokens to conduct due diligence on subscribers, and these obligations are set out in the Anguilla Utility Token Offering (Anti-Money Laundering and Terrorist Financing) Regulations 2018.[18] Every application to be registered as an issuer under the AUTO Act must include the procedure the issuer will take to conduct "due diligence on the subscribers to the offering for AML/CFT purposes in accordance with the AUTO AML/CFT Regulations."[19] This due diligence must be carried out by an AUTO Administrator, or a third party that is considered acceptable to the Commission.[20]

Section 2 of the 2018 Regulations provides that registered issuers must collect and maintain a list of subscribers that contain specific information, including personal details of the subscriber, such as their full name; a declaration of the country of residence; and addresses of subscribers that pay less than US$5,000. Subscriptions up to US$25,000 must also include a verified address in the form of a utility bill and government issued identification. Subscriptions up to US$100,000 require the address to be verified by a letter from a licensed financial institution. Subscriptions up to US$500,000 require all the information above, certified by a notary public, as well as additional photographic identification certified by a notary public and a declaration that includes any net worth over US$1 million, the source of wealth, that the subscriber is not a politically exposed person, and that the subscription is not undertaken on behalf of a third party.[21]

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[15] Anguilla Utility Token Offering (White Paper) Regulations 2018, SI 2018/20, § 2, http://www.fsc.org.ai/documents/Document Library/Legislation/Anguilla Utility Token Offering (White Paper) Regulations, 2018.pdf, *archived at* https://perma.cc/4PAP-3TFA.

[16] Anguilla Financial Services Commission, *supra* note 13, at 4.

[17] AUTO Act § 3.

[18] Anguilla Utility Token Offering (Anti-Money Laundering and Terrorist Financing) Regulations 2018, § 2, http://www.fsc.org.ai/documents/Document Library/Legislation/Anguilla Utility Token Offering (Anti-Money Laundering and Terriorist Financing) Regulations, 2018.pdf, *archived at* https://perma.cc/FE58-PSK6.

[19] Anguilla Financial Services Commission, *supra* note 13, at 2.

[20] Anguilla Utility Token Offering (Anti-Money Laundering and Terrorist Financing) Regulations 2018, SI 2018/22, § 2.

[21] *Id*.

C. Taxation

There do not appear to be any specific taxes that apply to cryptocurrencies in Anguilla. Issuers of utility token offerings are subject to a 1.5% levy on the aggregate value of subscriptions, as measured at the time of completion of the utility token offering.[22]

[22] Anguilla Utility Token Offering (Levy) Regulations 2018, SI 2018/22, § 2, http://www.fsc.org.ai/documents/Document Library/Legislation/Anguilla Utility Token Offering (Levy) Regulations, 2018.pdf, *archived at* https://perma.cc/AG88-G2VB.

Argentina

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I. Financial Regulation and Consumer Protection

Under the National Constitution of Argentina[1] the only authority capable of issuing legal currency is the Central Bank.[2] Bitcoins are not legal currency strictly speaking, because they are not issued by the government monetary authority and therefore are not legal tender.[3] They may be considered money but not legal currency, since they are not a mandatory means of cancelling debts or obligations.[4]

Although bitcoins are not specifically regulated, they are increasingly being used in Argentina, a country that has strict control over foreign currencies.[5] According to some experts[6] a bitcoin may be considered a good or a thing under the Civil Code,[7] and transactions with bitcoins may be governed by the rules of the sale of goods under the Civil Code.[8]

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[1] CONSTITUCIÓN DE LA NACIÓN ARGENTINA [NATIONAL CONSTITUTION OF ARGENTINA] art. 75, para. 6, BOLETÍN OFICIAL [BO], Aug. 22, 1994, http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm, *archived at* https://perma.cc/XN2T-C5G7.

[2] Ley No. 24.144, Carta Orgánica del Banco Central de la República Argentina [Law No. 24,144, Charter of the Central Bank of the Republic of Argentina] art. 30, BO, Oct. 13, 1992, http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/542/texact.htm, *archived at* https://perma.cc/2CVW-8VNX.

[3] *El Banco Central Argentino Considera Riesgoso Operar con Bitcoins* [*Central Bank of Argentina Considers Risky Operations with Bitcoins*], INFOTECHNOLOGY (May 28, 2014), http://www.infotechnology.com/internet/ El-Banco-Central-argentino-considera-riesgoso-operar-con-bitcoins-20140528-0003.html, *archived at* https://perma.cc/746A-JBYG.

[4] Mara Laudonia, *El Vacío Legal del Bitcoin, ¿Es o No Es Dinero?* [*The Legal Vacuum of the Bitcoin, Is It or Is It Not Money?*], TELAM (Feb. 28, 2018), http://www.telam.com.ar/notas/201702/180185-el-vacio-legal-del-bitcoin-es-o-no-es-dinero.html, *archived at* https://perma.cc/P2WE-L8F9.

[5] José Crettaz, *Bitcoin: Fiebre Argentina por la Máquina de Dinero Digital* [*Bitcoin: Argentine Fever for the Digital Money Machine*], LA NACIÓN (June 30, 2013), http://www.lanacion.com.ar/1596773-bitcoin-pasion-argentina-por-la-nueva-maquina-de-hacer-billetes-digitales, *archived at* https://perma.cc/PMU9-KWB5; Diego Geddes, *Argentina es uno de los países que más usa el bitcoin* [*Argentina Is One of the Countries that Uses the Bitcoin*], CLARÍN (Dec. 31, 2013), http://www.clarin.com/sociedad/Argentina-paises-Bitcoin-moneda-virtual_0_1057694271.html, *archived at* https://perma.cc/N8SA-5H9L.

[6] *See, e.g.*, Andres Chomczyk, *Situación Legal del Bitcoin en Argentina*, ELBITCOIN.ORG (Oct. 10, 2013), http://elbitcoin.org/situacion-legal-de-bitcoin-en-argentina, *archived at* https://perma.cc/43K8-ZYYK.

[7] CÓDIGO CIVIL [CIVIL CODE] art. 2311, http://servicios.infoleg.gob.ar/infolegInternet/anexos/105000-109999/109481/texactley340_libroIII_tituloI.htm, *archived at* https://perma.cc/Y3Q7-JT25.

[8] *Id*. art. 1323.

II. Anti-Money Laundering Law

A formal recognition of electronic currency was issued by the Unidad de Información Financiera (UIF) (Financial Information Unit) of the Ministry of Finance through Resolution 300/2014, which warned entities and individuals required by law to report suspicious transactions involving money laundering or terrorism financing and to be particularly alert with regard to operations carried out with virtual currency.[9] The UIF Resolution differentiates "virtual currency" and "electronic currency," stating that the latter involves the electronic transfer of legal tender while virtual currency transactions do not involve legal tender.[10]

III. Taxation

The latest amendment to the Income Tax law provides that the profit derived from the sale of digital currency will be considered income and taxed as such.[11] Income derived from the sale of digital currency is taxed at 15% when derived from either Argentine or foreign sources.[12] The tax treatment of cryptocurrency corresponds with the treatment of profits on securities and bonds, which represent a liability in favor of the holder—something that does not happen in the case of cryptocurrencies.[13]

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[9] Unidad de Información Financiera, Resolución 300/14 Prevención del Lavado de Activos y de la Financiación del Terrorismo, para. 9, BO, July 10, 2014, http://servicios.infoleg.gob.ar/infolegInternet/anexos/230000-234999/231930/norma.htm, *archived at* https://perma.cc/G2L7-9S2Q.

[10] *Id*. art. 2.

[11] Ley 27430 de Modificación del Impuesto a las Ganancias [Law 27430 Amending the Income Tax Law] art. 2.4, BO, Dec. 29, 2017, http://servicios.infoleg.gob.ar/infolegInternet/anexos/305000-309999/305262/texact.htm, *archived at*https://perma.cc/GS7J-UR7U, and its regulation, Decreto 1170/2018 de Modificaci'on de la Reglamentación de la Ley de Impuesto a las Ganancias [Decree 1170/2018 Modification of the Regulation of the Income Tax Law], BO, Dec. 27, 2018), http://servicios.infoleg.gob.ar/infolegInternet/anexos/315000-319999/318096/norma.htm, *archived at* https://perma.cc/8W5M-FQAC.

[12] Decreto 1170/2018 art. 90, para. 2.

[13] BITCOIN ARGENTINA, SOBRE EL PROYECTO DE GRAVAR LAS MONEDAS DIGITALES COMO RENTA FINANCIERA DE ACCIONES Y BONOS [ABOUT THE BILL THAT TAXES DIGITAL CURRENCY AS A FINANCIAL INCOME FROM STOCK AND BONDS] 2, last para. (Nov. 17, 2017), https://www.bitcoinargentina.org/wp-content/uploads/sites/6/2017/11/proyecto-impuesto-a-las-ganancias-bitcoin.pdf, *archived at* https://perma.cc/B8TG-XQYP.

Armenia

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I. Approach to Assets Created Through Blockchain

On October 18, 2018, Armenia opened its first crypto mining farm, with an investment of US$50 million and the capacity of 3,000 Bitcoin (BTC) and Ethereum (ETH) mining machines. It is envisaged that the capacity of the farm would reach 120,000 machines.[1] The crypto mining farm was created on the basis of the Governmental Decree on the Creation of a Free Economic Zone of August 30, 2018, and operates under the legal framework for free economic zones.[2]

In May 2018, a Bill on Amending the Law on Information Technologies was introduced.[3] The bill defines cryptocurrency as an asset accessible exclusively through digital means.[4] The bill establishes a liberal regulatory approach towards mining of cryptocurrencies. According to article 4 of the bill, any physical person (at least 18 years old), as well as legal entity, may be employed in the crypto mining sector.[5] In addition, article 4 states that no prior licensing or permits are required in order to engage in crypto mining activities.

Previously, the Central Bank of Armenia had issued a statement in which it expressed serious reservations concerning the circulation of cryptocurrencies, citing insufficient mitigation of the following risks:

- Cryptocurrencies are lacking security and are extremely unstable;
- In most schemes that use cryptocurrencies, there are no legally responsible entities;

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[1] Marie Huillet, *Armenian PM Attends Launch of Mining Farm Claiming to Be One of 'World's Largest'*, COINTELEGRAPH (Oct. 19, 2018), https://cointelegraph.com/news/armenian-pm-attends-launch-of-mining-farm-claiming-to-be-one-of-worlds-largest, *archived at* https://perma.cc/34E2-5AS6.

[2] Hajastani Hanrapetujan Voroshum Kotayqi Marzi Hrazdan Qaghaqum Azat Tntesakan Goti Steghtselu, "EKOS" Pak Bazhnetirakan Enkerutjann Azat Tntesakan Gotu Kazmakerpich Tsanachelu, Inchpes Naev Azat Tntesakan Gotu Gortsuneutjan Veraberjal Kamakerpchi Koghmits Nerakajatsvogh Hashvetvutjan dzevere Hastatelu Masin 30 Ogostoi 2018, 974 – Ա. [Resolution of the Government of the Republic of Armenia on Recognizing "EKOS" Closed Charitable Entity as an Organizer of Free Economic Zone in the city of Hrazdan of Kotayk Marz, As Well as on Approving Reporting Documentation for the Organizer Concerning the Activities of Free Economic Zone], August 30, 2018, 974-A, https://www.e-gov.am/gov-decrees/item/30750/ (in Armenian), *archived at* https://perma.cc/WCK4-JMGA.

[3] Hajastani Hanrapetujan Orenqe Tvajin Tekhnologianeri Masin, Nakhagits, P-253-05.02.2018-FV-011 [Law of the Republic of Armenia on Information Technologies, Bill P-253-05.02.2018-FV-011], http://www.parliament.am/drafts.php?sel=showdraft&DraftID=9504&Reading=0&fbclid=IwAR07Ok_a0yB1ENjT41jf2tZfXSKCsf5BcrHUq2OwHThtarK3sPvTPA9sbQQ (in Armenian; last visited Mar. 26, 2019), *archived at* https://perma.cc/5YD3-4N23.

[4] *Id.* art. 3.

[5] *Id.* art. 4.

- Transactions executed with cryptocurrencies can often be part of the money laundering and terrorist financing schemes, as they allow anonymous and cross-border transactions, the return of which cannot be secured; and
- In cases of fraud or criminal distortions in information security, authentic mechanisms to protect the legitimate interests of clients or to compensate for their losses are not in place, as a result of which the consumers' interests may be violated.[6]

According to the Central Bank, these concerns do not apply to mining activities, as their regulation can be delegated to the regulators of the IT sector rather than financial sector.[7] In a subsequent statement, the chairman of the Central Bank reiterated its support for blockchain technologies, but cautioned against using cryptocurrencies.[8] Furthermore, the statement indicated that when international cryptocurrencies regulation is adopted, Armenia would enact a national law to regulate cryptocurrencies.[9]

II. Taxation

The Bill on Information Technologies proposes to lift taxation requirements for crypto-mining transactions until December 31, 2023. The Bill also states that other tax, customs or other privileges may be introduced provided that equal economic competition is observed.[10]

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[6] Press Release, Central Bank of Armenia, The Statement of the Central Bank of Armenia on "Crypto-assets" (July 5, 2018), https://www.cba.am/EN/pmessagesannouncements/Cryptocurrency warning_07.05.2018 ENG.pdf, *archived at* https://perma.cc/54YZ-9KP6.

[7] *Id.*

[8] Press Release, Central Bank of Armenia, Armenian Central Bank Supports Blockchain Technology but Cautious about Cryptocurrencies (Nov. 14, 2018), http://www.armbanks.am/en/2018/11/14/117119, *archived at* https://perma.cc/LNU2-EFV5.

[9] *Id.*

[10] Law of the Republic of Armenia on Information Technologies, Bill P-253-05.02.2018-FV-011, art. 4.

Australia

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SUMMARY The Australian Securities and Investments Commission (ASIC) states that whether cryptoassets are a type of financial product under the Corporations Act 2001 (Cth) depends on their nature. Where tokens created through blockchain are considered to be an interest in a managed investment scheme, shares, derivatives, or a non-cash payment facility, an entity that deals with or provides custodial services with respect to such tokens could be providing financial services, with disclosure and licensing requirements applying. If the tokens are not financial products, the Australian Consumer Law would apply. Both this law and the Corporations Act prohibit false and misleading conduct. ASIC has been delegated functions under the Australian Consumer Law in relation to initial coin offerings that do not involve financial products.

Amendments to the anti-money laundering and counter-financing of terrorism legislation that came into force in April 2018 impose registration, recording, and reporting obligations on digital currency exchanges. Australian taxation law is also applicable to investing or dealing in cryptoassets, with capital gains or losses subject to the capital gains tax system.

The Australian Treasury recently sought public feedback on the regulatory treatment of initial coin offerings in Australia, including with respect to financial regulation, consumer protection, and taxation.

I. Approach to Assets Created Through Blockchain

A recent report analyzing the legal environment with respect to cryptocurrency in Australia states that,

> [t]o date, the [Australian] Government has taken a largely non-interventionist approach to the regulation of cryptocurrency, allowing the landscape to evolve at a faster rate than its regulatory responses. Australian law does not currently equate digital currency with fiat currency and does not treat cryptocurrency as "money".[1]

Furthermore,

> [w]hile there have been recent amendments to various pieces of legislation to accommodate the use of cryptocurrencies, these have predominantly focused on the

[1] Peter Reeves & Georgina Willcock, *Australia*, *in* BLOCKCHAIN AND CRYPTOCURRENCY REGULATION 2019 (Global Legal Insights, Jan. 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/australia, *archived at* https://perma.cc/8F46-PYWJ.

> transaction relationships, such as the issuing and exchanging process, rather than the cryptocurrencies themselves.[2]

Several Australian laws are relevant to the regulatory treatment of cryptocurrencies and other assets created through blockchain, including the Corporations Act 2001 (Cth) (regulation of financial products and services);[3] Australian Securities and Investments Commission Act 2001 (Cth) (establishes the role and powers of the Commission with regard to consumer protection in relation to financial services);[4] Australian Consumer Law, which is contained in the Competition and Consumer Act 2010 (Cth) (regulation of non-financial products and services);[5] Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) (anti-money laundering obligations and registration of digital currency exchanges);[6] and Income Tax Assessment Act 1997 (Cth).[7]

In January 2019, the Australian Treasury published an issues paper on initial coin offerings (ICOs) that sought feedback on, among other matters, the regulatory treatment of ICOs in Australia, including with respect to financial regulation, consumer protection, and taxation.[8] Consultation on the paper ended on February 28, 2019, and the feedback received will inform Treasury's advice to the government.[9]

A. Financial Regulation and Consumer Protection

The Australian Securities and Investments Commission (ASIC) updated its guidance on business obligations under the Corporations Act 2001 (Cth) and other Australian legislation in relation to

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[2] *Id*.

[3] Corporations Act 2001 (Cth), https://www.legislation.gov.au/Details/C2018C00424, *archived at* https://perma.cc/UAN8-XRLY. Chapter 7 of the Act relates to financial services and markets. Within this chapter, division 3 of part 7.1 defines "financial product," while division 4 defines "financial service."

[4] Australian Securities and Investments Commission Act 2001 (Cth), https://www.legislation.gov.au/Details/C2018C00438, *archived at* https://perma.cc/Z6ZF-ZSNP.

[5] Competition and Consumer Act 2010 (Cth) s 131A (division does not apply to financial services) & sch 2 (The Australian Consumer Law), https://www.legislation.gov.au/Details/C2018C00437, *archived at* https://perma.cc/VJF6-SVJA.

[6] Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth), https://www.legislation.gov.au/Details/C2019C00011, *archived at* https://perma.cc/V484-WF7H.

[7] Income Tax Assessment Act 1997 (Cth), https://www.legislation.gov.au/Details/C2019C00049.

[8] THE TREASURY, INITIAL COIN OFFERINGS: ISSUES PAPER (Jan. 2019), https://static.treasury.gov.au/uploads/sites/1/2019/02/c2019-t353604-Issues_Paper.pdf, *archived at* https://perma.cc/6JZ7-4WFV.

[9] *Initial Coin Offerings*, THE TREASURY, https://treasury.gov.au/consultation/c2019-t353604/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/L34G-QPUF.

ICOs and cryptocurrency in May 2018.[10] The guidance had originally been published in September 2017.[11] The guidance states that

> [f]or ICOs and crypto-assets that are financial products,[12] the Corporations Act includes prohibitions against misleading and deceptive conduct. . . .
>
> For ICOs and crypto-assets that are not financial products (for example, ASIC has stated that it does not consider bitcoin to be a financial product), the same prohibitions against misleading or deceptive conduct apply under the Australian Consumer Law.[13]

In April 2018, ASIC "received delegated powers from the ACCC [Australian Competition and Consumer Commission] that enabled ASIC to take action under the Australian Consumer Law for misleading or deceptive conduct in the marketing or selling of ICOs, even if the ICO does not involve a financial product."[14]

Whether the Corporations Act applies depends on the nature of the ICO or cryptoasset. The guidance explains that

> [f]or ICOs, the mere fact that the token issued is described as a utility token does not mean it is not a financial product. The mere existence of a statement that the ICO or the token is not a financial product also does not mean it is not a financial product. It is important for entities to consider all of the rights and features associated with the token.
>
> Similarly, the mere fact that a crypto-asset is described as a digital currency does not mean it is not a financial product.[15]

The guidance goes on to examine when tokens issued by an ICO could be a managed investment scheme, share, derivative, or non-cash payment facility under the Corporations Act. Where one of these categories applies, an entity that provides advice on, deals with, makes a market for, or provides a custodial or depositary service for such a financial product could be considered to be

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[10] *Initial Coin Offerings and Crypto-Currency: Information Sheet 225* (INFO 225), AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION (ASIC) (updated May 2018), https://asic.gov.au/regulatory-resources/digital-transformation/initial-coin-offerings-and-crypto-currency/, *archived at* https://perma.cc/6H72-AZYF.

[11] *See* Press Release, ASIC, 17-325MR ASIC Provides Guidance for Initial Coin Offerings (Sept. 28, 2017), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2017-releases/17-325mr-asic-provides-guidance-for-initial-coin-offerings/, *archived at* https://perma.cc/GP95-W9EX.

[12] Note that the term "financial product" can be seen as synonymous with the term "securities" in the United States. Frederick H.C. Mazando, *The Taxonomy of Global Securities: Is the U.S. Definition of a Security Too Broad?*, 33(1) NW. J. INT'L L. & BUS. 121 (2012), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1029&context=njilb, *archived at* https://perma.cc/SKG4-QXRN.

[13] INFO 225, *supra* note 10.

[14] ASIC, ANNUAL REPORT 2017-18, at 78 (Oct. 2018), https://download.asic.gov.au/media/4922570/annual-report-2017-18-published-31-october-2018-full.pdf, *archived at* https://perma.cc/VE5K-FHZR.

[15] INFO 225, *supra* note 10.

providing a financial service under the Act and various obligations would apply.[16] This includes disclosure requirements[17] and a requirement to hold an Australian financial services license.[18] If a cryptoasset trading platform enables trading in tokens that are financial products, this may involve the operation of a financial market and a market license may be required.[19]

The guidance states that

> [a]n assessment of what rights are attached to the tokens issued under an ICO is the key consideration in relation to assessing the legal status of an ICO. These rights are generally described in the ICO's 'white paper', an offer document issued by the business making the offer or sale of an ICO token. What is a right should be interpreted broadly and includes rights that may arise in the future or on a contingency, and rights that are not legally enforceable.[20]

In addition to the above guidance, ASIC directs investors to its "Moneysmart" website, which contains information and warnings about cryptocurrencies[21] and ICOs.[22]

ASIC also published information on its approach to evaluating distributed ledger technology or blockchain in March 2017.[23] The guidance is intended for "both existing licensees and start-ups that are considering operating market infrastructure, or providing financial or consumer credit services, using distributed ledger technology (DLT) or blockchain."[24] It states that ASIC's historical approach to the obligations contained in the existing regulatory framework is that they are "technology neutral." It notes, however, that "as DLT matures, we anticipate that additional regulatory considerations may arise. These are most likely to be resolved with early and collaborative dialogue between ASIC and the industry."[25]

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[16] Corporations Act 2001 (Cth) s 766A (when does a person provide a financial service?).

[17] *See id.* pt 7.7 (financial services disclosure).

[18] *Id.* pt 7.6 (licensing of providers of financial services); *AFS Licencees*, ASIC, https://asic.gov.au/for-finance-professionals/afs-licensees/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/Y7A5-BAZF.

[19] Corporations Act 2001 (Cth) s 795B; INFO 225, *supra* note 10; *Licensed and Exempt Market Operators*, ASIC, https://asic.gov.au/for-finance-professionals/market-infrastructure-licensees/licensed-and-exempt-market-operators/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/889Y-M6A9.

[20] INFO 225, *supra* note 10.

[21] *Cryptocurrencies*, ASIC'S MONEYSMART, https://www.moneysmart.gov.au/investing/investment-warnings/virtual-currencies (last updated Oct. 24, 2018), *archived at* https://perma.cc/J8XB-KHQQ.

[22] *Initial Coin Offerings (ICOs)*, ASIC'S MONEYSMART, https://www.moneysmart.gov.au/investing/investment-warnings/initial-coin-offerings-icos (last updated Dec. 12, 2018), *archived at* https://perma.cc/RV6X-ZLJN.

[23] *Evaluating Digital Ledger Technology: Information Sheet 219* (INFO 219), ASIC (Mar. 2017), https://asic.gov.au/regulatory-resources/digital-transformation/evaluating-distributed-ledger-technology/, *archived at* https://perma.cc/K7KT-GSBC.

[24] *Id.*

[25] *Id.*

The guidance contains an assessment tool for evaluating DLT-based services, which sets out a list of questions related to how the DLT will be used, what platform is being used, how the DLT uses data, how the DLT is run, how the DLT works under the law, and how the DLT affects others.[26] It also provides a summary of license obligations relevant to DLT (including financial services licenses and other types of license), depending on the nature of the business.[27]

In 2015, ASIC launched an "Innovation Hub," which "assists fintech startups developing innovative financial products or services to navigate [ASIC's] regulatory system."[28]

In its 2018-2022 Corporate Plan, published in August 2018, ASIC stated that a particular focus area for 2018-19 is the following:

> **Potential harms from technology** driven by the growing digital environment and structural changes in financial services and markets. We will continue to focus on monitoring threats of harm from emerging products (e.g. ICOs and crypto currencies), cyber resilience, the adequate management of technological solutions by firms and markets, and misconduct that is facilitated by or through digital and/or cyber-based mechanisms.[29]

In addition, a new project for 2018-19 was identified as follows:

- Developing our approach for applying the principles for regulating market infrastructure providers to crypto exchanges
- Monitoring emerging products, such as ICOs, and intervening where there is poor behaviour and potential harm to consumers and investors[30]

B. Anti-Money Laundering Law

The Australian Parliament passed the Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 (Cth) in December 2017.[31] This legislation brought providers of digital currency exchange services within the anti-money laundering and counter-financing of terrorism

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[26] INFO 219, *Appendix 1: Assessment Tool for Evaluating DLT-Based Services*, ASIC, https://asic.gov.au/regulatory-resources/digital-transformation/evaluating-distributed-ledger-technology/appendix-1-assessment-tool-for-evaluating-dlt-based-services/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/G92G-KZ77.

[27] INFO 219, *Appendix 2: Summary of Licence Obligations Relevant to DLT*, ASIC, https://asic.gov.au/regulatory-resources/digital-transformation/evaluating-distributed-ledger-technology/appendix-2-summary-of-licence-obligations-relevant-to-dlt/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/WL7Y-4PR5.

[28] *Innovation Hub*, ASIC, https://asic.gov.au/for-business/your-business/innovation-hub/ (last visited Mar. 11, 2019), *archived at* https://perma.cc/2KEL-8ARN.

[29] ASIC, ASIC'S CORPORATE PLAN 2018-22: FOCUS 2018-19, at 10 (Aug. 2018), https://download.asic.gov.au/media/4855947/asic-corporate-plan-2018-22-focus-2018-19-published-31-august-2018.pdf, *archived at* https://perma.cc/8QYW-QGQ4.

[30] *Id.* at 26.

[31] Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017 (Cth), https://www.legislation.gov.au/Details/C2017A00130, *archived at* https://perma.cc/RL7R-YE2X.

(AML/CFT) legal framework, requiring such entities to be registered with the Australian Transaction Reports and Analysis Centre (AUSTRAC), maintain an AML/CFT program, and meet certain recording and reporting obligations.[32] The amendments came into effect on April 3, 2018.

AUSTRAC guidance explains that digital currency exchange services include

> - exchanging digital currency for money (whether Australian or not)
> - exchanging money (whether Australian or not) for digital currency
>
> where the exchange is provided in the course of carrying on a digital currency exchange business.
>
> A transaction between two individuals in a personal capacity is not considered a designated service. Reporting entities that provide digital currency exchange services must be enrolled and registered on AUSTRAC's Digital Currency Exchange Register.[33]

According to a January 2019 media report, AUSTRAC had at that point officially registered 246 cryptocurrency exchanges. It had also investigated eleven exchanges and subsequently refused two registrations.[34]

C. Taxation

The Australian Taxation Office's (ATO's) guidance on cryptocurrencies states that the tax consequences of acquiring or disposing of cryptocurrency vary depending on the circumstances.[35] It states that

> [i]f you make a capital gain on the disposal of a cryptocurrency, some or all of the gain may be taxed. Certain capital gains or losses from disposing of a cryptocurrency that is a personal use asset are disregarded.
>
> If the disposal is part of a business you carry on, the profits you make on disposal will be assessable as ordinary income and not as a capital gain.

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[32] Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (Cth) ss 5 (definition of digital currency) & 6 (designated services) & pt 6A (the Digital Currency Exchange Register); *Digital Currency Exchange Providers*, AUSTRAC, http://www.austrac.gov.au/digital-currency-exchange-providers (last updated Dec. 20, 2018), *archived at* https://perma.cc/9KXL-QTK4.

[33] *Definitions and Examples of Common Designated Services*, AUSTRAC, http://www.austrac.gov.au/definitions-and-examples-common-designated-services (last updated Jan. 7, 2019), *archived at* https://perma.cc/9LZ2-6RFX.

[34] Ariel Bogle, *Cryptocurrency Looks for Respectability as More Than 200 Exchanges Registered*, ABC NEWS (Jan. 31, 2019), https://www.abc.net.au/news/science/2019-02-01/digital-currency-exchanges-bitcoin-austrac-industry-reputation/10764316, *archived at* https://perma.cc/MDJ5-P3EA.

[35] *Tax Treatment of Cryptocurrencies*, AUSTRALIAN TAXATION OFFICE (ATO), https://www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/ (last updated Nov. 8, 2018), *archived at* https://perma.cc/NSD3-27YS.

> While a digital wallet can contain different types of cryptocurrencies, each cryptocurrency is a separate CGT asset.[36]

A person who holds cryptocurrency as an investment is not entitled to the personal use asset exemption and investors "are required to keep records of each cryptocurrency transaction in order to work out whether [they] have a made a capital gain or loss from each CGT event."[37] The ATO further indicates that "[t]he longer the period of time that a cryptocurrency is held, the less likely it is that it will be a personal use asset."[38] Where cryptocurrency is a personal use asset, being "kept or used mainly to purchase items for personal use or consumption," capital gains made from such an asset that is acquired for less than AU$10,000 (approx. US$7,100) are disregarded.[39]

In terms of cryptocurrency businesses, the ATO states that

> [i]f you hold cryptocurrency for sale or exchange in the ordinary course of your business the trading stock rules apply, and not the CGT rules. Proceeds from the sale of cryptocurrency held as trading stock in a business are ordinary income, and the cost of acquiring cryptocurrency held as trading stock is deductible.[40]

The ATO has also provided specific guidance on self-managed super funds (SMSF, i.e., retirement savings funds) investing in cryptocurrencies[41] and on the application of goods and services tax (GST) with respect to transactions involving digital currencies.[42] Amendments to the GST provisions that came into effect on July 1, 2017, provide that there are no GST consequences in relation to buying or selling digital currency, or using it as a means of payment, unless the entity concerned is carrying on a business.[43]

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[36] *Transacting with Cryptocurrency*, ATO, https://www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/?page=2#Transacting_with_cryptocurrency (last updated Nov. 8, 2018), *archived at* https://perma.cc/6CWN-66U5.

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Cryptocurrency Used in Business*, ATO, https://www.ato.gov.au/general/gen/tax-treatment-of-crypto-currencies-in-australia---specifically-bitcoin/?page=3#Cryptocurrency_used_in_business (last updated Nov. 8, 2018), *archived at* https://perma.cc/DDY5-2W45.

[41] *SMSF Investing in Cryptocurrencies*, ATO, https://www.ato.gov.au/super/self-managed-super-funds/in-detail/smsf-investing/smsf-investing-in-cryptocurrencies/ (last updated Mar. 16, 2018), *archived at* https://perma.cc/3T7Q-WQJP.

[42] *GST and Digital Currency*, ATO, https://www.ato.gov.au/business/gst/in-detail/your-industry/financial-services-and-insurance/gst-and-digital-currency/ (last updated Mar. 16, 2018), *archived at* https://perma.cc/LTX9-5F9Z.

[43] *Id.* Detailed information regarding the tax treatment of cryptocurrencies is contained in KELLY BUCHANAN, REGULATION OF CRYPTOCURRENCY: AUSTRALIA (Law Library of Congress, June 2018), https://www.loc.gov/law/help/cryptocurrency/australia.php.

II. Custodianship of Cryptocurrencies by Financial Institutions

There are no specific legislative provisions governing custodianship of cryptocurrencies or other cryptoassets. As indicated above, where a cryptoasset stored in a vault or wallet is considered to be a financial product, the custodial services would be regulated under the financial services provisions of the Corporations Act 2001 (Cth).[44] Thus, "[t]hey are required to hold an Australian financial services licence (AFSL) that authorises them to provide custodial or depository services to clients with respect of financial products, and need to comply with obligations imposed upon them as AFSL holders."[45]

In July 2018, it was reported that two Australian companies, Decentralised Capital and Custodian Vaults, had announced a partnership to launch "Australia's first insured crypto-currency vault."[46] The vault services were expected to target "institutional and wealthy investors, in addition to cryptocurrency exchangers and issuers of initial coin offerings."[47]

III. Regulation of Cryptocurrencies as Financial Securities

The ASIC guidance covers when tokens offered under an ICO could be a share, interest in a managed investment scheme, derivative, or non-cash payment facility, all of which are "financial products" under the Corporations Act. It also clarifies that ICOs are not the same as "crowd-sourced funding" under recent amendments to the Corporations Act governing such arrangements.[48]

A. Shares

ASIC's guidance on cryptocurrencies and ICOs covers the question of when an ICO could be an offer of shares under the Corporations Act 2001 (Cth).[49] It states as follows:

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[44] *See* Corporations Act 2001 (Cth) s 766E (meaning of provide a custodial or depositary service).

[45] Simon Lovegrove & Albert Weatherill, *Cryptocurrency Exchanges and Custody Providers: International Regulatory Developments: Australia*, NORTON ROSE FULBRIGHT (Oct. 2018),https://www.nortonrosefulbright.com/en/knowledge/publications/e383ade6/cryptocurrency-exchanges-and-custody-providers-international-regulatory-developments#section9, *archived at* https://perma.cc/JR6L-Q4LB.

[46] Jim Bulling & Edwin Tan, *Australia's First Crypto-Custody Vault is Open for Business*, NATIONAL LAW REVIEW (July 26, 2018), https://www.natlawreview.com/article/australia-s-first-crypto-custody-vault-open-business, *archived at* https://perma.cc/5AZB-JFBY.

[47] Samuel Haig, *Australian Firms Partner to Provide Crypto Custody Services*, BITCOIN.COM NEWS (July 15, 2018), https://news.bitcoin.com/australian-firms-partner-to-provide-crypto-custody-services/, *archived at* https://perma.cc/G8RZ-STM9.

[48] INFO 225, *supra* note 10.

[49] Chapter 2H of the Corporations Act 2001 (Cth) relates to shares in a company, while section 761A provides a definition of "security" for the purposes of chapter 7 of the Act, and division 3 of part 7.1 includes securities within the meaning of "financial product."

> When an ICO is created to fund a company (or to fund an undertaking that looks like a company) then the rights attached to the tokens issued by the ICO may fall within the definition of a share.
>
> The bundle of rights referred to above may be used by ASIC to help determine if a token is in fact a share. If the rights attached to the token (which are generally found in the ICO's 'white paper') are similar to rights commonly attached to a share – such as if there appears to be ownership of the body, voting rights in decisions of the body or some right to participate in profits of the body shown in the white paper – then it is likely that the tokens could fall within the definition of a share.
>
> Where it appears that an issuer of an ICO is actually making an offer of a share, the issuer will need to prepare a prospectus. Such offers of shares are often described as initial public offerings (IPOs).
>
> By law, a prospectus must contain all information that consumers reasonably require to make an informed investment decision.
>
> Importantly, though an ICO may look similar to an IPO, the ICO may not offer the same protections to consumers and may result in liability for the issuer and those involved in the ICO. Issuers of an ICO need to be aware that where an offer document for an ICO is, or should have been, a prospectus and that document does not contain all the information required by the Corporations Act, or includes misleading or deceptive statements, consumers may be able to withdraw their investment before the tokens are issued or pursue the issuer and those involved in the ICO for the loss.[50]

In addition to the prospectus requirements, if an ICO is considered to be an offer of shares, the relevant company must maintain a share register, recording all of the shares it has issued and information about the company's shareholders.[51]

ASIC's 2017–18 annual report states that, in May 2018, it

> took action to protect investors where we identified fundamental concerns with the structure of an ICO, the status of the offeror and the lack of regulated disclosure. As we considered the tokens being offered were legally preference shares, the offer required prospectus disclosure and was being made by a proprietary limited company (proprietary limited companies are not permitted to make offers of securities requiring disclosure). The transaction was subsequently withdrawn.[52]

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[50] INFO 225, *supra* note 10.

[51] *See Shares: Information Sheet 70* (INFO 70), ASIC (reissued June 2016), https://asic.gov.au/for-business/running-a-company/shares/, *archived at* https://perma.cc/R4QB-3ETB; Philippa Ryan, *Australian Regulators Have Finally Made a Move on Initial Coin Offerings*, THE CONVERSATION (Sept. 29, 2017), https://theconversation.com/australian-regulators-have-finally-made-a-move-on-initial-coin-offerings-84840, *archived at* https://perma.cc/S8P3-U9QE.

[52] ASIC, ANNUAL REPORT 2017-18, *supra* note 13, at 78.

B. Managed Investment Schemes

Under the Corporations Act 2001 (Cth),[53] the following are the "basic indicators of whether an arrangement is a managed investment scheme":

- people contribute money or assets (such as digital currency) to obtain an interest in the scheme ('interests' in a scheme are generally a type of 'financial product' and are regulated by the Corporations Act)
- any of the contributions are pooled or used in a common enterprise to produce financial benefits or interests in property, and
- the contributors do not have day-to-day control over the operation of the scheme but, at times, may have voting rights or similar rights.[54]

If the value of a token is related to the management of such an arrangement, "the issuer of the ICO is likely to be offering a managed investment scheme."[55] This categorization carries a range of product disclosure, licensing, and registration obligations under the Corporations Act.[56]

C. Derivatives

Based on the definition of a derivative in the Corporations Act,[57]

> [i]f an ICO produced a token that is priced based on factors such as another financial product or underlying market index or asset price moving in a certain direction before a time or event which resulted in a payment being required as part of the rights or obligations attached to the token, this may be a derivative. For example, payment arrangements associated with changes in the relevant product, index or asset could be structured as a 'smart contract' or self-executing contract represented in the token itself.[58]

The ASIC guidance notes that the "underlying instrument of a derivative may be, among other things, a share, a share price index, a pair of currencies or a commodity (including a cryptocurrency)."[59]

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[53] A definition of "managed investment scheme" is provided in section 9 of the Corporations Act 2001 (Cth), while chapter 5C contains detailed provisions related to such schemes. Section 764A specifically provides that an interest in a managed investment scheme is a financial product.

[54] INFO 225, *supra* note 10.

[55] *Id*.

[56] *Id*.

[57] *See* Corporations Act 2001 (Cth) s 761D (meaning of *derivative*).

[58] INFO 225, *supra* note 10.

[59] *Id*.

D. Non-Cash Payment Facilities

Under the Corporations Act, a non-cash payment facility "is an arrangement through which a person makes payments, or causes payments to be made, other than by physical delivery of currency."[60] The ASIC guidance states that tokens offered through an ICO are unlikely to be non-cash payment facilities. However, the categorization could apply where the ICO includes an arrangement that allows

- payments to be made to a number of payees in this form, or
- payments to be started in this form and converted to fiat currency to enable completion of the payment.[61]

IV. Treatment of Cryptoassets Not Considered Securities

As noted above, ASIC has stated that it does not consider Bitcoin to be a financial product under the Corporations Act 2001 (Cth). Therefore, offers and other activities relating to Bitcoin and similar cryptocurrencies are likely to be subject to the Australian Consumer Law, rather than to the requirements in the Corporations Act (including licensing and disclosure requirements). They are also subject to the capital gains tax system and cryptocurrency exchanges are required to comply with the AML/CFT law.

Both the Australian Consumer Law and the Corporations Act prohibit misleading and deceptive conduct.[62] As also noted above, ASIC has been delegated functions and powers under the Australian Consumer Law in the context of ICOs and other cryptoasset activities. The ASIC guidance provides the following examples of conduct that may be prohibited, regardless of the applicable law:

- the use of social media to generate the appearance of a greater level of public interest in an ICO
- undertaking or arranging for a group to engage in trading strategies to generate the appearance of a greater level of buying and selling activity for an ICO or a crypto-asset
- failing to disclose adequate information about the ICO, or
- suggesting that the ICO is a regulated product or the regulator has approved the ICO if that is not the case.[63]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As stated above, the treatment of different types of cryptocurrencies depends on their nature. There does not appear to be any specific restrictions on the sale of, or investments in, a particular type of cryptocurrency.

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[60] *Id. See also* Corporations Act 2001 (Cth) s 763D (when a person *makes non-cash payments*).

[61] INFO 225, *supra* note 10.

[62] *See* Competition and Consumer Act 2010 (Cth) sch 2 pt 2-1; Corporations Act 2001 (Cth) pt 7.7 div 7 (containing offenses related to a disclosure document being "defective," including where it contains a "misleading or deceptive statement.").

[63] INFO 225, *supra* note 10.

Bahamas

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I. Introduction

The Bahamas does not have any legislation that specifically applies to cryptocurrencies. The regulation of cryptocurrencies in the Bahamas currently varies according to whether a particular cryptocurrency is considered to be a security, currency, or commodity.[1]

In September 2018, the Central Bank of the Bahamas issued a caution to the public on initial coin offerings (ICOs) of virtual currencies. The caution advised the public that virtual currencies are not regulated by the Central Bank of the Bahamas or the Securities Commission of the Bahamas, and that the Bank has not issued any licenses to cryptocurrency operators to offer digital currency or associated services, including but not limited to cryptocurrency exchanges, crypto loans, and crypto and fiat processing either in, or from within, the Bahamas.[2]

II. Discussion Paper

The Central Bank of the Bahamas issued a discussion paper in November 2018 proposing different approaches to the regulation of cryptoassets.[3] The paper notes the Bank

> will impose constraints on the range of crypto instruments in which [supervised financial institutions] may transact--either directly on balance sheet or from an associative point of view. The Bank will also prohibit direct convertibility between Bahamian dollar (B$) currency or officially sanctioned B$ crypto instruments and foreign currency denominated crypto assets or non-resident sponsored instruments.[4]

The discussion paper states that some cryptoassets may have underlying features or uses that meet the criteria of a financial instrument, and these are already regulated by the existing financial

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[1] Aliya Allen & Graham Thompson, *The Bahamas' Place in a Cryptographic World: A Whitepaper*, GRAHAM THOMPSON (Mar. 2018), http://www.grahamthompson.com/uploads/1609/doc/Crypto_Article,_AAllen,_March_2018,_IBFS.pdf, *archived at* https://perma.cc/Y7SS-P7VL.

[2] *The Central Bank Cautions the Public on Initial Coin Offerings (ICOs) of Virtual Currencies*, THE CENTRAL BANK OF THE BAHAMAS (Sept. 6, 2018), https://www.centralbankbahamas.com/news.php?cmd=view&id=16453, *archived at* https://perma.cc/W5JV-4NTU.

[3] CENTRAL BANK OF THE BAHAMAS, DISCUSSION PAPER: PROPOSED APPROACHES TO REGULATION OF CRYPTO ASSETS IN THE BAHAMAS (Nov. 2018), https://www.centralbankbahamas.com/download/086534800.pdf, *archived at* https://perma.cc/26JZ-4FHP.

[4] *Id* at 1.

regulations, such as the Payment Systems Act,[5] the Payments Instrument (Oversight) Regulations,[6] and the Securities Industry Act 2011.[7] The discussion paper notes that these acts and regulations need to be amended to ensure that cryptoassets clearly fall within their scope. If proposals in the report are accepted, the Payments Instrument (Oversight) Regulations will be amended to cover the use of the Bahamian dollar and "foreign currency denominated crypto payments instruments,"[8] although the discussion paper notes that "only Central Bank sponsored digital currencies, or payments instruments fully backed by Central Bank issued currencies or legal tender deposits, will be eligible for issuance by licensed payment services providers."[9]

The closing date for responses to the discussion paper was set at December 15, 2018. As of March 26, 2019, it does not appear that any further papers have been issued or amendments made to the laws.

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[5] Payment Systems Act 2012, Act No. 7 of 2012, OFFICIAL GAZETTE, Mar. 20, 2012, http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2012/2012-0007/PaymentSystemsAct2012_1.pdf, *archived at* https://perma.cc/XM67-VTGW.

[6] Payments Instrument (Oversight) Regulations 2017, SI 2017/53, OFFICIAL GAZETTE, July 26, 2017, http://laws.bahamas.gov.bs/cms/images/LEGISLATION/SUBORDINATE/2017/2017-0053/PaymentInstrumentsOversightRegulations2017_1.pdf, *archived at* https://perma.cc/LV8C-ZD7V.

[7] Securities Industry Act 2011, Act No. 10 of 2011, OFFICIAL GAZETTE, June 1, 2011, http://laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/2011/2011-0010/SecuritiesIndustryAct2011_1.pdf, *archived at* https://perma.cc/AA7U-9L35.

[8] DISCUSSION PAPER: PROPOSED APPROACHES TO REGULATION OF CRYPTO ASSETS IN THE BAHAMAS, *supra* note 3, at 1.

[9] *Id*.

Belarus

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SUMMARY Belarus was the first Eastern European country to adopt comprehensive legislation governing cryptocurrencies. The Presidential Decree on the Development of the Digital Economy, effective in March 2018, provides the legal framework for cryptocurrencies and blockchain technologies. Cryptocurrency operations are limited to the residents of High-Tech Park—an entity created by the Presidential Decree to serve as project incubator and host.

In November 2018, High-Tech Park issued five additional regulations pertaining to initial coin offerings, cryptocurrency platforms, and exchange operators. The regulations also provide for compliance procedures with anti-money laundering and counter-financing of terrorism legislation.

I. Financial Regulation and Consumer Protection

Belarus was the first Eastern European country to adopt comprehensive legislation governing cryptocurrencies. The Presidential Decree on the Development of the Digital Economy, which became effective on March 28, 2018, provided the foundation for cryptocurrency and blockchain technology regulation. The aim of the Decree was to create a legal framework for the comprehensive regulation of businesses based on blockchain technology, including for regulating the issuance of and transactions with cryptocurrencies and tokens.[1] The Decree created the High Technologies Park (High-Tech Park, HTP)—a project incubator entity authorized to register and regulate entities (both residents and non-residents) engaged in the development of blockchain technologies and transactions with cryptocurrencies.

The Decree defined cryptocurrencies as a bitcoin or other digital signs (tokens) that is used in international circulation as a universal means of exchange.[2] The Decree also defined "cryptoplatform operators," "cryptocurrency exchange office operators," and initial coin offering (ICO) entities based on their activities in the area of blockchain and cryptocurrencies.

In November 2018, the HTP issued the following five regulations related to cryptocurrency and token activities:

[1] Decree of the President of the Republic of Belarus No. 8 of Dec. 21, 2017, http://pravo.by/document/?guid=12551&p0=Pd1700008&p1=1&p5=0 (in Russian), *archived at* https://perma.cc/7PJ7-YEKA.

[2] *Id.*

- Regulations on the Requirements to be Met by Certain Applicants for Their Registration as Residents of the High Technologies Park[3]
- Regulations on the Activity of a Cryptoplatform Operator[4]
- Regulations on the Activity of a Cryptocurrency Exchange Office Operator[5]
- Regulations on Provision of Services Related to the Creation and Placement of Digital Tokens (Tokens) and Carrying Out of Operations on the Creation and Placement of Own Digital Tokens (Tokens) (ICO Regulations)[6]
- Regulations on the Requirements for the Internal Control Rules of Residents of the High Technologies Park (Internal Control Regulations.[7]

In addition to containing more detailed definitions of the roles and authorities of various cryptocurrency entities, the regulations also introduced detailed and comprehensive requirements related to risk management, data protection, and anti-money laundering and countering-financing of terrorism (AML/CFT) procedures.

A. ICO Organizers

According to the ICO Regulations, an ICO organizer (which must be an HTP resident) must create and place tokens based on a client's request. The creation and issuance of a particular type of token must be based on the analysis of smart contracts. The organizer can also be engaged in consulting and promotional activities with regard to tokens.[8]

The ICO organizer is required to provide for the proper identification and vetting of clients, including identification of the first owner or owners of the tokens. It is the responsibility of the ICO organizer to vet potential clients in order to identify and manage risks based on the following categories:

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[3] Regulations on the Requirements to be Met by Certain Applicants for Their Registration as Residents of the High Technologies Park (HTP Applicant Regulations), http://www.park.by/content/docs/Regulations-on-Crypto/Applicants%20requirements.pdf (unofficial English translation), *archived at* https://perma.cc/3NZ2-LPD4.

[4] Regulations on the Activity of a Cryptoplatform Operator, http://www.park.by/content/docs/Regulations-on-Crypto/CryptoExchange.pdf (unofficial English translation), *archived at* https://perma.cc/GB8B-RY2D.

[5] Regulations on the Activity of a Cryptocurrency Exchange Office Operator, http://www.park.by/content/docs/Regulations-on-Crypto/Exchanger.pdf (unofficial English translation), *archived at* https://perma.cc/288K-D74M.

[6] Regulations on Provision of Services Related to the Creation and Placement of Digital Tokens (Tokens) and Carrying Out of Operations on the Creation and Placement of Own Digital Tokens (Tokens) (ICO Regulations), http://www.park.by/content/docs/Regulations-on-Crypto/ICO.pdf (unofficial English translation), *archived at* https://perma.cc/M6YF-JA2K.

[7] Regulations on the Requirements for the Internal Control Rules of Residents of the High Technologies Park (Internal Control Regulations), http://www.park.by/content/docs/Regulations-on-Crypto/AML.pdf (unofficial English translation), *archived at* https://perma.cc/T4J4-3YTJ.

[8] ICO Regulations, § 6.

- Credit risk;
- Country risk;
- Market risk;
- Liquidity risk;
- Operational risk; and
- Reputational risk.[9]

In addition, ICO organizers must comply with documentation, audit, accounting, and personnel requirements of the cryptocurrency regulations listed above.[10]

The ICO organizer is required to make audio or video recordings of negotiations with clients (with mandatory prior notification about this) and keep the data as well as all correspondence with clients for at least five years. Belarusian and foreign legal entities are allowed to be ICO customers. ICO customers must meet the following requirements: the presence of key personnel and good business standing of the customer, his founders, director, and other key professional staff members.[11]

B. Cryptoplatform Operators

According to the Regulations on the Activity of a Cryptoplatform Operator, a cryptoplatform operator (which must be an HTP resident) is an entity engaged in facilitating trading in tokens, including transactions placing the tokens on behalf of clients.[12] The Regulations also allow cryptoplatform operators to engage in transactions with tokens in the clients' interests on the basis of an agency relationship. In order to execute these functions, cryptoplatform operators must adopt "local acts," which are procedural guidelines for clients with a description of the procedures and processes for accepting clients.[13]

Cryptoplatform operators must adopt measures to limit suspicious transactions, especially with regard to anonymous tokens.[14] They must also provide for the complete separation of their own money and the money and tokens of clients; report on the balances of electronic money and tokens of each client; and report on the execution (or non-execution) of orders.[15] Furthermore, they must have in place due diligence and proper control measures in preventing trading involving minors, citizens of countries that prohibit dealings with cryptocurrency and tokens,

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[9] *Id.* § 4.3.1

[10] HTP Applicant Regulations § 15; Internal Control Regulations, ch. 7. *See also* DEV., BELARUS HAS ACCOMPLISHED THE SECOND STAGE OF CRYPTOCURRENCY REGULATION 6-7 (Nov. 2018),https://uploads.dev.by/files/Cryptocurrency-regulation-in-Belarus%20(1).pdf, *archived at* https://perma.cc/6G55-SKWQ.

[11] ICO Regulations, § 2.

[12] Regulations on the Activity of a Cryptoplatform Operator, ch. 4.

[13] *Id.* § 12.

[14] *Id.* § 15.

[15] *Id.* § 5

and citizens of Belarus who lack proper knowledge of cryptocurrencies.[16] The Regulations also prescribe general rules for fair and transparent advertising, which must inform clients of the potential risks in dealing with cryptocurrencies.[17]

II. Anti-Money Laundering Law

The Internal Control Regulations prescribe requirements and procedures for vetting, verifying, and managing risks associated with activities governed by AML/CFT legislation.[18] In particular, the Regulations state that internal control rules must be in compliance with part 3 of article 5 of the AML/CFT Law, as well as other legislative and regulatory acts.[19] The main principle of AML/CFT legislation--know your client--must be complied with. HTP residents have the right to refuse to execute financial transactions on behalf of a client if the latter proposes or intends to execute anonymous financial transactions.

HTP residents also have the right to refuse to executive financial transactions exceeding 2000 base values if the client proposes or intends to use mechanism other than bank or electronic money transfers. In this case, the HTP resident must, within one business day, inform financial intelligence bodies about such a refusal.

A. Data Collection and Protection

HTP residents are required keep information about relevant transactions for five years beginning from the date of the client's request for the execution of such transactions. Such information includes verification of the addresses (identifiers) of virtual wallets with a high degree risk score from a money laundering perspective.[20]

B. Internal Control

According to the Internal Control Regulations, an HTP resident's internal control system must include

> identification and verification of all clients executing financial transactions, and in the cases specified by these Regulations and (or) the internal control rules, and also of the clients executing other transactions (operations) with tokens, which are not financial operations;
>
> storage of the information which includes clients' identification data (including the information obtained following the results of verification, information updating);

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[16] *Id.* §§ 6& 8.

[17] *Id.* ch. 3. *See also* BELARUS HAS ACCOMPLISHED THE SECOND STAGE OF CRYPTOCURRENCY REGULATION, *supra* note 9, at 8.

[18] Internal Control Regulations, chs. 1-4.

[19] *Id.* § 5. Zakon o Merakh Po Predotvrasheniju Legalizatsii Dokhodov, Poluchennikh Nezakonnim Put'em i Finnansirovaniya Terroristicheskoj Deyateljnosti. 30 Ijun'a 2014 goda, N 165-3 [Law on Preventing Legaisation of Income Obtained through illegal activity and on Prevention of Terrorism Financing, June 30, 2014, N165-3], https://www.centraldepo.by/doc/1/11/, *archived at* https://perma.cc/8DJP-NCRB

[20] Internal Control Regulations, § 6.3.

> determination of the nature of the client's ordinary activity; and
>
> monitoring of all financial transactions of the clients . . . [21]

C. Risk Management Measures

The Regulations prescribe that the following areas of risk exposure should be considered by HTP residents:

- The client's profile risk;
- The geographic or regional risk;
- The transactional risk.[22]

III. Taxation

According to the Presidential Decree, the income of HTP residents as well as the income of natural persons incurred during the mining, creation, acquisition, or alienation of tokens is exempt from income tax.[23] The sale of tokens is also exempt from value-added tax.[24] These exemptions will be in effect until January 1, 2023.[25]

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[21] *Id.* § 7.

[22] *Id.* § 13.

[23] Decree of the President of the Republic of Belarus No. 8 of Dec. 21, 2017, § 3.

[24] *Id.*

[25] *Id.*

Bermuda

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Senior Foreign Law Specialist

SUMMARY Bermuda enacted comprehensive legislation in 2018 that regulates cryptocurrencies, digital assets, and initial coin offerings. There is an extensive set of licensing requirements designed to ensure that digital asset businesses meet standards to ensure liquidity and transparency and comply with anti-money laundering laws and various consumer protections.

I. Introduction

In 2018, Bermuda introduced two new pieces of legislation, the Digital Asset Business Act[1] and the Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 (ICO Act).[2] These Acts regulate businesses that handle digital assets and those providing initial coin offerings (ICOs). They are designed to ensure transparency, robust anti-money laundering procedures, and consumer protection. This report provides a high level overview of the requirements and oversight provided by the Acts.

II. Regulation of Cryptocurrencies

A. Digital Asset Activities

1. Licensing

The Digital Asset Business Act entered into force on September 10, 2018.[3] It was supplemented with the Digital Asset Business (Cybersecurity) Rules 2018,[4] the Digital Asset Business (Client

[1] Digital Asset Business Act 2018, 2018/28, http://www.bermudalaws.bm/laws/Annual Laws/2018/Acts/Digital Asset Business Act 2018.pdf, *archived at* https://perma.cc/KA74-XMSH.

[2] Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018, 2018/20, http://www.bermudalaws.bm/laws/Annual Laws/2018/Acts/Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018.pdf, *archived at* https://perma.cc/5REL-UF5K.

[3] Digital Asset Business Act 2018 Commencement Day Notice 2018, BR 97/2018, www.bermudalaws.bm/laws/Annual Laws/2018/Statutory Instruments/Digital Asset Business Act 2018 Commencement Day Notice 2018.pdf, *archived at* https://perma.cc/SD6P-6QY7

[4] Digital Asset Business (Cybersecurity) Rules 2018, BR 99/2018, http://www.bermudalaws.bm/laws/Annual Laws/2018/Statutory Instruments/Digital Asset Business (Cybersecurity) Rules 2018.pdf, *archived at* https://perma.cc/WNK8-5SLD.

Disclosure) Rules 2018,[5] and the Digital Asset Business (Prudential Standards) (Annual Return) Rules 2018.[6]

The 2018 Act regulates "digital asset businesses" in Bermuda, and requires businesses that are incorporated or formed either within or outside of Bermuda that conduct digital asset business in, or from within, Bermuda to obtain a license from the Bermuda Monetary Authority. Digital assets are defined as

> anything that exists in binary format and comes with the right to use it and includes a digital representation of value that—
>
> (a) is used as a medium of exchange, unit of account, or store of value and is not legal tender, whether or not denominated in legal tender;
> (b) is intended to represent assets such as debt or equity in the promoter;
> (c) is otherwise intended to represent any assets or rights associated with such assets; or
> (d) is intended to provide access to an application or service or product by means of distributed ledger technology;
>
> but does not include—
>
> (e) a transaction in which a person grants value as part of an affinity or rewards program, which value cannot be taken from or exchanged with the person for legal tender, bank credit or any digital asset; or
> (f) a digital representation of value issued by or on behalf of the publisher and used within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform[.][7]

Businesses that require a license under the Act include those involved in

> (a) issuing, selling or redeeming virtual coins, tokens or any other form of digital assets;
> (b) operating as a payment service business utilising digital assets which includes the provision of services for the transfer of funds;
> (c) operating as an electronic exchange;
> (d) providing custodial wallet services;
> (e) operating as a digital assets services vendor.[8]

The Act specifically excludes the following activities from the definition of digital asset businesses:

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[5] Digital Asset Business (Client Disclosure) Rules 2018, BR 100/2018, www.bermudalaws.bm/laws/Annual Laws/2018/Statutory Instruments/Digital Asset Business (Client Disclosure) Rules 2018.pdf, *archived at* https://perma.cc/X4ES-6SD5.

[6] Digital Asset Business (Prudential Standards) (Annual Return) Rules 2018, BR 98/2018, http://www.bermudalaws.bm/laws/Annual%20Laws/2018/Statutory%20Instruments/Digital%20Asset%20Business%20(Prudential%20Standards)%20(Annual%20Return)%20Rules%202018.pdf, , *archived at* https://perma.cc/93DQ-WMQL.

[7] Digital Asset Business Act 2018, § 2(1).

[8] *Id*. § 10(1).

(a) contributing connectivity software or computing power to a decentralized digital asset, or to a protocol governing transfer of the digital representation of value;
(b) providing data storage or security services for a digital asset business, but is not otherwise engaged in digital asset business activity on behalf of other persons;
(c) the provision of any digital asset business activity by an undertaking solely for the purposed of its business operations or the business operations of any subsidiary of it.[9]

In order to obtain a license, the business must pay a fee and apply to the Bermuda Monetary Authority. The Act requires businesses to include the following information in the application:

(a) a business plan setting out the nature and scale of the digital asset business activity which is to be carried on by the applicant;
(b) particulars of the applicant's arrangements for the management of the business;
(c) policies and procedures to be adopted by the applicant to meet the obligations under this Act and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008;
(d) such other information and documents as the Authority may reasonably require for the purpose of determining the application; and
(e) an application fee which shall be an amount determined by the Authority commensurate to the nature, scale and complexity of the digital asset business to be carried on by the undertaking and as may be prescribed under the Bermuda Monetary Authority Act 1969.[10]

Bermuda offers two types of digital asset business licenses:

- Class F licenses enable individuals to provide any digital asset business activities.
- Class M licenses enables a person to provide all digital asset business activities for a specified period of time, which may be extended by the Bermuda Monetary Authority.[11]

Applicants requesting a license under the Act should specify the type of class of license they are seeking. The Bermuda Monetary Authority also has the authority to determine which class of license is issued to a business. When making this determination, the Bermuda Monetary Authority considers the interests of clients, potential clients, and the public and any obligations it believes should be imposed on the applicant "due to the nature of the digital asset business activities it intends to carry on."[12]

In order to issue a license, the Bermuda Monetary Authority must be satisfied of the following:

[9] *Id*. § 11(5).

[10] *Id*. § 12(6).

[11] *Id*. § 12(1).

[12] *Id*. § 14(2)(b).

- Controllers of the business are fit and proper persons;[13]
- Business is conducted in a prudent manner and in compliance with any codes of practice,[14] accounting requirements, and Bermuda's anti-money laundering legislation;
- Business is undertaken with skill and integrity;
- Minimum net assets of US$100,000 will be maintained, unless the Bermuda Monetary Authority has determined another amount;
- Sufficient insurance is carried to cover the risks inherent in the operation of its business, and the amount must be "commensurate with the nature and scale of its digital asset business";[15] and
- The business is directed by two individuals overseen by non-executive members.[16]

More detailed guidance on these requirements is contained in a "Statement of Principles" issued by the Bermuda Monetary Authority.[17] Businesses that conduct digital asset activities without a license are subject to a fine of up to US$250,000 and/or up to five years imprisonment.[18]

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[13] *Id*. sched. 1 ¶¶ 1-3. These paragraphs provide the Bermuda Monetary Authority with the following authorities:

> (2) In determining whether a person is a fit and proper person to hold any particular position, regard shall be had to his probity, to his competence and soundness of judgement for fulfilling the responsibilities of that position, to the diligence with which he is fulfilling or likely to fulfil those responsibilities and to whether the interests of clients or potential clients of the licensed undertaking are, or are likely to be, in any way threatened by his holding that position.
>
> (3) Without prejudice to the generality of the foregoing provisions, regard maybe had to the previous conduct and activities in business or financial matters of the person in question and, in particular, to any evidence that he has—
>
> (a) committed an offence involving fraud or other dishonesty, or violence;
>
> (b) contravened any provision made by or under any enactment appearing to the Authority to be designed for protecting members of the public against financial loss due to dishonesty, incompetence or malpractice by persons concerned in the provision of banking, insurance, investment or other financial services or the management of companies or against financial loss due to the conduct of discharged or undischarged bankrupts;
>
> (c) engaged in any business practices appearing to the Authority to be deceitful or oppressive or otherwise improper (whether lawful or not) or which otherwise reflect discredit on his method of conducting business;
>
> (d) engaged in or has been associated with any other business practices or otherwise conducted himself in such a way as to cast doubt on his competence and soundness of judgement.

[14] BERMUDA MONETARY AUTHORITY, DIGITAL ASSET BUSINESS ACT 2018: CODE OF PRACTICE (Sept. 2018), www.bma.bm/document-centre/policy-and-guidance/DAB/Digital Asset Business Code of Practice 2018.pdf, *archived at* https://perma.cc/M5LU-3DAN.

[15] Digital Asset Business Act 2018, sched. 1 ¶ 2(6).

[16] *Id*. sched. 1.

[17] BERMUDA MONETARY AUTHORITY, DIGITAL ASSET BUSINESS ACT 2018: STATEMENT OF PRINCIPLES (Sept. 2018), www.bma.bm/document-centre/policy-and-guidance/DAB/DAB Statement of Principles.pdf, *archived at* https://perma.cc/Q66A-8MP7.

[18] *Id*.

2. Oversight

In order to aid efficient oversight of activities conducted under the Act, licensed digital asset businesses must maintain a head office in Bermuda that directs and manages the digital asset business. When determining whether such operations occur in Bermuda, the Bermuda Monetary Authority considers where the majority of decision making of the business occurs, if senior executives responsible for the digital asset business are located in Bermuda, and where meetings of the board of directors occur.[19]

Businesses licensed under the Act are also required to appoint a senior representative who has been approved by the Bermuda Monetary Authority to act in this capacity on behalf of the business.[20] The Act imposes a duty on the senior representative to notify the Bermuda Monetary Authority where he or she believes any of the following circumstances has arisen in the digital asset business:

- There is a likelihood of the business becoming insolvent;
- The business is failing to comply with any conditions imposed by the Bermuda Monetary Authority;
- The business is involved in any criminal proceedings in Bermuda or overseas;
- The business stops operating a digital asset business;
- There are any material changes to the business; or
- A cyber-reporting event occurs.[21]

The Act bestows the Bermuda Monetary Authority with a number of supervisory powers, including the right to investigate into the activities of businesses; power to obtain information and reports; the ability to require licensed businesses to produce documentation; and a right of entry onto licensed businesses to obtain information and documents.[22]

Businesses licensed under the Digital Asset Business Act are required to prepare annual audited financial statements or accounts from an approved auditor of all transactions and balances of its businesses.[23]

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[19] Digital Asset Business Act 2018, § 21.

[20] *Id*. § 19.

[21] *Id*. § 20.

[22] *Id*. §§ 58-60.

[23] *Id*. § 31.

B. Initial Coin Offerings

The Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 (ICO Act) entered into force on July 9, 2018.[24] The ICO Act provides a framework for ICOs that occur in, or from within, Bermuda. The Act provides that no person is permitted to conduct an ICO from in, or within, Bermuda unless they are a company that is registered with the Registrar of Companies.[25] The ICO Act further provides that ICOs are a "restricted activity" and thus requires Bermuda companies to apply to the Minister for consent before launching one from in, or within, Bermuda. The ICO Act defines digital asset in the same manner as the Digital Asset Business Act, set out above.

The Fintech Advisory Committee reviews each application and then makes a recommendation to the Minister as to whether or not it should be approved. The application must include the details of the development and implementation of the product or services, how long it will take to complete, along with information about rights, functionality, features, and transferability. To ensure that anti-money laundering laws are complied with, the ICO must collect, confirm, and store the identity of any purchasers of tokens or coins offered.

Upon approval from the Minister, the ICO must publish an "offer document" and file it with the Registrar of Companies. The document must include details such as the business, or proposed business, the project, rights and restrictions on the digital assets as well as warning language about the risks associated with investing in ICOs.[26] The warning should appear both in the offer document and on the ICO platform itself when the offer is open or suspended. The warning statement must include the following details:

> (a) information regarding any substantial risks to the project which are known or reasonably foreseeable;
> (b) information as to a person's rights or options if the project which is the subject of the Initial Coin Offering in question does not go forward;
> (c) a description of the rights (if any) in relation to the digital assets that are being offered;
> (d) information regarding any disclaimer in respect of guarantees or warranties in relation to the project to be developed or any other asset related to the Initial Coin Offering.[27]

The ICO Act provides for two different regimes according to the type of assets issued. ICOs that are launched solely for crowdfunding purposes are regulated by the Companies Act 1981,[28] the

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[24] The Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 Commencement Day Notice 2018, BR 63/2018, www.bermudalaws.bm/laws/Annual Laws/2018/Statutory Instruments/Companies and Limited Liability Company (Initial Coin Offering) Amendment Act 2018 Commencement Day Notice 2018.pdf, *archived at* https://perma.cc/RV4K-C98P.

[25] *Id.* § 4.

[26] *Id.*

[27] *Id.*

[28] Companies Act 1981, 1981/59, http://www.bermudalaws.bm/laws/Consolidated Laws/Companies Act 1981.pdf, *archived at* https://perma.cc/8KP9-BDEF.

Limited Liability Company Act[29] and the Register of Companies. ICOs that involve virtual currencies or digital assets fall under the Digital Asset Business Act 2018 and are overseen by the Bermuda Monetary Authority.

III. Consumer Protection

The Digital Asset Business Act 2018 requires licensed businesses to conduct their business in a prudent manner, and specifically states that the business

> shall not be regarded as conducting its business in a prudent manner unless it maintains or, as the case may be, will maintain minimum net assets of $100,000 or such amount as the Authority may direct taking into consideration the nature, size and complexity of the licensed undertaking.[30]

The Digital Asset Business Act requires licensed businesses that hold client assets to keep these assets separately from other business accounts.[31] It further requires licensed businesses to maintain either a surety bond, trust account maintained by a qualified custodian, or indemnity insurance in the form and amount, as approved by the Bermuda Monetary Authority in order to protect the businesses clients.[32]

Licensed businesses that have custody of one or more digital assets are required to maintain a sufficient amount of digital assets to meet the obligations it owes to its clients.[33] The Digital Asset Business Act further mandates businesses should

> ensure that any assets belonging to clients are kept segregated from the DAB's own assets. The DAB may place client assets in a trust with a qualified custodian, or have a surety bond or indemnity insurance, or implement other arrangements to ensure the return of client assets in the event the DAB is placed into liquidation, becomes insolvent or is a victim of theft.[34]

The Bermuda Monetary Authority has issued a draft code of practice on the custody of digital assets to provide further clarity over the standards it expects from businesses when safeguarding customer assets.[35] The draft code covers the safekeeping of digital assets in the custody of the

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[29] Limited Liability Company Act 2016, 2016/40, http://www.bermudalaws.bm/laws/Annual Laws/2016/Acts/Limited Liability Company Act 2016.pdf, *archived at* https://perma.cc/X4WN-KXAB.

[30] Digital Asset Business Act 2018, sched. 1, ¶ 2.

[31] *Id.* § 17.

[32] *Id.* § 18.

[33] *Id.* § 18.

[34] DIGITAL ASSET BUSINESS ACT 2018: CODE OF PRACTICE, *supra* note 14, para. 34.

[35] BERMUDA MONETARY AUTHORITY, DRAFT DIGITAL ASSET CUSTODY CODE OF PRACTICE 1 (Dec. 2018), http://www.bma.bm/document-centre/consultation-papers/Digital Assets Business/Digital Asset Custody Code of Practice.pdf, *archived at* https://perma.cc/L8FF-EVX6.

digital asset business, including recovery protocols in cases of compromised or corrupted assets, the handling of transactions, and operational policies and procedures.[36]

The Bermuda Monetary Authority may direct licensed businesses to conduct certain actions that are "desirable for safeguarding the interests of the licensed undertaking's clients or proposed clients"[37] if it believes the businesses are in breach of any provisions of the Act, regulations, or rules that apply to it. Failing to comply with a direction is publishable by a fine of up to US$2 million.[38] The Bermuda Monetary Authority may also conduct an investigation into the nature, conduct, or state of a business licensed under the Digital Asset Business Act, suspected contraventions of the Digital Asset Business Act, as well as the ownership and control of a licensed business.[39]

IV. Anti-Money Laundering Laws

The Digital Asset Business Act amended Bermuda's anti-money laundering laws to include businesses licensed to conduct digital asset business within the definition of regulated financial institution under the Proceeds of Crime Act 1997 (POCA Act),[40] the Anti-Terrorism (Financial and Other Measures) Act 2004,[41] and the Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.[42] The obligations contained in these Acts therefore apply to businesses licensed under the Digital Asset Business Act. Anti-money laundering procedures and policies are required to be included in the license application under the Digital Asset Business Act,[43] and any branches or subsidiaries located overseas must also comply with Bermuda's anti-money laundering laws. In addition, the Digital Asset Business Act requires licensed businesses to operate in a prudent manner, and states part of that prudent manner involves complying with Bermuda's anti-money laundering legislation.[44]

The anti-money laundering laws require that senior management of digital asset businesses

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[36] *Id*. para. 1.4.

[37] Digital Asset Business Act 2018, § 28(2).

[38] *Id*. § 28(3).

[39] *Id*. § 61.

[40] Proceeds of Crime Act 1997, 1997/34, http://www.bermudalaws.bm/laws/Consolidated Laws/Proceeds of Crime Act 1997.pdf, *archived at* https://perma.cc/AM9Q-GX64.

[41] Anti-Terrorism (Financial and Other Measures) Act 2004, 2004/31, http://www.bermudalaws.bm/laws/Consolidated Laws/Anti-Terrorism (Financial and Other Measures) Act 2004.pdf, *archived at* https://perma.cc/Z83Y-J6RK.

[42] Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008, BR 77/2008, *available at* http://www.bermudalaws.bm/laws/Consolidated Laws/Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financing) Regulations 2008.pdf, *archived at* https://perma.cc/CE8V-72FY.

[43] Digital Asset Business Act 2018, § 12(6)(c).

[44] *Id*. sched. 1, ¶ 2. *See also* Proceeds of Crime Act 1997, Anti-Terrorism (Financial and Other Measures) Act 2004, and Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financial) Regulations 2008.

- Ensure compliance with the Acts and Regulations;
- Identify, assess and effectively mitigate the ML/TF risks the RFI faces amongst its customers, products, services, transactions, delivery channels, outsourcing arrangements and geographic connections;
- Conduct an AML and Sanctions risk assessment and ensure that the risk assessment findings are maintained up to date;
- Appoint a Compliance Officer at the senior management level to oversee the establishment, maintenance and effectiveness of the RFI's AML/ATF policies, procedures and controls;
- Appoint a Reporting Officer to process client disclosures;
- Screen employees against high standards;
- Ensure that adequate resources are periodically trained and devoted to the RFI's AML/ATF policies, procedures and controls;
- Audit and periodically test the RFI's AML/ATF policies, procedures and controls for effectiveness and address any issues uncovered adequately and timely; and
- Recognise potential personal liability if legal obligations are not met.[45]

Failing to comply with Bermuda's anti-money laundering laws can result in substantial penalties. Failing to comply with the requirements contained in the POCA Regulations is a criminal offence, punishable by up to two years imprisonment and/or a fine of up to US$750,000.[46] The Bermuda Monetary Authority may impose a financial penalty of up to US$10 million for each failure to comply with the regulations, along with restrictions on the license issued and other disciplinary measures.[47]

V. Taxation

Bermuda is a low tax jurisdiction and there are no specific taxes on income, capital gains, or other taxes on digital assets in Bermuda.

[45] BERMUDA MONETARY AUTHORITY, ANNEX VIII: SECTOR-SPECIFIC GUIDANCE NOTES FOR DIGITAL ASSET BUSINESS (DAB), para. VIII.25, ¶ http://www.bma.bm/document-centre/policy-and-guidance/DAB/Annex VIII-Sector-Specific Guidance Notes for Digital Assets.pdf (last visited Apr. 19, 2019), *archived at* https://perma.cc/MZD3-R4KK.

[46] Proceeds of Crime (Anti-Money Laundering and Anti-Terrorist Financial) Regulations 2008, reg. 19.

[47] The Proceeds of Crime (Anti-Money Laundering & Anti-Terrorist Financing Supervision and Enforcement) Act 2008, § 20.

Brazil

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SUMMARY Cryptocurrencies are not yet regulated in Brazil. Financial authorities in Brazil have issued statements regarding the risks posed by this type of currency and its lack of guarantee by the monetary authorities, and has advised that companies that trade in virtual currencies are not regulated, supervised, or licensed to operate by the central bank.

Recently, the Brazilian Securities and Exchange Commission issued statements saying, among other things, that cryptocurrencies could not be classified as financial assets and could not directly be acquired by investment funds, but indirect investments in cryptoassets abroad could be acquired provided that such assets were regulated in that foreign market.

For taxation purposes, gains obtained from the disposal of virtual currencies must be declared to the Brazilian Internal Revenue Service and taxes paid accordingly.

I. Approach to Assets Created Through Blockchain

A. Policy Statement No. 25,306 of February 19, 2014

On February 19, 2014, the Brazilian Central Bank (Banco Central do Brasil, BACEN) issued Policy Statement No. 25,306 on the risks related to the acquisition of so-called "virtual currencies" or "encrypted currencies" and transactions carried out with these currencies.[1] The purpose of the statement was, inter alia, to clarify that virtual currencies should not be confused with electronic money (*moeda eletrônica*) as defined in Law No. 12,865 of October 9, 2013, and its regulations.[2]

"Electronic money" is defined in article 6(VI) of Law No. 12,865 as a resource stored in a device or electronic system that allows the final user to make payment transactions in the national currency (*Brazilian Real*).[3] The statement explained that, in contrast, virtual currencies are denominated in a different unit of account from the currencies issued by sovereign governments and are not stored in a device or electronic system in national currency.[4]

According to the statement,

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[1] BANCO CENTRAL DO BRASIL, Policy Statement No. 25,306 of February 19, 2014, http://www.bcb.gov.br/pom/spb/ing/ IComunicado25306.pdf, *archived at* https://perma.cc/NC7T-TVSR.

[2] *Id.*

[3] Lei No. 12.865, de 9 de Outubro de 2013, https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/lei/l12865.htm, *archived at* https://perma.cc/5ZNY-3KVD.

[4] Policy Statement No. 25,306, *supra* note 1.

- the usage of virtual currencies and whether regulations applicable to financial and payments systems apply to them have been the theme of international debate and public announcements by monetary authorities and other public institutions, with few concrete conclusions thus far;
- virtual currencies are not issued or guaranteed by a monetary authority;
- these virtual assets are not regulated or supervised by the monetary authorities of any country;
- there is no government mechanism that guarantees the value in official currency of those instruments known as virtual currencies; and
- BACEN is monitoring the evolution of the usage of these instruments, as well as the related discussions in international forums—especially regarding their nature, ownership, and functioning—in order to possibly adopt measures within its sphere of legal competency, if necessary.[5]

B. Financial Regulation and Consumer Protection

On September 18, 2018, the Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica, CADE), Brazil's antitrust regulator, started an investigation into the country's financial institutions for allegedly abusing market power to undermine the performance of cryptocurrency brokers.[6]

The probe was initiated at the request of the Brazilian Blockchain and Cryptocurrency Association (Associação Brasileira de Criptomoedas e Blockchain, ABCB) to analyze the performance of major national banks in relation to the brokerage firms following several complaints that the banks undermine the economic order by closing accounts without explanation.[7]

According to CADE's superintendent, banks may be "imposing restrictions or even prohibiting . . . the access of crypto-currency brokerages to the financial system, which, in fact, can cause losses to brokers."[8]

In response to CADE's investigation, banks reported that the accounts were closed because of lack of basic customer data required by anti-money laundering legislation.[9]

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[5] *Id.*

[6] *Cade Abre Inquérito Contra Bancos por Supostamente Prejudicarem Corretoras de Criptomoedas*, REUTERS (Sept. 18, 2018), https://br.reuters.com/article/businessNews/idBRKCN1LY36O-OBRBS?feedType=RSS&feedName=businessNews, *archived at* https://perma.cc/FA3V-DNQM.

[7] *Id.*

[8] *Id.*

[9] *Id.*

C. Anti-Money Laundering Law

1. Law No. 9,613 of March 3, 1998

Article 1 of Law No. 9,613 of March 3, 1998, provides that to hide or conceal the nature, origin, location, disposition, movement or ownership of property, rights or values arising, directly or indirectly, from a criminal offense is punished with imprisonment from three to ten years and a fine.[10]

Apparently, articles 9, 10, and 11 of Law No. 9,613 were used by the defendants in CADE's investigation. Article 9 determines that natural persons and companies (pessoas jurídicas) are subject to the obligations referred to in articles 10 and 11 of the Law if they engage in

> I - the acquisition, intermediation and application of financial resources of third parties, in national or foreign currency;
>
> II - the purchase and sale of foreign currency or gold as a financial asset or foreign exchange instrument;
>
> III - the custody, issuance, distribution, liquidation, negotiation, intermediation or administration of securities.[11]

Article 10 of Law No. 9,613 establishes that the persons and companies referred to in article 9 must:

> I - identify their clients and maintain updated records, in accordance with instructions issued by the competent authorities;
>
> II - keep a record of all transactions in national or foreign currency, securities (títulos e valores mobiliários, títulos de crédito), metals, or any asset that can be converted into cash, that exceeds the limit set by the competent authority and in accordance with instructions issued by them;
>
> III - adopt policies, procedures and internal controls, compatible with their size and volume of operations, enabling them to comply with the provisions of articles 10 and 11 of Law No. 9,613, as disciplined by the competent bodies;
>
> IV - register and keep their registers up-to-date at the regulatory or supervisory body and, failing that, at the Financial Activities Control Council (Conselho de Controle de Atividades Financeiras, COAF), in the form and conditions established by them;
>
> V - respond to requests made by COAF at the periodicity, form and conditions established by it, and must preserve, under the terms of the law, the confidentiality of the information provided.[12]

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[10] Lei No. 9.613, de 3 de Março de 1998, art. 1, http://www.planalto.gov.br/CCIVIL_03/LEIS/L9613compilado.htm, *archived at* https://perma.cc/7RP8-KWEJ.

[11] *Id.* art. 9. The sole paragraph of article 9 further details the natural persons and companies that are subject to the same obligations specified in articles 10 and 11 of Law No. 9,613.

[12] *Id.* art. 10. COAF is a body under the Ministry of Justice and Public Security, and was created by article 14 of Law 9,613 of 1998, and acts primarily in the prevention and combating of money laundering and the financing of terrorism. *Conselho de Controle de Atividades Financeiras – COAF*, MINISTÉRIO DA ECONOMIA,

In the event that the client is a legal entity, the identification referred to in article 10(I) must cover the individuals authorized to represent it, as well as their owners.[13]

Article 11 determines that the persons and companies referred to in article 9 must

> I - pay special attention to operations which, according to instructions issued by the competent authorities, may constitute serious indications of the crimes provided for in Law No. 9,613 or related to them;
>
> II - notify the COAF, avoiding to give notice of such act to any person, including the one to whom the information refers to, within twenty four hours, the proposal or realization:
>
> > a) of all transactions referred to in article 10(II) (above), accompanied by the identification referred to in article 10(I) (above); and
> >
> > b) operations referred to in article 11(I) (above);
>
> III - notify the regulatory or supervisory body of their activity or, in their absence, to the COAF, at the periodicity, form and conditions established by them, the non-occurrence of proposals, transactions or operations that may be communicated under the terms of article 11(II) (above).[14]

The competent authorities, in the instructions referred to in article 11(I) must prepare a list of operations that, due to their characteristics, with respect to the parties involved, values, form of performance, instruments used, or lack of economic or legal grounds, can configure the hypothesis provided for therein.[15]

2. Bill of Law No. 2,303 of 2015

A Bill of Law that would have amended Law No. 12,865 of October 9, 2013, which provides for payment arrangements and payment institutions that are part of the Brazilian Payment System, and Law No. 9,613 of March 3, 1998, which provides for crimes of money laundering or concealment of assets and the prevention of the use of the financial system for illicit activities, was introduced in the Brazilian Chamber of Deputies in 2015.[16]

The Bill would have provided for the inclusion of virtual currencies and air mileage programs in the definition of "payment arrangements" under the supervision of the BACEN, and would have required individuals and companies engaged in investment businesses to closely monitor deals involving virtual currencies and air mileage programs for the crimes of money laundering or concealment of assets.[17]

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http://www.fazenda.gov.br/acesso-a-informacao/institucional/estrutura-organizacional/conselho-de-controle-de-atividades-financeiras-coaf (last visited Apr. 1, 2019), *archived at* https://perma.cc/9JQ6-T66K.

[13] Lei No. 9.613, art. 10(§ 1).

[14] *Id.* art. 11.

[15] *Id.* art. 11(§ 1).

[16] *Projeto de Lei No. 2.303, de 2015*, CÂMARA DOS DEPUTADOS, http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1555470, *archived at* https://perma.cc/97Y2-NJDV.

[17] *Id.*

Law No. 12,865 currently defines "payment arrangement" as a set of rules and procedures that regulate the rendering of a particular service to the public that is accepted by more than one recipient, through direct access by end users, payers, and recipients.[18]

The Bill did not move forward and lapsed on January 31, 2019.[19]

D. Taxation

1. Personal Income Tax

A booklet prepared by the Brazilian Secretariat of Federal Revenue (Secretaria da Receita Federal do Brasil, RFB)[20] containing questions and answers regarding personal income tax for 2018 includes information on how to declare virtual currencies on a person's income tax return and the appropriate taxation.[21]

The document states that virtual currencies must be declared. It explains that virtual currencies (bitcoins, for example), although not considered as currency under the current regulatory framework, should be declared in the Assets and Rights Tab as "other assets," since they can be treated as a financial asset. The acquisition value of the assets must be stated. As this type of "currency" does not have official quotation, since there is no organ responsible for controlling its issue, there is no legal rule for the conversion of amounts for tax purposes. However, the taxpayer must keep documentation proving the authenticity of these values.[22]

Another question asks whether gains obtained from the alienation of virtual currency are taxed. The answer provided indicates that where the gains obtained from the sale of virtual currencies (bitcoins, for example) in one month is more than R$35,000.00 (approx.US$9,256.00), these are taxed as capital gains, with progressive rates applying, and income tax must be paid before the last business day of the month following the month of the transaction. The taxpayer must keep documentation proving the authenticity of the transactions.[23]

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[18] Lei No. 12.865 de 9 de Outubro de 2013, art. 6(I). https://www.planalto.gov.br/ccivil_03/_ato2011-2014/2013/_lei/l12865.htm, *archived at* https://perma.cc/5ZNY-3KVD.

[19] *Projeto de Lei No. 2.303, de 2015*, *supra* note 51.

[20] *Institucional*, RECEITA FEDERAL, http://receita.economia.gov.br/sobre/institucional, *archived at* https://perma.cc/FLG2-SQTC. The Brazilian Secretariat of Federal Revenue is a specific body, which is subordinated to the Ministry of Finance, performing essential functions so that the State can fulfill its objectives. It is responsible for the administration of taxes of competence of the Union, including pensions, and those incidents on foreign trade, covering a significant part of the country's social contributions.

[21] MINISTÉRIO DA ECONOMIA, SECRETARIA ESPECIAL DA RECEITA FEDERAL DO BRASIL, PERGUNTAS E RESPOSTAS, IMPOSTO SOBRE A RENDA DA PESSOA FÍSICA (2019), http://receita.economia.gov.br/interface/cidadao/irpf/2019/perguntao/perguntas-e-respostas-irpf-2019.pdf, *archived at* https://perma.cc/ZSN3-V5BT.

[22] *Id.* at 183 (Question 447).

[23] *Id.* at 245 (Question 607).

2. Public Consultation

On October 30, 2018, the RFB issued a public consultation document seeking comments on the draft of a Normative Instruction regarding transactions performed with cryptoassets.[24]

The document proposes requiring that cryptoasset exchanges (companies that negotiate and/or enable the purchase and sale of cryptoassets) provide information of interest to the RFB regarding transactions involving cryptoassets, in addition to providing for the declaration by individuals and legal entities when using exchanges abroad or not using exchanges for transactions involving cryptoassets.[25]

The significant increase in recent years in the cryptoassets market in the country and the fact that the number of crypto exchange clients has already exceeded the number of users registered at the Brazilian stock exchange based in Sao Paulo, are mentioned as reasons for such a measure.[26]

II. Custodianship of Cryptocurrencies by Financial Institutions

In another statement associated with the growing interest of individuals and companies in virtual currencies, on November 16, 2017, BACEN warned of the risks derived from storing and negotiating virtual currencies and reiterated that these currencies are neither issued nor guaranteed by any monetary authority.[27]

The statement further explained that companies that negotiate or store virtual currencies on behalf of their owners, be they persons or companies, are neither regulated, licensed to operate, nor supervised by BACEN; there is no specific provision governing virtual currencies in the legal and regulatory frameworks associated with the National Financial System; and BACEN, in particular, neither regulates nor supervises transactions involving virtual currencies.[28] The statement again reminded persons that virtual currencies are not to be confused with e-money, which is defined in accordance with Law No. 12,865 of October 9, 2013, and controlled by BACEN regulations approved under the guidelines of the National Monetary Council.[29]

In addition, the statement noted that carrying out international wire transfers referenced in foreign currencies through the use of virtual currencies and related instruments does not exempt companies from the obligation to comply with foreign exchange rules—especially the rule

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[24] Consulta Pública RFB No. 06/2018, http://receita.economia.gov.br/sobre/consultas-publicas-e-editoriais/consulta-publica/arquivos-e-imagens/consulta-publica-rfb-no-06-2018.pdf, *archived at* https://perma.cc/G423-RACB.

[25] *Id*. Exposição de Motivos.

[26] *Id*. at 2.

[27] BANCO CENTRAL DO BRASIL, COMMUNIQUÉ 31,379 OF NOVEMBER 16, 2017, http://www.bcb.gov.br/ingles/norms/ Virtual-currencies-Communique-31379-English.pdf, *archived at* https://perma.cc/N7KB-P5J9.

[28] *Id.*

[29] *Id.*

establishing that this type of transaction may only be performed by institutions authorized by BACEN to operate in the foreign exchange market.[30]

III. Regulation of Cryptocurrencies as Financial Securities

A. CVM Statement No. 1 of January 12, 2018

On January 12, 2018, the Brazilian Securities and Exchange Commission (Comissão de Valores Mobiliários, CVM) issued Statement No. 1 (Ofício Circular), which was addressed to officers responsible for the administration and management of investment funds regulated by CVM Instruction No. 555 of December 17, 2014, that are investing in cryptocurrencies.[31]

The Statement noted that both in Brazil and in other jurisdictions the legal and economic nature of these investment modalities has been discussed, without a conclusion having been reached on a particular conceptualization, especially in the domestic market and within its internal regulation.[32] Based on this uncertainty, the interpretation of the CVM's technical area is that cryptocurrencies cannot be classified as financial assets for the purposes of CVM Instruction 555/14, and for this reason their direct acquisition by regulated investment funds is not allowed.[33]

The Statement further explained that the CVM has received inquiries regarding the possibility of investment funds being set up in Brazil for the specific purpose of investing in investment funds incorporated in other jurisdictions where they are admitted and regulated that invest in cryptocurrencies, or investing in derivatives allowed to be traded in regulated environments in other jurisdictions.[34] In this regard, the CVM emphasized that the existing discussions about investment in cryptocurrencies, both directly by funds or in other ways, are still in an initial stage.[35]

The CVM concluded that, based on its understanding of the technical area, there are still many other inherent risks associated with such investments (such as cybersecurity and privacy risks), and with the future legality of their acquisition or trade, and that considering all these variables it was not possible for the CVM to reach a conclusion regarding the possibility of the constitution and structuring of indirect investments in cryptocurrencies. Therefore, the CVM advised managers of

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[30] *Id.*

[31] COMISSÃO DE VALORES MOBILIÁRIOS, OFÍCIO CIRCULAR NO. 1/2018/CVM/SIN (Jan. 2, 2018), http://www.cvm.gov.br/export/ sites/cvm/legislacao/oficios-circulares/sin/anexos/oc-sin-0118.pdf, *archived at* https://perma.cc/486G-8TS4.

[32] *Id.*

[33] *Id.* Article 2(V) of CVM Instruction 555/2014 lists the financial assets applicable to investment funds registered with CVM. Instrução CVM No. 555, de 17 de Dezembro de 2014, http://www.cvm.gov.br/legislacao/instrucoes/ inst555.html, *archived at* https://perma.cc/6LV3-X532.

[34] *Id.*

[35] *Id.*

investment funds to await further and more conclusive guidance from the CVM on the subject in order to structure indirect investments in cryptocurrencies.[36]

B. CVM Statement No. 11 of September 19, 2018

On September 19, 2018, CVM issued Statement No. 11 (Ofício Circular), to complement CVM Statement No. 1 of January 12, 2018.[37]

Statement No. 11 says that CVM Instruction 555/14, in its articles 98 et seq., when dealing with investment abroad, authorizes indirect investment in cryptoassets by, for example, the acquisition of shares of funds and derivatives, among other assets traded in third jurisdictions, provided they are admitted and regulated in those markets. However, in the performance of the duties imposed by regulations, it is the responsibility of the managers (*administradores e gestores*) and independent auditors to be diligent to avoid financing, directly or indirectly, illegal transactions such as money laundering, unfair practices, fraudulent operations, or price manipulation, among other similar practices.[38]

Statement No. 11 further said that an adequate way to address these concerns is the realization of such investments through trading platforms ("exchanges") that are subject, in the relevant jurisdiction, to the supervision of regulatory bodies with powers to restrain such illegal practices, including through the establishment of regulatory requirements.[39]

It further said that while it is recommended that investments be made through these exchanges, there is no explicit prohibition on investments that are made otherwise. However, because of their fiduciary duties, administrators and managers should ensure that the chosen structure is able to fully meet the above-mentioned legal and regulatory requirements.[40]

Moreover, Statement No. 11 said it is important for the manager to verify that a cryptoasset is not a fraud, as has frequently been seen, for example, in initial coin offers worldwide. Thus, it is important that the manager takes steps to minimize the risk of fomenting the offer of a fraudulent cryptoasset, including through verification of the relevant variables associated with the issuance, management, governance, and other characteristics of the cryptoasset.[41]

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[36] *Id.*

[37] COMISSÃO DE VALORES MOBILIÁRIOS, OFÍCIO CIRCULAR NO. 11/2018/CVM/SIN (Sept. 19, 2018), http://www.cvm.gov.br/export/sites/cvm/legislacao/oficios-circulares/sin/anexos/oc-sin-1118.pdf, *archived at* https://perma.cc/679R-49GT.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

Canada

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SUMMARY Canada primarily regulates cryptocurrencies under securities laws. The Canadian Securities Administrators have issued guidance on how the relevant laws may apply to different activities involving cryptocurrencies. It includes information on when coins or tokens may be considered securities and states that each initial coin or token offering must be considered on its own characteristics. Where securities are involved, this may trigger prospectus or registration requirements.

Canada allows the use of digital currencies, including cryptocurrencies. However, cryptocurrencies are not considered legal tender in Canada. Canada's tax laws and rules, including the Income Tax Act, also apply to cryptocurrency transactions. The Canada Revenue Agency has characterized cryptocurrency as a commodity and stated that the use of cryptocurrency to pay for goods or services should be treated as a barter transaction.

On June 19, 2014, the Governor General of Canada gave his royal assent to Bill C-31, which includes amendments to Canada's Proceeds of Crime (Money Laundering) and Terrorist Financing Act. The new law treats virtual currencies as "money service businesses" for purposes of anti-money laundering provisions. The law is not yet in force, pending issuance of subsidiary regulations.

I. Approach to Assets Created Through Blockchain

According to a recent report on cryptocurrency regulation in Canada, "[t]he general attitude of the Canadian government (including regulatory agencies) to cryptocurrencies has been a mix of caution and encouragement: caution in terms of protecting investors and the public, but encouragement in its support of new technology."[1] Furthermore, "cryptocurrencies are primarily regulated under securities laws as part of the securities' regulators mandate to protect the public."[2]

Canada allows the use of cryptocurrencies as a means of payment.[3] According to the Government of Canada webpage on digital currencies, "[y]ou can use digital currencies to buy goods and services on the Internet and in stores that accept digital currencies. You may also buy and sell

[1] Conrad Druzeta et al., *Canada, in* BLOCKCHAIN & CRYPTOCURRENCY REGULATION 2019 (Josias Dewey ed., Global Legal Insights, 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/canada, *archived at* https://perma.cc/8MA6-JCS7.

[2] *Id.*

[3] *Digital Currency*, FINANCIAL CONSUMER AGENCY OF CANADA (FCAC), https://www.canada.ca/en/financial-consumer-agency/services/payment/digital-currency.html (last updated Jan. 19, 2018), *archived at* https://perma.cc/22BS-5L74.

digital currency on open exchanges, called digital currency or cryptocurrency exchanges."[4] However, cryptocurrencies are not considered legal tender in Canada.[5] The Currency Act[6] defines "legal tender" as "bank notes issued by the Bank of Canada under the Bank of Canada Act" and "coins issued under the Royal Canadian Mint Act."[7] According to the report referred to above, "[d]espite cryptocurrency not being recognized as legal tender, the Bank of Canada tested Digital Depository Receipts (DDR) as a digital representation of Canadian currency in 2016 and 2017. DDR is a way to transfer central bank money on to a distributed ledger technology platform (DLT, or "blockchain")."[8]

A. Financial Regulation and Consumer Protection

Canada does not have a federal securities regulatory system or authority. Securities regulators from each of the ten provinces and three territories in Canada have joined together to form the Canadian Securities Administrators (CSA), "whose objective is to improve, coordinate and harmonize regulation of the Canadian capital markets."[9] As a result, securities regulations in the provinces and territories "have largely been harmonized."[10]

On August 24, 2017, the CSA published *CSA Staff Notice 46-307 Cryptocurrency Offerings*,[11] "which outlines how securities law requirements may apply to initial coin offerings (ICOs), initial token offerings (ITOs), cryptocurrency investment funds and the cryptocurrency exchanges trading these products."[12] On June 11, 2018, the CSA issued *CSA Staff Notice 46-308 Securities Law Implications for Offerings of Tokens*.[13] Further information on these notices is provided below.

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[4] *Id*.

[5] *Id*.

[6] Currency Act, R.S.C., 1985, c. C-52, http://laws-lois.justice.gc.ca/eng/acts/c-52/page-1.html, *archived at* https://perma.cc/4A4E-3XBH.

[7] *Digital Currency*, FCAC, *supra* note 3; Currency Act § 8.

[8] Druzeta et al, *supra* note 1.

[9] *Overview*, CANADIAN SECURITIES ADMINISTRATORS (CSA) https://www.securities-administrators.ca/aboutcsa.aspx?id=45 (last updated Jan. 19, 2018), *archived at* https://perma.cc/LRN8-MNLG.

[10] Druzeta et al., *supra* note 1.

[11] CSA Staff Notice 46-307 Cryptocurrency Offerings (Aug. 24, 2017), https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20170824_cryptocurrency-offerings.htm, *archived at* https://perma.cc/7XF6-3T3E.

[12] Press Release, CSA, Canadian Securities Regulators Outline Securities Law Requirements that May Apply to Cryptocurrency Offerings (Aug. 24, 2017), https://www.securities-administrators.ca/aboutcsa.aspx?id=1606, *archived at* https://perma.cc/4KL4-YSEV.

[13] CSA Staff Notice 46-308 Securities Law Implications for Offerings of Tokens (June 11, 2018), https://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20180611_46-308_securities-law-implications-for-offerings-of-tokens.htm, *archived at* https://perma.cc/GK7Z-RFUH.

The Financial Consumer Agency of Canada (the Agency) "is a federal agency that oversees compliance of federally regulated financial entities with consumer protection rules."[14] The Agency has a digital currency page which provides information on risks associated with and tips on using digital currencies. According to lawyers from Goodmans LLP, the Agency "has not yet released an official position on how or if it intends to further regulate the space. However, it is possible that as larger Canadian financial institutions begin investing in blockchain and cryptocurrency in their retail operations, the Agency will respond with new rules to satisfy its mandate and protect financial consumers."[15]

B. Anti-Money Laundering Law

On June 19, 2014, the Governor-General of Canada gave his assent to Bill C-31 (An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014, and Other Measures),[16] which includes amendments to Canada's Proceeds of Crime (Money Laundering) and Terrorist Financing Act. The law treats virtual currencies as "money service businesses" for purposes of anti-money laundering laws.[17] As a result of the law, companies dealing in virtual currencies will be required to register with the Financial Transactions and Reports Analysis Centre of Canada (Fintrac), put into effect compliance programs, "keep and retain prescribed records," report suspicious or terrorist-related property transactions, and determine if any of their customers are "politically exposed persons."[18] The law will also apply to virtual currency exchanges operating outside of Canada "who direct services at persons or entities in Canada."[19] The new amendments also bar banks from opening and maintaining accounts or having a "correspondent banking relationship" with companies dealing in virtual currencies, "unless that person or entity is registered with the Centre."[20]

The law was regarded as the "world's first national law on digital currencies, and certainly the world's first treatment in law of digital currency financial transactions under national anti-money

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[14] Allan Goodman & Michael Partridge, *Cryptocurrency in Canada*, PRACTICAL LAW CANADA (Practice Note w-013-8891, 2018), https://www.goodmans.ca/files/file/docs/Cryptocurrency in Canada published 05 22 18.pdf, *archived at* https://perma.cc/9FH3-U2R2.

[15] *Id.*

[16] Bill C-31, An Act to Implement Certain Provisions of the Budget Tabled in Parliament on February 11, 2014, and Other Measures, Second Session, Forty-first Parliament, 62-63 Elizabeth II, 2013-2014, Statutes of Canada 2014 Ch. 20, http://www.parl.ca/DocumentViewer/en/41-2/bill/C-31/royal-assent, *archived at* https://perma.cc/2N7Q-E68C.

[17] *Id. See also* Tariq Ahmad, *Canada: Canada Passes Law Regulating Virtual Currencies as "Money Service Businesses,"* GLOBAL LEGAL MONITOR (July 9, 2014), http://www.loc.gov/law/foreign-news/article/canada-canada-passes-law-regulating-virtual-currencies-as-money-service-businesses/, *archived at* https://perma.cc/BQA6-K7MV.

[18] Christine Duhaime, *Canada Implements World's First National National Digital Currency Law; Regulates New Financial Technology Transactions*, DUHAIME LAW (June 22, 2014), http://www.duhaimelaw.com/2014/06/22/canada-implements-worlds-first-national-bitcoin-law/, *archived at* https://perma.cc/4TLH-LTN5.

[19] Bill C-31, § 255(2).

[20] *Id.* § 258.

laundering law."[21] Although the law has received royal assent it is not yet in force, pending issuance of subsidiary regulations. A March 2018 news report indicated that the government may have been about to issue those regulations,[22] but as yet none have been released.

C. Taxation

Canada's tax laws and rules also apply to digital currency transactions.[23] On March, 6, 2019, it was reported that Bitcoin investors were being targeted with audits by the Canada Revenue Agency (CRA).[24] When asked to comment, a media contact at the CRA said in a statement that

> [t]he Canada Revenue Agency (CRA) understands that a vast majority of middle-class Canadians pay their fair share, but it remains committed to ensuring that without exception, every taxpayer abides by the same tax laws. As a world-class tax administration, the CRA is also committed to adapting its administration to keep pace with evolving global services and products, and making key investments to effectively address the new ways of doing business in the global economy.
>
> In order to make good on these commitments, the CRA established a dedicated cryptocurrency unit in 2017 to build intelligence, and conduct audits focused on risks related to cryptocurrencies. This unit has enhanced the CRA's ability to monitor and enforce compliance in areas of emerging risk, including the cryptocurrency space. There are currently over 60 active audits related to cryptocurrency.
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> . . .
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> The CRA is also committed to helping taxpayers understand their tax obligations when using digital currencies, and to remind them that using digital currency does not exempt consumers from their tax obligations. The CRA has published educational material on its website regarding the tax treatment of dealing in Digital Currency.[25]

The CRA "has characterized cryptocurrency as a commodity and not a government-issued currency. Accordingly, the use of cryptocurrency to pay for goods or services is treated as a barter transaction."[26] The tax implications of barter transactions "is available by consulting the

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[21] Duhaime, *supra* note 18.

[22] Corin Faife, *Canada Is Gearing Up to Regulate Cryptocurrency*, MOTHERBOARD (Mar. 20, 2018), https://motherboard.vice.com/en_us/article/d358zk/canada-is-gearing-up-to-regulate-cryptocurrency-parliament-hearing, *archived at* https://perma.cc/K7AH-LDMZ.

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] Mariam Al-Shikarchy et al., Gowling WLG, *Canadian Taxation of Cryptocurrency . . . So Far*, LEXOLOGY (Nov. 14, 2017), https://www.lexology.com/library/detail.aspx?g=6283077e-9d32-4531-81a5-56355fa54f47 (by subscription), *archived at* https://perma.cc/KVX9-L5XA.

Canada Revenue Agency's Interpretation Bulletin IT-490, Barter Transactions."[27] According to the CRA, "[a]ny income from transactions involving cryptocurrency is generally treated as business income or as a capital gain, depending on the circumstances. Similarly, if earnings qualify as business income or as a capital gain then any losses are treated as business losses or capital losses."[28]

1. Payments in Cryptocurrencies

Digital currencies are subject to the Income Tax Act (ITA).[29] According to the Financial Consumer Agency of Canada, "[g]oods purchased using digital currency must be included in the seller's income for tax purposes."[30] On the issue of taxation, the CRA adds that,

> [w]here digital currency is used to pay for goods or services, the rules for barter transactions apply. A barter transaction occurs when any two persons agree to exchange goods or services and carry out that exchange without using legal currency. For example, paying for movies with digital currency is a barter transaction. The value of the movies purchased using digital currency must be included in the seller's income for tax purposes. The amount to be included would be the value of the movies in Canadian dollars.[31]

According to the CRA, "[w]here an employee receives digital currency as payment for salary or wages, the amount (computed in Canadian dollars) will be included in the employee's income pursuant to subsection 5(1) of the Income Tax Act."[32] The CRA has also said that "GST/HST [Goods and Services Tax/ harmonized sales tax] also applies on the fair market value of any goods or services you buy using digital currency."[33]

2. Trade in Cryptocurrencies

As noted above, digital currency is characterized as a commodity under Canadian law. Thus, according to the Financial Consumer Agency, "[w]hen you file your taxes you must report any gains or losses from selling or buying digital currencies."[34] Any resulting gains or losses "could

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[27] *Digital Currency*, CANADA REVENUE AGENCY (CRA), https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency.html (last updated Mar. 8, 2019), *archived at* https://perma.cc/K2T2-YQB9.

[28] *Guide for Cryptocurrency Users and Tax Professionals,* CRA, https://www.canada.ca/en/revenue-agency/programs/about-canada-revenue-agency-cra/compliance/digital-currency/cryptocurrency-guide.html (last updated Mar. 8, 2019), *archived at* https://perma.cc/PL2Q-VVQF.

[29] *Id.*

[30] *Digital Currency*, FCAC, *supra* note 3.

[31] *What You Should Know about Digital Currency*, CRA, https://www.canada.ca/en/revenue-agency/news/newsroom/fact-sheets/fact-sheets-2015/what-you-should-know-about-digital-currency.html (last updated Mar. 17, 2015), *archived at* https://perma.cc/CYV2-236S.

[32] *Digital Currency*, CRA, *supra* note 27.

[33] *Digital Currency*, FCAC, *supra* note 3.

[34] *Id.*

be taxable income or capital for the taxpayer."[35] The CRA has published a bulletin[36] to "provide information that can help in determining whether transactions are income or capital in nature."[37] The CRA has also recently published an online guide for cryptocurrency users and tax professionals.[38] According to lawyers from the law firm Gowling WLG,

> [i]n general terms, where a taxpayer does not engage in the business of trading in cryptocurrency (i.e., the taxpayer acquires such property for a long-term growth), any gain or loss generated from the disposition of cryptocurrency should be treated as on account of capital. However, where a taxpayer engages in the business of trading or investing in cryptocurrency, gains or losses therefrom should be treated as being on account of income. The cost to the taxpayer of property received in exchange for cryptocurrency (for example, another type of cryptocurrency) should be equal to the value of the cryptocurrency given up as consideration.[39]

The law firm also notes that "it is possible that a trader in cryptocurrency would also be required to collect GST/HST (and QST [Quebec Sales Tax]) on their supplies, but the CRA has not expressed a clear view on this point."[40]

3. Mining Cryptocurrencies

Mining of cryptocurrencies can be undertaken for profit (as a business) or as a personal hobby (which is nontaxable).[41] According to the CRA,

> [t]he income tax treatment for cryptocurrency miners is different depending on whether their mining activities are a personal activity (a hobby) or a business activity. This is decided case by case. A hobby is generally undertaken for pleasure, entertainment or enjoyment, rather than for business reasons. But if a hobby is pursued in a sufficiently commercial and businesslike way, it can be considered a business activity and will be taxed as such.[42]

According to the lawyers from Gowling WLG,

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[35] *What You Should Know about Digital Currency*, *supra* note 31.

[36] CRA, Interpretation Bulletin IT-479R, Transactions in Securities, https://www.canada.ca/en/revenue-agency/services/forms-publications/publications/it479r/archived-transactions-securities.html, *archived at* https://perma.cc/NDV9-4BGA.

[37] *What you Should Know about Digital Currency*, *supra* note 31.

[38] *Guide for Cryptocurrency Users and Tax Professionals*, *supra* note 28.

[39] Al-Shikarchy et al., *supra* note 26.

[40] *Id*.

[41] *Cryptocurrencies and Tax: Five Things Every Canadian Needs to Know*, WILDEBOER DELLELCE (Dec. 12, 2017), http://www.wildlaw.ca/resource-centre/legal-updates/2017/cryptocurrencies-and-tax-five-things-every-canadian-needs-to-know/, *archived at* https://perma.cc/F7RC-R2D3.

[42] *Guide for Cryptocurrency Users and Tax Professionals*, *supra* note 28.

> [i]f the taxpayer mines in a commercial manner, the income from that business must be included in the taxpayer's income for the year. Such income will be determined with reference to the value of the taxpayer's inventory at the end of the year, established pursuant to the rules in section 10 of the ITA and Part XVIII of the Regulations regarding valuing inventory.[43]

II. Custodianship of Cryptocurrencies by Financial Institutions

According to *CSA Staff Notice 46-307*, "cryptocurrency offerings can provide new opportunities for businesses to raise capital and for investors to access a broader range of investments. However, they can also raise investor protection concerns, due to issues around volatility, transparency, valuation, custody and liquidity, as well as the use of unregulated cryptocurrency exchanges."[44] The notice states that fintech businesses, when establishing a crypto currency investment fund, should consider the following:

> • Custody: Securities legislation of the jurisdictions of Canada generally require that all portfolio assets of an investment fund be held by one custodian that meets certain prescribed requirements. We expect a custodian to have expertise that is relevant to holding cryptocurrencies. For example, it should have experience with hot and cold storage, security measures to keep cryptocurrencies protected from theft and the ability to segregate the cryptocurrencies from other holdings as needed.[45]

III. Regulation of Cryptocurrencies as Financial Securities

CSA Staff Notice 46-307 Cryptocurrency Offerings "outlines how securities law requirements may apply to initial coin offerings (ICOs), initial token offerings (ITOs), cryptocurrency investment funds and the cryptocurrency exchanges trading these products."[46]

A. Cryptocurrency Exchanges

The first part of the notice looks at the nature of cyptocurrency exchanges and possible requirements that apply. It states as follows:

> A cryptocurrency exchange that offers cryptocurrencies that are securities must determine whether it is a marketplace. Marketplaces are required to comply with the rules governing exchanges or alternative trading systems. If an exchange is doing business in a jurisdiction of Canada, it must apply to that jurisdiction's securities regulatory authority for recognition or an exemption from recognition. To date, no cryptocurrency exchange has been recognized in any jurisdiction of Canada or exempted from recognition. Allowing coins/tokens that are securities issued as part of an ICO/ITO to trade on these cryptocurrency exchanges may also place the business issuing the coins/tokens offside

[43] Al-Shikarchy et al., *supra* note 26.

[44] CSA Staff Notice 46-307 Cryptocurrency Offerings, *supra* note 11.

[45] *Id.*

[46] Press Release, CSA, *supra* note 12.

> securities laws. For example, the resale of coins/tokens that are securities will be subject to restrictions on secondary trading.[47]

B. Treatment of Coin/Token Offerings

The second part of the notice looks at coin/token offerings and the circumstances under which they would be treated as securities. It states that

> [s]taff is aware of businesses marketing their coins/tokens as software products, taking the position that the coins/tokens are not subject to securities laws. However, in many cases, when the totality of the offering or arrangement is considered, the coins/tokens should properly be considered securities. In assessing whether or not securities laws apply, we will consider substance over form.
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> . . .
> Every ICO/ITO is unique and must be assessed on its own characteristics. For example, if an individual purchases coins/tokens that allow him/her to play video games on a platform, it is possible that securities may not be involved. However, if an individual purchases coins/tokens whose value is tied to the future profits or success of a business, these will likely be considered securities. We have received numerous inquiries from fintech businesses and their legal counsel relating to ICOs/ITOs. With the offerings that we have reviewed to date, we have in many instances found that the coins/tokens in question constitute securities for the purposes of securities laws, including because they are investment contracts. In arriving at this conclusion, we have considered the relevant case law,{6} which requires an assessment of the economic realities of a transaction and a purposive interpretation with the objective of investor protection in mind.[48]

C. Applicable Securities Legislation Requirements

The CSA states that cryptocurrency offerings, including ICOs and ITOs, "may involve an offering of securities and therefore may trigger prospectus or registration requirements under applicable securities laws."[49] The requirements are outlined as follows:

- Businesses completing ICOs/ITOs may be trading in securities for a business purpose (referred to as the "business trigger"), therefore requiring dealer registration or an exemption from the dealer registration requirement. Whether or not an activity meets the business trigger is facts specific.
- Businesses completing ICOs/ITOs may be trading in securities for a business purpose (referred to as the "business trigger"), therefore requiring dealer registration or an exemption from the dealer registration requirement. Whether or not an activity meets the business trigger is facts specific.[50]

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[47] CSA Staff Notice 46-307 Cryptocurrency Offerings, *supra* 11.

[48] *Id.*

[49] *CSA Reinforces Position that Securities Laws Apply to Cryptocurrency Offerings, Confirms Regulatory Scrutiny for Industry Participants*, MCMILLAN (2018), https://mcmillan.ca/Files/210799_CSA_Reinforces_Position_that_Securities_Laws_Apply_to_Cryptocurrency_Offerings.pdf, *archived at* https://perma.cc/P8HU-7X8Z.

[50] CSA Staff Notice 46-307 Cryptocurrency Offerings, *supra* 11.

D. Treatment of Cryptocurrency Investment Funds

The CSA notice also includes the following non-exhaustive list of matters fintech businesses should consider when looking to establish cryptocurrency investment funds:

- Retail investors: In certain jurisdictions of Canada, the OM prospectus exemption cannot be used by investment funds to distribute securities to investors.{10} Therefore, if investors in the investment fund will include retail investors, businesses will need to consider prospectus requirements, applicable investment fund rules and whether the investment is suitable.

- Cryptocurrency exchanges: Due diligence must be completed on any cryptocurrency exchange that the investment fund uses to purchase or sell cryptocurrencies for its portfolio, including on whether it is regulated in any way and the cryptocurrency exchange's policies and procedures for identity verification, anti-money laundering, counter-terrorist financing and recordkeeping. Businesses should be prepared to discuss with staff how trading volumes on the cryptocurrency exchanges that the investment fund intends to use may affect the ability to buy and sell cryptocurrencies and to fund redemption requests.

- Registration: Businesses must consider appropriate registration categories in respect of the investment fund, including dealer, adviser and/or investment fund manager.

- Valuation: How will cryptocurrencies in the investment fund's portfolio be valued? How will securities of the investment fund be valued? Will one or multiple cryptocurrency exchange(s) be used; and how will such exchange(s) be selected? Will there be an independent audit of the investment fund's valuation?

- Custody: Securities legislation of the jurisdictions of Canada generally require that all portfolio assets of an investment fund be held by one custodian that meets certain prescribed requirements. We expect a custodian to have expertise that is relevant to holding cryptocurrencies. For example, it should have experience with hot and cold storage, security measures to keep cryptocurrencies protected from theft and the ability to segregate the cryptocurrencies from other holdings as needed.[51]

E. Further Guidance on Token Offerings

CSA Staff Notice 46-308 Securities Law Implications for Offerings of Tokens "provides businesses that are considering offering digital tokens to the public with additional guidance on when securities may be involved and as to how securities regulation may apply to an ICO."[52] It provides particular guidance on the offering of tokens, including ones commonly known as "utility tokens." The first part of the notice sets out the purpose and background behind the published guidance. It states that,

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[51] *Id.*

[52] ONTARIO SECURITIES COMMISSION, TAKING CAUTION: FINANCIAL CONSUMERS AND THE CRYPTOASSET SECTOR 6 (June 28, 2018), https://www.osc.gov.on.ca/documents/en/Investors/inv_research_20180628_taking-caution-report.pdf, *archived at* https://perma.cc/5ZBV-JHET.

> [s]ince SN 46-307 was published, staff have engaged with numerous businesses wishing to complete offerings of tokens and have found that most of these offerings have involved securities. As part of this engagement with businesses, we have received various inquiries relating to offerings of tokens referred to as "utility tokens". "Utility token" is an industry term often used to refer to a token that has one or more specific functions, such as allowing its holder to access or purchase services or assets based on blockchain technology. We have seen many businesses offering tokens to raise capital for the development of their software, online platform or application. In many of these cases, the offering will involve securities despite the fact that the tokens have one or more utility functions.[53]

The notice then goes on to provide information on when an offering of tokens may or may not involve an offering of securities in light of the definition of "security," stating that,

> [a]s we indicated in SN 46-307, every offering is unique and must be assessed on its own characteristics. An offering of tokens may involve the distribution of securities, including because:
>
> - the offering involves the distribution of an investment contract; and/or
>
> - the offering and/or the tokens issued are securities under one or more of the other enumerated branches of the definition of security or may be a security that is not covered by the non-exclusive list of enumerated categories of securities.
>
> In determining whether or not an investment contract exists, the case law endorses a purposive interpretation that includes considering the objective of investor protection. This is especially important for businesses to consider in the context of offerings of tokens where the risk of loss to investors can be high. Businesses and their professional advisors should consider and apply the case law interpreting the term "investment contract"{1}, including considering whether the offering involves:
>
> 1. An investment of money
>
> 2. In a common enterprise
>
> 3. With the expectation of profit
>
> 4. To come significantly from the efforts of others
>
> In analyzing whether an offering of tokens involves an investment contract, businesses and their professional advisors should assess not only the technical characteristics of the token itself, but the economic realities of the offering as a whole, with a focus on substance over form.[54]

The notice then provides "examples of situations and their possible implication on one or more of the elements of an investment contract," but cautions that they are intended to be illustrative

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[53] CSA Staff Notice 46-308 Securities Law Implications for Offerings of Tokens, *supra* note 13.

[54] *Id.*

and not an exhaustive or determinative "on its own of whether or not a security exists."[55] The notice states that

> [it is possible that an offering of tokens may be viewed as involving, or not involving, a security even with the existence, or absence, of one or more of the characteristics listed below. As such, businesses and their professional advisors should complete a meaningful analysis based on the unique characteristics of their offering of tokens and should not use the following table to complete a mechanical "tick the box" exercise.[56]

The notice also discusses "token offerings that are structured in multiple steps."[57] On the question of enforcement and compliance with securities legislation, the CSA provides the following guidance:

> Staff are conducting active surveillance of coin and token offerings activity to identify past, ongoing and potential future violations of securities laws or conduct in the capital markets that is contrary to the public interest. CSA members have taken and intend to continue taking regulatory and/or enforcement action against businesses that do not comply with securities laws.
>
> In order to avoid costly regulatory surprises, we encourage businesses with proposed offerings of tokens to consult qualified securities legal counsel in their local jurisdiction about the potential application of, and possible approaches required to comply with, securities legislation. As trends in the cryptocurrency industry are evolving quickly, we encourage businesses seeking flexible approaches to compliance with securities laws to contact their local securities regulatory authority to discuss their project at the contact information below. When contacting their local securities regulatory authority, businesses should be ready to provide a draft whitepaper, a business plan or a detailed description of their proposed offering. We may also ask for copies of promotional materials in connection with the offering, and a description of the promotional activities and marketing efforts in respect of the offering, as well as information on the corporate structure and principals involved. We remind businesses to consider securities law requirements that may apply to their activities, regardless of where investors are located. A Canadian securities regulatory authority may have jurisdiction over trades to investors outside of that jurisdiction where there is a real and substantial connection between the transaction and that jurisdiction.[58]

F. CSA Regulatory Sandbox

The CSA Regulatory Sandbox is an initiative of the CSA "to support fintech businesses seeking to offer innovative products, services and applications in Canada." According to the CSA notice,

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[55] *Id.*

[56] *Id.*

[57] *CSA Staff Publish Follow-up Guidance on Token Offerings*, LEXOLOGY (July 2 2018), https://www.lexology.com/library/detail.aspx?g=ee5e1b22-dacf-48f8-8772-89b4888c1c48 (by subscription), *archived at* https://perma.cc/9UMM-EM7X.

[58] CSA Staff Notice 46-308 Securities Law Implications for Offerings of Tokens, *supra* note 13.

> [i]t allows firms to register and/or obtain exemptive relief from securities law requirements, under a faster and more flexible process than through a standard application, in order to test their products, services and applications throughout the Canadian market on a time-limited basis. Applications to the CSA Regulatory Sandbox are analyzed on a case-by-case basis.[59]

IV. Treatment of Cryptoassets Not Considered Securities

Apart from provincial level laws and regulations pertaining to securities, virtual currencies are also subject to the provincial-level consumer protection laws that are of general application. These laws may include provisions on cooling off periods/right to cancel, unsolicited goods, and misrepresentation/unfair business practices.[60] According to one law firm,

> [t]okens issued on functional networks with established, redeemable values may be analogized to gift cards. Transactions with such tokens may fall under the realm of consumer contracts regulated by the various provincial consumer protection agencies across Canada. For example, the statutes and regulations enforced by these agencies may impose implied legal warranties on the sale or redemption of tokens.[61]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

No other guidance with respect to the treatment of different categories of cryptocurrencies or assets was located.

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[59] *Id*.

[60] Mathew Burgoyne, *Canadian Provincial Bitcoin Law: It's All About Protecting the Consumer*, COINDESK.COM (Dec. 24, 2013), https://www.coindesk.com/canadian-bitcoin-law-consumer-protection, *archived at* https://perma.cc/X934-RNZG.

[61] Goodman & Partridge, *supra* note 14, at 12-13.

Cayman Islands

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SUMMARY According to the Cayman Islands Monetary Authority (CIMA), virtual currencies are not considered legal tender in the Cayman Islands. While there are no laws or regulations specifically geared towards governing virtual currencies, there are laws that appear to be more generally applicable, including the Securities Investment Business Law and anti-money laundering laws and regulations. Apart from a public advisory, CIMA has not provided specific guidance on exactly how these laws regulate virtual currencies. However, Cayman Island lawyers have provided some guidance on how they may be applicable.

I. Approach to Assets Created Through Blockchain

The Cayman Islands appear to have a fairly flexible regulatory environment for cryptocurrencies and blockchain technologies. The Cayman Islands Monetary Authority (CIMA) "has not issued statements or guidance on virtual currencies, blockchain technology, ICOs or STOs, other than a warning notice dated 23rd April 2018 which specifically flagged a number of risks specifically associated with ICOs and virtual currencies."[1] According to that public advisory, "[v]irtual currencies are not legal tender in the Cayman Islands."[2]

While there does not appear to be any specific legislation geared towards regulating cryptocurrencies, there are laws that may be applicable in certain circumstances. These include the Securities Investment Business Law (2015 Revision), Anti-Money Laundering (AML) Law and associated regulations, Money Services Law (2010 Revision), and Electronic Transactions Law (2003 Revision). Lawyers Chris Humphries and James Smith predicted in February 2018 that

> more-specific legislation will eventually be created although, for the time being, the regulators and lawmakers in the Cayman Islands are keen to avoid rushing through any legislation before the potential benefits and pitfalls of blockchain technology, cryptocurrencies and ICOs are properly understood.[3]

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[1] *Digital Assets. Five Questions to Ask Your Cayman Counsel*, LOEB SMITH (Nov. 22, 2018), https://www.loebsmith.com/story/2018/11/22/digital-assets-five-questions-to-ask-your-cayman-counsel/143/, *archived at* https://perma.cc/55Z5-5HZ8.

[2] Cayman Islands Monetary Authority, Public Advisory: Virtual Currencies (Apr. 23, 2018), https://www.cima.ky/upimages/noticedoc/1524507769PublicAdvisory-VirtualCurrencies_1524507769.pdf, *archived at* https://perma.cc/V8TF-MY7A.

[3] Chris A. Humphries & James Smith, *Cayman Islands: Initial Coin Offerings (ICO) in The Cayman Islands*, MONDAQ (Feb. 19, 2018), http://www.mondaq.com/caymanislands/x/667952/Commodities+Derivatives+Stock+Exchanges/Initial+Coin+Offerings+ICO+In+The+Cayman+Islands, *archived at* https://perma.cc/5XPY-LXGQ.

A. Financial Regulation and Consumer Protection

Securities licensing requirements are set by the Securities Investment Business Law (SIBL) (see part III, below).[4] This is the "primary legislation relating to the regulation of investments in 'securities' and associated businesses."[5] In addition, certain categories of mutual funds are regulated under the Mutual Funds Law (MFL).[6]

The MFL grants CIMA "responsibility for regulating certain categories of funds operating in and from the Cayman Islands. . . . The law also provides for the regulation of mutual fund administrators by CIMA."[7] To be categorized as a mutual fund a fund must be issuing "equity," in other words "shares, limited partnership interests, LLC interests or trust units."[8] This "excludes most ICO issuers, as tokens are not considered to be equity interests and therefore ICO issuers (as distinct from any Blockchain or cryptocurrency asset class focused fund) should not be impacted by the MFL."[9]

B. Anti-Money Laundering Law

CIMA also plays a "central role in the fight against money laundering and terrorism financing."[10] Section 6(1)(b)(ii) of the Monetary Authority Law grants CIMA the legal mandate, as part of its regulatory functions, "to monitor compliance with the money laundering regulations."[11] The Cayman Islands anti-money laundering (AML) regime consists of the following laws and regulations: the Proceeds of Crime Law (2019 Revision),[12] the Anti-Money Laundering

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[4] Securities Investment Business Law (2015 Revision), Extraordinary Gazette No. 53 (July 17, 2015), https://www.cima.ky/upimages/commonfiles/1499349906SecuritiesInvestmentBusinessLaw2015Revision.pdf, *archived at* https://perma.cc/356F-5DBD.

[5] Chris Humphries & Simon Orriss, *Initial Coin Offerings in the Cayman Islands,* STUARTS LAW (undated), https://www.stuartslaw.com/cms/document/Initial_Coin_Offerings_in_the_Cayman_Islands.pdf (last visited Apr. 1, 2019), *archived at* https://perma.cc/WA42-LB35.

[6] Mutual Funds Law (MFL) (2019 Revision), Legislation Gazette No. 2 (Feb. 19, 2019), https://www.cima.ky/upimages/commonfiles/MutualFundslaw2019Revision_1550861599.PDF, *archived at* https://perma.cc/ZHH5-PBAH.

[7] *Investment Funds*, CAYMAN ISLANDS MONETARY AUTHORITY, https://www.cima.ky/investment-funds (last visited Mar. 15, 2019), *archived at* https://perma.cc/6AZQ-M9DS.

[8] Ian Gobin & Daniella Skotnicki, *The Virtual Currency Regulation Review: Cayman Islands, in* THE LAW REVIEWS, THE VIRTUAL CURRENCY REGULATION REVIEW (Michael S. Sackheim & Nathan A. Howell eds., Nov. 2018), https://thelawreviews.co.uk/edition/the-virtual-currency-regulation-review-edition-1/1176633/cayman-islands, *archived at* https://perma.cc/FH5J-XTUZ.

[9] *Id.*

[10] *Anti-Money Laundering & Countering the Financing of Terrorism,* CAYMAN ISLANDS MONETARY AUTHORITY, https://www.cima.ky/amlcft (last visited Mar. 15, 2019), *archived at* https://perma.cc/YGX8-YQZY.

[11] Mutual Funds Law (MFL) (2019 Revision), § 6(1)(b)(ii).

[12] Proceeds of Crime Law (2019 Revision), Legislation Gazette No. 4 (Feb. 21, 2019), https://www.cima.ky/upimages/commonfiles/ProceedsofCrimeLaw2019Revision_1552422507.PDF, *archived at* https://perma.cc/D4G8-6559.

Regulations (2018 Revision),[13] and the Guidance Notes on the Prevention and Detection of Money Laundering and Terrorist Financing in the Cayman Islands.[14] According to CIMA,

> [t]hese regulations prescribe measures to be taken to prevent the use of the financial system for the purposes of money laundering and terrorist financing. In addition to the Anti-Money Laundering Regulations, the regulatory framework against financial crime in the Cayman Islands includes the Proceeds of Crime Law, the Terrorism Law and the Proliferation Financing (Prohibition) Law.[15]

Under the anti-money laundering laws and regulations, any person or business formed, registered, or based in the Cayman Islands that is conducting a "relevant financial business" is "subject to various obligations aimed at preventing, identifying, and reporting money laundering and terrorist financing."[16] The definition of "relevant financial business" is set out in section 2(1) and schedule 6 of the Proceeds of Crime Law.[17] According to a recent report on cryptocurrency regulation in the Cayman Islands, the definition "encompasses a broad variety of activity, including the following which may be a particular relevance in the context of Digital Assets":

- Money or value-transfer service;
- Issuing and managing means of payment (specifically including electronic money);
- Trading in transferable securites;
- Money broking;
- Securities investment business; and
- Investing or administering funds or money on behalf of others.[18]

The report also notes that,

> [a]s such, the relevant requirements may depend on the type of Digital Asset in question; for instance, whether it can best be classed as a currency or money substitute, a security, a utility token or something else. We would thus generally expect businesses that engage in the operation of cryptocurrency exchanges, cryptocurrency issuances, brokering transactions in cryptocurrency, the trading and management of Digital Assets that are properly classed as securities, and the investment of funds (whether in the form of fiat currency or cryptocurrency) on behalf of other into Digital Assents, to come within the

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[13] Anti-Money Laundering Regulations (2018 Revision), Extraordinary Gazette No. 22 (Mar. 16, 2018), https://www.cima.ky/upimages/commonfiles/Anti-MoneyLaunderingRegulations2018Revision_1524078242.PDF, *archived at* https://perma.cc/V3LY-RMJF.

[14] *Guidance Notes on the Prevention and Detection of Money Laundering in the Cayman Islands*, CAYMAN ISLANDS MONETARY AUTHORITY, https://www.cima.ky/guidance-notes (last visited Mar. 19, 2019), *archived at* https://perma.cc/XW5G-2ZEB.

[15] *Anti-Money Laundering & Countering the Financing of Terrorism, supra* note 10.

[16] Alistair Russell & Dylan Wiltermuth, *Cayman Islands, in* BLOCKCHAIN & CRYPTOCURRENCY REGULATION 2019 (Josias Dewey ed., Global Legal Insights, 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/cayman-islands, *archived at* https://perma.cc/ED7R-7XXB.

[17] Proceeds of Crime Law (2019 Revision), § 2(1).

[18] Russell & Wiltermuth, *supra* note 16.

> scope of the AML Laws. Notably Digital Assets that are purely in the nature of utility tokens may fall outside of the ambit of the regime.[19]

The following AML procedures are required under the regulations currently in force:

> i. identification and verification (KYC) procedures for investors/purchasers;
>
> ii. adoption of a risk-based approach to monitor activities;
>
> iii. record-keeping procedures;
>
> iv. procedures to screen employees to ensure high standards when hiring;
>
> v. adequate systems to identify risk in relation to persons, countries and activities which shall include checks against all applicable sanctions lists;
>
> vi. adoption of risk-management procedures concerning the conditions under which a customer may utilize the business relationship prior to verification;
>
> vii. observance of the list of countries, published by any competent authority, which are non-compliant, or do not sufficiently comply with the recommendations of the Financial Action Task Force (FATF);
>
> viii. internal reporting procedures; and
>
> ix. other procedures of internal control, including an appropriate effective risk-based independent audit function and communication as may be appropriate for the ongoing monitoring of business relationships or one-off transactions for the purpose of forestalling and preventing money laundering and terrorist financing.[20]

C. Taxation

The Cayman Islands does not impose any taxation on Cayman entities.[21] There is "no income, inheritance, gift, capital gains, corporate withholding or other taxes imposed by the government."

II. Custodianship of Cryptocurrencies by Financial Institutions

No information was found on the issue of custody or custodianship of cryptocurrencies or assets in the Cayman Islands.

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[19] *Id.*

[20] *Digital Assets. Five Questions to Ask Your Cayman Counsel*, *supra* note 1.

[21] Gobin & Skotnicki, *supra* note 8.

III. Regulation of Cryptocurrencies as Financial Securities

A. Regulation of Cryptoassets in General as Securities

According to the SIBL, persons engaging, "in the course of business," in securities investment business, as defined in the SIBL, must be licensed unless exempted under schedule 3 (Excluded Activities) or schedule 4 (Excluded Persons). Excluded persons must, however, be registered by CIMA.[22]

Schedule 1 of the SIBL provides a list of items considered "securities" for the purposes of determining "whether a person is engaged in licensable activity." The definition established in Schedule 1 includes

> a list of instruments that are common in today's financial markets (securities, instruments creating or acknowledging indebtedness, instruments giving entitlements to securities, certificates representing certain securities, options, futures and contracts for differences), and does not in and of itself include virtual currencies.[23]

According to the report referred to above, the SIBL will only apply

> to the extent that such Digital Assets constitute "securites" for the purposes thereof. The statute contains a detailed list of assets that are considered securities thereunder. Although such list does not currently make specific reference to any Digital Asset, in our view, certain types of Digital Asset are likely to constitute securities. Consequently, consideration will need to be given on a case-by-case basis as to whether the Digital Asset in question falls within one of the existing categories: for example, instruments creating or acknowledging indebtedness, options or futures. Equally, however, it seems clear that certain Digital Assets are likely to fall outside the definition, and thus outside the scope of the law (for instance, pure utility tokens and some cryptocurrencies).[24]

A further profile of the Cayman Islands notes the following:

> Digital assets that take the form of warrants, options, futures or derivatives for securities or commodities may still be securities. If a Cayman entity was deemed to be issuing securities, it would be exempt from any form of licensing under SIBL if the nature of the security was an equity interest, debt interest, or a warrant or similar for equity or debt interests.
>
> If a Cayman entity was issuing or trading digital assets that were options, futures or derivatives, it would need to consider the implications of SIBL in respect of licensing. A business considered to be conducting securities investment business must be licensed under SIBL unless it is considered to be conducting excluded activities, which include those businesses that are only providing services to sophisticated persons, high-net-worth persons or a company, partnership or trust (whether or not regulated as a mutual fund) of

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[22] *Securities Licensing Requirements*, CAYMAN ISLANDS MONETARY AUTHORITY, https://www.cima.ky/securities-licensing-authorisation-requirements (last visited Mar. 19, 2019), *archived at* https://perma.cc/X4NB-UJM7.

[23] Gobin & Skotnicki, *supra* note 8.

[24] Russell & Wiltermuth, *supra* note 16.

> which the shareholders, unitholders or limited partners are one or more persons falling within such definitions. Excluded persons must register with the Cayman Islands Monetary Authority (CIMA) and pay an annual fee.[25]

B. Security Token Offerings (STOs)

Whether or not a token is considered a security also appears to be fact-specific. According to lawyers working in this area,

> [a]s with ICOs and the issuance of utility tokens, it is imperative that a full analysis on the characteristics of the Security Token be conducted to determine whether or not such token is in fact a "security" for the purposes of the Securities Investment Business Law (Revised) (SIBL). Notwithstanding the nomenclature, it is possible that some Security Tokens will not actually be considered as securities under Cayman law. However, where the token is backed by profits or is redeemable for an asset, consideration must be given as to whether such token would be regarded as a debt instrument or an option and therefore a security. Alternatively, where the Security Token possesses all the rights of a typical share and such rights are acknowledged in the issuer's memorandum and articles of association, it is arguable that such token actually represents a share in the issuer, much like a share certificate albeit in digital form.
>
> Under Cayman law, a token issuer may not be carrying on "securities investment business" despite issuing securities. Where a token issuer is issuing its own securities, such activity would typically be regarded as an excluded activity under SIBL in which case the issuer would not be required to be registered or licensed with the Cayman Islands Monetary Authority **(**CIMA**).** As several such exclusions or exemptions apply, the token issuer can therefore take steps to structure the STO so that licensing and registration is not required in the Cayman Islands.[26]

IV. Treatment of Cryptoassets Not Considered Securities

No specific guidance was found regarding the regulation of cryptocurrencies not considered securities. However, it appears that purely utility tokens or other types of tokens may fall outside the AML or securities regulatory regimes. The Cayman Islands is currently considering the Consumer Protection and Guarantees Bill, which is undergoing consultation[27] and may be delayed.[28]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

No further guidance was located regarding the treatment of different types of cryptocurrencies.

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[25] Gobin & Skotnicki, *supra* note 8.

[26] Bradley Kruger & Michael Robinson, *Security Token Offerings (STOs) in the Cayman Islands*, OGIER (Jan. 11, 2019), https://www.ogier.com/publications/security-token-offerings-stos-in-the-cayman-islands, *archived at* https://perma.cc/URA9-U7PC.

[27] Piers Dryden, *Fintech in the Cayman Islands*, LEXOLOGY (Jan. 24, 2019), https://www.lexology.com/gtdt/tool/workareas/report/fintech/chapter/cayman-islands, *archived at* https://perma.cc/6HQ7-ZU3N.

[28] *Consumer Protection Bill Delayed*, CAYMAN COMPASS (Feb. 28, 2018), https://www.caymancompass.com/2018/02/28/consumer-protection-bill-delayed/, *archived at* https://perma.cc/EXJ8-GWRX.

China

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SUMMARY In China, cryptocurrencies are not legal tender and financial institutions are not allowed to accept cryptocurrencies or provide any relevant financial services. Initial coin offerings were banned in 2017, and cryptocurrency trading platforms have essentially shut down their trading business in China. However, the possession and transfer of cryptocurrencies by individuals do not appear to be specifically regulated; in respect of these cases, cryptocurrencies could be protected by Chinese law as property with economic value.

I. Approach to Assets Created Through Blockchain

China does not recognize cryptocurrencies[1] as legal tender or a tool for retail payments. In a circular jointly issued by several government regulators warning the public about the risks of bitcoin in December 2013 (2013 Circular), the regulators defined bitcoin as a virtual commodity. The Circular also reminded websites that provide bitcoin trading services to perform their anti-money laundering duties.[2]

Later, in a circular warning about the risks of initial coin offerings (ICOs) issued on September 4, 2017 (2017 Circular), the regulators reiterated that cryptocurrencies, such as Bitcoin and Ethereum, are not issued by the country's monetary authority and therefore are not mandatorily-accepted legal tender. They do not have equal legal status with fiat currencies and "cannot and should not be circulated and used in the market as currencies."[3]

The 2017 Circular also imposed restrictions on the primary business activities of cryptocurrency trading platforms, including converting legal tender into cryptocurrencies, or vice versa, purchasing or selling cryptocurrencies, setting prices, or providing other related agent services. According to the Circular, government authorities may shut down the websites and mobile applications of platforms that fail to comply, remove their applications from application stores,

[1] The term 虚拟货币 ("virtual currencies") is used in Chinese.

[2] People's Bank of China (PBOC), Ministry of Industry and Information Technology (MIIT), China Banking Regulatory Commission (CBRC), China Securities Regulatory Commission (CSRC), and China Insurance Regulatory Commission (CIRC), Notice on Precautions Against the Risks of Bitcoins (Dec. 3, 2013) (2013 Circular), http://www.miit.gov.cn/n1146295/n1652858/n1652930/ n3757016/c3762245/content.html (in Chinese), *archived at* https://perma.cc/S4DN-DXHD (all translations by author).

[3] PBOC, Cyberspace Administration of China, MIIT, State Administration for Industry and Commerce, CBRC, CSRC, and CIRC, Announcement on Preventing Financial Risks from Initial Coin Offerings (Sept. 4, 2017) (2017 Circular), http://www.pbc.gov.cn/goutongjiaoliu/113456/113469/3374222/index.html (in Chinese), *archived at* https://perma.cc/N88N-5CV5.

or suspend the platform's business licenses.[4] As a result of the 2017 Circular and the subsequent regulatory measures, cryptocurrency trading platforms have essentially shut down their trading activities in China.[5]

II. Custodianship of Cryptocurrencies by Financial Institutions

Financial institutions in China are not allowed to accept cryptocurrencies or provide any relevant financial services. The 2013 Circular provided that financial institutions and payment institutions in China must not deal in bitcoins; use bitcoin pricing for products or services; buy or sell bitcoins; or provide direct or indirect bitcoin-related services, including registering, trading, settling, clearing, or other services. Financial institutions are also prohibited from accepting bitcoins or using bitcoins as a clearing tool, or trading bitcoins with Chinese yuan or foreign currencies.[6]

The 2017 Circular again prohibited financial institutions and non-bank payment institutions from directly or indirectly providing services for ICOs and cryptocurrencies, including opening bank accounts or providing registration, trading, clearing, or liquidation services.[7]

III. Regulation of Cryptocurrencies as Financial Securities

According to the 2017 Circular, ICOs are "raising virtual currencies through the irregular sale and circulation of tokens," which are "essentially illegal public financing without official authorization."[8] The Circular warned that financial crimes may be involved in ICOs, such as the illegal issuance of tokens or securities, illegal fundraising, financial fraud, or pyramid selling.[9]

IV. Treatment of Cryptoassets Not Considered Securities

Despite of the bans on ICOs and cryptocurrency trading platforms, it appears the possession and transfer of cryptocurrencies by individuals are not specifically prohibited by the Chinese regulators. In respect of these cases, cryptocurrencies could be treated as property with economic value and protected by the General Rules on the Civil Law of the People's Republic of China (PRC) and the PRC Contract Law.

For example, on October 25, 2018, the Shenzhen Court of International Arbitration reportedly published a case analysis concerning a contract dispute involving the possession and transfer of cryptocurrencies. In this dispute, concerning the return of bitcoins owed by one private individual to another, the arbitral panel found that although bitcoin does not have the legal status

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[4] *Id.*

[5] Xie Xu, *China to Stamp Out Cryptocurrency Trading Completely with Ban on Foreign Platforms*, SOUTH CHINA MORNING POST (Feb. 7, 2018), http://www.scmp.com/business/banking-finance/article/2132009/china-stamp-out-cryptocurrency-trading-completely-ban, *archived at* https://perma.cc/42H4-F2AW.

[6] 2013 Circular, *supra* note 2.

[7] 2017 Circular, *supra* note 3.

[8] *Id.*

[9] *Id.*

equal to currency and should not be utilized as a currency in the market, this does not prevent bitcoin from being protected by Chinese law as property with economic value.[10]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

Despite cracking down on privately-issued cryptocurrencies, the People's Bank of China (PBOC), China's central bank, is reportedly considering the issuance of its own digital currency.[11] According to a March 2018 interview with Zhou Xiaochuan, the then governor of the PBOC, the PBOC had been conducting a study of digital currency for over three years and has set up an Institute of Digital Money within the PBOC.[12]

In October 2017, the PBOC reportedly completed trial runs on the algorithms needed for a digital currency supply, "taking it a step closer to addressing the technological challenges associated with digital currencies."[13] The digital currency would be a digital form of the sovereign currency that is backed by the central bank. A news report stated that, "[u]nlike Bitcoin or other digital money issued by the private sector, the digital fiat currency has the same legal status as the Chinese yuan, the only fiat currency issued by the People's Bank of China."[14]

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[10] *Chinese Arbitration Court Recognizes Bitcoin as Property Protected by Law*, DAVISPOLK (Nov. 1, 2018), https://www.davispolk.com/files/2018-11-01-chinese-arbitration-court-recognizes-bitcoin-property-protected-by-law.pdf, *archived at* https://perma.cc/6SAK-QPQC.

[11] The term 数字货币 ("digital money") is used in Chinese.

[12] *Zhou Xiaochuan: Future Regulation on Virtual Currency Will Be Dynamic, Imprudent Products Shall Be Stopped for Now*, XINHUANET (Mar. 1, 2018), http://www.xinhuanet.com/finance/2018-03/10/c_129826604.htm (in Chinese), *archived at* https://perma.cc/2CW7-8F2T.

[13] Wang Yanfei, *PBOC Inches Closer to Digital Currency*, CHINA DAILY (Oct. 14, 2017), http://www.chinadaily.com.cn/business/2017-10/14/content_33235955.htm, *archived at* https://perma.cc/T4R8-R4PU.

[14] *Id.*

Denmark

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SUMMARY Denmark has not adopted legislation that specifically deals with cryptoassets. A crypoasset transaction may fall under Danish regulatory authority, depending on whether the cryptoasset is considered a form of payment (currency), capital asset (investment), or financial service.

The Danish Financial Supervisory Authority has stated that the use of cryptocurrencies as payment is generally not regulated by the Authority, but the applicability of Danish securities law will depend on the specifics of the initial coin offering (ICO). ICOs that are similar to initial public offerings (IPOs) are subject to securities law, and the issuing corporation must publish a prospectus in connection with the ICO.

Denmark generally treats cryptocurrencies as capital property for tax purposes, taxing gains and allowing for deductions on losses. However, losses may not be deducted as a business expense when the value of cryptocurrencies that have been received as payment for goods or services has decreased.

I. Approach to Assets Created through Blockchain

A. General

Denmark has no laws specifically addressing cryptocurrencies and no regulatory proposals on cryptocurrencies are pending in the Danish Parliament. However, the Danish Financial Supervisory Authority has issued statements explaining that Danish laws may apply depending on the nature of the cryptoasset and how it is used.[1] The Authority determined that initial coin offerings (ICOs) may be conducted in such a way as to fall under the purview of the Authority, and thus would be subject to Danish regulation—for example, "legislation on alternative investment funds, prospectuses, and money laundering."[2] Cryptocurrencies that are solely used as a means of payment continue to be outside of the purview of Authority.[3]

[1] Press Release, Finanstilsynet, Orientering om ICO'er [Orientation on ICOs] (Nov. 13, 2017), https://finanstilsynet.dk/da/Nyheder-og-Presse/Sektornyt/2017/Orientering-om-ICO, *archived at* https://perma.cc/3A5Y-W4PS.

[2] *Id.*

[3] *Id.*

In 2018, the Financial Supervisory Authority made a determination that a specific ICO was not subject to its authority. In the specific case, the determining factor was that "the relevant token did not grant financial or decision rights over the corporation or the corporation's earnings."[4]

The Authority had previously in 2013 rejected the idea that cryptocurrencies that functioned similar to bitcoins were currencies and stated that it would not regulate use of such cryptocurrencies.[5] In its statement the Financial Supervisory Authority emphasized that it had evaluated the use of the cryptocurrency system and found that cryptocurrencies such as bitcoins do not fall under any of the financial services categories, including the issuing of electronic money, payment for services, currency exchanges, or the issuing of mortgages; thus, it concluded, such cryptocurrency activity was not covered under current financial regulations.[6]

B. Anti-Money Laundering Law

1. Regulation

As a member of the European Union, Denmark is bound by the EU's Anti-Money Laundering Directives. It implemented the Fourth Anti-Money Laundering Directive through its Money Laundering Act.[7] The Fifth Anti-Money Laundering Directive must be implemented by January 10, 2020.[8] Money laundering is technology neutral, i.e., even though cryptoassets are not mentioned in the legislation, all money laundering using that technology is criminalized.[9]

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[4] *Finanstilsynet tager stilling til konkret ICO* [*The Financial Supervisory Authority Considers a Concrete ICO*], FINANSTILSYNET (Oct. 3, 2018), https://www.finanstilsynet.dk/Nyheder-og-Presse/Sektornyt/2018/FT-tagerstilling-ICO, *archived at* https://perma.cc/79Z2-94Q5 (translation by author).

[5] Press Release, Finanstilsynet, Advarsel mod virtuelle valutaer (bitcoin m.fl.) [Warnings Regarding Digital Currencies (Bitcoins etc.)] (Dec. 17, 2013), https://www.finanstilsynet.dk/da/Nyheder-og-Presse/Pressemeddelelser/Arkiv/Presse-2013/Advarsel-mod-virtuelle-valutaer-bitcom-mfl-2013, *archived at* https://perma.cc/UZ2E-G7S7.

[6] *Id.*

[7] Officielle noter Lov om forebyggende foranstaltninger mod hvidvask og finansiering af terrorisme (hvidvaskloven) [Act on the Prevention of Money Laundering and Financing of Terrorism] (LOV nr 651 af 08/06/2017) https://www.retsinformation.dk/Forms/R0710.aspx?id=191822, *archived at* https://perma.cc/QS6Y-4543.

[8] 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 (5th AMLD) art. 4, 2018 O.J. (L 156) 43, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843, *archived at* https://perma.cc/JJ8H-NG29. For more on the EU's Anti-Money Laundering Directives see the EU survey in this report.

[9] § 290 a STRAFFELOVEN [CRIMINAL CODE] (LBK nr 1156 af 20/09/2018), https://www.retsinformation.dk/Forms/R0710.aspx?id=202516, *archived at* https://perma.cc/P9Y2-E7FQ; Press Release, Finanstilsynet, Orientering om ICO'er, *supra* note 1.

2. Case Law

On April 8, 2019, the Danish police published a summary of a Danish District Court case where a man was sentenced to four years and three months in prison for money laundering, involving the use of bitcoins.[10] The total value of the money laundered exceeded DKK 3 million (about US$450,000).[11]

3. Prevalence

In a 2018 response to a parliamentary question to the Minister of Justice, the Justice Department responded that it was not aware of the use of bitcoin ATMs in Denmark to launder illicit funds.[12] However, it acknowledged that such cases have happened in other countries and that there is a likelihood that it will take place in Denmark as well.[13]

C. Taxation

Similar to other legal interpretations of how to treat cryptoassets, the way a cryptoasset is taxed depends on how it is used. SKAT (the Danish Tax Authority) and the Danish Tax Council have issued a number of statements on virtual and cryptocurrencies.

1. Business Losses Not Deductible

In 2014 the Danish Tax Authority published a binding reply (a response to a public question from taxpayer that is a binding interpretation of the Tax Authority) in which it declared that an invoice amount cannot be issued in cryptocurrencies, but must be issued in Danish Kroner or another recognized currency.[14] The Authority went on to state that any losses in the value of bitcoins cannot be deducted as a cost of doing business when bitcoins are used as a means of payment. [15]

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[10] *33-årig mand idømt over fire års fængsel for groft hæleri og hacking*, POLITI (Apr. 8, 2019), https://politi.dk/nordjyllands-politi/nyhedsliste/bit-coin/2019/04/08, *archived at* https://perma.cc/Q9S8-RMAJ.

[11] *Id*.

[12] Justitsministeriet, Spørgsmål nr. 194 (Alm. del) fra Folketingets Retsudvalg, Case No. 2018-0030-1813 (Dec. 17, 2018), https://www.ft.dk/samling/20181/almdel/reu/spm/194/svar/1542126/1990093/index.htm, *archived at* https://perma.cc/2FT7-3LP5.

[13] *Id*.

[14] Bitcoins, ikke erhvervsmæssig begrundet, anset for særkilt virksomhed [Bitcoins, Not Commercially Justified, Considered Special Activity], SKAT (Apr. 1, 2014), https://www.skat.dk/SKAT.aspx?oId=2156173, *archived at* https://perma.cc/6B89-6WQ2.

[15] *Id*.

2. Value-Added Tax

In 2016 the Danish Tax Authority discussed cryptocurrencies in relation to value-added tax (VAT) and found that cryptocurrencies are exempt from VAT.[16] The determination is consistent with the preliminary ruling issued by the Court of Justice of the European Union in 2015.[17]

The Tax Authority has also commented on how the mining of bitcoins should be treated from a VAT tax perspective.[18] The case presented to the Authority involved a Danish person who wanted to sell hashing capacity (data capacity) on the electrical grid, an activity that was subject to VAT, a cost that the seller could later deduct.[19]

3. Cryptocurrencies Treated as Capital or Financial Instruments

In 2018 the Danish Tax Council declared that losses on the sale of certain cryptocurrencies (in this case bitcoins) that were purchased as an investment are tax deductible.[20] In determining that losses are tax deductible the Tax Council also found that profits are subject to income taxation.[21]

In 2017 the Tax Council had previously found that other cryptocurrencies (in the relevant case bookcoins) are not subject to the same provisions for tax purposes. Instead, cryptocurrencies that are tied to another value, here silver, are more similar to structured debt (trade in commodities), and therefore subject to financial contracts taxation.[22] Thus, any income derived from the increase in value of these types of cryptocurrencies is subject to gains tax and loss deductions under the same conditions as financial contracts.[23]

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[16] *Momsfritagelse og lønsumsafgift - Køb og salg af Bitcoins* [*VAT Exemption and Payroll Taxes – Purchase and Sale of Bitcoins*], SKAT (Jan. 26, 2016), http://skat.dk/skat.aspx?oid=2225268, *archived at* https://perma.cc/XZG2-WB6J.

[17] Case C□264/14. Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718, http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=EN, *archived at* https://perma.cc/LU2G-U6VD.

[18] *Bitcoin mining og tilrådighedsstillelse af datakapacitet - moms og godtgørelse af elafgifter* [*Bitcoin Mining and Supply of Data Capacity – VAT and Payment of Electricity Fees*], SKAT (June 27, 2017), https://skat.dk/skat.aspx?oid=2249418, archived at https://perma.cc/N772-UTZQ.

[19] *Id.*

[20] *Tab ved afståelse af bitcoins*, SKAT (Sept. 5, 2018), https://skat.dk/skat.aspx?oid=2276694&chk=215961, *archived at* https://perma.cc/9VM8-YWNS

[21] *Id.*; *see also Gevinst og tab ved handel med bitcoins og ether,* SKAT (Apr. 3, 2018), https://skat.dk/skat.aspx?oid=2271473, *archived at* https://perma.cc/B9AZ-GZRL.

[22] *Digital valuta anset for struktureret fordring,* SKAT (Aug. 31, 2017), https://skat.dk/skat.aspx?oid=2251503, *archived at* https://perma.cc/TU75-Y8ZE; KURSGEVINSTLOVEN [CAPITAL GAINS ACT](LBK nr 1283 af 25/10/2016), https://www.retsinformation.dk/Forms/r0710.aspx?id=183750, *archived at* https://perma.cc/2SC5-3XHR.

[23] *Digital valuta anset for struktureret fordring*, SKAT, *supra* note 22; § 24 stk 3 KURSGEVINSTLOVEN.

4. Tax Authority Investigation

In January of 2019 the Tax Authority announced that it will collect information from cryptocurrency traders operating in Denmark to assess whether their customers are paying taxes.[24] The Tax Authority had previously received information on the sale and purchase of cryptocurrencies performed by Danes and persons with ties to Denmark from the Finnish Financial Authority.[25] According to reports, some 2,700 Danish citizens and residents have purchased and sold bitcoins to a value of DKK 100 million (US$15 million) on Finnish trading sites.[26]

II. Custodianship of Cryptocurrencies by Financial Institutions

No specific legislative provisions governing custodianship of cryptocurrencies or other cryptoassets exist under Danish law. Legal commentary suggests that at present operators of cryptowallets are not subject to money laundering provisions.[27] The argument is based on the assumption that crytpocurrencies generally are not subject to money laundering legislation.[28] As evidenced by a recent court case, however, the use of cryptocurrencies in money laundering is indeed illegal.[29]

III. Regulation of Cryptoassets as Financial Securities

Certain ICOs may qualify as securities if, because of their nature, they are more similar to initial public offerings (IPOs), and they fall under the general definition of "financial instruments" in the Act on Capital Markets.[30] A cryptoasset is considered a financial security for the purpose of the Act on Capital Markets if the purchase of the asset is associated with "financial and deciding

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[24] Press Release, Skattestyrelsen, Skattestyrelsen indhenter oplysninger fra danske kryptobørser (Jan. 14, 2019), https://www.sktst.dk/aktuelt/pressemeddelelser-og-nyheder/skattestyrelsen-indhenter-oplysninger-fra-danske-kryptoboerser/, *archived at* https://perma.cc/FKV9-ZMBE.

[25] *Pålæg af oplysningspligt efter skattekontrollovens § 8 D, stk. 1 - handel med virtuel valuta*, SKAT (Jan. 14, 2019), https://skat.dk/skat.aspx?oid=2284259&lang=da, *archived at* https://perma.cc/6ZDH-DNR8. *See also* Oliver Batchelor, *Efter finsk tip: Skattestyrelsen jagter danske bitcoin-spekulanter,* DR (Dec. 10, 2018), https://www.dr.dk/nyheder/penge/efter-finsk-tip-skattestyrelsen-jagter-danske-bitcoin-spekulanter, *archived at* https://perma.cc/EAH6-HFV3.

[26] Batchelor, *supra* note 25.

[27] Hans Fogtdal, *Regulering af virtuelle valutaer* [*Regulation of Virtual Currencies*], PLESNER (Jan. 17, 2018), https://www.plesner.com/insights/artikler/2018/01/regulering-af-virtuelle-valutaer?sc_lang=da-DK, *archived at* https://perma.cc/9ZRG-6QL4.

[28] *Id*.

[29] *33-årig mand idømt over fire års fængsel for groft hæleri og hacking*, POLITI, *supra* note 10.

[30] LOV OM KAPITALMARKNADER [ACT ON CAPITAL MARKETS] (LBK nr 12 af 08/01/2018), https://www.retsinformation.dk/Forms/r0710.aspx?id=196949, *archived at* https://perma.cc/74FA-F3PJ; Erhvervsministeriet, Bekendtgørelse om hændelsesrapportering for operatører af væsentlige tjenester [Regulation on Trade Reporting Requirements for Providers of Substantial Services] (BEK nr 457 af 09/05/2018), https://www.finanstilsynet.dk/~/media/Lovgivning/Lovsamling/2018/457-090518-pdf.pdf, *archived at* https://perma.cc/F3XE-FUJP.

rights over the corporation or the corporation's earnings."[31] Such ICOs are subject to capital market requirements in accordance with the Capital Markets Act, specifically those found in chapter 3.[32] Among other things this includes a duty to publish a prospectus.[33]

IV. Treatment of Cryptoassets Not Considered Securities

Cryptoassets that are not considered securities are considered cryptocurrencies or utility tokens and may be subject to consumer protection legislation.[34] The government has, however, not made any public statement to that effect.

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As Danish law does not specifically mention cryptoassets it also does not prohibit a certain form of cryptoassets. As seen above, different laws will apply to different types of cryptoassets based on their use. This means that issuers and users of cryptoassets must be mindful of what legislation may apply to them and their activities currently and in the future.[35]

VI. Creation of an Official Digital Danish Currency

The Danish Central bank analyzed whether it should adopt an e-currency, and the result was a resounding "no."[36] Specifically, its analysis concluded that

> a central bank digital currency would not be an improvement of the existing payment solutions in Denmark. Central bank digital currency would fundamentally change Danmarks Nationalbank's role in the financial system and make it a direct competitor to the commercial banks. The introduction would also lead to risks of financial instability. The potential benefits of introducing central bank digital currency for households and businesses in Denmark would not match the considerable challenges which this

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[31] Compare the outcome in the Danish Financial Supervisory Authority case where the lack of these defining characteristics resulted in the ICO not being subject to securities laws. *Finanstilsynet tager stilling til konkret ICO*, FINANSTILSYNET, *supra* note 4 (translation by author).

[32] Kap. 3 Lov om kapitalmarknader.

[33] For further regulation of prospectus, *see* Bekendtgørelse om prospekter [Regulation on Prospectuses] (BEK nr 1170 af 25/09/2018), https://www.retsinformation.dk/Forms/R0710.aspx?id=202841, *archived at* https://perma.cc/9QHG-BD4G.

[34] *See* Lov om forbud til beskyttelse af forbrugernes interesser [Danish Act on Protection of Consumers' Interests] (LOV nr 1257 af 20/12/2000), https://www.retsinformation.dk/Forms/R0710.aspx?id=4858, *archived at* https://perma.cc/3LUB-D2VL; Forbrugeraftaleloven [Consumer Contracts Act] (LOV nr 1457 af 17/12/2013 Gældende), https://www.retsinformation.dk/Forms/R0710.aspx?id=160666, *archived at* https://perma.cc/6SUF-29FD.

[35] *See* Thomas Prakash, *Jurist: Danske bitcoin-ejere er fanget i gråzone* [*Lawyer: Danish Bitcoin Owners are Trapped in a (Legal) Greyzone*](Dec. 12, 2018), https://www.dr.dk/nyheder/penge/jurist-danske-bitcoin-ejere-er-fanget-i-graazone, *archived at* http://perma.cc/K469-S5HH.

[36] DANMARKS NATIONALBANK ANALYSIS, CENTRAL BANK DIGITAL CURRENCY IN DENMARK? No. 28 (Dec. 15, 2017), http://www.nationalbanken.dk/en/publications/Documents/2017/12/Analysis - Central bank digital currency in Denmark.pdf#search=electronic currency, *archived at* https://perma.cc/DA7R-UQSY.

introduction would present. Danmark's Nationalbank therefore has no plans to issue central bank digital currency.[37]

[37] *Id*.

Finland

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SUMMARY Cryptocurrencies or cryptoassets are not specifically addressed in Finnish legislation. Nevertheless cryptoassets may be to subject to Finnish legislation as its rules on securities, money laundering, and tax are technology neutral and do not include exemptions for cryptoassets.

Initial coin offerings (ICOs) that are similar to IPOs must file a prospectus and send annual reports to the Financial Supervisory Authority. ICOs that are not securities are subject to the Consumer Protection Act, which among other things prohibits misleading advertising.

Cryptocurrencies are generally taxed as capital assets. In accordance with EU law, trade in cryptocurrencies is not subject to value-added tax.

I. Approach to Assets Created Through Blockchain

Currently, Finland does not have specific legislation that regulates cryptocurrencies. However, legislation that is aimed at increasing the Financial Supervisory Authority's authority to take measures against cryptocurrencies, specifically to prevent money laundering and financing of terrorism, is pending before the Finnish Parliament.[1] Among other things, the legislation will implement the EU's Fifth Money Laundering Directive.[2]

According to the Finnish Financial Supervisory Authority, "[r]egulation of virtual currency exchange services currently depends on what kind of virtual currencies are admitted to trading and how payment transactions are arranged."[3] For example,

> [i]f a virtual currency is *considered to be security*, regulations applicable to issuing a security must be adhered to. Exchange services offering trading in such currencies must also take into consideration provisions relating to securities trading.

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[1] Press Release, Finansministeriet, Ny lagstiftning om virtuella valutor föreslås – brottsbekämpning underlättas [New Legislation on Virtual Currencies Proposed – Will Ease Crime Prevention] (June 14, 2018), https://mmm.fi/sv/web/vn/artikeln/-/asset_publisher/10623/virtuaalivaluutoille-ehdotetaan-saantelya-rikosten-torjunta-helpottuu, *archived at* https://perma.cc/YY4Y-WDMD; Regeringens proposition [Government Bill] RP 167 2018 rd, https://www.eduskunta.fi/SV/vaski/HallituksenEsitys/Sidor/RP_167+2018.aspx, *archived at* https://perma.cc/SK2W-LHEQ.

[2] *Id.*

[3] *Frequently Asked Questions on Virtual Currencies and their Issuance (Initial Coin Offering)*, FINANCIAL SUPERVISORY AUTHORITY, https://www.finanssivalvonta.fi/en/banks/fintech--financial-sector-innovations/frequently-asked-questions-on-virtual-currencies-and-their-issuance-initial-coin-offering/ (last updated Jan. 31, 2019), *archived at* https://perma.cc/5WP2-UQR6.

> If a virtual currency *is not considered to be a security or financial instrument*, the general provisions of the Consumer Protection Act, such as the provisions relating to distance selling, should nevertheless be taken into consideration.[4]

The Financial Supervisory Authority basically defines virtual currencies associated with initial coin offerings (ICOs) in three different ways depending on their use:[5]

> 1. **Payment instrument-like virtual currencies**, originally planned as alternatives to traditional currencies and also intended to be used as payment instruments elsewhere than in their issuer's services. The best known payment instrument-like virtual currency is Bitcoin.
> 2. **Virtual currencies used as payment for a certain commodity (utility coin),** which can be used to pay for their issuer's products or services. Generally, the products or services are only at an early stage of their development when the virtual currency usable to pay for them is issued.
> 3. **Financial instrument-like virtual currencies**, which have features in common with securities, such as voting and ownership rights and expected returns.[6]

Thus these three different types of ICOs will all be treated differently by the Financial Supervisory Authority. In this report they will be referred to as cryptocurrencies, tokens, and securities. In its explanatory statement the Financial Supervisory Authority also makes clear that operators must be aware of changes to legislation and regulation concerning their specific ICO, including how they may be interpreted.[7]

A. Financial Regulation and Consumer Protection

The Finnish legislation on securities is technology neutral, and may apply to cryptoassets and ICOs.[8] Cryptoassets and ICOs that are not covered by Finland's financial regulations will be subject to its consumer protection laws.[9]

B. Anti-Money Laundering Law

Money laundering is a crime in Finland, no matter what technological device is used.[10] Finland has not yet implemented the Fifth Money Laundering Directive. Once it does, the Law on Prevention of Money Laundering and Financing of Terrorism will include language targeting cryptocurrencies.[11]

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[4] *Id*. Emphasis by author.

[5] *Id*.

[6] *Id*.

[7] *Id*.

[8] *See* 1 kap. 1 § VÄRDEPAPPERSMARKNADSLAG [SECURITIES MARKET ACT] (FFS 2012/746), https://www.finlex.fi/sv/laki/ajantasa/2012/20120746, *archived at* https://perma.cc/936G-ATZA. Further discussed below, Part III.

[9] *See* Part IV, below.

[10] 32 kap. 6 § STRAFFLAG (PENAL CODE) (FFS 1889/39), https://www.finlex.fi/sv/laki/ajantasa/1889/18890039001, *archived at* https://perma.cc/BF5V-BP8S.

[11] Press Release, Finansministeriet, *supra* note 1; Regeringens proposition [Government Bill] RP 167 2018 rd, https://www.eduskunta.fi/SV/vaski/HallituksenEsitys/Sidor/RP_167+2018.aspx, *archived at* https://perma.cc/SK2W-LHEQ; LAG OM FÖRHINDRANDE AV PENNINGTVÄTT OCH AV FINANSIERING AV TERRORISM

C. Taxation

1. *Income Tax*

The Finnish Tax Authority (Vero/SKAT) has issued guidance on how virtual currencies are taxed for income tax purposes.[12] Taxation of cryptocurrencies and cryptoassets depend on the nature of the asset.[13] Typically, the money derived from the sale or barter of virtual currencies has been treated as income from capital.[14] However, losses are typically not deductible.[15] Thus, Finland treats, for purposes of income tax, cryptocurrencies similar to CFD (Contract for Difference) products.[16] In a March 2019 judgement the Finnish Supreme Administrative Court held that a sale of the cryptocurrency Ether that had been purchased with the goal of making a profit was not taxable as capital profits, but as income (gain) on transfer of property.[17] The tax authority is adjusting its guidelines accordingly.[18]

Mining of cryptocurrencies is taxed differently from the sale of cryptocurrencies. For tax purposes, mining of cryptocurrencies is considered Earned Income (*Förvärvsinkomst*) as Income from Other Activity, i.e. work-related.[19] The income is considered income for tax purposes when the value of the mined product is accessible to the user.[20] Thus, the market value of the virtual currency at the time it is mined and available to the miner will determine his or her tax liability.[21] Moreover, costs associated with the mining will be deductible in relation to the income derived from mining.[22] For example, mining generally requires a lot of electricity, and thus the electricity

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[LAW ON THE PREVENTION OF MONEY LAUNDERING AND THE FINANCING OF TERRORISM] (FFS 2017/444), https://www.finlex.fi/sv/laki/ajantasa/2017/20170444, *archived at* https://perma.cc/V5CB-M9LR.

[12] *Taxation of Virtual Currencies*, VERO (May 29, 2018), https://www.vero.fi/en/detailed-guidance/guidance/48411/taxation-of-virtual-currencies/, *archived at* https://perma.cc/W8JK-9BCC; *Har du använt virtuella valutor?*, VERO (Apr. 10, 2017), https://www.vero.fi/sv/skatteforvaltningen/skatteforvaltningen/nyheter/uutiset/2017/har_du_anvant_virtuella_valuto/, *archived at* https://perma.cc/8KGJ-NPBK.

[13] *Taxation of Virtual Currencies*, *supra* note 13.

[14] 32 § INKOMSTSKATTELAGEN [INCOME TAX ACT] (ISKL), https://www.finlex.fi/sv/laki/ajantasa/1992/19921535, *archived at* https://perma.cc/EW3Z-B99S.

[15] *Taxation of Virtual Currencies*, *supra* note 13; Högsta förvaltningsdomstolen [Supreme Administrative Court Decision] HFD 54/2017, HFD 2010:74, https://www.finlex.fi/sv/oikeus/kho/vuosikirjat/2010/201003093, *archived at* https://perma.cc/ZM7E-2NJN.

[16] *Taxation of Virtual Currencies*, *supra* note 13; HFD 2010:74.

[17] Högsta förvaltningsdomstolen [Supreme Administrative Court Decision] 29.3.2019/1263 HFD 2019:42 (ECLI:FI:KHO:2019:42) (summary in Swedish), https://www.finlex.fi/sv/oikeus/kho/vuosikirjat/2019/201901263, *archived at* https://perma.cc/XX2U-646C; 45 § 1 mom. ISKL.

[18] *Taxation of Virtual Currencies*, *supra* note 13.

[19] 61 § ISKL; *Taxation of Virtual Currencies*, *supra* note 13.

[20] *Taxation of Virtual Currencies*, *supra* note 13.

[21] *Id.*

[22] *Id.*

cost for mining is deductible,[23] as are costs for computers and other equipment needed in the mining.[24] Blocking others' mining activities for the protection of a value in the cryptocurrencies, known as proof-of-stake protocol, is considered as income from capital for tax purposes.[25]

In relation to ICOs, the nature of the investment conditions of the ICO determines how the acquisition and sale of the financial product is taxed.[26]

Virtual currencies used in internet games (tokens) that may be used as payments or that may be converted to cash are considered earned income as they relate to the gamer's personal activity.[27]

2. Value-Added Tax (VAT)

In accordance with EU law, trade in cryptocurrencies is exempt from VAT, as it is considered a financial service.[28]

II. Custodianship of Cryptocurrencies by Financial Institutions

There is no regulation of custodianship of cryptocurrencies by financial institutions in Finland. However, the Financial Supervisory Authority noted in 2019 that new money laundering rules are expected to enter into force in 2019 and therefore "providers of exchange services and wallet services should familiarise themselves with the regulations in advance."[29] Specifically, this means reviewing the draft Finnish legislation and the EU's Fifth Money Laundering Directive.[30]

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[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, 2006 O.J. (L 347) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0112&from=EN, *archived at* https://perma.cc/SSQ7-KEHL; 42 § mom. 5 p. MERVÄRDESSKATTELAG [VALUE ADDED TAX ACT] (MOMSL), https://www.finlex.fi/sv/laki/ajantasa/1993/19931501, *archived at* https://perma.cc/UQL8-PNC9; CENTRALSKATTENÄMNDEN CSN 2014/34, https://www.vero.fi/sv/Detaljerade_skatteanvisningar/centralskattenamndens-forhandsavgoranden/54360/csn034201/, *archived at* https://perma.cc/24GS-A8NQ; Case C□264/14. Skatteverket v. David Hedqvist, 2015 CURIA EUROPA, ECLI:EU:C:2015:718 (Oct. 22, 2015), http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=EN, *archived at* https://perma.cc/LU2G-U6VD.

[29] *Frequently Asked Questions on Virtual Currencies and their Issuance (Initial Coin Offering)*, *supra* note 3.

[30] Press Release, Finansministeriet, *supra* note 1.

III. Regulation of Cryptocurrencies as Financial Securities

Cryptoassets may be considered securities. The Finnish legislation on securities is technology neutral.[31] Thus, as the Financial Supervisory Authority has noted,

> [a] virtual currency to be issued via an ICO may also fall within the scope of the definition of a security or financial instrument. A security is defined in Chapter 2 Section 1 of the Securities Market Act. A security is negotiable and issued or meant to be issued to the public together with several other securities with similar rights. A financial instrument is defined in Chapter 1 Section 14 of the Investment Services Act (747/2012).[32]

Moreover the Financial Supervisory Authority has clarified that

> [t]here are no special regulations or exceptions for the issuance of virtual currencies. If a virtual currency classified as a transferable security is issued via an ICO, securities legislation should be adhered to. In this case, the issuer of the virtual currency may have, for example, an obligation to prepare and publish a prospectus.[33]

Finnish securities regulation requires that "[a]nyone that offers securities to the public or applies for securities to be traded on a regulated market, must make public a prospectus of the securities.[34] New EU rules on security market prospectus will enter into force on July 21, 2019.[35] Other general requirements on issuers of securities include a prohibition on providing false or misleading information.[36]

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[31] *See* 1 kap. 1 § VÄRDEPAPPERSMARKNADSLAG [SECURITIES MARKET ACT] (FFS 2012/746), https://www.finlex.fi/sv/laki/ajantasa/2012/20120746, *archived at* https://perma.cc/936G-ATZA.

[32] *Frequently Asked Questions on Virtual Currencies and their Issuance (Initial Coin Offering), supra* note 3.

[33] *Id.* For further information on prospectus regulations *see Offering of Securities and Prospectuses*, FINANCIAL SUPERVISORY AUTHORITY, https://www.finanssivalvonta.fi/en/capital-markets/issuers-and-investors/offering-of-securities-and-prospectuses/ (last updated Dec. 5, 2018), *archived at* https://perma.cc/WK73-6KN8.

[34] 3 kap. 1 § VÄRDEPAPPERSMARKNADSLAG [SECURITIES MARKET ACT](FFS 2012/746), https://www.finlex.fi/sv/laki/ajantasa/2012/20120746, *archived at* https://perma.cc/936G-ATZA.

See also Regleringen av värdepappersprospekt ska förnyas [Regulation of Securities Prospectus to be Updated], FINANSMINISTERIET (July 25, 2017) https://vm.fi/sv/artikel/-/asset_publisher/lainsaadantoa-uudistetaan-arvopapereita-koskevien-esitteiden-saantelyn-osalta, *archived at* https://perma.cc/L9PF-SVT9.

[35] *See* Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC (1), 2017 O.J. (L168) 12, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:L:2017:168:FULL&from=EN , *archived at* https://perma.cc/SN5D-SJ89; Press Release, Finansministeriet, Regleringen av värdepappersprospekt ska förnyas (July 25, 2017), https://vm.fi/sv/artikel/-/asset_publisher/lainsaadantoa-uudistetaan-arvopapereita-koskevien-esitteiden-saantelyn-osalta, *archived at* https://perma.cc/G4GE-FC8L.

[36] 1 kap. 4 § VÄRDEPAPPERSMARKNADSLAG.

IV. Treatment of Cryptoassets Not Considered Securities

No specific legislative provisions governing cryptocurrencies or other cryptoassets exist under Finnish law.

The Financial Supervisory Authority has explained that "[i]f a virtual currency is not considered to be a security or financial instrument, the general provisions of the Consumer Protection Act, such as the provisions relating to distance selling, should nevertheless be taken into consideration."[37] The Consumer Protection Act includes rules on misleading advertising, untrue information, transfer of the goods, and a duty to inform.[38]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As noted above, the type of cryptocurrency as well as the user's relationship to the cryptocurrency determine the legal treatment of the cryptoasset. The Finnish Supervisory Authority notes that "[t]he most important issue in organising an ICO is the nature of the virtual currency to be issued and to what it entitles."[39] There are no specific restrictions or rules regarding particular types of cryptocurrencies.

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[37] *Frequently Asked Questions on Virtual Currencies and their Issuance (Initial Coin Offering), supra* note 3.

[38] 2 kap. 2 and 6§§, 5 kap. 4 § and 6 a kap. 5§ KONSUMENTSKYDDSLAG [CONSUMER PROTECTION ACT] (FFS 1978/38), https://www.finlex.fi/sv/laki/ajantasa/1978/19780038, *archived at* https://perma.cc/SJT4-X8EN.

[39] *Frequently Asked Questions on Virtual Currencies and their Issuance (Initial Coin Offering)*, *supra* note 3.

France

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SUMMARY The French government has started to build a legal framework for cryptoassets with the goal of becoming a pioneering and key player in the field at the international level. Two recent studies, one by the National Assembly and one commissioned by the Minister of the Economy and Finance, offer in-depth analyses of cryptocurrencies in France and make several policy proposals. Both reports appear to agree on the importance of establishing rules that provide clarity and security while also allowing as much flexibility as possible, so that the cryptoasset sector may develop through experimentation.

The Prudential Supervisory Authority has adopted the position that cryptocurrency exchange platforms needed to be licensed as payment service providers to operate legally. A current bill includes several provisions on cryptoassets. If this bill becomes law, it will create a legal framework for initial coin offerings, based on an optional certification scheme that would include compliant token issuers on a public "white list," signaling to investors that they are trustworthy.

Anti-money-laundering regulations and reporting requirements apply to professionals involved in the sale or purchase of cryptoassets. France's principal anti-money-laundering agency has created a new specialized unit to address an increase in the use of cryptoassets in money laundering and the financing of terrorism.

The Appropriations Law for 2019 clarified how cryptoassets are taxed by specifying that gains from the sale of cryptoassets are subject to an income tax of 12.8% and social contributions of 17.2%. Starting in 2020, French taxpayers will have to declare all of their cryptoasset accounts to French tax authorities, including those located abroad.

I. Approach to Assets Created Through Blockchain

France appears to be in the process of building a fairly comprehensive legal framework for cryptoassets. The French Minister of Finance has expressed the country's ambition to "adopt an open approach while playing a pioneering and key role at the international level" in relation to cryptoassets.[1] The government has been actively studying the best ways to achieve those goals, and has started to adopt some legislation aimed at meeting them.

[1] ERIC WOERTH & PIERRE PERSON, RAPPORT D'INFORMATION RELATIE AUX MONNAIES VIRTUELLES [INFORMATIONAL REPORT ON VIRTUAL CURRENCIES] 52 (Commission des finances, de l'économie générale et du contrôle budgétaire [Commission on Finance, the General Economy, and Budgetary Control], Assemblée nationale [National Assembly], No. 1624, Jan. 30, 2019), http://www.assemblee-nationale.fr/15/pdf/rap-info/i1624.pdf, *archived at* https://perma.cc/FZP8-3P9Q.

A 2018 report commissioned by the Minister of the Economy and Finance, referred to as the Landau Report (after its main author), argued against "directly regulating cryptocurrencies," as this would make it necessary to "define and classify, and therefore rigidify objects that are essentially in motion and still unidentified."[2] For the near future, at least, regulators should accept a certain amount of ambiguity until cryptocurrencies become more established and less experimental, the report said.[3] Any regulation should be "technologically neutral" to the extent possible, and be geared towards regulating the actors rather than the products. Notable exceptions to this general principle, however, would be regulations to fight against money laundering and the financing of terrorism.[4]

Furthermore, this report called on the government to clarify the accounting and tax framework applicable to cryptocurrencies, to provide market actors with more legal certainty.[5] Additionally, the authors called on the government to promote the development of blockchain technology and the digitization of assets, while also taking measures to limit the financial sector's exposure to cryptoassets.[6]

A further report on cryptocurrencies was published in January 2019 by the Commission on Finance, the General Economy, and Budgetary Control of the National Assembly, France's lower house of Parliament.[7] This report, which included a series of 27 policy recommendations for cryptoassets, argued for a legislative approach that would "structure the conversion point between fiat currency and cryptoassets, while giving a maximum amount of flexibility within the blockchain space, giving free reign to experimentation."[8] Similar to the Landau Report, the National Assembly report called for a regulation that would be flexible and would not constrain cryptoassets to existing legal definitions.[9]

II. Early Blockchain-Related Legislation

The first piece of legislation directly related to cryptoassets appears to have been adopted in April 2016, when an ordinance included two provisions which allowed the use of blockchain technology for a specific type of zero-coupon bond called a "mini-bond" (*minibon*).[10] The main

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[2] JEAN-PIERRE LANDAU & ALBAN GENAIS, LES CRYPTO-MONNAIES [CRYPTOCURRENCIES]: RAPPORT AU MINISTRE DE L'ECONOMIE ET DES FINANCES [REPORT TO THE MINISTER OF ECONOMY AND FINANCE] 44 (July 4, 2018), https://www.ladocumentationfrancaise.fr/var/storage/rapports-publics/184000433.pdf, *archived at* https://perma.cc/83RK-WRNT.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 45.

[6] *Id.*

[7] WOERTH & PERSON, *supra* note 1.

[8] *Id.* at 119.

[9] *Id.* at 70.

[10] Ordonnance n° 2016-520 du 28 avril 2016 relative aux bons de caisse [Ordinance No. 2016-520 of 28 April 2016 Regarding Zero Coupon Bonds], art. 2,

impact of this ordinance was to provide the first definition of blockchain in French law, but otherwise these provisions only had a very narrow application. Another ordinance, from December 2017, went further and made it possible to use blockchain technology for a broader range of financial instruments.[11] This allows the tokenization of assets, which makes the trading of financial assets in large volumes possible.[12]

III. Financial Regulation and Consumer Protection

The French Financial Market Authority (Autorité des marchés financiers, AMF) and Prudential Supervisory Authority (Autorité de contrôle prudentiel et de résolution, ACPR) issued a joint notice in December 2017, warning investors about the current unregulated nature of cryptocurrencies.[13]

The ACPR took the position that intermediation in the exchange of cryptocurrencies against legal tender currency should be considered a payment service. Consequently, cryptocurrency exchange platforms in France need to be licensed as payment service providers by the ACPR.[14] As a condition for obtaining and keeping a payment service provider license, cryptocurrency exchanges must follow regulations designed to prevent money laundering and the financing of terrorism, particularly by establishing internal monitoring and compliance systems.[15]

A current bill, referred to as the PACTE Bill ("Projet de loi Pacte"), includes amendments to the French Monetary and Financial Code that would add several provisions regarding cryptoassets.[16] If it becomes law, this bill will create a new legal framework for initial coin offerings (ICOs). One of the features of this legal framework is the creation of a certification scheme by the AMF, by which token issuers that fulfill certain criteria will be included on a "white list" available to the

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https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000032465520&categorieLien=id, *archived at* https://perma.cc/K3UP-AJ9D.

[11] Ordonnance n° 2017-1674 du 8 décembre 2017 relative à l'utilisation d'un dispositif d'enregistrement électronique partagé pour la représentation et la transmission de titres financiers [Ordinance No. 2017-1674 of 8 December 2017 Regarding the Use of a Shared Electronic Registration Method for the Representation and Conveyance of Financial Instruments], https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000036171908&categorieLien=id, *archived at* https://perma.cc/ESA7-89E6.

[12] WOERTH & PERSON, *supra* note 1, at 51.

[13] *France, in* LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD 31 (June 2018), , http://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf; *Achats de Bitcoin: l'AMF et l'ACPR mettent en garde les épargnants* [*Bitcoin Purchases: The AMF and ACPR Warn Savers*], AMF, ACPR (Dec. 4, 2017), https://acpr.banque-france.fr/sites/default/files/medias/documents/20171204-cp-bitcoin.pdf, *archived at* https://perma.cc/CM6Q-EGUH.

[14] ACPR, Position de l'ACPR relative aux opérations sur Bitcoins en France [Position of the ACPR Regarding Bitcoin Operations in France] (Position 2014-P-01, Jan. 29, 2014), https://acpr.banque-france.fr/sites/default/files/20140101_acpr_position_bitcoin.pdf, *archived at* https://perma.cc/NYZ6-YR6N.

[15] *Id.*

[16] Projet de loi relatif à la croissance et la transformation des entreprises [Bill Regarding Growth and the Transformation of Companies], No. 382 (Sénat [Senate]) (Mar. 18, 2019), arts. 26, 26*bis*(A), 26*bis*(B), https://www.senat.fr/leg/pjl18-382.pdf, *archived at* https://perma.cc/A8DE-66LB.

public. The government hopes that this "white list" will provide investors useful evidence of an issuer's trustworthiness.[17] In debating the PACTE Bill, several legislators have expressed concerns that it does not provide enough protection to investors. Their concerns stem from the optional nature of the AMF's certification, and the fact that the Bill does notaddress online frauds related to cryptocurrencies.[18] The PACTE Bill was adopted by the National Assembly on March 16, 2019, and is scheduled to be discussed and voted on by the Senate in April.[19]

IV. Anti-Money Laundering Law

Legislation adopted in December 2016 amended the Financial and Monetary Code to apply anti-money laundering and counter-financing of terrorism regulations to professionals involved in the sale or purchase of cryptoassets.[20] The Code now requires "any person who, as a habitual part of their profession, is either a party or an intermediary in the purchase or sale of any instrument containing non-monetary value units in digital form, that can be saved or transferred for the purpose of buying a good or a service, but that does not represent a debt to the originator," to monitor and report activity which could linked to money laundering or the financing of terrorism.[21]

In its 2018 activity report, France's principal anti-money laundering agency, the Ministry of Finance's Traitement du renseignement et action contre les circuits financiers clandestins (Treatment of Intelligence and Action Against Clandestine Financial Circuits) (TRACFIN), stated that it had seen a sharp increase in the use of cryptoassets for money laundering and the financing

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[17] *Loi PACTE : les 6 mesures qui vont dynamiser l'innovation en France* [*PACTE Law : 6 Measures That Will Invigorate Innovation in France*], ECONOMIE.GOUV.FR [website of the French Ministry of the Economy and Finance] (Oct. 10, 2018), https://www.economie.gouv.fr/loi-pacte-encourager-innovation-france, *archived at* https://perma.cc/6TEB-838V.

[18] Gaëlle Marraud des Grottes, *PACTE et ICO : modification à la marge en séance publique* [*PACTE and ICOs : Amendments on the Margin During the Public Session*], ACTUALITES DU DROIT (Mar. 19, 2019), https://www.actualitesdudroit.fr/browse/tech-droit/blockchain/20492/pacte-et-ico-modification-a-la-marge-en-seance-publique, *archived at* https://perma.cc/4DUJ-P9US.

[19] AFP, *Projet de loi Pacte: nouveau feu vert de l'Assemblée* [*PACTE Bill : New Green Light From the Assembly*], PUBLIC SENAT (Mar. 16, 2019), https://www.publicsenat.fr/article/politique/projet-de-loi-pacte-nouveau-feu-vert-de-l-assemblee-139264, *archived at* https://perma.cc/QBX3-FCRF.

[20] Ordonnance n° 2016-1635 du 1er décembre 2016 renforçant le dispositif français de lutte contre le blanchiment et le financement du terrorisme [Ordinance No. 2016-1635 of 1 December 2016 Reinforcing the French Measures in the Fight Against Money Laundering and the Financing of Terrorism], art. 2, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033511344&categorieLien=id, *archived at* https://perma.cc/554B-N6Q5; CODE MONETAIRE ET FINANCIER [MONETARY AND FINANCIAL CODE], art. L561-2 (7° bis), https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000020871540&cidTexte=LEGITEXT000006072026, *archived at* https://perma.cc/B2KT-KBW4.

[21] CODE MONETAIRE ET FINANCIER [FINANCIAL AND MONETARY CODE], art. L561-2, https://www.legifrance.gouv.fr/affichCodeArticle.do?idArticle=LEGIARTI000020871540&cidTexte=LEGITEXT000006072026, *archived at* https://perma.cc/S92N-X66K.

of terrorism.[22] To address this development, TRACFIN created a new investigative unit specialized in the analysis of cryptoasset transactions.[23]

V. Taxation

The Appropriations Law for 2019 amended the French Tax Code to clarify how cryptoassets are taxed.[24] Under these new provisions, the gains from the sale of cryptoassets are subject to an income tax of 12.8% and social contributions of 17.2%.[25] This aligns cryptoassets with the taxation of income from stocks and other non-real estate assets.[26] Under the new tax provisions, persons who sell less than 305 Euros' (US$343) worth of cryptoassets in a year are exempt from these taxes.[27] However, the new provisions will also make it mandatory for French taxpayers to declare all of their cryptoasset accounts to the French tax authorities, including accounts located abroad.[28] This latter tax provision will only enter into force on January 1, 2020, while the former ones have been in force since January 1, 2019.[29]

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[22] TRACFIN, TENDANCES ET ANALYSE DES RISQUES DE BLANCHIMENT DE CAPITAUX ET DE FINANCEMENT DU TERRORISME EN 2017-2018 [TRENDS AND ANALYSIS OF RISKS OF MONEY LAUNDERING AND FINANCING OF TERRORISM IN 2017-2018] 61 (Nov. 28, 2018), https://www.economie.gouv.fr/files/2017_Rapport_analyse_FR.pdf, *archived at* https://perma.cc/64A7-JRRX.

[23] *Id.* at 62.

[24] Loi No. 2018-1317 du 28 décembre 2018 de finance pour 2019 [Law No. 2018-1317 of 28 December 2019 of Finance for 2019], art. 41, https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000037882341&dateTexte=&categorieLien=id, *archived at* https://perma.cc/LL56-TTCH.

[25] CODE GENERAL DES IMPOTS [GENERAL TAX CODE], art. 150 VH *bis*, https://www.legifrance.gouv.fr/affichCodeArticle.do?cidTexte=LEGITEXT000006069577&idArticle=LEGIARTI000037943236&dateTexte=&categorieLien=cid, *archived at* https://perma.cc/64F8-RUP8.

[26] Delphine Cuny, *Bitcoin: Bercy taxe à 30% et oblige à déclarer les comptes de crypto-actifs* [*Bitcoin : Ministry of Finance to Tax Crypto-Assets at 30%, and Makes Declaring Crypto-Asset Accounts Mandatory*], LA TRIBUNE (Nov. 15, 2018), https://www.latribune.fr/entreprises-finance/banques-finance/bitcoin-bercy-taxe-a-30-et-oblige-a-declarer-les-comptes-de-crypto-actifs-797653.html, *archived at* https://perma.cc/92TJ-YAPP.

[27] CODE GENERAL DES IMPOTS, art. 150 VH *bis* (II)(B).

[28] Loi No. 2018-1317 du 28 décembre 2018, art. 41(I)(4°).

[29] *Id.* art. 41 (II).

Germany

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SUMMARY The German federal government is currently preparing a comprehensive national "Blockchain Strategy," which is slated to be presented in the summer of 2019. In addition, it supports the development of European and international regulation for cryptocurrencies and tokens (cryptoassets). In addition, in March 2019, the German Federal Ministry of Finance together with the German Federal Ministry for Justice and Consumer Protection published key points for the regulatory treatment of electronic securities and crypto tokens as the first implementing measure within the framework of the Blockchain Strategy.

Germany is currently in the process of transposing into its domestic law the amendment of the European Union's Anti-Money Laundering Directive (5th AMLD), which extended the customer due diligence requirements to custodian wallet providers and virtual currency exchange platforms, and defined virtual currencies. In line with the jurisprudence of the European Court of Justice, transactions to exchange a traditional currency for bitcoin or other virtual currencies and vice versa constitute the taxable supply of other services for consideration, but fall under the exemption from value-added tax (VAT).

The German Federal Financial Supervisory Authority (BaFin) qualifies virtual currencies/cryptocurrencies as units of account and therefore financial instruments. However, on September 29, 2018, the Higher Regional Court of Berlin held that trading in bitcoin does not require a banking license, because it is not a unit of account within the meaning of the German Banking Act, a decision that is directly at odds with the regulatory practice of BaFin. With regard to ICOs, BaFin assesses on a case-by-case basis whether the ICOs qualify as financial instruments or as securities and therefore trigger the need to comply with the relevant financial legislation.

I. Approach to Assets Created through Blockchain

The German Federal government is currently preparing a comprehensive national "Blockchain Strategy," one of its priorities set out in the coalition agreement between the governing parties CDU, CSU, and SPD. In addition, it supports the development of European and international regulation for cryptocurrencies and tokens (cryptoassets).[1] A public consultation on the

[1] EIN NEUER AUFBRUCH FÜR EUROPA. EINE NEUE DYNAMIK FÜR DEUTSCHLAND. EIN NEUER ZUSAMMENHALT FÜR UNSER LAND [A NEW DEPARTURE FOR EUROPE. A NEW DYNAMIC FOR GERMANY. A NEW SOLIDARITY FOR OUR COUNTRY], KOALITIONSVERTRAG ZWISCHEN CDU, CSU UND SPD [COALITION AGREEMENT BETWEEN CDU, CSU, AND SPD], 19. LEGISLATURPERIODE [19TH LEGISLATIVE PERIOD], at 70, 71, https://www.cdu.de/system/tdf/media/dokumente/koalitionsvertrag_2018.pdf?file=1, *archived at* http://perma.cc/J63C-3ZCW; *Blockchain-Strategie* [*Blockchain Strategy*], BUNDESREGIERUNG [FEDERAL GOVERNMENT], https://www.bundesregierung.de/breg-de/themen/digital-made-in-de/blockchain-strategie-1546662 (last visited Mar. 13, 2019), *archived at* http://perma.cc/L929-T2P3.

Blockchain Strategy took place from February 20 to March 29, 2019.[2] The Blockchain Strategy is slated to be presented in the summer of 2019.[3] With regard to the legal framework, the Blockchain Strategy will cover the necessity of a different legal approach for public and private blockchain, the applicable law, liability and enforcement, smart contracts, the use of intermediaries, data protection, formal requirements such as recognizing digital formats as equivalent to written formats, and taxation.[4]

In addition, in March 2019, the German Federal Ministry of Finance together with the German Federal Ministry for Justice and Consumer Protection published key points for the regulatory treatment of electronic securities und cryptotokens.[5] The key points are the first implementing measure within the framework of the Blockchain Strategy.[6] Its goal is to "make electronic securities possible while ensuring investor protection and creating legal certainty and application security for the areas of civil and supervisory law."[7] The key points go beyond the Blockchain Strategy by making electronic securities available outside of blockchain technology and similar technologies.[8] Developments on a European and international level are taken into account to avoid a "German solution" that would conflict with EU-wide harmonization measures; however, Germany did not want to wait to publish its own rules as such EU-wide measures can take several years.[9] Anti-money laundering regulation is not the focus of this consultation paper, but will be addressed in the act implementing the amendment of the EU anti-money laundering legislation.[10]

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[2] BUNDESMINISTERIUM FÜR WIRTSCHAFT UND ENERGIE [BMWI] [FEDERAL MINISTRY FOR ECONOMIC AFFAIRS AND ENERGY] & BUNDESMINISTERIUM DER FINANZEN [BMF] [FEDERAL MINISTRY OF FINANCE], ONLINE-KONSULTATION ZUR ERARBEITUNG DER BLOCKCHAIN-STRATEGIE DER BUNDESREGIERUNG [ONLINE CONSULTATION TO DEVELOP THE BLOCKCHAIN STRATEGY OF THE FEDERAL GOVERNMENT] (2019), https://www.blockchain-strategie.de/BC/Redaktion/DE/Downloads/online-konsultation-zur-erarbeitung-der-blockchain-strategie.pdf?__blob=publicationFile&v=3, *archived at* http://perma.cc/NKE7-ABYX.

[3] *Blockchain-Strategie*, *supra* note 1.

[4] ONLINE-KONSULTATION, *supra* note 2, at 23-27.

[5] BUNDESMINISTERIUM DER FINANZEN & BUNDESMINISTERIUM DER JUSTIZ UND FÜR VERBRAUCHERSCHUTZ [FEDERAL MINISTRY OF FINANCE & FEDERAL MINISTRY FOR JUSTICE AND CONSUMER PROTECTION], ECKPUNKTE FÜR DIE REGULATORISCHE BEHANDLUNG VON ELEKTRONISCHEN WERTPAPIEREN UND KRYPTO-TOKEN. DIGITALE INNOVATIONEN ERMÖGLICHEN – ANLEGERSCHUTZ GEWÄHRLEISTEN [KEY POINTS FOR THE REGULATORY TREATMENT OF ELECTRONIC SECURITIES AND CRYPTO TOKENS. MAKING DIGITAL INNOVATIONS POSSIBLE. ENSURING INVESTOR PROTECTION] (Mar. 7, 2019), https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Internationales_Finanzmarkt/2019-03-08-eckpunktelelektronische-wertpapiere.pdf;jsessionid=E6F58727AB7EC88D34631AEA3204B3E0?__blob=publicationFile&v=3, *archived at* http://perma.cc/2ZWU-75J7.

[6] *Id.* at 1.

[7] *Id.* (translation by author).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 2 et seq.; *see also* Part I(B), below, and the European Union survey in this report.

A. Financial Regulation and Consumer Protection

1. Consultation Paper of the Federal Ministry of Finance

The consultation paper of the Federal Ministry of Finance suggests that German law should generally be opened up for electronic securities, meaning the current requirement that securities need to be embodied in a physical certificate would be eliminated.[11] However, issuing securities in electronic form would not be mandatory; issuers would have the option to still use a paper form.[12] In addition, the Ministry of Finance proposes that the regulation be technology-neutral, in particular with regard to the fact that blockchain technologies consume a lot of energy and affect the environment, and should therefore not be privileged.[13] The regulation of electronic shares will be taken up at a later point.[14]

The paper also suggests establishing a register for electronic securities run by a central state registry or a registry supervised by the state.[15] The issuer itself or an authorized third party might be able to register an electronic security if it is proven that blockchain technology will not permit subsequent unauthorized amendments.[16] The blockchain securities register might be included in another public register to provide legal certainty to issuers and investors that the securities listed therein are securities within the meaning of German civil law.[17] However, keeping a register on a blockchain might qualify as the operation of a securities settlement system, so that registration as a central security depository (CSD) within the meaning of EU Regulation No. 909/2014 might be necessary.[18] The paper states that further review is needed in this regard.[19] To ensure investor protection for securities registered on a blockchain ("blockchain securities"), the following is proposed (individually or cumulative):

- Blockchain securities may only be purchased by institutional investors.
- The issuer or the authorized third party who keeps the register must be subject to some type of state supervision.

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[11] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 2.

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.* at 3 & 4.

[16] *Id.* at 4.

[17] *Id.*

[18] *Id.*; Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on Improving Securities Settlement in the European Union and on Central Securities Depositories and Amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012, 2014 O.J. (L 257) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0909&from=EN, *archived at* http://perma.cc/PD5P-N8LE.

[19] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 4.

- Blockchain securities may only be purchased by private investors if the relevant blockchain register is run by a credit or financial institution subject to supervision in the EU.
- Private investors may not purchase blockchain securities directly from the issuer or another investor, but the purchase must be effected by a licensed and supervised intermediary, who explains rules and advises investors.
- Private investors may purchase blockchain securities directly from issuers; however, issuers are subject to special information and documentation obligations. A resale of blockchain securities by a private investor to another private investor can only be effected via the issuer as a counterparty interposed between the seller and buyer in order to ensure that information and documentation obligations are complied with.[20]

The paper also proposes that electronic securities could be declared "objects" by means of a legal fiction so that the rules on property law apply. Alternatively, they could be subject to a law *sui generis* similar to the Swiss Federal Act on Intermediated Securities.[21] In any case, there will be independent rules on the acquisition and transfer of electronic securities as well as on good faith.[22] The paper also points out that electronic securities will be subject to the Securities Trading Act,[23] the Securities Prospectus Act,[24] and the provisions of the EU Market Abuse Regulation[25] as these laws do not require the embodiment of securities in physical form.[26]

As a last point, the paper also deals with the issuance of utility tokens/cryptocurrencies. It states that utility tokens are generally not classified as securities, investment assets, or other types of financial instruments within the meaning of the Securities Trading Act, and will most likely also

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[20] *Id.* at 6.

[21] *Id.*; Bucheffektengesetz [BEG] [Federal Intermediated Securities Act] [FISA], Oct. 3, 2008, SYSTEMATISCHE RECHTSSAMMLUNG [SR] [SYSTEMATIC COLLECTION OF LAWS] 957.1, as amended, https://www.admin.ch/opc/de/classified-compilation/20061735/201601010000/957.1.pdf, *archived at* http://perma.cc/8ZXM-ATLS, unofficial English translation available *at* https://www.admin.ch/opc/en/classified-compilation/20061735/201601010000/957.1.pdf, *archived at* http://perma.cc/58J9-QZDJ.

[22] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 3.

[23] Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BUNDESGESETZBLATT [BGBL.] [FEDERAL LAW GAZETTE] I at 2708, as amended, https://www.gesetze-im-internet.de/wphg/WpHG.pdf, *archived at* http://perma.cc/EX64-UCYG, unofficial English translation available *at* https://www.bafin.de/SharedDocs/Veroeffentlichungen/EN/Aufsichtsrecht/Gesetz/WpHG_en.html?nn=8356586, *archived at* http://perma.cc/U3J5-M55M.

[24] Wertpapierprospektgesetz [WpPG] [Securities Prospectus Act], June 22, 2005, BGBL. I at 1698, http://www.gesetze-im-internet.de/wppg/WpPG.pdf, *archived at* http://perma.cc/5B9L-FL8X, unofficial English translation available *at* https://www.bafin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_wppg_en.html?nn=8356586 (English version updated through June 22, 2011), *archived at* http://perma.cc/75RV-X5HQ.

[25] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN, *archived at* http://perma.cc/RSV8-9K97.

[26] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 6.

not be classified as electronic securities in most cases.[27] They therefore will not be subject to the provisions of the Securities Trading Act, the Securities Prospectus Act, or the Investment Assets Act.[28] Thus, there is no obligation to publish a prospectus or information sheet for the public offering of utility tokens. The paper states that the "whitepapers" that are generally published are not comparable and do not enable an investor to make an informed decision. It also points out the risks associated with investing in utility tokens.[29] It notes that the European Securities and Markets Authority (ESMA) has also pointed out the necessity to create adequate risk disclosure requirements in its advice on ICOs and cryptoassets.[30] The paper proposes two different options to handle this situation:

- Germany will wait until the EU passes a regulation on the issuance of utility tokens based on ESMA's recommendations and will actively participate in the legislative process; or
- Germany could pass national legislation as a bridge solution that would be in force until an EU regulation has been passed. It would require the publication of an information sheet approved by the German Federal Financial Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht, BaFin) for every public offer of utility tokens.[31]

2. Proposal to Regulate Distributed Ledger Technologies

In addition, on September 11, 2018, the parliamentary group of the Free Democratic Party (FDP) submitted a request that the federal government regulate distributed ledger technologies (DLT) to the German parliament.[32] The proposal aims to provide legal certainty for the application of DLT, among others blockchain technology and ICOs, and to create a workable legal framework so that private persons as well as companies can make use of the new technology.[33] It also states that the treatment of utility tokens, debt tokens, and security tokens remains unclear and there is no enforceable legal protection against "ICO scams." The application of tax law must also be clarified.[34] The proposal requests the following:

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[27] *Id.* at 7.

[28] *Id.*; Vermögensanlagengesetz [VermAnlG] [Investment Assets Act], Dec. 6, 2011, BGBL. I at 2481, http://www.gesetze-im-internet.de/vermanlg/VermAnlG.pdf, *archived at* http://perma.cc/W5QH-U24Y.

[29] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 7.

[30] *Id.* at 7; ESMA, ADVICE. INITIAL COIN OFFERINGS AND CRYPTO-ASSETS (Jan. 9, 2019) (ESMA REPORT), https://www.esma.europa.eu/file/49978/download?token=56LqdNMN, *archived at* http://perma.cc/2GRY-J8BG. For more information on the ESMA report, see the EU survey in this report.

[31] BUNDESMINISTERIUM DER FINANZEN, *supra* note 5, at 8.

[32] DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT-DRS.] 19/4217, http://dip21.bundestag.de/dip21/btd/19/042/1904217.pdf, *archived at* http://perma.cc/CEC9-UW3L.

[33] *Id.* at 2.

[34] *Id.*

- Creation of more expertise and resources at BaFin to deal with regulatory hurdles with regard to the use of blockchain technology in the financial market.
- BaFin must be more transparent with regard to its classification of tokens; clear criteria must be published and be publicly available; the framework conditions for blockchain technologies, ICOs, and token sales must be available in several languages.
- Companies must have the possibility to submit a voluntary prospectus for tokens to BaFin for its approval; furthermore, Germany should advocate for EU-wide rules on prospectuses for securities token offers.
- Tax authorities must be technically capable of capturing situations involving cryptocurrencies and token issuances and be able to tax them appropriately. Data on blockchain technology must be compiled.
- A review must be undertaken as to whether the current legal framework is compatible with DLT and whether there are regulatory gaps, including in financial laws and civil law.
- The requirement that securities must be embodied in physical form must be abolished and a qualified digital register must be established.
- The use of smart contracts must be reviewed.
- Data protection rules must be updated.
- The role of banks as digital wallet providers must be reviewed and classified; a new provision in the Banking Act might be necessary.
- Taxation in general must be clarified—in particular whether the sale of tokens is subject to the "First-In-First-Out-Rule," the "Last-In-Last-Out-Rule," or if there is a choice; the tax treatment of forks; and whether the sale of tokens is subject to value-added tax (VAT).[35]

B. Anti-Money Laundering Law

On July 9, 2018, the amendment of the European Union's Anti-Money Laundering Directive (5th AMLD) entered into force, extending the customer due diligence requirements to custodian wallet providers and virtual-currency exchange platforms, and defined virtual currencies.[36]

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[35] *Id*. at 3 & 4.

[36] 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 (5th AMLD), 2018 O.J. (L 156) 43, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN, *archived at* http://perma.cc/JV7W-64Y5; Consolidated Version of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Anti-Money Laundering Directive, AMLD), 2015 O.J. (L 141) 73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015L0849-20180709&qid=1552510550346&from=EN, *archived at* http://perma.cc/W7KN-PCPM. For more detailed information on the amendment, see the EU survey in this report.

Member States must transpose the new rules into national law by January 10, 2020.[37] Germany so far has not implemented the changes into its domestic law.[38]

C. Taxation

In February 2018, the German Federal Ministry of Finance published guidance on VAT treatment of bitcoin and other virtual currencies. It determined that transactions to exchange a traditional currency for bitcoin or other virtual currencies and vice versa constitute the taxable supply of other services for consideration, but fall under the exemption from VAT. It stated that bitcoin or other virtual currencies that are used simply as a means of payment are treated the same as traditional means of payment. Using bitcoin or other virtual currencies for no other purpose than as a means of payment is therefore not taxable.[39] This guidance is in line with the European Court of Justice (ECJ) decision *Hedqvist* dated October 22, 2015.[40]

II. Custodianship of Cryptocurrencies by Financial Institutions

It appears that Germany does not have any specific rules on custodianship of cryptocurrencies by financial institutions.

III. Regulation of Cryptocurrencies as Financial Securities

BaFin qualifies virtual currencies/cryptocurrencies as units of account and therefore financial instruments.[41] Undertakings and persons that arrange the acquisition of tokens, sell or purchase tokens on a commercial basis, or carry out principal broking services in tokens via online trading platforms, among others, are generally required to obtain authorization from BaFin in advance.[42]

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[37] 5th AMLD, *supra* note 36, art. 4, para. 1.

[38] Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten [Geldwäschegesetz] [GwG] [Anti-Money Laundering Act], June 23, 2017, BUNDESGESETZBLATT [BGBL.] [FEDERAL LAW GAZETTE] I at 1822, as amended, http://www.gesetze-im-internet.de/gwg_2017/GwG.pdf, *archived at* http://perma.cc/E7DA-VM42.

[39] Bundesministerium der Finanzen [BMF] [Federal Ministry of Finance], BMF-Schreiben. Umsatzsteuerliche Behandlung von Bitcoin und anderen sog. virtuellen Währungen; EuGH-Urteil vom 22. Oktober 2015, C-264/14, Hedqvist [BMF-Letter. VAT Treatment of Bitcoin and Other So-Called Virtual Currencies; ECJ Decision of October, 2015, C-264/14, Hedqvist] (BMF Letter), Feb. 27, 2018, at 1 & 2, http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Steuerarten/Umsatzsteuer/Umsatzsteuer-Anwendungserlass/2018-02-27-umsatzsteuerliche-behandlung-von-bitcoin-und-anderen-sog-virtuellen-waehrungen.pdf?__blob=publicationFile&v=1, *archived at* http://perma.cc/56TQ-9RJJ.

[40] Case C-264/14, Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718, http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0264&lang1=en&type=TXT&ancre, *archived at* http://perma.cc/7Q6Q-MM9V.

[41] Gesetz über das Kreditwesen [KWG] [Banking Act], Sept. 9, 1998, BGBL. I at 2776, § 1, para. 11, sentence 1, no. 7, http://www.gesetze-im-internet.de/kredwg/KWG.pdf, *archived at* http://perma.cc/7WF4-79PG, unofficial English translation available *at* http://perma.cc/GV76-TSDZ (English version updated through July 15, 2014), *archived at* http://perma.cc/GV76-TSDZ; *Virtual Currency (VC)*, BAFIN, https://www.bafin.de/EN/Aufsicht/FinTech/VirtualCurrency/virtual_currency_node_en.html (last visited Mar. 21, 2019), *archived at* http://perma.cc/HF5Q-E7AF.

[42] Banking Act, § 32; *Virtual Currency (VC)*, *supra* note 41.

However, on September 29, 2018, the Higher Regional Court of Berlin (Kammergericht Berlin, KG Berlin) held that trading in bitcoin does not require a banking license because it is not a financial instrument—in particular, not a unit of account within the meaning of the German Banking Act. The decision is directly at odds with the regulatory practice of BaFin. The Court ruled that BaFin overstepped its competency when it classified bitcoin as "units of account" and therefore made them subject to authorization.[43]

In February 2018, the BaFin published information on the regulatory assessment of ICOs and the tokens, coins, and cryptocurrencies on which they are based.[44] It stated that firms involved in ICOs need to assess on a case-by-case basis whether the ICOs qualify as financial instruments (transferable securities, units in collective investment undertakings, or investments) or as securities and therefore trigger the need to comply with the relevant financial legislation.

[43] KG Berlin, Sept. 25, 2018, Docket No. (4) 161 Ss 28/18 (35/18), http://www.gerichtsentscheidungen.berlin-brandenburg.de/jportal/portal/t/279b/bs/10/page/sammlung.psml?pid=Dokumentanzeige&showdoccase=1&js_peid=Trefferliste&documentnumber=1&numberofresults=1&fromdoctodoc=yes&doc.id=KORE223872018&doc.part=L&doc.price=0.0#focuspoint, *archived at* http://perma.cc/AS2C-6RVN. For more details on the case, see Jenny Gesley, *Germany: Court Holds That Bitcoin Trading Does Not Require a Banking License*, GLOBAL LEGAL MONITOR (Oct. 19, 2018), http://www.loc.gov/law/foreign-news/article/germany-court-holds-that-bitcoin-trading-does-not-require-a-banking-license/, *archived at* http://perma.cc/JK24-ZFA9.

[44] BaFin, Advisory Letter (WA). Supervisory Classification of Tokens or Cryptocurrencies Underlying "Initial Coin Offerings" (ICOs) as Financial Instruments in the Field of Securities Supervision, reference no. WA 11-QB 4100-2017/0010, https://www.bafin.de/SharedDocs/Downloads/EN/Merkblatt/WA/dl_hinweisschreiben_einordnung_ICOs_en.pdf?__blob=publicationFile&v=2, *archived at* http://perma.cc/69Z2-JT8L.

Gibraltar

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SUMMARY Gibraltar has actively sought to provide legal certainty regarding the operation of cryptocurrencies within its jurisdiction. It currently requires the registration of firms that use distributed ledger technology to store or transmit value belonging to others. The registration process involves the Gibraltar Financial Services Commission reviewing the application and, if satisfied that certain criteria are met, a license may be granted, enabling the holder to operate a business using distributed ledger technology. Gibraltar is also in the process of introducing regulations that will regulate digital tokens that are not securities.

I. Introduction

The Gibraltar Financial Services Commission (GFSC) is the regulator of the financial services market in Gibraltar and is responsible for regulating providers of such services that conduct business in Gibraltar and overseas. The GFSC must undertake this responsibility "in an effective and efficient manner in order to promote good business, protect the public from financial loss and enhance Gibraltar's reputation as a quality financial centre."[1]

The government of Gibraltar recently introduced regulations governing the use of distributed ledger technology (DLT) in order to provide legal certainty to those operating within this framework, help with consumer confidence, and ensure that Gibraltar's reputation and its financial sector is protected.[2] Gibraltar has established a regulatory framework for cryptocurrency exchanges, and is currently working on legislation to regulate initial coin offerings (ICOs). The Gibraltar Funds and Investment Association has stated that the DLT legislation and upcoming ICO regulations has resulted in a surge of interest in Gibraltar that has had

> a positive effect on Gibraltar's funds industry. Gibraltar is now considered the 'go-to' place for anything involving crypto currency or blockchain technology . . . [and] it is one of the few jurisdictions in the world where it is possible to open a bank account for such activities.[3]

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[1] Press Release, Gibraltar Financial Services Commission (GFSC), Distributed Ledger Technology (DLT) Regulatory Framework (Jan. 2, 2018), http://www.gfsc.gi/news/distributed-ledger-technology-dlt-regulatory-framework-270, *archived at* https://perma.cc/7DPW-ANKK.

[2] Presentation, Siân Jones & Nicky Gomez, GFSC, Gibraltar's DLT Regulatory Framework: Turning the Vision into Reality 7 (Oct. 2017), http://www.gfsc.gi/publications/2018/10/DLT Turning Vision into Reality 20 October 2017.pdf, *archived at* https://perma.cc/4LSC-EAZ3.

[3] *Gibraltar: A Safe Haven for Crypto Funds*, GIBRALTAR FUNDS & INVESTMENTS ASSOCIATION, https://www.gfia.gi/crypto (last visited Mar. 26, 2019), *archived at* https://perma.cc/G7NC-2EKL.

II. Regulation of Cryptoassets

In May 2017, the Gibraltar government published a consultation paper discussing proposals for a regulatory framework covering DLT.[4] In September 2017, the GFSC issued a statement that a new regulatory framework for DLT would be introduced and, on October 12, 2017, the government introduced the Financial Services (Distributed Ledger Technology Providers) Regulations 2017[5] under the Financial Services (Investment and Fiduciary Services) Act.[6] These regulations entered into force on January 1, 2018.[7] The government of Gibraltar claims that the GFSC was the first regulator to introduce a framework regulating DLT.[8] The aim of the legislation is to protect consumers, protect the reputation of Gibraltar as a well-regulated and safe environment for firms that use DLT, and enable Gibraltar to prosper from the use and growth of new financial technology.[9]

The term "Distributed Ledger Technology" is defined in the Financial Services (Investment and Fiduciary Services) Act 1989 as

> a database system in which–
>
> (a) information is recorded and consensually shared and synchronised across a network of multiple nodes; and
>
> (b) all copies of the database are regarded as equally authentic[.][10]

The DLT framework in Gibraltar does not regulate cryptocurrencies themselves, rather it serves to fill the gap by providing a regulatory regime for activities that use DLT for storing or transmitting value that belongs to another for businesses operating in or from Gibraltar that are not subject to another regulatory framework.[11] Providing DLT services is defined in the Financial Services (Investment and Fiduciary Services) Act 1989 as "[c]arrying on by way of business, in or from Gibraltar, the use of distributed ledger technology for storing or transmitting value

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[4] GIBRALTAR FINANCE, PROPOSALS FOR A DLT REGULATORY FRAMEWORK 18 (May 2017), http://www.gibraltarfinance.gi/downloads/20170508-dlt-consultation-published-version.pdf?dc_%3D1494312876, *archived at* https://perma.cc/K36X-47YD.

[5] Financial Services (Distributed Ledger Technology Providers) Regulations 2017, LN 2017/204, regs. 4-5, https://www.gibraltarlaws.gov.gi/articles/2017s204.pdf, *archived at* https://perma.cc/KN48-CJQF.

[6] Financial Services (Investment and Fiduciary Services) Act 1989, §§ 5, 7, 53, 56, http://www.gibraltarlaws.gov.gi/articles/1989-47o.pdf, *archived at* https://perma.cc/MUK3-5Q3T.

[7] Financial Services (Distributed Ledger Technology Providers) Regulations 2017, reg. 1(2). *See also* Press Release, GFSC, *supra* note 1.

[8] Press Release, GFSC, *supra* note 1.

[9] *Id*.

[10] Financial Services (Investment and Fiduciary Services) Act 1989, Act No. 49-1989, sched. 3 ¶ 10(2) (as amended).

[11] *Id*. sched. 3 ¶ 10(1).

belonging to others."[12] "Value" is defined as including "assets, holdings and other forms of ownership, rights or interests, with or without related information, such as agreements or transactions for the transfer of value or its payment, clearing or settlement."[13]

The DLT framework requires that firms operating in or from Gibraltar that engage in this type of activity for business purposes must be authorized by the GFSC.[14] The GFSC has stated that "[f]irms and activities that are subject to another regulatory framework continue to be regulated under that framework."[15]

In order to obtain a DLT provider license, a person must submit an initial application assessment request with a £2,000 fee[16] (approx. US$2,750) to the GFSC,[17] which must

> (a) assess the nature and complexity of the requester's proposed business model and of the products and services which the requester proposes to offer; and
>
> (b) provide the requester with an initial assessment notice informing the requester of
>
> > (i) any steps which the requester must take before applying for a DLT Provider's licence;
> >
> > (ii) the documents and other information which must accompany any application; and
> >
> > (iii) the prescribed application fee which is payable.

Licenses are then granted if the applicant follows these steps and the GFSC is satisfied the applicant will comply with the nine regulatory principles.[18] Upon receiving an application assessment notice from the GFSC, the person may then apply for a DLT provider's license conforming with the requirements of the notice and including an additional fee that ranges from £8,000 (approx. US$11,000) to £28,000 (approx. US$39,000), depending upon the complexity of the application, which is determined during the initial application assessment.[19]

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[12] *Id.*

[13] *Id.* sched. 3 ¶ 10(2).

[14] *Distributed Ledger Technology Regulatory Framework (DLT Framework)*, GFSC, www.gfsc.gi/dlt (last visited Mar. 26, 2019), *archived at* https://perma.cc/2VEY-TNUM.

[15] *Id.*; Financial Services (Investment and Fiduciary Services) Act 1989, Act No. 49-1989, sched. 3 ¶ 10(3) (as amended).

[16] GFSC, DLT APPLICATION PROCESS AND FEE STRUCTURE (Oct. 4, 2017), https://www.fsc.gi/uploads/DLT Application Process and Fee Structure Public.pdf, *archived at* https://perma.cc/96VL-T4TJ.

[17] Financial Services (Distributed Ledger Technology Providers) Regulations 2017, LN 2017/204, regs. 4-5; Financial Services (Investment and Fiduciary Services) Act 1989, Act No. 49-1989, § 2(1).

[18] Financial Services (Distributed Ledger Technology Providers) Regulations 2017, LN 2017/204, reg. 5.

[19] Financial Services Commission (Fees) Regulations 2016, sched. 2, https://www.gibraltarlaws.gov.gi/articles/2016s071.pdf, *archived at* https://perma.cc/TJF7-FK8W.

Nine regulatory principles are set out in schedule 2 of the Financial Services (Distributed Ledger Technology Providers) Regulations 2017:[20]

> 1. A DLT Provider must conduct its business with honesty and integrity.[21]
>
> 2. A DLT Provider must pay due regard to the interests and needs of each and all its customers and must communicate with them in a way that is fair, clear and not misleading.[22]
>
> 3. A DLT Provider must maintain adequate financial and non-financial resources.[23]
>
> 4. A DLT Provider must manage and control its business effectively, and conduct its business with due skill, care and diligence; including having proper regard to risks to its business and customers.[24]
>
> 5. A DLT Provider must have effective arrangements in place for the protection of customer assets and money when it is responsible for them.[25]
>
> 6. A DLT Provider must have effective corporate governance arrangements.[26]
>
> 7. A DLT Provider must ensure that all of its systems and security access protocols are maintained to appropriate high standards.[27]
>
> 8. A DLT Provider must have systems in place to prevent, detect and disclose financial crime risks such as money laundering and terrorist financing.[28]
>
> 9. A DLT Provider must be resilient and have contingency arrangements for the orderly and solvent wind down of its business.[29]

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[20] *Id.*

[21] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: HONESTY AND INTEGRITY (2017), www.gfsc.gi/uploads/Guidance Note 1 - Honesty and Integrity GFSC.pdf, *archived at* https://perma.cc/VD8U-VQLZ.

[22] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: CUSTOMER CARE (2017), http://www.gfsc.gi/uploads/Guidance Note 2 - Customer Care GFSC.pdf, *archived at* https://perma.cc/5R44-58K5.

[23] Further guidance on this principle is available at: GFSC, DLT PROVIDER GUIDANCE NOTES: FINANCIAL AND NON-FINANCIAL RESOURCES (2017), http://www.gfsc.gi/uploads/Guidance Note 3 - Resources GFSC.pdf, *archived at* https://perma.cc/Z2RL-S9TU.

[24] Further guidance on this principle is available at: GFSC, DLT PROVIDER GUIDANCE NOTES: RISK MANAGEMENT (2017), http://www.gfsc.gi/uploads/Guidance Note 4 - Risk Management GFSC.pdf, *archived at* https://perma.cc/2A9V-QZCX.

[25] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: PROTECTION OF CLIENT ASSETS (2017), http://www.gfsc.gi/uploads/Guidance Note 5 - Protection of Client Assets GFSC.pdf, *archived at* https://perma.cc/QWT6-GXYG.

[26] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: CORPORATE GOVERNANCE (2017), http://www.gfsc.gi/uploads/Guidance Note 6 - Corporate Governance GFSC.pdf, *archived at* https://perma.cc/TW75-ZD48.

[27] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: SYSTEMS AND SECURITY ACCESS (2017), http://www.gfsc.gi/uploads/Guidance Note 7 - Cyber Security GFSC.pdf, *archived at* https://perma.cc/3VCD-YSC4.

[28] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: FINANCIAL CRIME (2017), http://www.gfsc.gi/uploads/Guidance Note 8 - Financial Crime GFSC.pdf, *archived at* https://perma.cc/S5QZ-7SP6.

[29] *See* GFSC, DLT PROVIDER GUIDANCE NOTES: RESILIENCE (2017), http://www.gfsc.gi/publications/2018/11/Guidance Note 9 - Resilience GFSC.pdf, *archived at* https://perma.cc/59G6-XUXR.

In a paper discussing the introduction of these regulations, the government noted that,

> [i]n determining whether a principle is met, the GFSC will have regard to similarities in such matters as risk profile, use case, business model and product. The principles will be applied proportionately and on a risk-based approach.[30]

DLT provider license holders are further required to pay an annual fee, charged at a flat rate of £10,000 (approx. US$14,000), although an additional fee of up to £20,000 (approx. US$28,000) may be charged "depending upon the complexity of regulating the DLT Provider."[31] Companies that are currently licensed under the existing financial legislation in Gibraltar and use DLT to improve their procedures and processes do not need a separate license unless the activities that DLT is used for are not within the scope of the current license. Banks that wish to provide virtual currency services and warrants need to obtain a new DLT provider license for these activities. Providing DLT services without a license under the regulations is an offense, punishable with a fine of up to £10,000 (approx. US$14,000).[32]

The nine regulatory principles that govern the DLT framework were established as it was determined that

> [a] flexible, adaptive approach is required in the case of novel business activities, products, and business models. We consider that regulatory outcomes remain central but are better achieved through the application of principles rather than rigid rules. This is because for businesses based on rapidly-evolving technology such hard and fast rules can quickly become outdated and unfit for purpose.[33]

III. Gibraltar Blockchain Exchange

The Gibraltar Blockchain Exchange (GBX)[34] was established in November 2018 as an official licensed exchange by the GFSC and is a subsidiary of the Gibraltar Stock Exchange.[35] It is recognized by ESMA (the European regulator) and HMRC (UK) and

> aims to be a world-leading institutional-grade token sale platform and digital asset exchange. Built upon principles of decentralisation and community consensus, we seek to create a new era of trust, openness and global acceptance for the crypto industry, one quality token listing at a time.[36]

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[30] PROPOSALS FOR A DLT REGULATORY FRAMEWORK, *supra* note 4, at 18.

[31] Financial Services Commission (Fees) Regulations 2016, LN 2016/071, sched. 1.

[32] Financial Services (Penalty Fees) Regulations 1993, LN 1993/147, sched., http://www.gibraltarlaws.gov.gi/articles/1993s147.pdf, *archived at* https://perma.cc/A58V-PQ2C.

[33] *Distributed Ledger Technology Regulatory Framework (DLT Framework)*, *supra* note 14.

[34] *A Trusted, Regulated, Insured Digital Asset Exchange (DAX)*, GIBRALTAR BLOCKCHAIN EXCHANGE, https://gbx.gi (last visited Mar. 26, 2019), *archived at* https://perma.cc/K8GX-2JBL.

[35] *Id*.

[36] *Id*.

The DLT framework requires exchanges to register with the GFSC and meet the criteria discussed above.[37] The objective of the GBX is to enable consumers to access vetted token sales, while enabling token issuers to provide tokens to a "large pool of AML/KYC-cleared [anti-money laundering/know your customer-cleared] buyers."[38]

The Digital Asset Exchange (DAX) was also recently formed as a licensed, regulated digital asset exchange that forms part of the Gibraltar Stock Exchange Group.[39]

IV. Digital Tokens

Unless a digital token has the underlying structure of a security, these assets are currently unregulated in Gibraltar.[40] In 2017 the GFSC issued a statement that it would monitor the use of ICOs within the DLT framework.[41] A further statement was issued in 2018 stating that the GFSC would work to introduce legislation to regulate digital tokens, which it considered are "essentially those created and traded using [DLT]."[42] The token regulation proposals recommended that these services should be covered to in the same manner as financial services that are currently regulated and cover

- the promotion, sale and distribution of tokens;
- operating secondary market platforms trading in tokens; and
- providing investment and ancillary services relating to tokens.[43]

The proposed framework in the token regulation proposals will not directly regulate tokens, but how the sale is conducted, the distribution and promotion of tokens and require disclosure of information aimed to ensure consumers have an accurate idea of the risks posed by purchasing the token.[44]

A statement from the GFSC stated the regulations would include rules governing disclosure of information about the token, anti-money laundering provisions and cover

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[37] GIBRALTAR BLOCKCHAIN EXCHANGE, EXCHANGE RULES (v. 2.0, Aug. 2018), https://gbx.gi/docs/GBX-Exchange-Rules.pdf, *archived at* https://perma.cc/42ST-KJE4.

[38] *A Trusted, Regulated, Insured Digital Asset Exchange (DAX)*, *supra* note 33.

[39] *Id.*

[40] GIBRALTAR FINANCE, TOKEN REGULATION 2 (2018), http://gibraltarfinance.gi/20180309-token-regulation---policy-document-v2.1-final.pdf, *archived at* https://perma.cc/Y9TF-FFYY.

[41] Press Release, GFSC, Statement on Initial Coin Offerings (Sept. 22, 2017), http://www.fsc.gi/news/statement-on-initial-coin-offerings-250, *archived at* https://perma.cc/HD3M-N6UB.

[42] Press Release, Minister for Commerce & GFSC, HM Government of Gibraltar and the Gibraltar Financial Services Commission Announce Plans for Token Legislation (Feb. 12, 2018), www.gfsc.gi/news/hm-government-of-gibraltar-and-the-gibraltar-financial-services-commission-announce-plans-for-token-legislation-272, *archived at* https://perma.cc/5LGC-ALNZ.

[43] TOKEN REGULATION, *supra* note 40, at 2.

[44] *Id.* at 4.

- the promotion, sale and distribution of tokens by persons connected with Gibraltar;
- secondary market activities relating to tokens, carried out in or from Gibraltar; and
- the provision, by way of business, in or from Gibraltar of investment advice relating to tokens.[45]

The GFSC has stated that the proposed regulations are a natural extension of the DLT framework:

> Token regulation is the natural progression following the regulation of DLT Providers, being vital to the protection of consumers. One of the key aspects of the token regulations is that we will be introducing the concept of regulating authorised sponsors who will be responsible for assuring compliance with disclosure and financial crime rules.[46]

Cryptocurrencies that operate solely as a decentralized virtual currency, such as bitcoin, are currently excluded from the token regulation proposals, but the GFSC is currently reviewing the possibility of regulating investment funds that involve these types of digital assets.[47]

V. Financial Services

The Gibraltar Funds and Investment Association formed a crypto fund committee to investigate the issues related to crypto currencies. The first resolution from the committee was to

> encourage the industry of Gibraltar to use Experienced Investor Funds (EIF)[48] as the regulatory regime for crypto funds. . . . The industry that investors in crypto funds should be afforded the regulatory infrastructure and the protections that the EIFs regulations offer along with the support of experienced EIF directors, fund administrators and auditors, many of whom are notable absent in the establishment of some private funds.[49]

The Association has published a code of conduct that covers corporate governance, risk management, valuation, custody, corporate governance and anti-money laundering measures.[50] The Association stated that it "expects EIFs to comply with the guidance notes that deal with Protection of Client Assets, Systems and Securities Access and Resilience which apply to DLT providers."[51]

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[45] Press Release, Minister for Commerce & GFSC, *supra* note 42.

[46] *Id*.

[47] *Id*.

[48] Financial Services (Experienced Investor Funds) Regulations 2018, LN 2018/226, https://www.gibraltarlaws.gov.gi/articles/2018s226.pdf, *archived at* https://perma.cc/6745-PZBE.

[49] *Gibraltar: A Safe Haven for Crypto Funds, supra* note 3.

[50] GIBRALTAR FUNDS AND INVESTMENT ASSOCIATION, CORPORATE GOVERNANCE CODE FOR GIBRALTAR CRYPTO FUNDS (2018), www.gfia.gi/images/pdf/GFIA-Code-of-Conduct-for-Crypto-Funds.pdf, *archived at* https://perma.cc/SX9N-99GW.

[51] Press Release, GFSC, Statement on Funds Investing in Digital Assets (Oct. 17, 2018), https://www.fsc.gi/news/statement-on-funds-investing-in-digital-assets-298, *archived at* https://perma.cc/73ES-HUR7.

VI. Money Laundering

The Proceeds of Crime Act transposed the EU Anti-Money Laundering Directive into the national law of Gibraltar. Section 9(1)(p) extended the definition of "relevant financial business" to include

> undertakings that receive, whether on their own account or on behalf of another person, proceeds in any form from the sale of tokenised digital assets involving the use of distributed ledger technology or a similar means of recording a digital representation of an asset.[52]

This definition brings the sales of digital assets within the existing anti-money laundering (AML) laws, which are extensive and require relevant financial businesses to conduct customer due diligence measures including, but not limited to, verifying the identity of customers, keeping accurate records, and conducting risk assessments.[53] Additional AML prevention mechanisms are put in place through the DLT framework, which mandates that a firm must have systems in place to prevent, detect and disclose any financial crime risks, including money laundering.

VII. Taxation

Gibraltar is a low tax jurisdiction, and capital gains tax or dividend tax is not charged on cryptocurrencies. Crypto exchanges are liable to pay corporate income tax, currently charged at 10%.[54]

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[52] Proceeds of Crime Act 2015, Act No. 2015-22, § 9(1)(p), https://www.gibraltarlaws.gov.gi/articles/2015-22o.pdf, *archived at* https://perma.cc/WEK3-A4MF.

[53] *Id*. Part III.

[54] Income Tax Act 2010, Act No. 2010-21, https://www.gibraltarlaws.gov.gi/articles/2010-21o.pdf, *archived at* https://perma.cc/R34K-AYYN.

Hong Kong

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SUMMARY In Hong Kong, virtual currencies are not considered legal tender but are virtual commodities. Hong Kong's Securities and Futures Commission (SFC) has clarified that virtual assets falling under the definition of "securities" are subject to the SFC's regulation.

More recently, in November 2018, the SFC issued guidance on a new regulatory approach to bring more virtual asset portfolio managers and distributors of virtual asset funds under its regulatory net. The SFC will impose licensing conditions on corporations that manage or intend to manage portfolios investing in virtual assets, where 10% or more of the gross asset value of the portfolio is invested in virtual assets, irrespective of whether the virtual assets meet the definition of "securities" or "futures contracts."

Under the new regulatory framework, the SFC will allow licensed corporations that manage virtual asset portfolios to select the most appropriate custodial arrangement. For example, the assets may be held by the licensed corporation itself, with a third-party custodian, or by an exchange.

The SFC is also exploring the potential regulation of virtual asset trading platform operators. Such platform operators would be required to provide services only to professional investors. Virtual assets issued through an initial coin offering (ICO) would only be admitted for trading on the platform at least twelve months after the completion of the ICO or when the ICO project has started to generate profit.

I. Approach to Assets Created Through Blockchain

On January 8, 2014, in replying to a question raised at the meeting of the Legislative Council on the use of bitcoin, the Secretary for Financial Services and the Treasury said virtual currencies such as bitcoin are not considered legal tender but are virtual commodities in Hong Kong, and warned about the risks of using virtual currencies.[1]

More recently, in a speech made on September 21, 2018, the Chief Executive of the Hong Kong Monetary Authority (HKMA) reiterated that cryptoassets are not money or currencies, and warned that "people wishing to invest or speculate in crypto-assets should do so without

[1] Press Release, Government of Hong Kong, LCQ1: Monitoring the Use of Bitcoins (Jan. 8, 2014), http://www.info.gov.hk/gia/general/201401/08/P201401080357.htm, *archived at* https://perma.cc/AY9N-B58F.

harboring the unrealistic expectation that they would one day become money or currencies that can be used as a means of exchange."[2]

In a circular issued on March 18, 2019, the HKMA asked banks and other authorized institutions planning to engage in activities relating to cryptoassets to discuss with the HKMA and demonstrate that they have put in place appropriate systems and controls to identify and manage any risks associated with such activities. The circular was issued after the Basel Committee on Banking Supervision (BCBS) issued a statement on cryptoassets. The BCBS statement sets out its "prudential expectations regarding banks' exposures to crypto-assets and related services in jurisdictions where banks are involved in such business activities."[3]

A. Financial Regulation

Hong Kong's Securities and Futures Commission (SFC) has issued a number of circulars clarifying its regulatory stance on virtual assets. According to the SFC, where virtual assets fall under the definition of "securities" as defined in the Securities and Futures Ordinance, these products and related activities fall within the SFC's ambit.[4]

More recently, however, the SFC realized that many virtual assets do not amount to "securities." By using the conventional regulatory approach, many investors in virtual assets are left unprotected. Having identified significant risks associated with investing in virtual assets, on November 1, 2018, the SFC issued its guidance on regulatory standards expected of virtual asset portfolio managers and fund distributors, aiming to bring virtual asset portfolio managers and distributors of virtual asset funds under its regulatory net. The SFC also stated that it was exploring the potential regulation of virtual asset trading platform operators, commonly known as crypotocurrency exchanges, and issued a conceptual framework with this regard.[5]

The SFC's Statement on Regulatory Framework for Virtual Asset Portfolios Managers, Fund Distributors and Trading Platform Operators contains two appendixes, and an accompanying circular was also issued on the same day:

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[2] Norman T.L. Chan, Chief Executive, Hong Kong Monetary Authority, *Keynote Speech at Treasury Markets Summit 2018: "Crypto-assets and Money"* (Sept. 21, 2018), https://www.hkma.gov.hk/eng/key-information/speech-speakers/ntlchan/20180921-1.shtml, *archived at* https://perma.cc/2GFJ-DYFU.

[3] Hong Kong Monetary Authority, BCBS Statement on Crypto-Assets (Mar. 18, 2019), https://www.hkma.gov.hk/media/eng/doc/key-information/guidelines-and-circular/2019/20190318e1.pdf, *archived at* https://perma.cc/K9WP-HLS6.

[4] Securities and Futures Commission (SFC), Statement on Regulatory Framework for Virtual Asset Portfolios Managers, Fund Distributors and Trading Platform Operators (Nov. 1, 2018) (Statement), https://www.sfc.hk/web/EN/news-and-announcements/policy-statements-and-announcements/reg-framework-virtual-asset-portfolios-managers-fund-distributors-trading-platform-operators.html, *archived at* https://perma.cc/2MDU-2C3G.

[5] *Id.*

- Appendix 1: Regulatory Standards for Licensed Corporations Managing Virtual Asset Portfolios;[6]

- Appendix 2: Conceptual Framework for the Potential Regulation of Virtual Asset Trading Platform Operators;[7]

- Circular to Intermediaries Distribution of Virtual Asset Funds.[8]

1. Background

In the statement, the SFC explained the background of its new regulatory approach on virtual assets as follows:

> Under existing regulatory remits in Hong Kong, markets for virtual assets may not be subject to the oversight of the SFC if the virtual assets involved fall outside the legal definition of "securities" or "futures contracts" (or equivalent financial instruments). Therefore, investors who trade in virtual assets through unregulated trading platforms or invest in virtual asset portfolios which are managed by unregulated portfolio managers do not enjoy the protections afforded under the Securities and Futures Ordinance (SFO), such as requirements which ensure safe custody of assets and fair and open markets. If platform operators and portfolio managers are not regulated, their fitness and properness, including their financial soundness and competence, have not been assessed, and their operations are not subject to any supervision.[9]

2. Definition of Virtual Assets

According to the SFC statement, a "virtual asset" is a digital representation of value, which is also known as "cryptocurrency," "crypto-asset," or "digital token." Virtual assets "may be or claim to be, a means of payment, may confer a right to present or future earnings or enable a token holder to access a product or service, or a combination of any of these functions."[10]

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[6] SFC, Regulatory Standards for Licensed Corporations Managing Virtual Asset Portfolios (Nov. 1, 2018) (Regulatory Standards), https://www.sfc.hk/web/EN/files/ER/PDF/App%201%20-%20Reg%20standards%20for%20VA%20portfolio%20mgrs_eng.pdf, *archived at* https://perma.cc/2FLD-PG4P.

[7] SFC, Conceptual Framework for the Potential Regulation of Virtual Asset Trading Platform Operators (Nov. 1, 2018) (Conceptual Framework), https://www.sfc.hk/web/EN/files/ER/PDF/App%202_%20Conceptual%20framework%20for%20VA%20trading%20platform_eng.pdf, *archived at* https://perma.cc/DX59-TWVQ.

[8] SFC, Circular to Intermediaries Distribution of Virtual Asset Funds (Nov. 1, 2018) (Circular to Intermediaries), https://www.sfc.hk/edistributionWeb/gateway/EN/circular/doc?refNo=18EC77, *archived at* https://perma.cc/VUM6-R68G.

[9] Statement, *supra* note 4.

[10] *Id.*

3. Virtual Asset Portfolio Managers

The SFC will impose licensing conditions on corporations that manage or intend to manage portfolios investing in virtual assets, where 10% or more of the gross asset value of the portfolio is invested in virtual assets, irrespective of whether the virtual assets meet the definition of "securities" or "futures contracts."[11] Only professional investors as defined by the Securities and Futures Ordinance are allowed to invest into virtual asset portfolio managed by these licensed corporations.[12]

4. Virtual Asset Fund Distributors

In the Circular to Intermediaries Distribution of Virtual Asset Funds, the SFC provided detailed guidance and reminded firms that distribute funds investing in virtual assets that they should be registered with or regulated by the SFC and comply with its regulatory requirements, including the suitability obligations, when distributing these funds.[13] Such funds should only be distributed to professional investors as defined by the Securities and Futures Ordinance, according to the Circular.[14]

5. Virtual Asset Trading Platform Operators

For virtual asset trading platform operators, the SFC will explore whether they are suitable for regulation in the SFC Regulatory Sandbox:

> The SFC will observe the operations of interested trading platform operators and their compliance with proposed regulatory requirements in the Sandbox environment. . . . If it is decided at the end of this stage that it is appropriate to regulate platform operators, the SFC would then consider granting a licence and putting them under its close supervision. Alternatively, it may take the view that the risks involved cannot be sufficiently addressed and no licence shall be granted as protection for investors cannot be ensured.[15]

Under the conceptual framework, a platform operator would also be required to provide its services only to professional investors.[16] Furthermore, a platform operator should only admit a virtual asset issued through an initial coin offering (ICO) for trading on its platform at least twelve months after the completion of the ICO, or when the ICO project has started to generate profit, whichever is earlier.[17]

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[11] Press Release, SFC, SFC Sets out New Regulatory Approach for Virtual Assets (Nov. 1, 2018), https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=18PR126, *archived at* https://perma.cc/Y4D3-BEGU; Regulatory Standards, *supra* note 6, at 2.

[12] Regulatory Standards, *supra* note 6, at 3.

[13] Press Release, SFC, SFC Sets out New Regulatory Approach for Virtual Assets (Nov. 1, 2018), *supra* note 11; Circular to Intermediaries, *supra* note 8.

[14] Circular to Intermediaries, *supra* note 8.

[15] Press Release, SFC, SFC Sets out New Regulatory Approach for Virtual Assets (Nov. 1, 2018), *supra* note 11;

[16] Conceptual Framework, supra note 7, at 4.

[17] *Id.*

B. Anti-Money Laundering Law

Under the conceptual framework for the potential regulation of virtual asset trading platform operators issued in November 2018, a virtual asset platform operator would be required to ensure that its anti-money laundering and countering financing of terrorism (AML/CFT) systems can adequately manage the money laundering and terrorist financing risks relating to the relevant activities. The conceptual framework also contains specific measures to be taken by a platform operator with this regard, such as obtaining sufficient contact information of the client, and suspending or terminating the account of any client who provides incomplete or suspicious contact information.[18]

Previously, on March 25, 2015, the Secretary for Financial Services and the Treasury responded to a question on the regulation of bitcoin trading activities raised at the meeting of the Legislative Council.[19] The Secretary stated that the existing laws of Hong Kong provide for sanctions against unlawful acts such as money laundering, terrorist financing, fraud, pyramid schemes, and cybercrimes, with or without virtual commodities being involved. The Hong Kong Government and financial regulators would also keep a close watch on the development of bitcoin and other virtual commodities, he said [20]

C. Taxation

Hong Kong's Inland Revenue Department does not appear to have issued any specific guidelines on how it would treat cryptocurrencies for the purpose of tax assessment. In general, there is no capital gains tax payable from the sale of financial instruments in Hong Kong, but the income tax and profits tax may apply on the income from cryptocurrency trading.[21]

II. Custodianship of Cryptocurrencies by Financial Institutions

The SFC will allow licensed corporations that manage virtual asset portfolios to select the most appropriate custodial arrangement. For example, the assets may be held by the licensed corporation itself, with a third-party custodian, or by an exchange.[22]

The following factors, among other matters, should be considered in the selection, appointment, and ongoing monitoring of custodians:

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[18] *Id.* at 6–7.

[19] Press Release, Government of Hong Kong, LCQ4: Regulation of Trading Activities of Bitcoins (Mar. 25, 2015), http://www.info.gov.hk/gia/general/201503/25/P201503250463.htm, *archived at* https://perma.cc/WK74-B453.

[20] *Id.*

[21] Henry Yu, *Hong Kong*, *in* BLOCKCHAIN LAWS AND REGULATIONS 2019 (Global Legal Insights, Sept. 17, 2018), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/hong-kong, *archived at* https://perma.cc/W7PG-4SD5.

[22] Regulatory Standards, *supra* note 6, at 3.

(a) the experience and track record of the custodian in providing custodial services for virtual assets;

(b) the regulatory status of the custodian, in particular, whether it is subject to any regulatory oversight over its virtual asset custodial business;

(c) the corporate governance structure and background of the senior management of the custodian;

(d) the financial resources and insurance cover of the custodian for the purpose of compensating its customers in the event of loss of customers' assets; and

(e) the operational capabilities and arrangements of the custodian, for example, the "wallet" arrangements and cybersecurity risk management measures.[23]

III. Regulation of Cryptocurrencies as Financial Securities

As indicated above, under the new SFC regulatory approach announced in November 2018, the SFC will impose licensing conditions on firms that manage or intend to manage portfolios investing in virtual assets, irrespective of whether the virtual assets meet the definition of "securities" or "futures contracts."[24]

Previously, in a statement on ICOs dated September 5, 2017, the SFC explained that, depending on the facts and circumstances of an ICO, digital tokens that are offered or sold may be "securities" as defined in the Securities and Futures Ordinance, and therefore subject to the securities laws of Hong Kong.[25] According to the statement, where the digital tokens involved in an ICO fall under the definition of "securities," dealing in or advising on the digital tokens, or managing or marketing a fund investing in such digital tokens, may constitute a "regulated activity." Parties engaging in a "regulated activity" are required to be licensed by or registered with the SFC irrespective of whether the parties involved are located in Hong Kong, so long as such business activities target the Hong Kong public.[26]

In another statement, dated February 9, 2018, the SFC alerted investors to the potential risks of dealing with cryptocurrency exchanges and investing in ICOs.[27] In the alert, the SFC said it has taken regulatory action against a number of cryptocurrency exchanges and issuers of ICOs. The SFC had warned cryptocurrency exchanges in Hong Kong or with connections to Hong Kong that they should not trade cryptocurrencies that are "securities" as defined in the Securities and

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[23] *Id.* at 4.

[24] Press Release, SFC Sets out New Regulatory Approach for Virtual Assets (Nov. 1, 2018), *supra* note 11.

[25] SFC, Statement on Initial Coin Offerings (Sept. 5, 2017), http://www.sfc.hk/web/ EN/news-and-announcements/policy-statements-and-announcements/statement-on-initial-coin-offerings.html, *archived at* https://perma.cc/8VYV-W7D7.

[26] *Id.*

[27] Press Release, SFC, SFC Warns of Cryptocurrency Risks (Feb. 9, 2018), https://www.sfc.hk/edistributionWeb/gateway/EN/news-and-announcements/news/doc?refNo=18PR13, *archived at* https://perma.cc/K72W-NUTC.

Futures Ordinance without a license. The SFC had written to ICO issuers and most of them confirmed compliance with the SFC's regulatory regime or immediately ceased to offer tokens to Hong Kong investors. The SFC stated it would continue to police the market and engage in enforcement actions when necessary, and also urged market professionals to do proper gatekeeping to prevent fraud or dubious fundraising, and to assist the SFC in ensuring compliance with the law.[28]

IV. Treatment of Cryptoassets Not Considered Securities

As mentioned above, the Secretary for Financial Services and the Treasury made a statement in 2015, indicating that the existing laws of Hong Kong provide for sanctions against unlawful acts such as money laundering, terrorist financing, fraud, pyramid schemes, and cybercrimes, with or without virtual commodities being involved.[29] In that statement, the Secretary said the police would take enforcement action if they find criminal conduct involving virtual commodities by conducting patrols, including searching for relevant information via public platforms on the Internet, the Secretary said.[30]

Cryptoassets not considered securities would be subject to the regulation of Hong Kong's Customs and Excise Department (Customs) as virtual commodities. On January 30, 2014, the Hong Kong's Customs issued a circular to money service operators, warning about the money laundering and terrorist financing risks associated with "virtual commodities such as Bitcoin."[31] "Virtual commodities which are transacted or held on the basis of anonymity by their nature pose significantly higher inherent ML/TF risks," the circular states.[32]

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[28] *Id.*

[29] Press Release, Government of Hong Kong, LCQ4: Regulation of Trading Activities of Bitcoins (Mar. 25, 2015), *supra* note 19.

[30] *Id.*

[31] Customs and Excise Department, Circular to Money Service Operators, Anti-Money Laundering/Counter-Terrorist Financing, Money Laundering and Terrorist Financing Risks Associated with Virtual Commodities (Jan. 30, 2014), https://www.customs.gov.hk/filemanager/common/pdf/circular_VC_30012014_en.pdf, *archived at* https://perma.cc/S3NZ-83N9.

[32] *Id.*

Ireland

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I. Introduction

Ireland does not appear to have any laws that specifically regulate cryptocurrencies.[1] The Central Bank of Ireland has cautioned investors about the high risks that are associated with initial coin offerings due to the lack of regulation surrounding them.[2]

II. Approach to Cryptocurrencies and Cryptoassets

In 2018, the Department of Finance issued a discussion paper on virtual assets. The paper explicitly states that its purpose is not "[t]o provide guidance or set forth policy in relation to virtual currencies trading, purchasing, selling, or raising funds via Initial Coin Offerings (ICO)."[3]

One of the key considerations from the Department of Finance in the Discussion Paper was the need for a "clear legal & regulatory environment to ensure compliance when investing in blockchain linked businesses [and] Guidance in relation to tax and consumer protection matters."[4]

The government introduced an Intra-Departmental Working Group to identify the risks and economic opportunities for Ireland, monitor developments into virtual currencies, and consider whether policy recommendations are required.[5]

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[1] DEPARTMENT OF FINANCE & DEPARTMENT OF JUSTICE AND EQUALITY, NATIONAL RISK ASSESSMENT FOR IRELAND: MONEY LAUNDERING AND TERRORIST FINANCING 85, http://www.inis.gov.ie/en/JELR/National_Risk_Assessment_ Money_Laundering_and_Terrorist_Financing_Oct16.pdf/Files/National_Risk_Assessment_ Money_Laundering_and_Terrorist_Financing_Oct16.pdf (last visited Mar. 20, 2018), *archived at* https://perma.cc/W8BV-GGKU.

[2] *Alert on Initial Coin Offerings*, *Information Notice December 2017*, CENTRAL BANK OF IRELAND, https://www.centralbank.ie/consumer-hub/consumer-notices/alert-on-initial-coin-offerings, *archived at* https://perma.cc/JR3C-NJX4..

[3] DEPARTMENT OF FINANCE, DISCUSSION PAPER: VIRTUAL CURRENCIES AND BLOCKCHAIN TECHNOLOGIES (Mar. 2018), *available at* https://assets.gov.ie/6284/070219124115-a1199ab02f0c4a8ba5589a7f40985a63.pdf, *archived at* https://perma.cc/VCK7-LZXM.

[4] *Id.*, Table 2.3.

[5] *Virtual Currencies and Blockchain Technology*, DEPARTMENT OF FINANCE, https://www.gov.ie/en/publication/67039d-b/ (last updated Feb. 13, 2019), *archived at* https://perma.cc/QB6Q-WASN.

III. Anti-Money Laundering Legislation

Ireland has no specific anti-money laundering laws that apply to cryptocurrencies.[6]

IV. Taxation

There is no taxation legislation in Ireland that applies specifically to cryptocurrencies. The current tax structure applies to cryptocurrencies and cryptoassets, such as income tax, corporation tax and capital gains tax, with the particular tax depending upon the activities the cryptocurrencies or assets are used for and the individual.[7]

The Office of the Revenue Commissioners has noted that it considers bitcoin and other cryptocurrencies as "negotiable instruments" that are exempt from value-added tax (VAT).[8] VAT does, however, arise on purchases made with virtual currencies.[9] Any profits are liable to capital gains tax for an individual or corporation tax for a company, and losses may be written off.[10] If virtual currencies are mined, any virtual assets acquired as a result of mining are subject to income tax.[11]

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[6] *Blockchain & Cryptocurrency Regulation 2019 | Ireland*, GLOBAL LEGAL INSIGHTS, https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/ireland (last visited Apr. 2, 2019), *archived at* https://perma.cc/G3CY-5T8K.

[7] OFFICE OF THE REVENUE COMMISSIONERS, TAX AND DUTY MANUAL: TAXATION OF CRYPTOCURRENCY TRANSACTIONS (May 2018), https://www.revenue.ie/en/tax-professionals/tdm/income-tax-capital-gains-tax-corporation-tax/part-02/02-01-03.pdf, *archived at* https://perma.cc/B2FY-N8GT.

[8] VAT Consolidation Act 2010, No. 31 of 2010 § 6(1)(c), www.irishstatutebook.ie/eli/2010/act/31/enacted/en/pdf, *archived at* https://perma.cc/NT5Z-84UT; *see also id.* ¶ 2.1.

[9] VAT Consolidation Act 2010 § 6(1)(d); *see also id.* ¶ 2.2.

[10] DEPARTMENT OF FINANCE, *supra* note 3.

[11] *Id.*

Indonesia

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SUMMARY Indonesia's commodity futures trading regulator, Bappebti, recently issued regulations that provide the legal framework for the trading of cryptoassets as commodities that can be subject to futures trading. The regulations contain requirements related to the approval of cryptoassets that can be traded, traders, exchanges, clearing houses, and storage providers. These include technical, structural, and security requirements, as well as requirements for entities to maintain certain levels of paid-up and closing capital. Exchanges are also subject to anti-money laundering obligations.

It appears that, despite these regulatory developments, Bank Indonesia continues to prohibit the use of cryptocurrency as a means of payment in the country. In addition, financial services institutions regulated by the Financial Services Authority appear to be prohibited from engaging in activities related to cryptocurrencies.

I. Approach to Assets Created Through Blockchain

Indonesia's Commodity Futures Trading Regulatory Agency (known as Bappebti), which is part of the Ministry of Trade, issued four regulations in February 2019 that provide a legal framework for "the trading of crypto assets as commodities that could become the subjects of futures contracts and other derivative contracts traded in the stock market."[1] The four regulations are as follows:[2]

- Peraturan Bappebti No. 2 Tahun 2019 tentang Penyelenggaraan Pasar Fisik Komoditi di Bursa Berjangka[3] [Bappebti Regulation No. 2/2019 concerning the Implementation of the Commodity Physical Market on the Futures Exchange] (Regulation No. 2/2019).

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* At present there are no Law Library of Congress research staff members versed in Indonesian. This report has been prepared by the author's reliance on practiced legal research methods and on the basis of relevant legal resources, chiefly in English, currently available in the Law Library and online.

[1] *Trade Ministry Issues Four Regulations on Crypto Assets*, JAKARTA POST (Feb. 19, 2019), https://www.thejakartapost.com/news/2019/02/19/trade-ministry-issues-four-regulations-on-crypto-assets.html, *archived at* https://perma.cc/2R9C-Y7J5. *See also* Yogita Khatri, *Indonesia Passes Rules for Trading of Cryptocurrency Futures*, COINDESK (Feb. 18, 2019), https://www.coindesk.com/indonesia-passes-rules-for-trading-of-cryptocurrency-futures, *archived at* https://perma.cc/Z5FN-KACT.

[2] Press Release, Bappebti, Bappebti Terbitkan Empat Peraturan Aset Kripto dan Emas Digital [Bappebti Issues Four Rules for Crypto and Digital Gold Assets] (Feb. 19, 2019), http://bappebti.go.id/resources/docs/siaran_pers_2019_02_18_gpfdzt8b_id.pdf, *archived at* https://perma.cc/4EJS-DGD3.

[3] Peraturan Bappebti No. 2 Tahun 2019 tentang Penyelenggaraan Pasar Fisik Komoditi di Bursa Berjangka, http://bappebti.go.id/resources/docs/peraturan/sk_kep_kepala_bappebti/sk_kep_kepala_bappebti_2019_02_01_9lpcqskp_id.pdf, *archived at* https://perma.cc/Q6QC-366Q.

- Peraturan Bappebti No. 3 Tahun 2019 tentang Komoditi yang Dapat Dijadikan Subjek Kontrak Berjangka, Kontrak Derivatif Syariah dan/atau Kontrak Derivatif Lainnya yang Diperdagangkan di Bursa Berjangka[4] [Bappebti Regulation No. 3/2019 concerning Commodities that Can be Subjected to Futures Contracts, Sharia Derivative Contracts and/or Other Derivative Contracts on the Futures Exchange].
- Peraturan Bappebti No. 4 Tahun 2019 tentang Ketentuan Teknis Penyelenggaraan Pasar Fisik Emas Digital di Bursa Berjangka[5] [Bappebti Regulation No. 4/2019 concerning Technical Provisions for the Implementation of the Digital Gold Physical Market].
- Peraturan Bappebti No. 5 Tahun 2019 tentang Ketentuan Teknis Penyelenggaraan Pasar Fisik Aset Kripto (Crypto Asset) di Bursa Berjangka[6] [Bappebti No. 5/2019 concerning Technical Provisions for the Implementation of the Physical Market for Crypto Assets on the Futures Exchange] (Regulation No. 5/2019).

A news article on the regulations stated that

> [t]he new policy reportedly outlines a set of requirements in regard to any cryptocurrency circulating in Indonesia. Specifically, cryptocurrencies have to comply with risk assessment, anti-money laundering (AML) and combating the financing of terrorism (CFT) requirements. The policy also stipulates that cryptocurrency traders must keep transaction histories for at least five years and have a server located inside the country.
>
> Head of Bappepti Indrasari Wisnu Wardhana reportedly said that with the introduction of the new legislation, the agency wants to "give protection to people who want to invest in crypto assets so that they aren't cheated by fraudulent sellers."[7]

The new regulations followed the promulgation of two ministerial regulations related to trading cryptoassets and "digital gold" in October 2018 and January 2019: Peraturan Menteri Perdagangan No. 99 Tahun 2018 tentang Kebijakan Umum Penyelenggaraan Perdagangan Berjangka Aset Kripto (Crypto Asset)[8] (Minister of Trade Regulation No. 99/2018 concerning the

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[4] Peraturan Bappebti No. 3 Tahun 2019 tentang Komoditi yang Dapat Dijadikan Subjek Kontrak Berjangka, Kontrak Derivatif Syariah dan/atau Kontrak Derivatif Lainnya yang Diperdagangkan di Bursa Berjangka, http://bappebti.go.id/resources/docs/peraturan/sk_kep_kepala_bappebti/sk_kep_kepala_bappebti_2019_02_01_zhwpqewx_id.pdf, *archived at* https://perma.cc/J7F2-MNG4.

[5] Peraturan Bappebti No. 4 Tahun 2019 tentang Ketentuan Teknis Penyelenggaraan Pasar Fisik Emas Digital di Bursa Berjangka, http://bappebti.go.id/resources/docs/peraturan/sk_kep_kepala_bappebti/sk_kep_kepala_bappebti_2019_02_01_knhj9oc2_id.pdf, *archived at* https://perma.cc/5WRY-UNMN.

[6] Peraturan Bappebti No. 5 Tahun 2019 tentang Ketentuan Teknis Penyelenggaraan Pasar Fisik Aset Kripto (Crypto Asset) di Bursa Berjangka, http://bappebti.go.id/resources/docs/peraturan/sk_kep_kepala_bappebti/sk_kep_kepala_bappebti_2019_02_01_w9i365pf_id.pdf, *archived at* https://perma.cc/DBT6-TBE6.

[7] Ana Alexandre, *Indonesia: New Legislation Recognizes Crypto as Trading Commodity*, COINTELEGRAPH (Feb. 15, 2019), https://cointelegraph.com/news/indonesia-new-legislation-recognizes-crypto-as-trading-commodity, *archived at* https://perma.cc/H8VA-G6SA.

[8] Peraturan Menteri Perdagangan No. 99 Tahun 2018 tentang Kebijakan Umum Penyelenggaraan Perdagangan Berjangka Aset Kripto (Crypto Asset),

General Policy for the Implementation of Crypto Assets Futures Trading) and Peraturan Menteri Perdagangan No. 119 Tahun 2018 tentang Kebijakan Umum Perdagangan Pasar Fisik Emas Digital di Bursa Berjangka[9] (Minister of Trade Regulation No. 119/2018 concerning the General Policy on the Trading of Physical Market for Digital Gold on the Futures Exchange). "Digital gold" is defined as gold for which ownership is digitally recorded.[10]

Bappebti had previously issued a formal decision on the status of cryptocurrencies in June 2018, which stated that "cryptocurrencies are a commodity that can be subject to futures trading."[11] Minister of Trade Regulation No. 99/2018 codified this designation and stated that further arrangements regarding the matter would be determined by Bappebti.[12]

When the Bappebti decision was issued in June 2018, it was reported that "[t]he issues of taxation were not fully addressed, but will be looked at by the Directorate General of Taxes. It was proposed that the trading will be subject to a final tax as well as taxes applied on the exchange."[13] No further information on developments in this area was located.

Prior to these developments, Bank Indonesia (the central bank) issued a regulation in late 2017 banning fintech companies from using cryptocurrency as a payment system.[14] It has also issued several warnings to investors regarding the risks associated with digital assets.[15] Following the promulgation of the new regulations on futures trading of cryptoassets, Bank Indonesia

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http://jdih.kemendag.go.id/backendx/image/regulasi/27191241_PERMENDAG_NOMOR_99_TAHUN_2018.PDF, *archived at* https://perma.cc/LQP7-ZB5H.

[9] Peraturan Menteri Perdagangan No. 119 Tahun 2018 tentang Kebijakan Umum Perdagangan Pasar Fisik Emas Digital di Bursa Berjangka, http://jdih.kemendag.go.id/backendx/image/regulasi/22030103_PERMENDAG_NOMOR_119_TAHUN_2018.PDF, *archived at* https://perma.cc/8VW9-U5XQ.

[10] *Id.* art. 1(5).

[11] Tim Copeland, *Cryptocurrencies Are Now Commodities Subjected to Futures Trading in Indonesia*, NEWS BTC (June 4, 2018), https://www.newsbtc.com/2018/06/04/cryptocurrencies-are-now-commodities-subjected-to-futures-trading-in-indonesia/, *archived at* https://perma.cc/2XAM-C6QG. *See also Cryptocurrencies Decided as Future Trading Commodity*, JAKARTA POST (June 4, 2018), https://www.thejakartapost.com/news/2018/06/04/cryptocurrencies-decided-as-future-trading-commodity.html, *archived at* https://perma.cc/99V2-LJF2.

[12] Peraturan Menteri Perdagangan No. 99 Tahun 2018 tentang Kebijakan Umum Penyelenggaraan Perdagangan Berjangka Aset Kripto (Crypto Asset), arts. 1 & 2.

[13] Copeland, *supra* note 11.

[14] *See* Erwida Maulia, *Bank Indonesia Declares Bitcoin Payment Illegal*, NIKKEI ASIAN REVIEW (Dec. 7, 2017), https://asia.nikkei.com/Economy/Bank-Indonesia-declares-bitcoin-payment-illegal, *archived at* https://perma.cc/2VAR-3CQD; Peter Terlato, *Indonesia Bans Cryptocurrency Payments*, FINDER (Jan. 15, 2018), https://www.finder.com/indonesia-bans-cryptocurrency-payments, *archived at* https://perma.cc/JR9C-VPLK; SSEK, *Indonesia: Virtual Currency is Here, So How is Indonesia Going to Regulate It?*, MONDAQ (last updated Nov. 19, 2018), http://www.mondaq.com/x/756088/fin+tech/Virtual+Currency+Is+Here+So+How+Is+Indonesia+Going+to+Regulate+It, *archived at* https://perma.cc/HZ8M-XPD3.

[15] *See Indonesia, in* LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD (June 2018), https://www.loc.gov/law/help/cryptocurrency/world-survey.php#indonesia.

reportedly reiterated its position prohibiting cryptocurrency from being used as a means of payment.[16]

The Financial Services Authority (Otoritas Jasa Keuangan, OJK) is responsible for regulating and supervising the financial services sector in Indonesia. In a 2018 consumer education document, OJK stated that it prohibits financial services institutions using or marketing unregulated products, including cryptocurrencies. It also said it would continue to educate the public regarding the risks of cryptocurrencies.[17] Several entities that provide cryptocurrency services are listed by OJK as being ones that consumers need to be aware of.[18] Following Babbepti naming cryptocurrencies as a commodity that can be subject to trading in a futures exchange, OJK reportedly continued to assert that the financial services industry is prohibited from actively participating in cryptocurrency transactions.[19]

The Ministry of Finance and the Indonesian Financial Transaction Reports and Analysis Center have also issued a warnings related to cryptocurrencies.[20]

II. Custodianship of Cryptocurrencies by Financial Institutions

Information regarding the requirements in Regulation No. 5/2019 for an entity to be approved as a Crypto-Asset Storage Provider in the context of futures trading is provided in Part IV, below. As noted above, financial services institutions in Indonesia are currently prohibited from engaging in cryptocurrency activities.

III. Regulation of Cryptocurrencies as Financial Securities

As indicated above, while Indonesia currently has regulations enabling cryptoassets to be traded as commodities on a futures exchange in Indonesia, no law or regulation brings cryptocurrencies into the regulatory regime for financial securities.

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[16] Helen Patz, *Indonesia's Commodity Futures Regulator Releases Regulation for Crypto Futures Market*, COINTELEGRAPH (Feb. 18, 2019), https://cointelegraph.com/news/indonesias-commodity-futures-regulator-releases-regulation-for-crypto-futures-market, *archived at* https://perma.cc/45UH-V5XV.

[17] OTORITAS JASA KEUANGAN (OJK), EDUKASI KONSUMEN [CONSUMER EDUCATION] 24 (Mar. 2018), https://sikapiuangmu.ojk.go.id/FrontEnd/CMS/Download/469, *archived at* https://perma.cc/N8BS-8LRJ.

[18] OJK, SATGAS WASPADA INVESTASI [INVESTMENT ALERT TASKFORCE], PENJELASAN KEGIATAN USAHA 21 ENTITAS YANG PERLU DIWASPADAI OLEH MASYARAKAT [EXPLANATION OF BUSINESS ACTIVITIES OF 21 ENTITIES THAT NEED TO BE WATCHED BY THE PUBLIC] (undated), https://www.ojk.go.id/id/berita-dan-kegiatan/siaran-pers/Documents/Pages/Siaran-Pers-Di-Penghujung-Tahun,-Satgas-Waspada-Investasi-Imbau-Masyarakat-Waspada-terhadap-Kegiatan-Usaha-21-Entitas/SP%204%20Lampiran%2021%20entitas%20a.pdf (last visited Mar. 18, 2019), *archived at* https://perma.cc/G5T4-WXQX.

[19] *OJK Asserts Cryptocurrencies, Bitcoins Barred for Trade*, TEMPO (June 5, 2018), https://en.tempo.co/read/918979/ojk-asserts-cryptocurrencies-bitcoins-barred-for-trade, *archived at* https://perma.cc/G4KQ-JXCR.

[20] *See* SSEK, *supra* note 14.

IV. Treatment of Cryptoassets Not Considered Securities

According to an article in the *Jakarta Post*, Regulation No. 5/2019 on the implementation of physical markets for cryptoassets in futures exchanges "focuses among other things on good governance principles for crypto asset traders, legal certainty, consumer protection and the requirement for Bappebti to establish a physical market for crypto assets through electronic infrastructure."[21] The regulation "also regulates crypto assets that could be traded as well as mechanisms for crypto asset trading, starting from the opening of accounts, fund saving, crypto asset transactions, withdrawing crypto assets and withdrawing funds."[22]

An Indonesian law firm has provided a detailed overview of the new regulations that establish the legal framework for futures trading of cryptoassets. It states that Regulation No. 5/2019 needs to be read in conjunction with Regulation No. 2/2019, which "establishes an amended regulatory framework for commodity futures trading in general."[23] According to the law firm, Regulation No. 5/2019 defines a "Crypto Asset" as "an intangible commodity in the form of a digital asset that uses cryptography, a peer-to-peer network and distributed-ledger technology to regulate the creation of new units, verify transactions and ensure transaction security without the involvement of a third party intermediary."[24] The regulation also defines the terms "Crypto-Asset Exchanges," "Crypto-Asset Clearing Agencies," "Crypto-Asset Traders, Crypto-Asset Clients," and "Crypto-Asset Storage Providers." For example,

> [a] Trader is defined as a "party that has been approved by Bappebti to conduct crypto-asset transactions on its own behalf and/or to facilitate crypto-asset transactions by Clients," while a Client is defined as "a party that uses the services of a Trader to buy and sell crypto assets on the crypto-assets market."[25]

Under Regulation No. 5/2019,

> [a] crypto asset may only be traded on a Crypto-asset Exchange if the crypto asset is approved by Bappebti and listed in Bappebti's Schedule of Crypto Assets.
>
> To be approved by Bappebti, a crypto asset must, at a minimum, satisfy the following requirements:
>
> a. employs distributed ledger technology;
> b. is asset backed or utility-based;

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[21] *Futures Exchange Authority Issues Regulation on Cryptocurrency*, JAKARTA POST (Feb. 13, 2019), https://www.thejakartapost.com/news/2019/02/13/futures-exchange-authority-issues-regulation-on-cryptocurrency.html, *archived at* https://perma.cc/N8N4-QZZW.

[22] *Id.*

[23] Elsie Hakim, *Indonesia Establishes Legal Framework for Futures Trading of Crypto Assets*, ABNR LAW (Feb. 18, 2019), https://www.abnrlaw.com/news_detail.php?send_news_id=341&year=2019, *archived at* https://perma.cc/6HTT-9V72.

[24] *Id.*

[25] *Id.*

> c. in the case of a utility-based crypto asset, the crypto asset must be among the top 500 in terms of market capitalization;
> d. it must be traded on the largest crypto asset exchange in the world;
> e. offers economic benefit; and
> f. has successfully passed a risk assessment, including as regards the anti-money laundering and combating the financing of terrorism and proliferation of weapons of mass destruction regulations.[26]

The regulation "expressly excludes initial coin offerings from the scope of its regulatory scheme."[27]

Crypto-Asset Exchanges and Crypo-Asset Clearing Agencies must be approved by Bappebti. In addition to complying with the general requirements in Regulation 2/2019 and other subsidiary legislation, Bappebti explained in a statement that such entities "must have paid-up capital of at least 1.5 trillion Indonesian rupiahs ([US]$106 million) and must maintain a closing capital balance of at least 1.2 trillion Indonesian rupiahs ($85 million)."[28] Exchanges must also have a "good level of system security" and "a minimum of three employees who are Certified Information System Security Professionals (CISSP). They must also undergo a risk assessment process, the agency said, including confirming anti-money laundering (AML) and combating the financing of terrorism (CFT) compliance."[29]

A Crypto-Asset Trader must be

> incorporated as a limited liability company, be a member of a Crypto-asset Exchange and a Crypto-asset Clearing Agency, be designated as a Trader by the Crypto-asset Exchange and be approved by Bappebti. Separate Bappebti approvals are required for each type of transaction mechanism that is employed by the Trader. In addition, every such mechanism must be governed by trading rules that are approved by Bappebti.[30]

A trader must also have minimum paid-up capital of IDR 1 trillion (approx. US$70,475,000) and maintain a minimum closing capital balance of IDR 800 billion (approx. US$56,412,000). In addition, it "must have an organizational structure that, at a minimum, consists of an IT division, audit division, legal division, client-complaints division, client-support division and finance division."[31] Regulation No. 5/2019 also contains "a detailed list of technical requirements for Traders, including having ISO 27001 (Information Security Management System) certification. In addition, Traders that avail of Cloud storage must have ISO 27017 (cloud security) and ISO 27018

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[26] *Id.*

[27] *Id.*

[28] Khatri, *supra* note 1.

[29] *Id.*

[30] Hakim, *supra* note 23.

[31] *Id.*

(cloud privacy) certification."[32] A Trader's online trading system "must be audited by a certified and competent independent agency before being approved by Bappebti."[33]

A Crypto-Asset Storage Provider "must be approved by Bappebti based on a recommendation by a Crypto-Asset Exchange."[34] It must satisfy the same financial requirements as a Trader, meet detailed technical requirements (including ISO 27001 certification), and "have an organizational structure that consists of, at a minimum, an IT division, audit division and legal division."[35] A Storage Provider's online storage system must also be independently audited.

Both Traders and Storage Providers are accountable for the cryptoassets that they manage.[36]

In terms of trading operations, Regulation No. 5/2019 contains the following general provisions:

> Before opening a Client account and accepting funds from a Client, a Trader must provide the Client with information on the Trader's corporate particulars, the risks involved in crypto-asset trading (including those related to price fluctuation and system failure), and enter into a contract with the Client. Traders are also required to apply Know Your Customer (KYC) in respect of the money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction regulations. All suspicious transactions must be reported to the Financial-Transaction Analysis and Reporting Center (PPATK).
>
> A Trader is required to keep a minimum of 70 percent of the total crypto assets that it manages in "cold storage" (that is, in physical paper form). This may be undertaken (a) in collaboration with a Crypto-asset Storage Provider that provides token or wallet storage services: or (b) by the Trader itself, using a token or wallet storage mechanism.
>
> Every Client transaction that is facilitated by a Trader must be verified by the Crypto-asset Clearing Agency, and reported to the Crypto-asset Exchange for the purposes of setting price references and conducting supervision.[37]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As noted above, cryptocurrency is permitted to be traded in Indonesia as a commodity, but cannot be used as a method of payment, and financial services institutions cannot engage in cryptocurrency activities.

Based on Regulation No. 5/2019, it appears that local futures trading in cryptoassets (as defined by the regulation) that have not been approved by Bappebti is also prohibited. To be approved by Bappebti for trading on a futures exchange, cryptoassets must be asset-backed or utility-based.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

Isle of Man

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SUMMARY The Isle of Man currently provides for the registration of virtual currency businesses within its shores, but this registration is to ensure compliance with anti-money laundering laws rather than regulation of the industry. The Isle of Man's Financial Services Authority continues to warn consumers as to the risks posed by investing in virtual currencies and cryptoassets.

I. Introduction

The Isle of Man is a Crown Dependency of the United Kingdom and is a low-tax jurisdiction with a robust online gambling industry and burgeoning financial sector. Referred to in some reports as "Bitcoin Island," many establishments across the Island already accept bitcoins as payment alongside its national currency.[1]

II. Approach to Assets Created through Blockchain

The Isle of Man was an early adopter of legislation to regulate cryptocurrencies within its jurisdiction. The Isle of Man distinguishes between four different types of online currencies:

> Digital currency refers to any electronic representation of a fiat currency and this can include representations of virtual currency.
>
> Virtual currency is a narrower asset and is a digital representation of value which can be traded digitally. The nature of a virtual currency means that it does not need to be centrally controlled or administered. Virtual currency can be either convertible or non-convertible.
>
> Convertible virtual currency, which includes crypto-currency, can be converted into a fiat currency, either directly, or through an exchange. For a currency to be convertible, there does not need to be set rate or an established benchmark, but that merely a market exists and the ownership rights can be transferred from one person to another, whether for consideration or not.
>
> Non-convertible virtual currency, once purchased, cannot be transferred to another person and cannot be redeemed for fiat currency, either directly or through an exchange. (Note that the Schedule 4 to POCA [Proceeds of Crime Act] definition does not extend to non-convertible currency businesses).[2]

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[1] Cahal Milmo, *Bitcoin: How the Isle of Man Is Leading a Cryptocurrency Revolution*, INDEPENDENT (London) (Jan. 3, 2016), https://www.independent.co.uk/news/uk/home-news/bitcoin-how-the-isle-of-man-is-sparking-a-cryptocurrency-revolution-a6794756.html, *archived at* https://perma.cc/NUY8-XTS4.

[2] Isle of Man Financial Services Authority, *Virtual Currency Business Sector Specific AML/CFT Guidance Notes* (Oct. 2016), at 4, *available at* https://www.iomfsa.im/media/1606/virtualcurrencyguidance.pdf, *archived at* https://perma.cc/4UWC-S4BK.

The Designated Business (Registration and Oversight) Act 2015[3] provides that virtual currency businesses are designated businesses, requiring such businesses to register with, and be overseen by, the Isle of Man Financial Services Authority for compliance with anti-money laundering laws.[4] Virtual currency businesses are defined in the Act as those that are in

> the business of issuing, transmitting, transferring, providing safe custody or storage of, administering, managing, lending, buying, selling, exchanging or otherwise trading or intermediating convertible virtual currencies, including crypto-currencies or similar concepts where the concept is accepted by persons as a means of payment for goods or services, a unit of account, a store of value or a commodity[.][5]

In order to issue a convertible virtual currency, the business must be registered under the Designated Businesses (Registration and Oversight) Act 2015.[6] For ICOs, the FSA has stated that it will not register an applicant if the ICO provides tokens that do not offer any benefit to the purchaser other than the token itself, because

> [s]uch characteristics are generally considered by the FSA to pose an unacceptably high risk that the money raised from the ICO could be used for unanticipated and illegal purposes, as well as posing a risk to consumers. It is because of these risks that it is the policy of the FSA to refuse to register this type of business.[7]

The Isle of Man recently amended its online gambling laws to enable operators to accept virtual currencies.[8]

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[3] Designated Business (Registration and Oversight) Act 2015, No. 9 of 2015, https://legislation.gov.im/cms/images/ LEGISLATION/PRINCIPAL/2015/2015-0009/DesignatedBusinessesRegistrationandOversightAct2015_6.pdf, *archived at* https://perma.cc/SMR3-LYKL.

[4] Isle of Man Financial Services Authority Anti-Money Laundering and Countering the Financing of Terrorism Handbook (Nov. 2018), https://www.iomfsa.im/media/1475/amlcfthandbookfinalversiond.pdf, *archived at* https://perma.cc/UMS5-Y4RK.

[5] Designated Business (Registration and Oversight) Act 2015, No. 9 of 2015, sched. 1(1), https://legislation.gov.im/ cms/images/LEGISLATION/PRINCIPAL/2015/2015-0009/DesignatedBusinessesRegistrationandOversight Act2015_6.pdf, *archived at* https://perma.cc/SMR3-LYKL.

[6] *Questions & Answers in Respect of Persons Seeking to Issue Convertible Virtual Currency (Such as Via an Initial Coin Offering) in or from the Isle of Man*, ISLE OF MAN FINANCIAL SERVICES AUTHORITY, https://www.iomfsa.im/ media/2365/icoguidanceforapplicants.pdf (last visited Apr. 3, 2019), *archived at* https://perma.cc/92PD-6AMH.

[7] *Initial Coin Offerings – Questions and Answers*, ISLE OF MAN FINANCIAL SERVICES AUTHORITY, https://www.iomfsa. im/consumer-material/initial-coin-offerings-questions-and-answers/ (last visited Apr. 3, 2019), *archived at* https://perma.cc/F6HF-HPWZ.

[8] Online Gambling (Amendments) Regulations 2016, SD 2016/0341, reg. 11(1)–(2), https://www.gov.im/media/ 1354648/online-gambling-amendments-regulations-2016.pdf, *archived at* https://perma.cc/TJ24-UKYF. *See also* Isle of Man Gambling Supervision Commission, *AML/CFT Guidance for Virtual Currencies* (May 2017), *available at* https://www.gov.im/media/1356960/aml-guidance-notes-virtual-currencies.pdf, *archived at* https://perma.cc/ 9856-6MJ2.

III. Consumer Protection

While virtual currency businesses must be registered under the Designated Businesses (Registration and Oversight) Act 2015, this registration does not subject it to financial oversight regulation:

> [O]versight [of the Isle of Man Financial Services Authority] does not extend to conduct of business, prudential and solvency regulation or protection of client assets. For the avoidance of doubt, businesses operating as CVC businesses (including ICOs) fall under this category. . . . A Designated Business is not a regulated entity and must not hold out that it is anything but a registered Designated Business.[9]

Thus, virtual currencies or tokens issued through initial coin offerings are not regulated investments in the Isle of Man as the virtual currencies or tokens do not fall within the definition of investment within the Regulated Activities Order 2011.[10] Thus, tokens are not regulated investments in the Isle of Man[11] and the protections to investors of traditional financial products regulated under the Financial Services Act 2008 are not provided to investors of ICOs.[12] The Isle of Man Financial Services Authority has cautioned investors over the volatility and risks posed by investing in ICOs:

> [Y]our money is not protected. You should be prepared for the fact that you might lose all of the money you use for the purchase. Any money or assets provided to a virtual currency business is not covered by any compensation scheme, and not subject to any protections afforded by the Isle of Man Financial Ombudsman Scheme.[13]

IV. Taxation

There does not appear to be any legislation that specifically applies to the taxation of virtual currencies.

V. Anti Money Laundering Measures

The Proceeds of Crime Act 2008 was amended in 2015 to include virtual currency businesses within its regulated sector as a "designated business,"[14] specifically those that are in

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[9] *Questions & Answers in Respect of Persons Seeking to Issue Convertible Virtual Currency,* ISLE OF MAN FINANCIAL SERVICES AUTHORITY, *supra* note 6, at 2.

[10] Regulated Activities Order 2011, SD 884/2011, https://www.iomfsa.im/media/1427/regulatedactivitiesorder 2011.pdf, *archived at* https://perma.cc/6PCX-L2JL.

[11] *Initial Coin Offerings – Questions and Answers,* ISLE OF MAN FINANCIAL SERVICES AUTHORITY, *supra* note 7.

[12] Financial Services Act 2008, 8/20008, https://legislation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0008/FinancialServicesAct2008_15.pdf, *archived at* https://perma.cc/DE8S-Z7ES.

[13] *Initial Coin Offerings - Questions and Answers,* ISLE OF MAN FINANCIAL SERVICES AUTHORITY, *supra* note 7.

[14] *Questions & Answers in Respect of Persons Seeking to Issue Convertible Virtual Currency,* ISLE OF MAN FINANCIAL SERVICES AUTHORITY, *supra* note 6.

> the business of issuing, transmitting, transferring, providing safe custody or storage of, administering, managing, lending, buying, selling, exchanging or otherwise trading or intermediating convertible virtual currencies, including crypto-currencies or similar concepts where the concept is accepted by persons as a means of payment for goods.[15]

This amendment brought businesses that engaged in these activities, including those that wish to offer initial coin offerings (ICO),[16] within the ambit of its anti-money laundering laws.[17]

Businesses registered under the Designated Business (Registration and Oversight) Act 2015 are required to submit annual returns that show compliance with anti-money laundering laws, requiring the use of know-your-customer practices, such as collecting identifying information, knowing the beneficial owner of any currency, and record keeping and reporting requirements for certain transactions.[18] These businesses are overseen by the Isle of Man Financial Services Authority to ensure compliance with these laws.[19]

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[15] Proceeds of Crime (Business in the Regulated Sector) Order 2015, 2015/0073, Sched., art. 1(1)(mm), https://www.gov.im/media/470633/proceedsofcrime-businessintheregulatedsector-order2015-final.pdf, *archived at* https://perma.cc/M83K-C2JM (amending Proceeds of Crime Act 2008, No. 13 of 2008, Sched. 4, http://www.legis lation.gov.im/cms/images/LEGISLATION/PRINCIPAL/2008/2008-0013/ProceedsofCrimeAct2008_6.pdf, *archived at* https://perma.cc/JX8R-EHNY).

[16] *Questions & Answers in Respect of Persons Seeking to Issue Convertible Virtual Currency,* ISLE OF MAN FINANCIAL SERVICES AUTHORITY, *supra* note 6.

[17] *AML/CFT Handbook, supra* note 4.

[18] Isle of Man Financial Services Authority, *Virtual Currency Business: Sector Specific AML/CFT Guidance Notes, supra* note 2.

[19] *AML/CFT Handbook*, *supra* note 4.

Israel

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SUMMARY The regulation of cryptoassets created through blockchain is constantly being updated in Israel as authorities are following trends and developments in the field. The existing regulatory approach appears to depend on the particular classification of such assets.

The Committee for the Examination of Regulation for the Issuance of Distributed Cryptographic Coins to the Public, established in 2017, published its final report in March 2019. The Committee concluded that although the issuance of cryptoassets to the public is commonly viewed as constituting an offer of securities, a situation involving cryptoassets that are classified as "utility" assets that would not be considered securities could not be ruled out. The Committee opined that trading in cryptoassets is usually done for financial investment purposes. Therefore, supervision of such trading by Israel's Security Authority was justified, even if the assets did not meet the definition of a security or a financial service.

Under current laws, providers of services related to and traders in "virtual currencies" are required to be licensed under legislation on securities and financial services. Companies trading in securities are expressly prohibited from taking advantage of customers' lack of knowledge or experience.

Providers of financial services, such as management of financial assets and securities, are also subject to current legislation against money laundering that imposes identification and reporting requirements. Israeli financial services regulators are reportedly currently working on anti-money laundering regulations that would contain specific disclosure and documentation requirements for financial service providers regarding the source of crypto-funds they receive.

For the purpose of income tax and value added tax requirements, cryptocurrency is viewed by Israel's Tax Authority as "an asset" and is taxed in accordance with relevant transaction classifications under the tax laws. Additionally, utility token issuers are taxed at different stages in accordance with the nature of the issuing company's operations and its business model. Special instructions regarding taxation of employees and directors receiving utility tokens as part of their compensations (employees' tokens) apply.

There are currently no specific legislative provisions governing custodianship of cryptocurrencies or other cryptoassets.

I. Approach to Assets Created Through Blockchain

On August 10, 2017, Shmuel Howzer, then-chairman of the Israel Securities Authority (ISA), appointed an interdepartmental Committee for the Examination of Regulation for the Issuance of

Distributed Cryptographic Coins to the Public (the Committee). The Committee's main objective was to examine the application of the Securities Law[1] to the issuance, distribution of, and trading in cryptoassets that are based on distributed ledger technology.[2]

Following publication of its interim report in March 2018,[3] the Committee held extensive public hearings as well as a series of additional meetings with activists from industry and academia. The final report was issued to Anat Gueta, the current ISA chairwoman, on March 5, 2019 (Final Report). According to the Final Report, the Committee continues to follow trends and developments in the regulation of cryptoassets worldwide.[4]

The Committee recognized the importance of the development of innovative technologies to the improvement of the financial market and to strengthening the Israeli economy. In its view, such developments might provide new means of financing for Israeli companies and improve public access to diverse investment channels.[5] The Committee therefore

> considered it important that the Authority [ISA] be actively involved in creating a regulatory infrastructure and taking active measures to implement a technological advance in the capital market. At the same time, the Authority's main function is to protect investors, and therefore the Authority must ensure that the use of innovative technology is performed in a fair manner, ensuring the preservation of the interest of the investing public and its confidence in the capital market.[6]

One of the questions evaluated by the Committee was whether and how the cryptoassets sector should be regulated in view of its special characteristics. The Committee's main recommendations were the establishment of a dedicated platform for the trading of cryptocurrency, adaptation of disclosure requirements, and granting blockchain companies regulatory relief in the framework of a regulatory "sandbox."[7] A regulatory "sandbox," according to the Final Report, was designed to enable "Fin Tech companies . . . [to] enjoy the benefits offered

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[1] Securities Law, 5728-1968, SEFER HAHUKIM [SH, BOOK OF LAWS, official gazette] 5728 No. 541 p. 234, as amended.

[2] COMMITTEE FOR THE EXAMINATION OF REGULATION FOR THE ISSUANCE OF DISTRIBUTED CRYPTOGRAPHIC COINS TO THE PUBLIC, FINAL REPORT 2 (Mar. 2019) (Final Report), http://www.isa.gov.il/הודעות ופרסומים/Reports/177/Documents/CryptoCommitteeFinalReport.pdf (in Hebrew), *archived at* https://perma.cc/39ZK-G696.

[3] COMMITTEE FOR THE EXAMINATION OF REGULATION FOR THE ISSUANCE OF DISTRIBUTED CRYPTOGRAPHIC COINS TO THE PUBLIC, INTERIM REPORT (Mar. 2018), http://www.isa.gov.il/הודעות ופרסומים/Reports/177/Documents/CryptoCommitteeInterimReport.pdf, *archived at* https://perma.cc/3K35-WEYC.

[4] Final Report, *supra* note 2, at 2.

[5] *Id.*

[6] *Id.*, translation from Hebrew here and below are by author, R.L.

[7] *Id.* at 2; Roi Ktsiri, *The Securities Authority has Determined: This is How the Digital Coins Market in Israel will be Regulated*, GLOBES (Mar. 6, 2019) (in Hebrew), https://www.globes.co.il/news/article.aspx?did=1001276905 , *archived at* https://perma.cc/YN7G-JK3R.

by the high-tech world while moderating the level of risk to which the public is exposed."[8] The Committee further recommended examination of the application of a model similar to crowd funding for projects involving cryptoassets that are securities.[9]

The existing regulatory approach to cryptoassets created through blockchain appears to depend on their particular classification.

II. Classification of Cryptoassets

The Final Report surveyed developments in the cryptoassets market, such as the introduction of security tokens (STOs), including equity tokens (ETOs), and security tokens platforms.[10] The Final Report noted the distinctions that had been made in the Committee's prior interim report among three groups of cryptographic assets:

> (1) Currency - Assets to be used as a means of payment, exchange or clearing; (2) Investments or Security - Assets designed to grant ownership rights, membership or participation in a specific venture or rights…; (3) Utility - assets intended to grant access rights or use of a service or a product offered by a particular enterprise. . . .
>
> It was further explained in the report that the determination whether a cryptographic asset is a security asset depends on the circumstances of the case and the nature of the real transaction, and is not based on the label attached to it. In general, assets from the first group (Currency), i.e. assets intended to be used only as a method of payment, settlement or exchange, other than in a specific enterprise, that do not confer additional rights other than their own ownership, and are not controlled by a central entity, shall not be considered a security.
>
> On the other hand, assets from the second and third groups are not intended solely as an exchange instrument but to grant additional rights. These rights are generally broader than the mere right to own the currency, and include among other [,] rights in connection with a specific venture. Another fundamental difference between a cryptographic asset that is intended to transfer value to cryptographic assets from the second and third groups is the human factor behind it - in contrast to assets of a distributed ledger, tokens and the project for which they were designed were usually developed by a central issuer, sometimes at an initial stage where the design or development of the product have not yet been completed. . . .
>
> In the interim report[,] it was explained that while for assets from the category of Security there is an agreement that . . . [they are] in the category of security, for Utility assets, an examination of the properties of the assets is required and it was specifically stated that the following characteristics should be considered: (1) The purpose of the investment in the eyes of the tokens' purchasers; (2) the degree of the token's functionality in the IPO stage, i.e. how much token purchasers can use it for the purpose for which it is intended; (3) representations and undertakings of the issuer, including a promise to achieve yield

[8] Final Report, *supra* note 2, at 33.

[9] *Id*. at 3.

[10] *Id*. at 24-25. Additional types of assets mentioned include Stable Coins; digital fiat; Asset Backed tokens; Reverse ICO; Non-fungible tokens (NFTs), and Decentralized Credit Networks. *Id* at 26-28.

> and the creation of a secondary market, and significant efforts to create a secondary market after the issue.[11]

Stating that although the issuance of cryptoassets to the public is commonly viewed as constituting an offer of securities, the Committee opined in its Final Report that a situation in which cryptographic assets that are classified as "utility" assets will not be considered securities cannot be ruled out, depending on the circumstances of the case.[12]

III. Current Financial Regulation and Consumer Protection

A comprehensive regulatory approach to cryptographic assets is still evolving. As of the writing of this report in March 2019, it appears that the following regulatory and consumer protection provisions would apply depending on the particular cryptoasset's classification:

A. Financial Services Law

Under the Supervision on Financial Services (Regulated Financial Services) Law, 5776-2016, persons engaging in providing services involving a "financial asset" are required to obtain a license issued by the Supervisor on Financial Services Providers.[13] The license enumerates conditions and types of activities approved to be carried out the licensee.[14] "Virtual currency" is included in the definition of "financial asset" in this context.[15]

A license will generally be issued to an Israeli citizen or a resident who has reached the age of majority; is legally competent; and has not been declared bankrupt or, in the case of a corporation, has not been required to dissolve. Additional licensing requirements include that the licensee has a minimum specified equity and, for individuals, has not been convicted of an offense that due to its nature makes the licensee unfit to handle financial transactions.[16]

B. Securities Law

Cryptoassets that constitute an offering of securities are subject to the provisions of the Securities Law, 5728-1968.[17] This law requires traders in securities to be licensed.[18] The Law further prohibits trading companies from "tak[ing] advantage of the customer's lack of knowledge or lack of

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[11] *Id*. at 35-36.

[12] *Id*. at 36.

[13] Supervision on Financial Services (Regulated Financial Services) Law 5776-2016, § 12, SH 5776 No. 2570 p. 1098, *as amended*.

[14] *Id*. §§ 2 & 12.

[15] *Id*. § 11(7) (defining "financial asset").

[16] *Id*. § 15.

[17] Securities Law, 5728-1968, SH 5728 No. 541 p. 234, *as amended*.

[18] *Id*. § 44.

experience in order to enter into the transaction under unreasonable conditions, give, or receive an unreasonably different consideration from the accepted consideration."[19]

C. Regulation of Non-Security Cryptoassets

In reality, the Committee opined, trading in cryptoassets is usually done for financial investment purposes. Therefore, subordination of trading in such assets to ISA supervision was justified, "even if the assets they did not enter the definition of security or a financial service, especially when it involves systems that enable multi party transactions"[20]

IV. Anti-Money Laundering Law

The Prohibition on Money Laundering Law, 5760-2000, imposes special duties on providers of business services. Such services include the management of financial assets and securities.[21] Duties imposed by the Law include client identification, reporting, and registration requirements.[22]

According to an Israeli practitioner, as of November 6, 2018, the Israeli financial services regulators were working on specific anti-money laundering regulations that would contain specific disclosure and documentation requirements for financial service providers regarding the sources of crypto-funds they receive. Accordingly, providers would have to report the source of cryptoassets by disclosing the address (Public Key) of the person or entity depositing funds; their IP address; and transactions involving any of the following elements that would automatically qualify the transactions as suspicious:

- Transactions using crypto-funds based on ZKP (Zero Knowledge Protocol). ZKP's involve technology, which results in high or even complete levels of anonymity of its users, making it effectively impossible to securely record the identity of the person or entity using their services. ZCash and Monero are example of such ZKP currencies and, though it not illegal to transact with these currencies, such transactions would likely be listed as suspicious and have to be reported.

- Transactions from Mixer Platforms — on mixer platforms, funds are all mixed together and randomly assigned to wallets, preventing proper identification of the source of the crypto funds.

- Transactions from Dark Net

[19] *Id*. § 44S.

[20] Final Report, *supra* note 2, at 38.

[21] Prohibition on Money Laundering Law, 5760-2000, § 8B(a)(3), SH 5760 No. 1753 p. 293, *as amended*.

[22] *Id*. §§ -9.

- Transactions with inconsistencies between IP Address and other geographical indicators.[23]

V. Taxation

A. Virtual Currencies

The Bank of Israel reportedly said in a January 2018 statement that "it would not recognize virtual currencies such as bitcoin as actual currency and . . . it was difficult to devise regulations to monitor the risks of such activity to the country's banks and their clients."[24]

Although virtual currencies are not recognized as actual currency by the Bank of Israel, the Israel Tax Authority (ITA) has proposed that the use of virtual currencies should be considered as a "means of virtual payment" and subject to taxation.[25] Specifically, for the purpose of income tax and value added tax requirements, virtual currency is viewed as "an asset" and is taxed in accordance with relevant transaction classifications under the Income Tax Ordinance (New Version), 1961, and the Value Added Tax Law, 5736-1975.[26] Accordingly,

> [u]nlike a regular currency, the Israel Tax Authority will regard an increase in the value of a cryptocurrency as a capital gain rather than an exchange fluctuation, making it subject to capital gains tax. Individual investors will not be liable for value-added tax, but anyone engaging in cryptocurrency mining will be classified as a "dealer" and subject to VAT, according to the circular. Anyone trading as a business will be classified as a "financial institution" for tax purposes, meaning that they will be unable to reclaim VAT on expenses but will be subject to an extra 17 percent "profit tax" applied to financial institutions.[27]

B. Utility Tokens

In March 2018, the ITA issued a circular addressing the tax consequences of initial offerings of utility tokens. According to the circular, utility token issuers will be taxed at different stages in

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[23] Patricia de Hemricourt, *Blockchain's Regulations Trends and Reality Checks (Focus on Israel)*, HACKER NOON (Dec. 5, 2018), https://hackernoon.com/blockchains-trends-and-reality-checks-with-a-focus-on-israel-ea1dbddda45b, *archived at* https://perma.cc/AC25-RMB9.

[24] Steven Scheer, *Bitcoin Is an Asset, Not a Currency - Israel's Central Bank*, REUTERS (Jan. 8, 2018), https://www.reuters.com/article/uk-bitcoin-israel/bitcoin-is-an-asset-not-a-currency-israels-central-bank-idUSKBN1EX18E, *archived at* https://perma.cc/3458-ZY58.

[25] Israel Tax Authority, Circular No. 05/2018: Taxation of Activity by Means of Virtual Payment (Known as 'Virtual Currencies') (Jan. 17, 2018), https://taxes.gov.il/incometax/documents/hozrim/hor_acc%2015.2.18.pdf (in Hebrew), *archived at* https://perma.cc/NDH8-VFZP.

[26] *Id.* §§ 3.1–3.2; Income Tax Ordinance (New Version), 1961, 1 LAWS OF THE STATE OF ISRAEL [LSI] (New Version) 1967 & Value Added Tax Law, 5736-1975, 30 LSI 46 (1975/76), both *as amended*.

[27] Matthew Kalman, *Israel Taxman's Guidelines Killing Cryptocurrency Boom?*, BNA (Feb. 21, 2018), https://www.bna.com/israel-taxmans-guidelines-n57982089034/, *archived at* https://perma.cc/J8DE-6AJQ.

accordance with the nature of the issuing company's operations and its business model.[28] Accordingly, "the tax on the proceeds from the sale of the issued tokens will be deferred until the platform begins to provide services, or if the company goes bankrupt, if that occurs earlier."[29]

The circular further provides special instructions regarding employees and directors receiving utility tokens as part of their compensations (employees' tokens).[30] Taxes on these tokens will be due at marginal rates upon the earlier of the sale or the exercise of the rights embedded in the tokens. The company can choose in advance, however, that its employees' tokens will be taxable at the date of the actual offering. In such a case, the taxable income will be at the level of the tokens' market value on the date of offering, minus the incremental realization, if any.[31]

VI. Custodianship of Cryptocurrencies by Financial Institutions

There are no specific legislative provisions governing custodianship of cryptocurrencies or other cryptoassets.

On February 25, 2018, the Supreme Court issued a temporary injunction prohibiting a bank from blocking activities in an account held by a company engaging in trade in bitcoin.[32]

According to the bank, its decision to block the company's activities had been reached based on a 2014 warning by the Bank of Israel and other regulatory agencies regarding risks associated with the bitcoin trade.[33] The bank further asserted that the dangers described in the warning had in fact materialized "by the occurrence of several events perceived to be connected to fraud, furtherance of criminal objectives including suspicions for money laundering and financing of terrorism."[34] The bank alleged that activities exposing the bank to such unlawful acts might harm its reputation and public trust in the bank.[35]

In granting the temporary injunction, Justice Anat Baron noted that the reasonableness of a bank's decision to refuse to enable trading activities involving virtual currencies was an issue that had not yet been determined by the Supreme Court. An examination of the legal questions regarding the proper balancing between the duty of a bank to provide banking services vis-à-vis its

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[28] Israel Tax Authority, Circular No. 7/2018: ICO Issuing "Digital Tokens" for the Provision of Services and/or Products Under Development (Utility Tokens), Part 3(1) (Mar. 13, 2018), https://taxes.gov.il/incometax/documents/hozrim/hoz_07_2018_acc.docx.pdf (in Hebrew), *archived at* https://perma.cc/A5PM-N7RQ.

[29] de Hemricourt, *supra* note 23.

[30] Israel Tax Authority, Circular No. 7/2018, *supra* note 28, Part 3.3.

[31] *Id.* ¶ 3.3.1.2.

[32] CA 6389/17 Bits of Gold Ltd. v. Bank Leumi LeIsrael Ltd., ¶¶ 3–4, available in the Nevo Legal Database, http://www.nevo.co.il (by subscription, in Hebrew), *archived at* https://perma.cc/R76Z-2AQX.

[33] Press Release, Bank of Israel et al., Notice to the Public Regarding Possible Risks in Decentralized Virtual Currencies (Such as Bitcoin) (Feb. 19, 2014), https://www.boi.org.il/en/NewsAndPublications/PressReleases/Pages/19-02-2014-BitCoin.aspx, *archived at* https://perma.cc/3GD6-CHL4.

[34] CA 6389/17 Bits of Gold Ltd. v. Bank Leumi LeIsrael Ltd. ¶ 4.

[35] *Id.*

responsibility to prevent prohibited activity such as money laundering or the financing of terrorism, among others, led Justice Baron to conclude that the chances of the appeal could not be said to be null.[36]

A search for further developments in this lawsuit has not identified a final decision as of March 25, 2019.[37]

[36] *Id*. ¶ 12.

[37] Nevo Legal Database, search for "CA 6389/17 Bits of Gold Ltd. v. Bank Leumi LeIsrael Ltd" under "Life Cycle" (in Hebrew), https://www.nevo.co.il/PsikaSearchResults.aspx (last visited Mar. 25, 2019), *archived at* https://perma.cc/N2V2-ASCN.

Italy

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SUMMARY Pursuant to legislation passed in 2017, the Italian government is to issue regulations establishing the requirements for carrying out cryptocurrency-related operations throughout the country. At least two relevant EU directives applicable to the use of cryptocurrencies for money laundering purposes have already been implemented in Italy. In addition, a resolution by the Italian Revenue Agency issued in 2016 addresses the tax treatment of cryptocurrencies, including the application of value-added tax and corporate income taxes. Finally, a comprehensive legislative bill regulating cryptocurrencies was introduced in the Italian Parliament in 2016 and is still pending.

I. Financial Regulation and Consumer Protection

Legislative Decree No. 90 of 2017 subjected virtual currency providers (*prestatori di servizi relativi all'utilizzo di valuta virtuale*) to the regulations established for traditional money exchange operators.[1] To that effect, Legislative Decree No. 90 charged the Ministry of the Economy and Finance with issuing a ministerial decree setting forth the requirements and timelines for the legal performance of such activities throughout the country.[2] Accordingly, in early 2018 the Treasury Department, which is part of the Ministry of Economy and Finance, commenced a public consultation process on the proposed text of a ministerial decree on the methods and timing according to which providers of virtual currency services will be required to submit information concerning their Italian operations.[3] A draft of the ministerial decree is available online for review.[4] It is expected that the ministerial decree will be issued during 2019.

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[1] L.D. No. 90, art. 8 ¶ 1, extending the application of article 17-*bis* of Decreto Legislativo decreto legislativo 13 agosto 2010, n. 141 Attuazione della Direttiva 2008/48/CE relativa ai Contratti di Credito ai Consumatori, nonche' Modifiche del Titolo VI del Testo Unico Bancario (Decreto Legislativo n. 385 del 1993) in merito alla disciplina dei Soggetti Operanti nel Settore Finanziario, degli Agenti in Attivita' Finanziaria e dei Mediatori Creditizi (Legislative Decree No. 141 of August 13, 2010, Implementation of Directive 2008/48/CE on Credit Agreements for Consumers, as well as Amendments to Title VI of the Single Banking Text (Legislative Decree No. 385 of 1993), related to Operators in the Financial Sector, Agents in Financial Activities and Credit Brokers), G.U. Sept. 4, 2010, n. 207, www.gazzettaufficiale.it/eli/id/2010/09/04/010G0170/sg, *archived at* https://perma.cc/8GCJ-4RRZ.

[2] *Id.*

[3] Dipartimento del Tesoro [Treasury Department], Esiti della Consultazione Pubblica sulla Bozza di Decreto Ministeriale di cui all'Articolo 17-bis, comma 8-ter del Decreto Legislativo 13 agosto 2010, n.141 e Successive Modificazioni [Results of the Public Consultation on the Ministerial Decree referred to by Article 17-bis, Paragraph 8-ter of Legislative Decree No. 141 of August 13, 2010, and Successive Amendments], http://www.dt.tesoro.it/export/sites/sitodt/modules/documenti_it/regolamentazione_bancaria_finanziaria/consultazioni_pubbliche/Monete_Virtuali_Esiti_della_consultazione_pubblica_sulla_bozza_di_decreto_ministeriale.pdf (last visited March 27, 2019), *archived at* https://perma.cc/ND4R-5FPA.

[4] Ministry of the Economy and Finance, Draft Ministerial Decree pursuant to Legislative Decree No. 90 of 2017, art. 8 ¶ 1 and Legislative Decree No. 141 of 2010, art. 17-*bis*, http://www.dt.tesoro.it/modules/documenti_it/regolamentazione_bancaria_finanziaria/consultazioni_pubb

II. Anti-Money Laundering

Italy has implemented several EU Directives related to money laundering and cryptocurrencies through the following legislation:

- Legislative Decree No. 90 of May 25, 2017, Implementing Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing;[5] and

- Legislative Decree No. 231 of November 21, 2007, Implementation of EU Directive 2005/60/CE) on the Prevention of the Use of the Financial System for purposes of Money Laundering from Criminal Activities and Terrorist Financing as well as EU Directive 2006/70/CE, containing Implementing Measures.[6]

III. Taxation

A Ministerial Resolution of September 2016 issued by the Revenue Agency (*Agenzia delle Entrate*)[7] addressed aspects of the tax treatment of bitcoin and other cryptocurrencies. This Resolution implemented the decision issued by the European Court of Justice (ECJ) in the case of *Skatteverket*

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liche/31.01.18_bozza_DM_prestatori_val_virtuale_.pdf, *archived at* https://perma.cc/MG5C-E3D4 (last visited Mar. 28, 2019).

[5] Decreto Legislativo 25 maggio 2017, n. 90 Attuazione della Direttiva (UE) 2015/849 Relativa alla Prevenzione dell'Uso del Sistema Finanziario a Scopo di Riciclaggio dei Proventi di Attivita Criminose e di Finanziamento del Terrorismo [Legislative Decree No. 90 of May 25, 2017, Implementing Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing.] (L.D. No. 90), G.U. June 19, 2017, n. 140, www.gazzettaufficiale.it/eli/id/2017/06/19/17G00104/sg, *archived at* https://perma.cc/YQX5-BJWK.

[6] Decreto Legislativo 21 novembre 2007, n. 231 Attuazione della direttiva 2005/60/CE concernente la Prevenzione dell'Utilizzo del Sistema Finanziario a scopo di Riciclaggio dei Proventi di Attività Criminose e di Finanziamento del Terrorismo nonché della Direttiva 2006/70/CE che ne reca Misure di Esecuzione [Legislative Decree No. 231 of November 21, 2007, Implementation of EU Directive 2005/60/CE on the Prevention of the Use of the Financial System for purposes of Money Laundering from Criminal Activities and Terrorist Financing as well as EU Directive 2006/70/CE, containing Implementing Measures], GAZZETTA UFFICIALE [G.U.] [OFFICIAL GAZETTE] No. 290 (Dec. 14, 2007), www.gazzettaufficiale.it/eli/id/2007/12/14/007X0246/sg, *archived at* https://perma.cc/557J-XDBA. Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Anti-Money Laundering Directive, AMLD), 2015 O.J. (L 141) 73, are *available at* https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015L0849-20180709&qid=1552510550346&from=EN, *archived at* http://perma.cc/W7KN-PCPM.

[7] Risoluzione Ministeriale 72/E del 2 settembre 2016, Interpello ai sensi dell'art. 11, legge 27 luglio 2000, n. 212, Trattamento Fiscale Applicabile alle Societa che Svolgono Attivita di Servizi Relativi a Monete Virtuali [Ministerial Resolution 72/E of September 2, 2016, Rule Issued According to Art. 11 of Law No. 212 of July 27, 2000, Fiscal Treatment Applicable to Companies that Develop Service Activities Related to Virtual Currencies] (Agenzia Entrate) (Ministerial Resolution 72/E), https://www.finaria.it/pdf/bitcoin-tasse-agenzia-entrate.pdf, *archived at* https://perma.cc/9EAZ-LS79.

v. *David Hedqvist*,[8] which held that the value-added tax (VAT) does not apply to transactions in which crypocurrencies are exchanged for traditional currencies or vice versa.[9]

In addition, the 2016 Resolution indicates that for purposes of the corporate income tax (*Imposta sul Reddito sulle Società*, IRES) and the Italian regional production tax (*Imposta Regionale sulle Attività Produttive*, IRAP), profits and losses arising from such transactions constitute corporate income or losses subject to taxation.[10] The Resolution contains specific requirements for the registration of cryptocurrency operations, including names, amounts, dates, and other information on transactions.[11] Cryptocurrency operations performed by individuals who hold bitcoin for other than commercial or corporate purposes do not generate taxable income, according to the Resolution.[12]

IV. Pending Legislative Bill

A bill introduced in the Italian Parliament in 2016[13] would establish the following rules regarding cryptocurrencies:

- Forbid the use of total anonymisation techniques in transactions in relation to payers, paid subjects, as well as to the amount of the transaction;[14]

- Allow the use of cryptocurrencies that involve total anonymisation techniques only when they are equipped with mechanisms for recognizing outgoing conversion transactions, as long as they are available to the national judicial authorities in a manner established by law;[15]

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[8] Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718 (ECJ Oct. 22, 2015), http://curia.europa.eu/juris/document/document.jsf?text=&docid=170305&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=302749, *archived at* https://perma.cc/JYH8-Q6AL.

[9] Paolo Luigi Burlone, *Dichiarazione dei Redditi e Bitcoin* [*Declaration of Income and Bitcoin*], COINLEX (Apr. 26, 2016), https://coinlexit.wordpress.com/2016/04/26/dichiarazione-dei-redditi-e-bitcoin/, *archived at* https://perma.cc/QSN8-XSHV.

[10] *Id.*

[11] Ministerial Resolution 72/E, at 6.

[12] *Bitcoin e Tasse: Come Fare per la Dichiarazione dei Redditi?* [*Bitcoin and Taxes: How to Make the Declaration of Income?*], MERCATI 24, https://www.mercati24.com/bitcoin-tasse/ (last visited Mar. 28, 2019), *archived at* https://perma.cc/S3W4-5BP5.

[13] Proposta di Legge 4119 del 26 Ottobre 2016, Divieto di Utilizzo delle Criptovalute che Impiegano Tecniche di Anonimizzazione Totale nelle Transazioni Economiche [Bill No. 4119 of October 26, 2016, Prohibition of Use of Cryptocurrencies Using Total Anonymization Techniques in Economic Transactions], Chamber of Deputies, XVII Legislature, http://documenti.camera.it/_dati/leg17/lavori/stampati/pdf/17PDL0060630.pdf, *archived at* https://perma.cc/XMQ4-EPEL.

[14] *Id.* art. 1(1).

[15] *Id.* art. 1(2).

- Prohibit the establishment of cryptocurrency exchange service providers with total anonymisation as well as the offer, promotion, or facilitation of access, in any way, to currency exchange services with total anonymisation that have been established abroad;[16]

- Permit the operation of suppliers and the offer of foreign exchange services only when these are equipped with mechanisms for recognizing outgoing conversion transactions, as long as they are available to national judicial authorities in a manner established by law;[17]

- Require pseudonym cryptocurrency changers to block any conversion into another cryptocurrency coming from anonymisation services included in a list established in the law, and to inform the competent supervisory bodies of the identification details of the subjects requesting the money changing operations;[18]

- Require the competent authority established by a ministerial decree to publish and keep updated, in collaboration with international organizations having a similar role, the list of the anonymisation services of pseudonym cryptocurrencies;[19]

- Mandate the Ministry of Economy and Finance to issue a special decree containing operating instructions for the planning and control, by the competent supervisory authorities, of the use of cryptocurrencies with total anonymisation that differ from those mentioned in the bill, in order to counter their use and dissemination, as well as to regulate the exercise, offer and promotion of pseudonymous cryptocurrency anonymisation services that differ from those established in the bill;[20] and

- Establish penalties of fines and imprisonment for the violation of prohibitions related to cryptocurrencies.[21]

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[16] *Id.* art. 2(1).

[17] *Id.* art. 2(2).

[18] *Id.* art. 3(1).

[19] *Id.* art. 3(2).

[20] *Id.* art. 4(1).

[21] *Id.* art. 4(3).

Japan

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SUMMARY Currently, virtual currency exchange businesses are regulated by the Payment Services Act. Virtual currency exchange business operators must be registered with a competent local finance bureau. A bill to amend the Payment Services Act and other acts that was submitted in March 2019 would change the name of virtual currency to "crypto assets," require cold wallet for storage of cryptoassets, recognize and regulate cryptoasset custodian businesses, and regulate ICOs.

I. Definition of Virtual Currency

The Payment Services Act defines "virtual currency"[1] as

- property value that can be used as payment for the purchase or rental of goods or provision of services by unspecified persons, that can be purchased from or sold to unspecified persons, and that is transferable via an electronic data processing system; or
- property value that can be mutually exchangeable for the above property value with unspecified persons and is transferable via an electronic data processing system.[2]

The Act also states that virtual currency is limited to property values that are stored electronically on electronic devices; currency and currency-denominated assets are excluded.[3]

Virtual currency is not currently included in the definition of securities in the Financial Instruments and Exchange Act[4] or its enforcement order.[5]

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[1] In Japanese, the term 仮想通貨 ("virtual currency") is used.

[2] 資金決済に関する法律 [Payment Services Act], Act No. 59 of 2009, *amended by* Act No. 62 of 2016, art. 2, para. 5.

[3] *Id*.

[4] 金融商品取引法 [Financial Instruments and Exchange Act], Act No. 25 of 1948, *amended by* Act No. 46 of 2017, art. 2, para. 1, http://www.japaneselawtranslation.go.jp/law/detail/?printID=&id=3186&re=&vm=02, *archived at* https://perma.cc/LK7Y-BXTH.

[5] 金融商品取引業等に関する内閣府令 [Cabinet Office Order on Financial Instruments Business, etc.], Cabinet Office Order No. 52 of 2007, *amended by* Cabinet Office Order No. 55 of 2017, http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=02&dn=1&yo=Financial+Business+Instruments&ia=03&ph=&x=43&y=11&ky=&page=1&vm=02, *archived at* https://perma.cc/H6JA-Q7EK.

II. Regulation of Virtual Currency Exchange Businesses

Under the Payment Services Act, only business operators registered with a competent local finance bureau are allowed to operate a virtual currency exchange business.[6] The operator must be a stock company or a "foreign virtual currency exchange business" that is a company with a representative who is resident in Japan and an office in Japan.[7] A "foreign virtual currency exchange business" means a virtual currency exchange service provider that is registered with a foreign government in the foreign country under a law that provides an equivalent registration system to the system under the Japanese Payment Services Act.[8]

The Act requires virtual currency exchanges businesses to establish security systems to protect the business information they hold.[9] When such a business entrusts part of its operations to a contractor, it must take measures to ensure that business is appropriately conducted.[10] Virtual currency exchange businesses must separately manage customers' money or virtual currency apart from their own. The state of such management must be reviewed by certified public accountants or accounting firms.[11]

Virtual currency exchange businesses must keep accounting records of virtual currency transactions[12] and submit annual reports to the Financial Services Agency (FSA).[13] The FSA is authorized to order exchange businesses to submit reports and reference materials and to dispatch its officials to inspect the offices of an exchange business where necessary to ensure proper conduct.[14] The FSA may issue orders to such businesses to improve their practices,[15] rescind registration of a virtual currency exchange business, or suspend its business for up to six months in certain cases.[16]

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[6] *Id*. arts. 63-2 & 63-3. Because the Cabinet delegates its authority over most of the matters under the Payment Services Act to the Financial Services Agency (FSA) (*id*. art. 104), the FSA is the regulatory agency that handles virtual currency transactions. *See also Details of Screening for New Registration Application as Virtual Currency Exchange Service Provider*, FSA, http://www.fsa.go.jp/en/news/2017/20170930-1/02.pdf (last visited Apr. 30, 2018), *archived at* https://perma.cc/BVU7-PGSW.

[7] Payment Services Act, art. 63-5, para. 1.

[8] *Id*. art. 2, para. 9.

[9] *Id*. art. 63-8.

[10] *Id*. art. 63-9.

[11] *Id*. art. 63-11.

[12] *Id*. art. 63-13.

[13] *Id*. art. 63-14.

[14] *Id*. art. 63-15.

[15] *Id*. art. 63-16.

[16] *Id*. art. 63-17.

III. Pending Bill to Amend the Payment Services Act

The Cabinet submitted a bill to amend the Payment Services Act and other acts on March 15, 2019.[17] The bill proposes to change the name of virtual currency to "crypto asset."[18]

The bill would require cryptoasset exchange businesses to manage customers' cryptoassets, except for the part that is necessary for running the business, using reliable methods that would be described in a Cabinet order,[19] such as a "cold wallet" that is disconnected from the internet.[20] Cryptoasset exchange businesses would be required to maintain a holding of cryptoassets (guarantee cryptoassets) that are the same kind as customers' cryptoassets in an amount equivalent to the customers' cryptoassets that are not stored in cold wallet. Such guarantee cryptoassets must be stored separately from their other cryptoassets.[21]

The bill would add businesses that only manage cryptoassets (custodian businesses) to cryptoasset exchange businesses under the Payment Services Act.[22] Therefore, cryptoasset custodian businesses would be registered in the same way as crypto currency exchange businesses, and would be obligated to confirm the identity of owners and store customers' assets separately from their own.[23]

The bill would obligate cryptoasset exchange businesses to report changes to the cryptoassets that they deal with, in advance, to the FSA.[24] This is to screen problematic cryptoassets for which trading records are not disclosed and, therefore, which can be used for money laundering.[25]

The bill also amends the Financial Instruments and Exchange Act. The amendment would add cryptoassets to a category of financial instruments.[26] Therefore, cryptocurrency sales would be subject to regulation under the Act. Cryptoasset margin transactions, which are currently not

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[17] Cabinet Bill No. 49 of 198th Diet Session, http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g19809049.htm (in Japanese), *archived at* https://perma.cc/32MU-VJ2V.

[18] Payment Services Act, *as amended by* Cabinet Bill No. 49 of 198th Diet Session (hereinafter "Proposed Payment Services Act"), art. 1 & art. 2, item 5.

[19] Proposed Payment Services Act, art. 63-11, para. 2.

[20] FSA,「情報通信技術の進展に伴う金融取引の多様化に対応するための資金決済に関する法律等の一部を改正する法律案」説明資料 (Explanatory Material of "Bill to Amend Part of Payment Services Act, etc. in Order to Adjust to Diversified Financial Transactions by Development of Information Communication Technologies") 2 (Mar. 2019) (hereinafter "Explanatory Material"), https://www.fsa.go.jp/common/diet/198/02/setsumei.pdf, *archived at* https://perma.cc/DH48-E3PH.

[21] Proposed Payment Services Act, art. 63-11-2.

[22] *Id*. art. 2, item 7.

[23] Explanatory Material, *supra* note 20, at 2.

[24] Proposed Payment Services Act, art. 63-3, para. 1, item 7 & art. 63-6, para. 1.

[25] Explanatory Material, *supra* note 20, at 3.

[26] Financial Instruments and Exchange Act, *as amended by* Cabinet Bill No. 49 of 198th Diet Session (hereinafter "Proposed Financial Instruments and Exchange Act"), art. 2, para. 24.

regulated, would be limited to leverage up to 25 times more than traders' deposits, the same as forex leverage.[27]

IV. Anti-Money Laundering Regulation

The Act on Prevention of Transfer of Criminal Proceeds subjects virtual currency exchange businesses to the requirements under the anti-money laundering regulations.[28] Virtual currency exchange businesses are therefore obligated to check the identities of customers who open accounts, keep transaction records, and notify authorities when a suspicious transaction is identified.[29]

V. ICO Regulation

To date, it has not been clear what existing regulations are applicable to initial coin offerings (ICOs).[30] The proposed amendments to the Financial Instruments and Exchange Act would clarify that the Act is applicable to the issuance of tokens in exchange for cryptoassets.[31] ICOs would be subject to similar regulations to stock issue, such as disclosure of information.[32]

VI. Taxation

The National Tax Agency (NTA) treats the profit earned from sales of virtual currency, in principle, as miscellaneous income,[33] rather than capital gains,[34] under the Income Tax Act.[35]

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[27] Explanatory Material, *supra* note 20, at 4.

[28] 犯罪による収益の移転防止に関する法律 [Act on Prevention of Transfer of Criminal Proceeds], Act No. 22 of 2007, *amended by* Act No. 67 of 2017, art. 2, para. 2, item 31.

[29] *Id*. arts. 4, 7–8.

[30] Explanatory Material, *supra* note 20, at 4. *See also* Taro Awataguchi, *Japan, in* BLOCKCHAIN AND CRYPTOCURRENCY REGULATION 2019 (Global Legal Insights, Jan. 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/japan, *archived at* https://perma.cc/6VVF-YAT9.

[31] Proposed Financial Instruments and Exchange Act, art. 2, paras. 3 & 8, art. 3 & art. 28. *See also* Explanatory Material, *supra* note 20, at 4.

[32] Explanatory Material, *supra* note 20, at 4.

[33] 所得税法 [Income Tax Act], Act No. 33 of 1965, *amended by* Act No. 74 of 2017, art. 35.

[34] *Id*. art. 33.

[35] NTA, 仮想通貨に関する所得の計算方法等について（情報）[Regarding Calculation Method of Income Relating to Virtual currency (Information), Individual Taxation Information], No. 4 (Dec. 1, 2017), http://www.nta. go.jp/law/joho-zeikaishaku/shotoku/shinkoku/171127/01.pdf, *archived at* https://perma.cc/M22N-53MF.

Miscellaneous income is added to the amount of other income, excluding specified capital gains,[36] when a person's taxable income is calculated and taxed.[37]

[36] 租税特別措置法 [Act on Special Measures concerning Taxation], Act No. 26 of 1957, *amended by* Act No. 4 of 2017, arts. 8 through 8-5.

[37] Income Tax Act, art. 89.

Jersey

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SUMMARY Jersey has introduced legislation that regulates cryptocurrency exchanges with an annual turnover of £150,000 (approximately US$210,000) or more. These exchanges are supervised by the Jersey Financial Services Commission and must comply with anti-money laundering and counter-financing of terrorism laws, including know-your-customer requirements. By excluding exchanges with a turnover below £150,000, Jersey aims to create a means for companies to test various methods of financial technology without being subject to regulation.

I. Introduction

Jersey is a Crown Dependency of the United Kingdom and is a low-tax jurisdiction with a large financial sector.

II. Regulation of Cryptocurrencies

Jersey issued a consultation paper on the regulation of cryptocurrencies in 2015, noting "[t]he creation of a business-friendly framework that encourages innovation, jobs and growth in both the financial services and digital sectors is a priority for the Government of Jersey."[1] The majority response to the consultation paper was that cryptocurrencies should be regulated only insofar as necessary to ensure compliance with anti-money laundering laws and to counter the financing of terrorism.[2] The government of Jersey rejected "a full prudential and conduct of business regime" for cryptocurrencies, as it considered it was too early to issue such regulations given that cryptocurrencies are in the early stages of development and that doing so could restrict development and innovation.[3] The legislative framework that applies to cryptocurrencies mirrors these recommendations.

The result of the consultation process was the issuance of a policy document that aims to

> further enhance Jersey's proposition as a world leading Fintech jurisdiction . . . [and] outline Jersey's commitment to creating an environment that encourages confidence and innovation in the digital sector whilst protecting the Island from the most prominent

[1] CHIEF MINISTER'S DEPARTMENT, REGULATION OF VIRTUAL CURRENCY: CONSULTATION PAPER (July 9, 2015), http://www.statesassembly.gov.je/assemblyreports/2015/r.80-2015.pdf, *archived at* https://perma.cc/K5PY-GZRP.

[2] CHIEF MINISTER'S DEPARTMENT, REGULATION OF VIRTUAL CURRENCY: POLICY DOCUMENT para. 1.1 (Oct. 21, 2015), https://www.gov.je/SiteCollectionDocuments/Government and administration/P Regulation of Virtual Currency 20151021 GP.PDF, *archived at* https://perma.cc/9QBL-YQNT.

[3] *Id*. para. 1.2.

> money laundering and terrorist financing risks that are presented by virtual currencies in their current form.[4]

The Jersey Financial Services Commission (JFSC) has stated that

> most ICOs are unlikely to be regulated by the JFSC. Instead, the JFSC places some conditions on an issuer of an ICO (an ICO issuer) through the powers conferred on the JFSC in the Island's statutory instrument governing the raising of capital, the Control of Borrowing (Jersey) Order 1958.[5]

Thus, while there are no specific regulations in Jersey that apply to cryptocurrencies and initial coin offereings (ICOs), certain types of ICOs may fall under the existing financial regulatory regime in Jersey, depending on the form the offer takes.[6] If an ICO does fall under the Jersey financial regulatory regime,

> [a]s a general policy, Jersey based ICO issuers are required to be incorporated as a Jersey company and administered through a trust and company service provider licensed by the JFSC under the Financial Services (Jersey) Law 1998 to carry on trust company business.[7]

To provide clarity the JFSC issued guidance to aid companies in determining whether or not they fall within the legislative framework.[8] In order to fall within this framework, all ICO issuers in Jersey are required to meet the following criteria:

> 3.2.1 be incorporated as a Jersey company with its registered office being provided by the TCSP appointed by the issuer
> 3.2.2 receive consent under the COBO from the JFSC before it undertakes any activity;
> 3.2.3 comply with the JFSC's Sound Business Practice Policy;
> 3.2.4 apply relevant AML/CFT requirements to persons that either purchase tokens from, or sell tokens back to, the issuer of those tokens;
> 3.2.5 appoint and maintain a TCSP;
> 3.2.6 appoint and maintain a Jersey resident director who is a natural person and also a principal person of the TCSP appointed by the issuer;
> 3.2.7 be subject to an ongoing audit requirement;
> 3.2.8 have procedures and processes in place to (i) mitigate and manage the risk of retail investors investing inappropriately in the ICO, and (ii) to ensure retail investors understand the risks involved;
> 3.2.9 prepare and submit to the JFSC an Information Memorandum (which may be in the form of a White Paper) which complies with certain content requirements required of a

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[4] *Id.* at 2.

[5] JERSEY FINANCIAL SERVICES COMMISSION, THE APPLICATION PROCESS FOR ISSUERS OF INITIAL COIN OFFERINGS (ICOS): GUIDANCE NOTE (July 2018), https://www.jerseyfsc.org/media/1999/gn-ico-july-2018.pdf, *archived at* https://perma.cc/9VML-8NRN.

[6] Press Release, Jersey Financial Services Commission, JFSC Warning on Initial Coin Offerings (Nov. 30, 2017), https://www.jerseyfsc.org/media/1612/jfsc-warning-initial-coin-offerings.pdf, *archived at* https://perma.cc/S3EG-QMDU.

[7] *Id.*

[8] JERSEY FINANCIAL SERVICES COMMISSION, *supra* note 5.

> prospectus issued by a company under the Companies (Jersey) Law 1991; and 3.2.10 ensure that any marketing material (including the Information Memorandum) is clear, fair and not misleading.[9]

In cases where the ICO requires consent under the Control of Borrowing (Jersey) Order, the JFSC may impose certain conditions on the company, which

> require the issuer of the ICO to take certain measures to manage, amongst other things, financial crime and investor risks. The conditions reflect the guiding principles pursuant to which the JFSC discharges its functions as the Island's financial services regulator (the Guiding Principles) which are to have regard to:
>
> 1.3.1. the reduction of the risk to the public of financial loss due to dishonesty, incompetence, malpractice or the financial unsoundness of financial service providers;
> 1.3.2. the protection and enhancement of Jersey's reputation and integrity in commercial and financial matters;
> 1.3.3. the best economic interests of Jersey;
> 1.3.4. and the need to counter financial crime both in Jersey and elsewhere.[10]

While the JFSC may, in some cases, regulate ICOs, it "does not take any responsibility for the financial soundness of any schemes or for the correctness of any statements made or opinions expressed with regard to them."[11]

III. Anti-Money Laundering Laws

A. Application

Jersey's anti-money laundering and counter-financing of terrorism (AML/CFT) laws were extended to cover cryptocurrencies, with the changes coming into force on September 26, 2016.[12] "Virtual currencies" are defined in the Proceeds of Crime Act as a currency rather than a commodity, thus enabling it to fall within the pre-existing regulatory framework and be regulated by the JFSC.[13] Specifically, the Proceeds of Crime Act defines virtual currency as

> (4) . . . any currency which (whilst not itself being issued by, or legal tender in, any jurisdiction)–
>
> (a) digitally represents value;

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Proceeds of Crime (Miscellaneous Amendments) (Jersey) Regulations 2016, R&O 63/2016, https://www.jersey law.je/laws/enacted/PDFs/RO-063-2016.pdf, *archived at* https://perma.cc/F2H5-2KNV; Proceeds of Crime (Supervisory Bodies) (Virtual Currency Exchange Business) (Exemption) (Jersey) Order 2016, REVISED LAWS OF JERSEY, https://www.jerseylaw.je/laws/revised/PDFs/08.785.80.pdf, *archived at* https://perma.cc/A8W9-7753.

[13] Proceeds of Crime Act 1999, Sched. 2, Part B, ¶ 9, https://www.jerseylaw.je/laws/revised/Pages/08.780.aspx#_Toc468266188, *archived at* https://perma.cc/K2YU-7KA4.

(b) is a unit of account;

(c) functions as a medium of exchange; and

(d) is capable of being digitally exchanged for money in any form.

(5) For the avoidance of doubt, virtual currency does not include any instrument which represents or stores (whether digitally or otherwise) value that can be used only to acquire goods and services in or on the premises of, or under a commercial agreement with, the issuer of the instrument.[14]

A "virtual currency exchange" is defined in the Act as "the exchange of virtual currency for money in any form, or vice versa," but "a reference to providing a service to third parties shall not include a company's providing that service to a connected company."[15]

Virtual currencies were also brought within the ambit of the Money Laundering (Jersey) Order 2008,[16] which requires individuals operating a "money service business" to register with the JFSC[17] and comply with the jurisdiction's AML/CFT laws if they have an annual turnover greater than £150,000 (approx. US$210,000).[18] These laws require such businesses to adopt policies and procedures to prevent and detect money laundering and terrorist financing, appoint a money laundering compliance officer and reporting officer, and ensure that record keeping and customer due diligence measures are implemented,[19] such as know-your-customer measures, prior to entering into a business relationship with a person, or before conducting a "one-off" for all transactions greater than €1,000 (approx. US$1,220).[20]

Businesses that trade in goods and receive payments in cryptocurrency of €15,000 (approx. US$18,500) and above per transaction, or in groupings of transactions, are considered to be "high value dealers" under the Proceeds of Crime Act 1999.[21] Such dealers must be registered and supervised by the JFSC and comply with Jersey's AML/CFT laws.[22]

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[14] *Id*. Sched. 2, Part B, ¶¶ 4, 5.

[15] *Id*. Sched. 2, Part B, ¶ 9(2)(a)–(b).

[16] Money Laundering (Jersey) Order 2008, REVISED LAWS OF JERSEY, https://www.jerseylaw.je/laws/revised/Pages/ 08.780.30.aspx, *archived at* https://perma.cc/2ENA-U4AQ.

[17] Proceeds of Crime (Supervisory Bodies) (Jersey) Law 2008, REVISED LAWS OF JERSEY, https://www.jerseylaw.je/laws/revised/PDFs/08.785.pdf, *archived at* https://perma.cc/U5CQ-EQGY.

[18] Money Laundering (Jersey) Order 2008, REVISED LAWS OF JERSEY, https://www.jerseylaw.je/laws/revised/Pages/08.780.30.aspx, *archived at* https://perma.cc/PT5L-A4X6.

[19] "Customer due diligence measures" are defined in the Proceeds of Crime Act 1999, Sched. 2, Part B, ¶ 3.

[20] REGULATION OF VIRTUAL CURRENCY: POLICY DOCUMENT, *supra* note 2, par. 1.14. *See also* Money Laundering (Jersey) Order 2008.

[21] Proceeds of Crime Act 1999, Sched. 2, Part B, ¶ 4.

[22] *Id*.; JERSEY FINANCIAL SERVICES COMMISSION, AML/CFT HANDBOOK FOR ESTATE AGENTS AND HIGH VALUE DEALERS (effective Aug. 14, 2015), https://www.jerseyfsc.org/pdf/Consolidated-Estate-Agents-and-HVD-Section-1-to-10.pdf, *archived at* https://perma.cc/H5CA-UEGK.

B. Exemptions

Individuals who operate a virtual currency exchange as a business but have an annual turnover of less than £150,000 are exempt from the Act. These businesses must notify the JFSC that they are conducting such a business, but that they are exempt.[23] There is no fee for this notification, but it makes the business known to the JFSC and enables them to "build a good profile of the businesses in this sector"[24] and to investigate the business for any suspected breaches of legislation.[25] The aim of this exemption is to create "an innovative regulatory sandbox . . . allowing Exchangers with turnover of less than £150,000 per calendar year to test virtual currency exchange delivery mechanisms in a live environment without the normal registration requirements and associated costs."[26]

IV. Taxation

There do not appear to be specific legislative provisions that apply solely to the taxation of cryptocurrencies. The government of Jersey has issued guidance on the tax treatment of cryptocurrencies, particularly with regard to the mining of cryptocurrencies, the exchange of cryptocurrencies to conventional currencies, and the use of cryptocurrencies to pay for goods and services.[27]

The government has stated that income generated from mining cryptocurrencies on a small or irregular scale are generally not to be considered as a trading activity, and that mining alone does not make a person liable for income tax.[28] Costs associated with mining are also typically not deductible as an expense. If mining is accompanied by"trading in cryptocurrencies on a sufficiently commercial scale that they would be regarded as trading on application of the 'Badges of Trade' principles."[29]

Occasional transactions that involve the exchange of cryptocurrencies that result in a gain or loss are generally not taxable. Exchange of cryptocurrencies to and from conventional currencies by businesses or entities renders them liable to income tax if the activity is considered to be trading,

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[23] Proceeds of Crime (Supervisory Bodies) (Virtual Currency Exchange Business) (Exemption) (Jersey) Order 2016, REVISED LAWS OF JERSEY, https://www.jerseylaw.je/laws/revised/PDFs/08.785.80.pdf, *archived at* https://perma.cc/A8W9-7753. *See also Jersey Strengthens Financial Crime Regulation with Extension to Cover Virtual Currency*, JERSEY FINANCE (Oct. 24, 2016), https://www.jerseyfinance.je/news/jersey-strengthens-financial-crime-regulation-with-extension-to-cover-virtual-currency#.WrI4_v6os5s, *archived at* https://perma.cc/TX8J-KE5R.

[24] REGULATION OF VIRTUAL CURRENCY: POLICY DOCUMENT, *supra* note 2, para. 1.8.

[25] *Id.*

[26] *Virtual Currency Regulation in Jersey Takes Effect*, OGIER (Oct. 4, 2016), http://www.ogier.com/publications/virtual-currency-regulation-in-jersey-takes-effect, *archived at* https://perma.cc/AHT8-HJBZ.

[27] *Cryptocurrency Tax Treatment*, GOV.JE, https://www.gov.je/taxesmoney/incometax/technical/guidelines/pages/cryptocurrenciestreatment.aspx (last visited April 4, 2019), *archived at* https://perma.cc/Z5K5-3R68.

[28] *Id.*

[29] *Id.*

or if features of trading are met.[30] Businesses that use cryptocurrency transactions are taxable under income tax rules, but must convert the transaction to the local currency (sterling).[31] In cases where goods and services are paid for in cryptocurrency, the transaction must be converted to the local currency in order to apply the goods and service tax.[32]

V. Consumer Protection

In November 2017, the JFSC issued a warning on ICOs, noting that these types of offerings are speculative, risky and are typically unregulated, and thus not subject to typical investor protection requirements.[33]

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] Press Release, Jersey Financial Services Commission, JFSC Warning on Initial Coin Offerings (Nov. 30, 2017), https://www.jerseyfsc.org/media/1612/jfsc-warning-initial-coin-offerings.pdf, *archived at* https://perma.cc/S3EG-QMDU.

Liechtenstein

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SUMMARY In 2017, Liechtenstein amended its Due Diligence Act to extend the scope to exchange offices that exchange virtual currencies against fiat money and vice versa. It also included a definition of virtual currencies in that law. In addition, initial coin offerings (ICOs) may be subject to financial market law, depending on the specific design and de facto function of the tokens.

On August 28, 2018, the government of Liechtenstein adopted a consultation report on a proposed Blockchain Act. The goal of the Blockchain Act is to take advantage of the potential of blockchain technology, create legal certainty for market participants, protect users of blockchain technology from potential abuse, and reduce potential reputation risks for Liechtenstein. The report also proposed a further extension of the scope of the Due Diligence Act to include other participants in the blockchain industry. However, the final adoption of the Blockchain Act has been delayed and it will most likely not enter into force until 2020.

I. Approach to Assets Created Through Blockchain

In 2017, Liechtenstein amended its Due Diligence Act to extend the scope to exchange offices that exchange virtual currencies against fiat money and vice versa. It also included a definition of virtual currencies in that law. Besides this amendment, there is currently no specific legislation for assets created through blockchain in Liechtenstein. However, on August 28, 2018, the government of Liechtenstein adopted a consultation report on a proposed Blockchain Act.[1] The goal of the Blockchain Act is to take advantage of the potential of blockchain technology, create legal certainty for market participants, protect users of blockchain technology from potential abuse, and reduce potential reputation risks for Liechtenstein.[2] The government also aims to define the minimum requirements for blockchain-based activities and have them registered by

[1] *See* Jenny Gesley, *Liechtenstein: Government Adopts Consultation Report on Draft Blockchain Act*, GLOBAL LEGAL MONITOR (Sept. 20, 2018), http://www.loc.gov/law/foreign-news/article/liechtenstein-government-adopts-consultation-report-on-draft-blockchain-act/, *archived at* http://perma.cc/JE7C-HUSW.

[2] MINISTERIUM FÜR PRÄSIDIALES UND FINANZEN [MINISTRY FOR GENERAL GOVERNMENT AFFAIRS AND FINANCE], VERNEHMLASSUNGSBERICHT DER REGIERUNG BETREFFEND DIE SCHAFFUNG EINES GESETZES ÜBER AUF VERTRAUENSWÜRDIGEN TECHNOLOGIEN (VT) BERUHENDE TRANSAKTIONSSYSTEME (BLOCKCHAIN-GESETZ; VT-GESETZ; VTG) UND DIE ABÄNDERUNG WEITERER GESETZE. [CONSULTATION REPORT ON ENACTING AN ACT ON TRANSACTION SYSTEMS BASED ON TRUSTWORTHY TECHNOLOGIES (TT) (BLOCKCHAIN ACT; TT ACT; VTG) AND THE AMENDMENT OF FURTHER ACTS] (hereinafter "Consultation Report") (Aug. 28, 2018), https://www.llv.li/files/srk/vnb-blockchain-gesetz.pdf, *archived at* http://perma.cc/W8GW-YUQQ; unofficial English translation *available at* https://www.regierung.li/media/attachments/VNB-Blockchain-Gesetz-en-full-clean.pdf?t=636869640270903690, *archived at* http://perma.cc/QS55-YN3W. *See also* Press Release, Government of the Principality of Liechtenstein, Consultation Launched on Blockchain Act (Aug. 29, 2018), https://www.regierung.li/en/press-releases/212310, *archived at* http://perma.cc/M76B-AKE6.

the Financial Market Authority of Liechtenstein (FMA).[3] The deadline for comments on the consultation report (consultation period) was November 16, 2018. The consultation procedure is a preliminary voluntary step in the legislative process before the draft is submitted to Parliament for debate. However, the final adoption of the Blockchain Act has been delayed and it will most likely not enter into force until 2020.[4] The parliament is planning to debate the report and draft of the government before the summer recess of 2019.[5]

In addition, initial coin offerings (ICOs) may be subject to financial market law depending on the specific design and de facto function of the tokens.

A. Draft Blockchain Act

1. Scope of Application

The proposed Blockchain Act applies to all trustworthy technologies (TT) service providers, unless the TT system is available only to a closed user group.[6] "Trustworthy" technologies are defined as "technologies that ensure the integrity of tokens, their unambiguous allocation to the owner whom [sic] possesses the power of disposal and their disposal without an operator."[7] The rules on the control and use of tokens are only applicable when tokens are generated or issued by a TT service provider who is subject to Liechtenstein law, or when the Blockchain Act declares them applicable.[8] The Consultation Report on the draft Act states that the term "trustworthy technologies" was chosen as a technology-neutral term to encompass a wide range of technology options instead of the narrower terms "blockchain" and "distributed ledgers." Furthermore, technology-neutral terms ensure that the law will not be outdated after a few years and only have a limited scope.[9]

2. Tokens and Related Concepts

The Consultation Report uses the word "tokens" to describe all types of technical implementation methods of the blockchain technology, even if the system does not actually use a "token" to implement it. "Token" is understood in an abstract and not in a technological sense.[10] The draft Blockchain Act defines "tokens" as "information on a TT-system that can embody fungible claims or membership rights to an individual, goods, and/or other absolute or relative rights and

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[3] Consultation Report (English version), *supra* note 2, at 6.

[4] Landtag des Fürstentums Liechtenstein [Parliament of the Principality of Liechtenstein], Kleine Anfrage. Kryptowährungen und Liechtensteins Blockchain-Gesetz [Parliamentary Interpellation. Cryptocurrencies and Liechtenstein's Blockchain Act] 1 (Feb. 27, 2019), https://www.landtag.li/kleineanfragenprint.aspx?id=15514, *archived at* http://perma.cc/69SV-9RXL.

[5] *Id.* at 3.

[6] Consultation Report (English version), *supra* note 2, at 130 et seq., Draft Blockchain Act, arts. 2 & 4.

[7] *Id.* at 130, Draft Blockchain Act, art. 3, para. 1.

[8] *Id.* at 135, Draft Blockchain Act, art. 11.

[9] *Id.* at 38.

[10] *Id.* at 43.

ensuring [sic] the allocation to one or more public keys."[11] A token functions as a "container" that represents all types of rights on a TT-system. "Empty containers," meaning tokens like Bitcoin that do not represent a specific right, are also possible.[12] The report states that the Blockchain Act serves as a framework law for all types of token-based applications.[13] It was decided to establish autonomous rules for ownership of tokens and TT-systems instead of modifying the existing property rules.[14]

A "public key" is defined as "consist[ing] of a series of characters representing a unique publicly accessible address contained in a TT-system to which tokens can be uniquely allocated."[15] A "private key" on the other hand consists of a series of characters that, by themselves or together with other private keys, enable the use and transfer of the public key.[16] A transfer of a token by the person who owns the private key causes a transfer of the right that is represented by the token, meaning the online transfer precedes the offline transfer.[17]

3. General Requirements for Persons Involved in Token Transactions

The draft Blockchain Act introduces a number of requirements for persons involved in token transactions. In general, TT services may be provided only by persons who have full capacity to act and are trustworthy.[18] Trustworthiness exists when a person has not been convicted by a court of fraudulent bankruptcy or similar offenses and there are no other reasons that would give rise to serious doubts regarding the provider's trustworthiness.[19] In addition, TT service providers may provide services only if they have a clear organizational structure, including procedures to deal with conflicts of interest; written internal control mechanisms; and a minimum capital of CHF100,000 (about US$100,565) or equivalent of collateral.[20]

4. Specific Requirements for Selected TT Service Providers

For selected TT service providers, in particular token issuers, token generators, physical validators, TT depositors, and TT protectors, the draft Blockchain Act sets out additional requirements and establishes a duty to register with the Financial Market Authority of Liechtenstein (FMA).

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[11] *Id*. at 131, Draft Blockchain Act, art. 5, para. 1, no. 1.

[12] *Id*. at 42.

[13] *Id*. at 27.

[14] *Id*. at 44.

[15] *Id*. at 131, Draft Blockchain Act, art. 5, para. 1, no. 2.

[16] *Id*. at 131, Draft Blockchain Act, art. 5, para. 1, no. 3.

[17] *Id*. at 46; *id*. at 133, Draft Blockchain Act, arts. 6, 7.

[18] *Id.* at 136, Draft Blockchain Act, art. 13, para. 1.

[19] *Id*. at 136, Draft Blockchain Act, art. 13, para. 3.

[20] *Id*. at 136, Draft Blockchain Act, art. 13, para. 4.

5. Token Issuers

A "token issuance" is defined as the "public offering of tokens."[21] Token issuers (*Token Emittenten*) are persons who perform the token issuance in their own name or on a professional basis on behalf of a third party.[22] They must set up appropriate internal control mechanisms to

- ensure the disclosure of basic information as defined in articles 28–32 during the token issuance and for at least ten years after the issuance;
- ensure the proper execution of the token issuance;
- prevent the repeat token issuance for the same rights;
- note a previous token issuance for a subsequent issuance on related rights; and
- ensure business continuity in the case of disruptions during the token issuance.[23]

The rules are similar to the ones found in the Securities Prospectus Act, which may therefore be used as an additional interpretation aid.[24]

6. Token Generators

"Token generators" (*Token Erzeuger*) are defined as "persons who generate one or more tokens and make them available on a TT-system.[25] Token generators must ensure by appropriate means that the transfer of the token causes the transfer of the represented right and that any other transfer of the represented right is not possible.[26] The law does not specify what the appropriate means are.[27] In addition, token generators must establish internal control mechanisms to ensure the technical operability of the generated tokens during the token generation and for the following three years.[28]

7. Physical Validators

"Physical validators" are defined as persons who ensure the enforcement of property rights within the meaning of property law that are represented by the tokens on a TT-systems.[29] They must establish internal control mechanisms to ensure at all times

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[21] *Id*. at 131, Draft Blockchain Act, art. 5, para. 1, no. 5.

[22] *Id*. at 132, Draft Blockchain Act, art. 5, para. 1, no. 8.

[23] *Id*. at 138, Blockchain Act, art. 14.

[24] *Id*. at 64; Wertpapierprospektgesetz [WPPG] [Securities Prospectus Act], May 23, 2007, LIECHTENSTEINISCHES LANDESGESETZBLATT NUMMER [LGBL.-NR.] [LIECHTENSTEIN OFFICIAL LAW GAZETTE NO.] 2007.196, as amended, https://www.gesetze.li/konso/pdf/2007196000?version=9, *archived at* http://perma.cc/9Y6H-8MW8.

[25] Consultation Report (English version), *supra* note 2, at 132, Draft Blockchain Act, art. 5, para. 1, no. 9.

[26] *Id*. at 133, Draft Blockchain Act art. 7, para. 2.

[27] *Id*. at 46.

[28] *Id*. at 140, Draft Blockchain Act, art. 19.

[29] *Id*. at 132, Draft Blockchain Act, art. 5, para. 1, no. 11.

- that the person initiating the token generation is the actual owner of the object at the time of the token generation;
- that a collision of rights concerning the same object is avoided; and
- that they will be held liable if the rights guaranteed by them cannot be enforced as stipulated in the contract. They must also ensure that the owner of the token has a direct claim against the insurance company of the physical validator or against the insurance for the specific object.[30]

8. TT Depositories

"TT depositories" (*VT Verwahrer*) are defined as persons who provide custodial services for private keys of third parties on a TT-system.[31] They must establish internal control mechanisms to ensure

- the establishment of appropriate security measures that prevent the loss or misuse of private keys by unauthorized third parties;
- asset separation between the business assets of the TT custodian and the private keys of the customers; and
- business continuity in the case of disruptions.[32]

9. TT Protectors

"TT protectors" are defined as "persons who hold tokens as a trustee in their own name on behalf of third parties."[33] They are required to obtain an authorization according to the Trustee Act or the Banking Act.[34]

10. Duty to Register

The following persons must register with the Financial Market Authority of Liechtenstein (FMA) if they intend to provide TT services on a professional basis in Liechtenstein:

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[30] *Id*. at 140, Draft Blockchain Act, art. 20.

[31] *Id*. at 132, Draft Blockchain Act, art. 5, para. 1, no. 10.

[32] *Id*. at 138, Draft Blockchain Act art. 15.

[33] *Id*. at 132, Draft Blockchain Act art. 5, para. 1, no. 12.

[34] *Id*. at 139, Draft Blockchain Act, art. 18; Treuhändergesetz [TrHG] [Trustee Act], Nov. 8, 2013, LGBL.-NR. 2013.421, as amended, https://www.gesetze.li/konso/pdf/2013421000?version=8, *archived at* http://perma.cc/7ENE-8ZMK, unofficial English translation available *at* https://www.regierung.li/media/medienarchiv/173_520_01_01_2017_en_636650151936919292.pdf?t=7, (English version updated through Jan. 1, 2017), *archived at* http://perma.cc/5QSE-SSUM; Gesetz über die Banken und Wertpapierfirmen [Bankengesetz] [BankG] [Act on Banks and Investment Firms] [Banking Act], Oct. 21, 1992, LGBL.-NR. 1992.108, as amended, https://www.gesetze.li/konso/pdf/1992108000?version=28, *archived at* http://perma.cc/52EK-DCD5, unofficial English translation available *at* https://www.regierung.li/media/medienarchiv/952_0_24_04_2018_en_636632620673283491.pdf?t=7 (English version updated through Apr. 24, 2018), *archived at* http://perma.cc/SF6P-L43H.

- Token issuers
- TT protectors
- TT custodians
- TT exchange office operators
- Physical validators
- TT identity service providers as defined in article 5, paragraph 1, number 16 of the Blockchain Act[35]

Other TT service providers, including token generators, may register with the FMA on a voluntary basis.[36] Registered TT service providers are to be listed in a publicly accessible TT service provider registry by the FMA.[37]

11. Protections in Bankruptcy Proceedings

Tokens that are held by TT protectors or private keys that are held by TT custodians do not become part of the bankruptcy estate when the TT service provider becomes bankrupt and are to be held separately for the benefit of the customer.[38]

12. Fines

TT service providers that do not comply with the obligations set out in the draft Blockchain Act are subject to a fine of CHF20,000–30,000 (about US$20,150–30,225) depending on the type of violation.[39]

B. Anti-Money Laundering Law

As noted above, in 2017, Liechtenstein amended its Due Diligence Act (DDA) to extend the scope to virtual currency exchange offices. The due diligence obligations codified in the DDA serve to combat money laundering, organized crime, and terrorist financing.[40] The DDA obligates certain

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[35] Consultation Report (English version), *supra* note 2, at 132, at 150, Draft Blockchain Act art. 36, para. 1.

[36] *Id*. at 150, Draft Blockchain Act art. 36, para. 2.

[37] *Id*. at 152, Draft Blockchain Act, art. 37, at 155, Draft Blockchain Act, art. 41.

[38] *Id*. at 142 et seq., Draft Blockchain Act arts. 24, 25.

[39] *Id*. at 160 et seq., Draft Blockchain Act, art. 49.

[40] Gesetz über berufliche Sorgfaltspflichten zur Bekämpfung von Geldwäscherei, organisierter Kriminalität und Terrorismusfinanzierung [Sorgfaltspflichtgesetz] [SPG] [Act on Professional Due Diligence to Combat Money Laundering, Organized Crime, and Terrorist Financing], Dec. 11, 2008, LGBl.-Nr. 2009.047, *as amended*, https://www.gesetze.li/konso/pdf/2009098000?version=20, *archived at* http://perma.cc/3YY9-BST6, unofficial English translation *available at* https://www.regierung.li/media/medienarchiv/952_1_14_6_18_en.pdf?t=7 (English version updated through June 14, 2018), *archived at* http://perma.cc/5TBM-FQZ4.

entities and persons to identify their contracting partner by means of valid documentation.[41] Among others, it applies to bureaux de change (exchange offices), which are defined as "natural or legal persons whose activities consist in the exchange of legal tender at the official exchange rate or of virtual currencies against legal tender and vice versa."[42] Virtual currencies are defined as "digital monetary units, which can be exchanged for legal tender, used to purchase goods or services or to preserve value and thus assume the function of legal tender."[43]

The Consultation Report on the draft Blockchain Act proposes to widen the scope of the Due Diligence Act. It includes token issuers, TT protectors, physical validators, TT custodians, TT identity service providers, and TT exchange offices (bureaux de change) operators among the persons subject to the due diligence requirements.[44]

C. Taxation

The tax authorities of Liechtenstein have not given out any specific guidance with regard to cryptocurrencies.

II. Custodianship of Cryptocurrencies by Financial Institutions

As mentioned above, the draft Blockchain Act defines "TT depositories" and sets out their obligations when they provide custodial services.[45] They must establish internal control mechanisms to ensure

- the establishment of appropriate security measures that prevent the loss or misuse of private keys by unauthorized third parties;
- asset separation between the business assets of the TT custodian and the private keys of the customers; and
- business continuity in the case of disruptions.[46]

III. Regulation of Cryptocurrencies as Financial Securities

The FMA states in its guidance on ICOs that they may be subject to financial market law; however, it depends on the specific design and de facto function of the tokens.[47] An example are tokens that have characteristics of equity securities or other investments. If they are classified as financial

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[41] *Id*. arts. 3, 5.

[42] *Id*. art. 2, para. 1(l), art. 3, para. 1(f).

[43] *Id*. art. 2, para. 1(l).

[44] Consultation Report (English version), *supra* note 2, at 164, amendment of Due Diligence Act, art. 3.

[45] See above, part I.A(8).

[46] Consultation Report (English version), *supra* note 2, at 138, Draft Blockchain Act art. 15.

[47] FMA, FACT SHEET ON INITIAL COIN OFFERINGS 2 (Sept. 10, 2017), https://www.fma-li.li/files/fma/fma-factsheet-ico.pdf, *archived at* http://perma.cc/8W3X-N572.

instruments, they are subject to licensing by the FMA on the basis of special legislation and may require publication of a prospectus.[48]

[48] *Id*.

Lithuania

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SUMMARY In 2018, the Lithuania Ministry of Finance issued ICO guidelines that reiterated the differentiated approach to cryptocurrencies adopted by the Bank of Lithuania in 2017. The guidelines stated that there is no single piece of legislation that governs cryptocurrencies and cryptoassets. Applicable laws will depend on the nature of particular cryptocurrencies, their purpose, and their potential utilization.

I. Introduction

In 2017, the Bank of Lithuania adopted a definition of virtual currency similar to that of the European Banking Authority. It states that "virtual currency shall mean ungoverned and unregulated digital money, which may be used as a means of payment, but is issued into circulation and guaranteed by an institution other than the central bank."[1] According to the Bank, virtual currencies can serve various purposes and have various forms, including as a means of payment, accumulation of saving, and as a tool for investments (including derivatives, commodities, or securities).[2]

In 2018, the Ministry of Finance of Lithuania issued guidelines on initial coin offerings (ICO Guidelines) with an aim of providing more certainty and transparency regarding the regulatory, taxation, accounting, and other requirements, as well as better cooperation between different stakeholders.[3]

According to the Guidelines, organizing an ICO is not regulated by specific legislation. However, taking into account different ICO models and different characteristics of tokens, in some cases such an activity may be subject to the requirements of certain legislation and to the supervision of the Bank of Lithuania.[4]

Various provisions of Lithuanian legislation could apply depending on the conditions of the ICO issue and the rights acquired in the process of the issuance of tokens.

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[1] Position of the Bank of Lithuania on Virtual Currencies and Initial Coin Offering (Oct. 10, 2017), https://www.lb.lt/uploads/documents/docs/19814_21cc129916894b000a0dce69199828c5.pdf, *archived at* https://perma.cc/K2J4-R46X.

[2] *Id.*

[3] MINISTRY OF FINANCE, ICO GUIDELINES 3 (2018), http://finmin.lrv.lt/uploads/finmin/documents/files/ICO Guidelines Lithuania.pdf, *archived at* https://perma.cc/NB9Z-TAUB.

[4] *Id.* at 4.

II. Financial Regulation and Consumer Protection

According to the Guidelines, only entities that are planning to provide regulated financial services and/or projects that release tokens that have the characteristics of securities will be under the scrutiny of Bank of Lithuania.

A Financial Market Participant (FMP) can provide services associated with virtual currencies provided there is proper separation of the services by the FMP. According to the Guidelines and the position of the Bank of Lithuania, FMPs must ensure that their regulated financial services, including their name, brands, domain, and other corporate attributes, including managed environment (website, platform, mobile application, online account, etc.) or other elements are not linked to services associated with virtual currencies.

FMPs should ensure compliance with the requirements of anti-money laundering and counter-financing of terrorism (AML/CFT) legislation, and take appropriate measures to manage the risks associated with of money laundering and terrorist financing.[5]

As noted above, the intent and the character of tokens issued through an ICO process determine the applicable legislation. This differentiated approach was set forward in the position of the Bank of Lithuania concerning ICOs and reiterated in the Ministry of Finance guidelines. The ICO Guidelines provide for two types of ICO based on their purpose:

- *ICOs that do not grant profits or governing rights*

If an ICO grants a right to use a product or service then the provisions of the Civil Code would apply. When ICOs are used as a payment instrument or are considered to be a charity, the AML/CFT legislation would apply.[6]

- *ICOs that grant profits or governing rights*

If the tokens issued by an ICO have the characteristics of securities then the provisions of the Law on Securities would apply. When an ICO is used in crowdfunding of a project the provisions of the Law on Crowdfunding would apply.[7] For example, a newly-launched ICO platform called DESICO, which aims to create a safe and regulated environment in order to develop global financial and blockchain technologies, is governed by the Law on Crowdfunding.[8]

When an ICO is used as a financial instrument or when entities are engaged in the secondary trading of tokens, the Law on Markets in Financial Instruments would be the governing legislation. If the funds generated through an ICO are collectively invested by entities in certain

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[5] *Id.* at 5.

[6] *Id.* at 6.

[7] *Id.*

[8] *Lithuania Introduces World's First Security ICOs Platform, Opens up for Global Blockchain Based Businesses,* MINISTRY OF FINANCE (Mar. 5, 2018), http://finmin.lrv.lt/en/news/lithuania-introduces-world-s-first-security-icos-platform-opens-up-for-global-blockchain-based-businesses, *archived at*https://perma.cc/8JQ4-WWPB.

projects, the provisions of the Law on Collective Investment Subjects, the Law on Collective Investment Undertakings Intended for Informed Investors, and the Law on Collective Investment Undertakings Intended for Professional Investors would apply.[9]

If the funds raised through an ICO are intended for the formation of the capital of a newly established FMP, the capital formation requirements applicable to a specific form of financial institution shall apply.[10]

III. Taxation

The State Tax Inspectorate has issued a position paper with regard to the taxation of virtual currencies.[11] The tax treatment of virtual currencies is differentiated based on their purpose. The position paper states that, from the standpoint of the Law on Corporate Income Tax and the Law on Personal Income Tax, "according to the substance and economic sense of the transactions carried out, 'a virtual currency' is recognized as current assets which may be used as payment means for goods and services or stored for sale, while for VAT purposes, 'a virtual currency' is considered as the same currency as euros, dollars and etc."[12]

Tax laws are applicable to the following transactions involving virtual currencies: mining, purchase, sale of virtual currencies, payment by such currencies for purchased/sold goods or services.[13] For accounting purposes, all transactions in virtual currencies should be reported in Euro. The exchange rate of virtual currency (or tokens) against the Euro is not regulated by legislation. Therefore, in selecting the exchange rate to be applied, "all available information and comparable data on the market may be used."[14]

A. Corporate Income Tax

The production of virtual currency is not taxable. However, any profit incurred from selling of the produced virtual currency being the difference in the cost associated with the production of the virtual currency and sale price, is taxable.[15]

B. Personal Income Tax

For the purposes of Lithuanian tax legislation, virtual currency is considered to be property; therefore, income incurred from the sale of virtual currency is taxable in the same way as any

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[9] ICO GUIDELINES, *supra* note 3, at 6.

[10] *Id.*

[11] Position of State Tax Inspectorate Concerning Application of the Provisions of Tax Laws to the Activities Related to Virtual Currencies and Tokens, http://finmin.lrv.lt/uploads/finmin/documents/files/STI General Provisions on ICO(1).pdf (last visited Apr. 8, 2019), *archived at* https://perma.cc/NX34-PBPV.

[12] *Id.* at 1.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 2.

other form of income. In this case, the difference between the sales price and the acquisition price is taxed. It should be noted that a virtual currency or similar instrument is not considered as personal income in itself. A personal income tax obligation only arises when a person sells virtual currency.[16] Income in the amount of EUR 2,500 (approximately $2,80) or less incurred from the sale of virtual currency is not taxable.[17] Starting from January 1, 2018, income from the sale or purchase of virtual currencies will be subject to personal income tax rate of 15%.[18]

1. Tax Treatment of Wages (Incentives) in Virtual Currency

According to article 139(3) of the Labor Code of the Republic of Lithuania, wages must be paid in cash.[19] Transferred items or services provided by the employer or other persons are not considered part of wages. Therefore, the incentives transferred in a virtual currency by the right of ownership to the employee are considered income in-kind for the purposes of Lithuanian tax legislation. Such income is attributed as work-related income, from which the employer must calculate, pay, and declare income tax.[20]

2. Tax Treatment of Tokens Provided to the Founders of a Company

Locked or non-activated tokens received by founders without payment are not considered to be subject of income tax. When the sale, exchange, or transfer of tokens takes place, the tokens will become subject to income tax.[21]

C. Value-Added Tax

For the purposes of value-added tax (VAT), tokens issued by an ICO are divided into three categories:

- Tokens with characteristics of securities. In this case, the funds raised by an entity through an ICO are not subject to corporate income tax or VAT.
- Tokens having the same characteristics as virtual currencies. Their supply is exempt from VAT.
- Tokens with characteristics of coupons. Consideration received for the supply of such tokens will be considered as advance payment and will not be subject to VAT.[22]

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[16] *Id.*

[17] *Id.*

[18] *Id.* at 3.

[19] Lietuvos Respublikos Darbo Kodeksas [Labor Code of the Republic of Lithuania], art. 139(3), Sept. 19, 2016, https://www.infolex.lt/ta/368200, *archived at* https://perma.cc/2EZU-JMJB.

[20] Position of State Tax Inspectorate Concerning Application of the Provisions of Tax Laws to the Activities Related to Virtual Currencies and Tokens, *supra* note 11, at 4.

[21] *Id.* at 5.

[22] *Id.* at 11.

IV. Anti-Money Laundering Law

According to the ICO Guidelines, Lithuania is in the process of updating its anti-money laundering legislation with regard to cryptocurrency operations.[23] The Guidelines state that all FMPs engaged in cryptocurrency operations should comply with existing anti-money laundering legislation.[24]

[23] ICO GUIDELINES, *supra* note 3, at 14.

[24] *Id*. at 5.

Luxembourg

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Luxembourg has recently taken some steps towards establishing a regulatory framework for cryptoassets. Specifically, on March 1, 2019, the government of Luxembourg adopted a law that officially recognized tokenized securities as having the same status as traditional securities.[1] This new law confirms the fungible character of tokenized securities, and specifies that transfers made using blockchain-type technologies are legally considered as transfers between brokerage accounts.[2]

Additionally, the government of Luxembourg issued instructions on the tax treatment of cryptocurrencies on July 26, 2018.[3] This document establishes that Luxembourg does not consider cryptocurrencies to be actual currencies. Rather, cryptocurrencies are considered to be intangible assets for tax purposes.[4] Furthermore, the use of a cryptocurrency as a means of payment does not affect the nature of the income for tax purposes, and normal Luxembourger tax laws apply according to the income's nature.[5]

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[1] Loi du 1er mars 2019 portant modification de la loi modifiée du 1er août 2001 concernant la circulation de titres [Law of 1 March 2019 Amending the Amended Law of 1 August 2001 Regarding the Circulation of Securities], http://data.legilux.public.lu/eli/etat/leg/loi/2019/03/01/a111/jo, *archived at* https://perma.cc/QMX5-TJ5Z.

[2] Chambre des Députés [Chamber of Deputies], Projet de loi portant modification de la loi modifiée du 1er août 2001 concernant la circulation de titres [Bill Amending the Amended Law of 1 August 2001 Regarding the Circulation of Securities], No. 7363, *Commentaire de l'article unique* [*Commentary on the Sole Article*], https://chd.lu/wps/PA_RoleDesAffaires/FTSByteServingServletImpl?path=941A5ADDCBD2A7967FA717045881789D441DD9A03654CB056EB4C1BD77207AD3A680CD9F7B06B38FF5BDE9B7845E2E09$20CD81147AB6C983B2B378482C9F6417, *archived at* https://perma.cc/T364-F4QT.

[3] Circulaire du directeur des contributions [Circular of the Director of Contributions], L.I.R. No. 14/5 – 99/3 – 99bis/3 du 26 juillet 2018 [L.I.R. No. 14/5 – 99/3 – 99bis/3 of 26 July 2018], https://impotsdirects.public.lu/dam-assets/fr/legislation/legi18/circulaireLIR14-5-99-3-99bis-3du26072018.pdf, *archived at* https://perma.cc/ED8J-QZLH.

[4] *Id.*

[5] *Id.*

Malaysia

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SUMMARY In January 2019, the Securities Commission Malaysia (SC) issued an order that sets out the characteristics of "digital currency" and "digital tokens" that are prescribed as being securities for the purposes of Malaysia's securities law. It subsequently issued amendments to its recognized market guidelines, which now include a framework for operators of digital asset platforms to be approved by the SC as recognized market operators. This includes requirements related to an entity's structure and governance, risk management processes, client asset protection, transparency, and market integrity.

In March 2019, the SC published a consultation paper on its proposed approach to regulating initial coin offerings (ICOs). This approach would include approval of the ICO by the SC based on various criteria and the registration of a disclosure document that meets certain requirements.

Digital currency exchanges were previously made subject to Malaysia's anti-money laundering and counter-financing of terrorism system, which is overseen by the central bank. The Inland Revenue Board has also previously indicated that income earned through cryptocurrency trading is subject to the Income Tax Act 1967, although it has not yet issued any specific guidance on this issue.

I. Approach to Assets Created Through Blockchain

A. Financial Regulation and Consumer Protection

The Securities Commission Malaysia (SC) and Bank Negara Malaysia (BNM), the central bank, issued a joint statement in December 2018 "to provide clarity on the regulatory approach for the offering and trading of digital assets in Malaysia,"[1] stating as follows:

> The SC will regulate issuances of digital assets [including digital currencies and digital tokens] via initial coin offerings (ICO) and the trading of digital assets at digital asset exchanges in Malaysia. Regulations are currently being put in place to bring digital assets within the remit of securities laws to promote fair and orderly trading and ensure investor protection.
>
> ICO issuers and digital asset exchanges which are involved in the issuance or dealing of digital assets with a payment function will need to comply with relevant BNM laws and regulations relating to payments and currency matters. In addition, ICO issuers and digital

[1] Press Release, Securities Commission Malaysia (SC) & Bank Negara Malaysia (BNM), Joint Statement on Regulation of Digital Assets in Malaysia (Dec. 6, 2018), https://www.sc.com.my/news/media-releases-and-announcements/joint-statement-on-regulation-of-digital-assets-in-malaysia, *archived at* https://perma.cc/F4DL-ADV2.

> asset exchanges are subject to the SC's Guidelines on Prevention of Money Laundering and Terrorism Financing.
>
> BNM wishes to reiterate that digital assets are not legal tender in Malaysia. Members of the public are advised to carefully evaluate the risks associated with dealings in digital assets.
>
> In order to implement the regulatory framework on digital assets, the SC and BNM will enter into coordination arrangements to ensure compliance with laws and regulations under the purview of both regulators.[2]

The SC subsequently issued the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 (Prescription Order), which came into force on January 15, 2019.[3] This instrument, which was made under the Capital Markets and Services Act 2007,[4] set out the characteristics of digital currency and digital tokens that are prescribed as being securities for the purposes of Malaysia's securities law. The SC then issued a statement regarding the implementation of the Order, including transitional arrangements, saying that

> the SC has invited and engaged with existing digital asset platform operators. Arrangements have been put in place to facilitate the operations of these platforms for a transitional period until 1 March 2019, subject to them fulfilling the conditions specified by the SC. During this period, these platform operators will not be permitted to accept new investors and will only be allowed to facilitate the withdrawal or transfer of client assets with the written instruction of the investor.
>
> Existing platform operators who failed to or did not attend the engagement with the SC on 17 January 2019 are advised to contact the SC immediately and not later than 25 January 2019, failing which they shall be deemed to be operating a market in breach of the securities laws.
>
> Once the relevant guidelines have been issued, existing platform operators will be required to apply to the SC for authorisation if they intend to operate beyond the transitional period. Prospective operators can also apply to the SC for authorisation once the guidelines are issued. The SC will evaluate all applications and will only authorise market operators that fulfil the relevant requirements.
>
> With regard to initial coin offerings (ICOs), no person shall conduct an ICO without the prior authorisation of the SC. In this regard, the guidelines for ICOs will be issued by the

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[2] *Id*.

[3] Capital Markets and Services (Prescription of Securities (Digital Currency and Digital Token) Order 2019, P.U.(A) 12/2009 (Jan. 8, 2019), https://www.sc.com.my/api/documentms/download.ashx?id=8c8bc467-c750-466e-9a86-98c12fec4a77, *archived at* https://perma.cc/SUR8-882U.

[4] Capital Markets and Services Act 2007 (Act 671), as at Nov. 1, 2016, http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20671%20-Reprint%202016.pdf, *archived at* https://perma.cc/5M78-536V.

> end of Q1 2019. In the meantime, ongoing ICOs should cease all activities and return all monies or digital assets collected from investors.[5]

The SC's amended *Guidelines on Recognized Markets* were subsequently released on January 31, 2019,[6] setting out the requirements and framework for operators of digital asset platforms to apply to the SC to be registered as recognized market operators.[7] The guidelines "establish criteria for determining fit and properness of issuers and exchange operators, disclosure standards and best practices in price discovery, trading rules and client asset protection."[8] The SC also stated that "[t]hose dealing in digital assets will be required to put in place anti-money laundering and counter-terrorism financing (AML/CFT) rules, cyber security and business continuity measures."[9]

On March 6, 2019, the SC published a public consultation paper on the proposed regulatory framework for the issuance of digital assets through ICOs.[10] The paper "discusses the proposed framework for, among others, the eligibility of issuers, the need for transparent and adequate disclosures as well as utilisation of proceeds of the ICO."[11] The period for comments on the paper closed on March 29, 2019. The paper states that

> [t]he SC recognises the potential use cases of blockchain and digital assets in enhancing efficiencies in the capital market including lowering post trade latency and counterparty risks, and enabling seamless regulatory reporting and compliance. Digital assets also have the potential to act as an alternative asset class for investors. As such, in line with the SC's mandate to promote the development of the capital market, the SC seeks to develop a regulatory framework that will balance promoting innovation with ensuring proper safeguards to protect the integrity of the capital market and investors' interest.[12]

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[5] Press Release, SC, Media Statement on Implementation of Digital Assets Prescription Order (Jan. 17, 2019), https://www.sc.com.my/news/media-releases-and-announcements/media-statement-on-implementation-of-digital-assets-prescription-order, *archived at* https://perma.cc/H5DB-D69L.

[6] *See Recognized Markets*, SC, https://www.sc.com.my/regulation/guidelines/recognizedmarkets (last visited Mar. 14, 2019), *archived at* https://perma.cc/WM2V-5JTL.

[7] Press Release, SC, SC Introduces Framework to Facilitate Trading of Digital Assets in Malaysia (Jan. 31, 2019), https://www.sc.com.my/news/media-releases-and-announcements/sc-introduces-framework-to-facilitate-trading-of-digital-assets-in-malaysia, *archived at* https://perma.cc/XX6N-P7CB.

[8] Press Release, SC, SC to Regulate Offering and Trading of Digital Assets (Jan. 14, 2019), https://www.sc.com.my/news/media-releases-and-announcements/sc-to-regulate-offering-and-trading-of-digital-assets, *archived at* https://perma.cc/T8MB-BJ3W.

[9] *Id.*

[10] SC, PUBLIC CONSULTATION PAPER NO. 1/2019: PROPOSED REGULATORY FRAMEWORK FOR THE ISSUANCE OF DIGITAL ASSETS THROUGH INITIAL COIN OFFERINGS (ICOS) (hereinafter ICO CONSULTATION PAPER) (Mar. 6, 2019), https://www.sc.com.my/api/documentms/download.ashx?id=d3067bf4-ba39-4bce-8dc4-1b660ff37977, *archived at* https://perma.cc/M4VS-GVJM.

[11] Press Release, SC, SC Seeks Public Feedback on Proposed Initial Coin Offering and Property Crowdfunding Frameworks (Mar. 6, 2019), https://www.sc.com.my/news/media-releases-and-announcements/sc-seeks-public-feedback-on-proposed-initial-coin-offering-and-property-crowdfunding-frameworks, *archived at* https://perma.cc/6HVU-A2X2.

[12] ICO CONSULTATION PAPER, *supra* note 10, at 4.

Prior to these recent developments, the SC had issued a statement warning investors about the risks associated with ICOs and similar activities.[13] The BNM has also issued warnings on digital currencies, stating in January 2014 that "[t]he Bitcoin is not recognised as legal tender in Malaysia. The Central Bank does not regulate the operations of Bitcoin. The public is therefore advised to be cautious of the risks associated with the usage of such digital currency."[14]

In addition to the Capital Markets and Services Act 2007, securities law in Malaysia includes the Securities Commission Malaysia Act 1993[15] and the Securities Industry (Central Depositories) Act 1991,[16] and associated regulations.[17] These laws are administered and enforced by the SC. In addition, BNM has powers to regulate and supervise the financial system and financial institutions under several laws, including the Central Bank of Malaysia Act 2009, Financial Services Act 2013, Islamic Financial Services Act 2013, Money Services Business Act 2011, and AML/CFT legislation.[18]

B. Anti-Money Laundering Law

Information on the BNM website advises persons operating a business relating to digital currencies that, "[p]ursuant to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA), persons carrying on activities specified in paragraph 25 of the First Schedule of the AMLA are subject to obligations as a reporting

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[13] Press Release, SC, Media Statement on Initial Coin Offerings (Sept. 7, 2017), https://www.sc.com.my/news/media-releases-and-announcements/media-statement-on-initial-coin-offerings, *archived at* https://perma.cc/742Z-RF2M. *See also Malaysia, in* LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD (June 2018), https://www.loc.gov/law/help/cryptocurrency/world-survey.php#malaysia.

[14] Press Release, BNM, Statement on Bitcoin (Jan. 3, 2014), http://www.bnm.gov.my/index.php?ch=en_announcement&pg=en_announcement&ac=49&lang=en, *archived at* https://perma.cc/TV92-GSE4. *See also* Press Release, BNM, Caution on Unauthorized Cryptocurrency Investment Platform Coinzer (Mar. 11, 2018), http://www.bnm.gov.my/index.php?ch=en_announcement&pg=en_announcement&ac=616&lang=en, *archived at* https://perma.cc/LM9T-EW2H.

[15] Securities Commission Malaysia Act 1993 (Act 498), as at Mar. 1, 2016, http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20498%20-diluluskan%20TPPUU%20(29%2002%202016).pdf, *archived at* https://perma.cc/DZA2-HEZ2.

[16] Securities Industry (Central Depositories) Act 1991 (Act 453), as at Mar. 1, 2013), http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Act%20453%20-%20Securities%20Industry%20(Central%20Depositories)%20Act%201991.pdf, *archived at* https://perma.cc/FP2Q-WN94.

[17] *See Capital Markets and Services Act 2007*, SC, https://www.sc.com.my/regulation/acts/capital-markets-and-services-act-2007 (last visited Mar. 14, 2019), *archived at* https://perma.cc/49DW-HUTF; *Securities Commission Malysia Act 1993*, SC, https://www.sc.com.my/regulation/acts/securities-commission-malaysia-act-1993 (last visited Mar. 14, 2019), *archived at* https://perma.cc/K2EN-85CN; *Securities Industry (Central Depositories) Act 1991*, SC, https://www.sc.com.my/regulation/acts/securities-industry-central-depositories-act-1991 (last visited Mar. 14, 2019), *archived at* https://perma.cc/42F2-P2YJ.

[18] *Legislation*, BNM, http://www.bnm.gov.my/index.php?lang=en&ch=en_legislation (last visited Mar. 14, 2019), *archived at* https://perma.cc/CXM8-NPMB.

institution under the AMLA."[19] The First Schedule lists the activities that, if performed by an entity, would make it a reporting institution under the Act. Paragraph 25 reads as follows:

> (1) Activities carried out by any person who provides any or any combination of the following services:
>
> (a) exchanging digital currency for money;
> (b) exchanging money for digital currency;
> (c) exchanging one digital currency for another digital currency,
>
> whether in the course of carrying on a digital currency exchange business or otherwise.
>
> (2) For the purpose of this paragraph, "digital currency" means a digital representation of value that functions as a medium of exchange and is interchangeable with any money, including through the crediting or debiting of an account, but does not include electronic money, as defined under the Financial Services Act 2013 [Act 758] and the Islamic Financial Services Act 2013 [Act 759], issued by an approved issuer of electronic money under those Acts.[20]

In February 2018, the BNM issued a policy document regarding digital currencies and AML/CFT,[21] which "aims to ensure that effective measures are in place against money laundering and terrorism financing risks associated with the use of digital currencies and to increase the transparency of digital currency activities in Malaysia."[22]

C. Taxation

Prior to the recent developments with respect to the regulation of digital assets as securities, it appears that the Inland Revenue Board (IRB) considered that the Income Tax Act 1967 was applicable to cryptocurrency traders. Section 3 of the Act provides that tax shall be charged upon the income of any person accruing in or derived from Malaysia.[23] The IRB had, for example, taken

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[19] *Digital Currency*, BNM, http://www.bnm.gov.my/index.php?ch=en_digital_currency&lang=en (last visited Mar. 14, 2019), *archived at* https://perma.cc/WYS7-SFH4.

[20] Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (Act 613), as at Dec. 1, 2015, sch. 1, para. 25, http://www.agc.gov.my/agcportal/uploads/files/ACT%20613%20diluluskan%20TPPUU%20Dis%202015.pdf, *archived at* https://perma.cc/8HLS-HA2Q.

[21] BNM, Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6) (undated), http://amlcft.bnm.gov.my/document/PD%20Digital%20currency-v2.pdf (last visited Mar. 14, 2019), *archived at* https://perma.cc/92H2-NGE7.

[22] Press Release, BNM, Bank Negara Malaysia Issues Policy Document for Digital Currencies (Feb. 27, 2018), http://www.bnm.gov.my/index.php?ch=en_press&pg=en_press&ac=4628&lang=en, *archived at* https://perma.cc/M3MP-8QZ6.

[23] Income Tax Act 1967 (Act 53), as at Feb. 1, 2018), s. 3, http://www.agc.gov.my/agcportal/uploads/files/Publications/LOM/EN/Draf%20Muktamad%20Act%2053%20(13.12.2018).pdf, *archived at* https://perma.cc/JZ5A-NSJL.

action against a cryptocurrency exchange business in early 2018, freezing its account in Malaysia and seeking to ensure it was complying with tax and record-keeping requirements.[24]

Malaysia "does not tax capital gains from the sale of investments or capital assets other than those related to land and buildings."[25] The IRB has so far not provided specific guidance regarding the impact of the Prescription Order and the shift to regulating digital assets as securities on the application of the Income Tax Act.

II. Custodianship of Cryptocurrencies by Financial Institutions

As further referenced in Part III, below, the updated *Guidelines on Recognized Markets* includes a requirement that operators of Digital Asset Exchanges, which deal in digital assets that are prescribed securities under the Prescription Order, must "establish and maintain a sufficiently and verifiably secured storage medium designated to store Digital Assets from investors."[26] There does not appear to be a requirement for particular cryptocurrencies to otherwise be subject to custodianship by financial institutions.

The Securities Industry (Central Depositories) Act 1991 may also be relevant in the context of the custody of tokens that are prescribed securities. The purpose of this Act is "to provide for the regulation of central depositories, and the deposit, holding, withdrawal of, and dealings in, securities deposited therewith and to provide for matters incidental thereto."[27] A company that wishes to establish and maintain a central depository must apply to the Minister of Finance for approval.[28]

III. Regulation of Cryptocurrencies as Financial Securities

A. Digital Assets as Prescribed Securities

Under the Prescription Order, "digital currency" is defined as

> a digital representation of value which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise, that functions as a medium of exchange and is

[24] *IRB: Cryptocurrency Not Regulated but Traders Still Subject to Malaysian Income Tax Law*, THE STAR ONLINE (Jan. 19, 2018), https://www.thestar.com.my/tech/tech-news/2018/01/19/irb-cryptocurrency-not-regulated-but-traders-still-subject-to-malaysian-income-tax/, *archived at* https://perma.cc/YG9G-FQHL.

[25] DELOITTE, TAXATION AND INVESTMENT IN MALAYSIA 2018, at 9 (updated Apr. 2018), https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Tax/dttl-tax-malaysiaguide-2018.pdf, *archived at* https://perma.cc/2EVF-2HX9.

[26] SC, GUIDELINES ON RECOGNIZED MARKETS 42 (rev. Jan. 31, 2019), https://www.sc.com.my/api/documentms/download.ashx?id=eb8f1b04-d744-4f9a-a6b6-ff8f6fee8701, *archived at* https://perma.cc/2N6C-W2X4.

[27] Securities Industry (Central Depositories) Act 1991, Long title.

[28] *Id.* s. 4.

> interchangeable with any money, including through the crediting or debiting of an account[.][29]

"Digital token" means "a digital representation which is recorded on a distributed digital ledger whether cryptographically-secured or otherwise."[30]

The central provision of the Order, prescribing such assets to be securities, states as follows:

> (1) A digital currency which—
> (a) is traded in a place or on a facility where offers to sell, purchase, or exchange of, the digital currency are regularly made or accepted;
> (b) a person expects a return in any form from the trading, conversion or redemption of the digital currency or the appreciation in the value of the digital currency; and
> (c) is not issued or guaranteed by any government body or central banks as may be specified by the Commission,
>
> is prescribed as securities for the purposes of the securities laws.
>
> (2) A digital token which represents a right or interest of a person in any arrangement made for the purpose of, or having the effect of, providing facilities for the person, where—
> (a) the person receives the digital token in exchange for a consideration;
> (b) the consideration or contribution from the person, and the income or returns, are pooled;
> (c) the income or returns of the arrangement are generated from the acquisition, holding, management or disposal of any property or assets or business activities;
> (d) the person expects a return in any form from the trading, conversion or redemption of the digital token or the appreciation in the value of the digital token;
> (e) the person does not have day-to-day control over the management of the property, assets or business of the arrangement; and
> (f) the digital token is not issued or guaranteed by any government body or central banks as may be specified by the Commission,
>
> is prescribed as securities for the purposes of the securities laws.[31]

All securities laws are stated as being applicable to such assets, other than division 3 of Part VI of the Capital Markets and Services Act 2007,[32] which contains the requirement for a prospectus to be registered in relation to securities.[33]

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[29] Prescription Order, cl. 2.

[30] *Id*.

[31] *Id.* cl. 3.

[32] *Id.* cl. 4.

[33] Capital Markets and Services Act 2007, pt. VI, div. 3.

B. Additional Requirements for Digital Asset Exchanges

The amendments to the *Guidelines on Recognized Markets*, issued on January 31, 2019, included a new chapter on additional requirements to be complied with by a person who wishes to operate a digital asset exchange (DAX). The Guidelines explain the differences between an approved market, exempt market, and recognized market, stating that

> [a] recognized market essentially covers an alternative trading venue, marketplace or facility that brings together purchasers and sellers of capital market products. The level of regulation in comparison to approved markets is not as stringent. Terms and conditions may be imposed on the [recognized market operator] to commensurate with the risk profile, nature and scope of the proposed recognized market operations.[34]

Part B of the Guidelines sets out the requirements and criteria for a person to register as a recognized market operator (RMO).[35] Part C states that, in registering an RMO, the SC may impose any term or condition, and may also issue a direction to the RMO, the board, chief executive, controller, or other person in relation to a list of matters.[36] It also lists the obligations that must be met by an RMO (including in relation to compliance with its rules, disclosures, fees and charges, and AML/CFT processes) and by the RMO's board, as well requirements to submit rules and reports to the SC.[37] Part D relates to cessation of business, withdrawal of registration, and SC reviews of an RMO.[38]

Part G of the Guidelines contains the new chapter, Chapter 15, which sets out the additional requirements relating to a DAX.[39] These include the following:

- DAX operators (RMOs who operate a DAX) must be locally incorporated and have a minimum paid-up capital of RM5 million (approx. US$1,229,500).
- Where a DAX operator is a public company, at least one member of the board must be an independent director.
- Additional requirements applicable to a DAX operator's framework relating to conflicts of interest.
- A prohibition on a DAX operator providing financial assistance to investors to invest or trade in digital assets on its platform.
- Additional requirements relating to the establishment of a risk management framework.
- A requirement for a DAX operator to have a business continuity plan "that addresses events posing a significant risk of disrupting operations," including the use of a secondary site.

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[34] GUIDELINES ON RECOGNIZED MARKETS, *supra* note 26, at 4.

[35] *Id.* at 7–13.

[36] *Id.* at 14–15.

[37] *Id.* at 16–19

[38] *Id.* at 20–22.

[39] *Id.* at 38–43.

- A requirement to carry out periodic reviews, audits, and testing of systems, policies, procedures, and controls relating to risk management and the business continuity plan.
- A requirement to notify the SC of any systems error, failure, or malfunction.
- A prohibition on facilitating the trade of any digital asset unless this has been approved the by the SC, and a list of matters that must be covered in the relevant application to trade in the asset.
- Additional obligations of a DAX operator, including ensuring the orderly, fair, and transparent operation of its platform and that all disclosures are fair, clear, and not misleading.
- DAX operators must only allow investors to invest or trade in digital assets using Ringgit Malaysia or "any foreign currency that is recognized as legal tender."
- Requirements relating to client asset protection, including maintaining records, safeguarding assets from conversion (including implementing multi-signature arrangements), establishing trust accounts in a licensed Malaysian financial institution to hold monies received from investors, establishing and maintaining "a sufficiently and verifiably secured storage medium designated to store Digital Assets from investors," and having arrangements and processes in place to protect against the risk of loss, theft, or hacking.
- Requirements related to ensuring orderly, clear, and efficient clearing and settlement arrangements.
- A statement that the SC can impose a fee or levy on all transactions conducted on a DAX.
- Various market integrity provisions, including requirements related to arrangements and processes to deter manipulative activities, manage excessive volatility of the market, manage error trades, manage systems error or malfunction, and manage investors' assets in the event of any suspension or outages of the platform, and provisions related to market transparency and market-making activities.

C. Proposed ICO Regulation

The ICO consultation paper proposes a "two-pronged approach" to regulating ICOs in order to "mitigate instances of fraud while protecting market integrity."[40] This entails "an authorisation for the offering or issuance of the ICO and the registration of a disclosure document (Whitepaper) which complies with prescribed minimum requirements set by the SC."[41] Furthermore,

> [t]he SC proposes that an ICO issuer be required to approach a third party to agree to "host" the ICO and assess its Whitepaper. In this regard, the ICO issuer will be required to undergo an assessment conducted by an independent third party authorised by the SC, prior to it submitting a formal application to the SC. . . .
>
> . . .

[40] ICO CONSULTATION PAPER, *supra* note 10, at 8.

[41] *Id*.

> It is proposed that the third party "host" is a recognised market operator or alternatively any other person recognised by the SC as having the necessary skills and expertise. In this regard, the SC will be introducing a separate framework in relation to the authorisation of the third party who will carry out this role.[42]

The paper proceeds to list potential assessment criteria for the evaluation of an ICO by the SC.[43] It also proposes that only a company that is locally incorporated, with its main business operation in Malaysia, that is not a public listed company, and that has a minimum paid-up capital of RM500,000 (approx. US$123,000) be eligible to undertake ICOs.[44] In addition, the board of directors and senior management team would need to collectively have a 50% equity holding in the ICO issuer, and they would not be able to dispose of their equity holding for a period of eighteen months.[45] In terms of governance, an ICO issuer would need to ensure that directors and senior managers are fit and proper, and at least half of the board would be required to be Malaysian. A responsible person would be appointed as the main contact for the SC, and the entity would need to have conflict of interest and risk management processes in place, as well as a business continuity management and a cyber-resiliency framework.[46]

The consultation paper proposes to limit the amount that can be raised through an ICO to a multiple of ten times the shareholders' funds, subject to a ceiling of RM100 million (approx. US$24,586,000).[47] Furthermore, at least 50% of the proceeds would be required to be utilized in Malaysia. If the ICO is asset-backed, at least 50% of the assets must be based in Malaysia.[48] An ICO issuer would only be able to withdraw or utilize investors' monies "based on milestones disclosed in the Whitepaper."[49]

Other proposed obligations on ICO issuers include having processes in place to monitor AML/CFT requirements, a prohibition on third party endorsement of the ICO, and annual and quarterly reporting to the SC and to investors "in relation to information as may be specified by the SC."[50] In addition, an ICO issuer would be required to deposit funds raised through an ICO in a separate trust account with a licensed bank.[51]

The consultation paper also lists information to be contained in the Whitepaper that would be required to accompany an ICO, including details of the board and senior management team and the shares and/or digital token they hold; the objective and timeline of the ICO; a business plan;

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[42] *Id.* at 9–10.

[43] *Id.* at 11.

[44] *Id.* at 12.

[45] *Id.*

[46] *Id.* at 13.

[47] *Id.* at 14.

[48] *Id.*

[49] *Id.*

[50] *Id.* at 16.

[51] *Id.* at 17.

the targeted amount to be raised through the ICO and a scheduled timeline for utilization of the proceeds; any rights or functions attached to the digital tokens issued; details of the independent custodian, escrow agents, or entity acting in the capacity of a trustee; discussion on the determination of the price per token; financial information; a detailed technical description of the protocol, platform, or application and the associated benefits of the technology; and details of associated challenges and risks, including any conflict of interest.[52]

IV. Treatment of Cryptoassets Not Considered Securities

Given the definitions contained in the Prescription Order, it appears that all cryptoassets created through blockchain would be considered securities. For example, the SC's recent consultation paper on ICOs states that "[t]he PO [Prescription Order] provides that a digital asset must be recorded on a distributed ledger. As such, discount cards, e-money or e-payment etc. will not be considered as securities unless it is recorded on a distributed ledger and satisfies the PO's requirements."[53]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

It appears that the above regulatory approach applies to all cryptocurrencies that utilize digital ledger technology or blockchain. There does not appear to be any specific restrictions on the sale of, or investments in, a particular type of cryptocurrency.

[52] *Id.* at 18–19.

[53] *Id.* at 5.

Malta

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SUMMARY The Maltese government enacted a series of laws in 2018 aimed at providing regulatory certainty over the use and development of cryptocurrencies within its jurisdiction. The laws provide a framework through which virtual currencies themselves and the individuals or entities that work with these currencies are regulated. Specifically, they provide a licensing system for providers of virtual financial asset services and regulate activities connected with virtual financial assets, including the initial offerings of these assets and the certification of platforms that these assets are offered on, and designate a regulatory body to oversee the application and enforcement of the framework.

I. Introduction

The Maltese government has actively encouraged the development of cryptocurrency and has issued many consultation documents and other papers that discuss its regulation and development, with the aim of providing "the necessary legal certainty to allow this industry to flourish."[1] In 2018, Malta enacted the Virtual Financial Assets Act (VFA Act),[2] the Innovative Technology Arrangement and Services Act (ITAS Act),[3] and the Malta Digital Innovation Authority Act (MDIA Act).[4] The intention behind these laws is to provide regulatory certainty, protect those who invest in virtual currencies, and encourage development in the innovative technology sector in Malta.[5]

This report provides a high-level summary of these Acts, paying particular attention to the VFA Act and how it regulates virtual financial assets (VFAs).

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[1] Ivan Martin, *Malta Digital Innovation Authority Unveiled: Government Working on Green Paper on AI and Internet of Things*, TIMES OF MALTA (Feb. 16, 2018), https://www.timesofmalta.com/articles/ view/20180216/ local/malta-digital-innovation-authority-unveiled.670847, *archived at* https://perma.cc/7P7W-7V3R.

[2] Virtual Financial Assets Act (VFA Act), cap. 590, http://www.justiceservices.gov.mt/Download Document.aspx?app=lom& itemid=12872&l=1, *archived at* https://perma.cc/8QZA-NW8W.

[3] Innovative Technology Arrangement and Services Act (ITAS Act), cap. 592, http://www.justiceservices.gov. mt/DownloadDocument.aspx?app=lom& itemid=12874&l=1, *archived at* https://perma.cc/XTY2-JDDD.

[4] Malta Digital Innovation Authority Act (MDIA Act), cap. 591, http://www.justiceservices.gov.mt/Download Document.aspx?app= lom&itemid=12873&l=1, *archived at* https://perma.cc/A5BF-XZRA.

[5] MALTA FINANCIAL SERVICES AUTHORITY (MFSA), VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS FAQ 6.1 (Oct. 2018), https://www.mfsa.com.mt/wp-content/uploads/2019/01/20190125_VFARFAQs_v1.01.pdf, *archived at* https://perma.cc/TS4D-WKBY.

II. Virtual Financial Assets Act

The VFA Act regulates a number of activities relating to VFAs when conducted in, or from within, Malta. These activities encompass

- the issuance of Initial VFA Offerings (commonly known as initial coin offerings, or ICOs);
- the application of a VFA issuer to trade the VFA on a distributed ledger technology (DLT) exchange;
- the activities of a VFA agent; and
- VFA service providers, such as eWallet providers, brokerages, and cryptocurrency exchanges.

Individuals or entities that provide Virtual Financial Services (VFS) must be licensed. Individuals engaged in these activities are all identified as "subject persons" and must comply with the anti-money laundering and counter-financing of terrorism laws of Malta.[6]

The VFA Act designates the Malta Financial Services Authority (MFSA) as the competent authority responsible for overseeing and enforcing its provisions.[7]

A. Definitions

The VFA Act contains a vast array of definitions and includes cryptocurrency under the term "virtual financial asset," which is defined as

> any form of digital medium recordation that is used as a digital medium of exchange, unit of account, or store of value and that is not
> (a) electronic money;[8]
> (b) a financial instrument;[9] or
> (c) a virtual token;
>
> "virtual token" means a form of digital medium recordation whose utility, value or application is restricted solely to the acquisition of goods or services, either solely within the DLT platform on or in relation to which it was issued or within a limited network of DLT platforms[.][10]

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[6] VFA Act arts. 5, 9, & 23. *See also* VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5.

[7] VFA Act Parts III-V.

[8] The VFA Act provides that the term "electronic Money" has the meaning provided by the Financial Institutions Act, sched. 3. *Id.* art. 2.

[9] Article 2 of the VFA Act provides that the term "financial instrument" has the meaning provided by the Financial Institutions Act, sched. 2. *Id.*

[10] *Id.* art. 2(2).

The VFA Act provides that if a virtual token can be converted into another DLT asset type, it will be treated as the asset type to which it can be converted.[11] Thus, a virtual token has no utility or value outside of the DLT platform on which it was issued, or within a limited group of DLT platforms,[12] and may only be redeemed on the platform by the issuer of the DLT asset.

The VFA Act defines DLT as "a database system in which information is recorded, consensually shared, and synchronised across a network of multiple nodes."[13] Article 2 defines a "DLT asset" as "(a) a virtual token; (b) a virtual financial asset; (c) electronic money; or (d) a financial instrument, that is intrinsically dependent on, or utilises, Distributed Ledger Technology."[14]

A DLT exchange is defined as "any trading and, or exchange platform or facility, whether in Malta or in another jurisdiction, on which any form of DLT asset may be transacted in accordance with the rules of the platform or facility."[15] The VFA Act distinguishes between DLT exchanges and DLT platforms, and specifically excludes DLT exchanges from the definition of DLT platforms. The MFSA has advised that "this definition should not thus be interpreted as excluding fiat currencies from its scope. Therefore, the VFA exchange licence under the Act will encompass (i) VFA-to-VFA, (ii) fiat-to-VFA and (iii) VFA-to-fiat transactions."[16]

A license must be obtained from the MFSA for individuals or entities that wish to offer a VFA or provide VFA services,[17] and such licenses can only be obtained by an application submitted to the MFSA through a VFA agent.[18] The application must include "a programme of operations setting out the systems, security access protocols and any other matters as may be required to be set out by the competent authority from time to time."[19] An individual or entity that obtains a VFA license is able to facilitate the exchange of VFAs or provide services in the VFA sector.

B. Role of the MFSA

The MFSA is the regulatory body charged as the competent authority under the VFA Act. It may determine a person or entity is engaged in an activity that constitutes a VFA service, or that a DLT asset is a financial asset, virtual token, electronic money, or financial instrument. The MFSA may also make a determination that a VFA service is provided from or within Malta or that an initial VFA offering has been made, or is being made, in or from within Malta. When such a determination is made, the individual or entity has a right to appeal the MFSA's decision.[20]

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[11] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 2-3.

[12] *Id*.

[13] VFA Act art. 2(2).

[14] *Id*.

[15] *Id*.

[16] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 5.19.

[17] VFA Act art. 13.

[18] *Id*. art. 14.

[19] *Id*. art. 14(1)(d).

[20] *Id*. art. 13.

C. VFA Agents

The VFA Act provides for a system of VFA agents, who must be

- an accountant, auditor, or advocate;
- a firm that provides these services or corporate services;
- a legal organization held by an aforementioned person or firm; or
- a person the MFSA considers suitable to perform the duties of a VFA agent listed in the VFA Act.[21]

The VFA agent is responsible for a variety of obligations under the VFA Act, including conducting a "fitness and properness" assessment before accepting a client; advising the issuer as to the obligations contained in the VFA Act; ensuring the issuer complies with the provisions of the VFA Act; cooperating with the MFSA; and ensuring the anti-money laundering laws of Malta are complied with. The MFSA has issued a rulebook that sets out in detail the obligations and responsibilities of VFA agents.[22]

VFA agents are considered gatekeepers and are required to have a "know your client" system in place, which includes verifying the source of funds of those whose primary wealth originates from, or includes, DLT assets, such as bitcoins.[23] The MFSA has specifically stated that it "will not be endorsing any specific know your client software solutions."[24] It expects the VFA agents to have "robust Know Your Client ('KYC') systems and controls in place in order to address and mitigate the money laundering/funding of terrorism risks pertaining to their specific business model. It is emphasised that there is no 'one-size-fits-all' approach in this respect."[25]

D. Initial Virtual Financial Asset Offering

An "initial VFA offering" (commonly known as an initial coin offering, or ICO) is defined as "a method of raising funds whereby an issuer is issuing virtual financial assets and is offering them in exchange for funds."[26] The issuer of a VFA offering must comply with the VFA Act and the Virtual Financial Assets Rulebook issued by the MFSA.[27] The issuer of the initial VFA offering must be a legal person formed under any law in Malta that proposes to issue, or actually issues,

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[21] *Id*. arts. 7, 14.

[22] MFSA, VIRTUAL FINANCIAL ASSETS RULEBOOK, CHAPTER 1 VIRTUAL FINANCIAL ASSETS RULES FOR VFA AGENTS (Oct. 2018), https://www.mfsa.com.mt/wp-content/uploads/2019/02/VFAR_Chapter1_FINAL.pdf, *archived at* https://perma.cc/8RBP-LYXZ.

[23] *Id*.; VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 3.8.

[24] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 3.9.

[25] *Id*. FAQ 3.8.

[26] VFA Act art. 2(2).

[27] MFSA, VIRTUAL FINANCIAL ASSETS RULEBOOK, CHAPTER 2 VIRTUAL FINANCIAL ASSETS RULES FOR ISSUERS OF VFAS (Oct. 2018), https://www.mfsa.com.mt/wp-content/uploads/2019/02/VFAR_Chapter2_FINAL.pdf, *archived at* https://perma.cc/K9XW-BFLS.

VFAs in or from within Malta.[28] The issuer must appoint a VFA agent, who must be registered with the MFSA.[29] The issuer itself is not required to be registered with the MFSA, but the VFA Act requires that issuers of initial VFA offerings register a white paper with the MFSA, which must be done through the VFA agent of the issuer. The white paper must be clearly written, easily understood, and set out information that, "according to the particular nature of the issuer and of the virtual financial assets offered to the public, is necessary to enable investors to make an informed assessment of the prospects of the issuer, the proposed project and of the features of the virtual financial asset."[30]

The white paper must be approved by the MFSA[31] and is valid for six months after such approval.[32] The VFA Act sets out extensive specifications concerning the information the white paper must include. The white paper is intended to protect investors by providing transparency. It must include a summary in non-technical language that provides key information about the VFAs.[33] Unless the disclosure of such information would be contrary to the public interest or is seriously detrimental to the issuer, the white paper must also include a detailed description of various aspects of the VFA offering, including

- the reason behind the initial offering;
- a technical description of the platform and its benefits;
- the sustainability of the project;
- the challenges, risks, and mitigating measures of the offering;
- the characteristics of the financial assets offered;
- a description of the issuer;
- a description of the wallet(s) the issuers will use;
- security safeguards against cyber threats;
- the life cycle of the offering;
- the targeted investor base;
- the exchange rate of the VFAs;
- the underlying protocol's interoperability with other protocols;
- how funds raised through the offering will be allocated;
- the amount and purpose of the issue;

[28] VFA Act art. 7.

[29] *Id*. art. 2(2).

[30] *Id*. arts. 3-4 & sched. 1 art. 2(1).

[31] *Id*. arts. 2(2), 7.

[32] *Id*. sched. 1 art. 13.

[33] *Id*. sched. 1 art. 4(1).

- the total number of financial assets to be issued and the features of these assets;
- the distribution of financial assets;
- the incentive mechanism to secure any transactions;
- the methods of payment;
- the estimated speed of transactions;
- the applicable taxes;
- the time during which the offer is open;
- any restrictions on the transferability of the virtual financial assets;
- any soft or hard cap for the offering, and how investors can retrieve their money if the cap is not met;
- the risks associated with the offering;
- details of the issuer, including the name, registered address and registered number, the issuer's objectives, the group of undertakings the issuer belongs to, and if applicable, the members who directly or indirectly exercise, or could exercise, a role in the issuer's administration;
- the issuer's principal activities, and any legal proceedings against the issuer that would impact the issuer's financial position;
- details of the issuer's board of administration; and
- the financial track records of issuers that have been established for three or more years.[34]

The MFSA states that financial track records are needed

> in order to ensure that investors are adequately safeguarded. Investor protection is achieved predominantly through transparency. This means that investors need to have all the necessary information in order to be able to make an informed assessment of the prospects of the Issuer, the proposed project and of the features of the VFA.[35]

An individual or entity that includes false statements in a white paper, or publishes them to a website or advertisement, and thus causes any person to lose money is liable to pay damages whether the statements were made intentionally or through gross negligence.[36]

The VFA Act requires individuals that wish to submit VFAs to be traded on a DLT exchange to submit an application for admission, and include almost the same information required by issuers of VFAs in a white paper.[37]

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[34] *Id*. sched. 1 art. 7.

[35] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 4.6.

[36] VFA Act art. 10.

[37] *Id*. art. 4 & sched. 1; VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 4.7.

E. Determinations of DLT Assets

The MFSA has developed a financial instrument test, along with guidelines,[38] designed to aid individuals and entities within the financial sector in determining whether a product or service falls under traditional financial services legislation or within the new VFA legislative framework.[39] The test aims to provide clarity over whether a DLT asset is a virtual token, a VFA, electronic money, or a financial asset.[40] The test is aimed at issuers that offer DLT assets to the public, or on a DLT exchange from within Malta, or those providing VFA services or activities with a DLT asset that has not yet been classified under the VFA Act or under the traditional financial services framework.[41] The test operates as follows:

- If the DLT asset is a virtual token, then any activities in relation to the token are not regulated.[42]
- If deemed a financial instrument or electronic money, then the traditional financial services framework applies.[43]
- If determined to be neither a virtual token, financial instrument, nor electronic money, then the asset is considered to be a VFA and will be regulated by the VFA framework.[44]

Thus, a DLT asset may not be listed as both a VFA and a financial instrument. It either qualifies as a VFA regulated by the VFA framework, as a financial instrument regulated by the traditional financial services framework, or as a virtual token that is not subject to any regulations.[45]

The result of the test must be signed by either a VFA agent for issuers of initial VFA offerings, the compliance officer for license holders under the traditional financial services framework or VFA framework, or the VFA agent or legal advisor of any person or entity without a license.[46]

The MFSA has stated that it intends to create a public register of DLT assets that have been determined in accordance with the test.

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[38] MFSA, GUIDANCE NOTE TO THE FINANCIAL INSTRUMENT TEST (July 2018), https://www.mfsa.com. mt/wp-content/uploads/2019/01/20180724_GuidanceFITest1.pdf, *archived at* https://perma.cc/UNH6-LKNP.

[39] *Financial Instruments Test*, MFSA, https://www.mfsa.com.mt/fintech/virtual-financial-assets/guidance/financial-instrument-test/ (last visited Mar. 6, 2019), *archived at* https://perma.cc/723Y-FCWG.

[40] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 2.7.

[41] *Id*. FAQ 2.9.

[42] *Id*. FAQ 2.9.

[43] *Id*. FAQ 2.12.

[44] *Id*. FAQ 2.14.

[45] *Id*. FAQ 5.18.

[46] *Id*. FAQ 2.8.

F. VFA Services

Schedule 2 of the VFA Act sets out what VFA services are, and covers activities provided in connection with a DLT asset that has been determined to be a VFA, including

- receiving or transmitting orders;
- executing orders on behalf of another person;
- managing a portfolio of assets containing or including more than one VFA;
- acting as a custodian or nominee holder of a VFA or cryptographic key;
- providing investment advice;
- marketing newly issued VFAs; or
- operating a VFA exchange.[47]

Individuals or entities that provide VFA services in, or from within, Malta must comply with the provisions of the VFA Act and the Rulebook issued by the MFSA.[48] In order to provide a VFA service in, or from within, Malta a license must be obtained from the MFSA, which must be applied for through a VFA agent.[49] The Central Bank of Malta and other members of the European System of Central Banks and national bodies along with liquidators, individuals managing their own accounts, and individuals providing VFA services for their parent company or subsidiaries are exempted from the requirement to have a license to provide VFA services.[50]

VFA service licenses are divided into four different classes:

- Class 1: Authorized to receive and hold orders and provide investment advice to VFAs, but not authorized to hold or control clients' assets or money.
- Class 2: Authorized to provide any VFA service and hold or control clients' assets or money in the course of providing VFA services, but not authorized to operate a VFA exchange or deal with their own account.
- Class 3: May provide any VFA service other than a VFA exchange and hold or control clients' assets or money in the course of providing VFA services.
- Class 4: May provide any VFA service, or hold or control clients' assets or money in the course of providing a VFA service.[51]

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[47] VFA Act sched. 2.

[48] MFSA, VIRTUAL FINANCIAL ASSETS RULEBOOK, CHAPTER 3 VIRTUAL FINANCIAL ASSETS RULES FOR VFA SERVICE PROVIDERS (Oct. 2018), https://www.mfsa.com.mt/wp-content/uploads/2019/03/VFAR_Chapter3_Updated.pdf, *archived at* https://perma.cc/3VGJ-4BBT.

[49] VFA Act art. 14.

[50] Innovative Technology Arrangements and Services (Fees) S.L. 592.01, art. 4, http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=12916&l=1, *archived at* https://perma.cc/J8DQ-MTDZ.

[51] *Id.* art. 8.

The MFSA has stated that the VFA services license is limited to the purposes of acting as a VFA services license holder and that traditional financial services license holders would be conducting activities that are not compatible with the VFA Act, as "a purpose or object referring to any activity that requires any kind of authorisation whatsoever by the MFSA under any Maltese law, other than the Act, shall be deemed to be incompatible with the services of a VFA Service Provider."[52]

The MFSA notes that traditional financial services license holders that wish to be a VFA service provider can do so, but must establish a separate entity.[53]

The VFA Act contains a variety of offenses relating to activities regulated under the VFA Act, and issuers or license holders can, upon conviction, be fined up to €10 million (approx. US$11.3 million) or three times the profits made or losses avoided due to the offense and/or imprisonment for up to six years.[54] Upon conviction of an offense under the VFA Act, VFA agents can be fined up to €500,000 (approx. US$565,000) and/or be sentenced to up to six months' imprisonment.[55]

III. Innovative Technology Arrangement and Services Act

The ITAS Act regulates innovative technology arrangements and designated innovative technology service providers, which are overseen by the MDIA. The MDIA Act defines innovative technology arrangements as "the intrinsic elements including software, codes, computer protocols and other architectures which are used in the context of DLT, smart contracts and related applications."[56] The ITAS Act lists what it considers to be an innovative technology arrangement to include

> 1. software and architectures which are used in designing and delivering DLT which ordinarily, but not necessarily:
>
> (a) uses a distributed, decentralized, shared and, or replicated ledger;
> (b) may be public or private or hybrids thereof;
> (c) is permissioned or permissionless or hybrids thereof;
> (d) is secure to a high level against retrospective tampering, such that the history of transactions cannot be replaced;
> (e) is protected with cryptography; and
> (f) is auditable;
>
> 2. smart contracts and related applications, including decentralised autonomous organisations, as well as other similar arrangements;
>
> 3. any other innovative technology arrangement which may be designated by the Minister, on the recommendation of the Authority, by notice from time to time.[57]

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[52] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQ 5.7.

[53] *Id*. FAQ 5.7.

[54] VFA Act art. 54.

[55] *Id*.

[56] ITAS Act art. 2.

[57] *Id*. sched. 1 art. 1.

Information technology services are defined in the ITAS Act as

1. the review or audit services referred to in this Act with reference to innovative technology arrangements provided by system auditors;

2. the technical administration services referred to in this Act with reference to innovative technology arrangements provided by technical administrators.[58]

The ITAS Act provides for the certification of innovative technology arrangements if they contain certain qualities, features, attributes, behaviors, or aspects, as determined by the MDIA.[59] The ITAS Act provides for the registration of innovative technology services, which is handled by the MDIA. The MDIA maintains an electronic register of the details of all providers registered, which is publicly available.[60] This certification and registration process provides formal recognition of these arrangements and services and "will be undertaken in full respect of the importance of not hindering innovation," while ensuring that investors, consumers, and market integrity are protected, according to one commentary.[61]

IV. Malta Digital Innovation Authority Act

The MDIA Act established the Malta Digital Innovation Authority to develop the innovative technology sector in Malta. The MDIA has a variety of roles connected to this purpose, including to

- promote government policies for the deployment of innovative technology arrangements within the government;
- promote and facilitate the advancement and use of innovative technology arrangements;
- promote education about ethical standards on the use and advancement of innovative technology arrangements;
- ensure Malta's reputation with regard to innovative technology arrangements is maintained and protected;
- protect users of innovative technology arrangements;
- harmonize both practices and standards use in innovative technology arrangements; and
- promote legal certainty in the law applying to innovative technology arrangements.[62]

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[58] *Id*. sched. 2 art. 2.

[59] *Id*. art. 7.

[60] *Id*. art. 6.

[61] *An Overview of the Malta Digital Innovation Authority Bill*, GANDO ADVOCATES (June 6, 2018), https://www.ganadoadvocates.com/practice-news/an-overview-of-the-malta-digital-innovation-authority-bill/, *archived at* https://perma.cc/G5CP-X3CW.

[62] MDIA Act art. 6.

The MDIA is also responsible for authorizing innovative technology arrangements and innovative technology services providers, as discussed above.

Practitioners have noted that the most important roles held by the MDIA are harmonizing practice and facilitating the adoption of standards on innovative technology arrangements and promoting ease of access to publicly available innovative technology arrangements, as

> [t]he pursuit of these objectives will secure the integrity of the Maltese DLT market and will ensure that any measures adopted in Malta will not be disconnected from DLT international policies and rules. This will afford both providers and consumers with more legal certainty especially when the operations and transactions, even though arising in or from Malta, include cross-border elements.[63]

V. Conclusion

The Maltese government is continuing to work on the regulatory structure to ensure that Malta is a world leader in the development of cryptocurrencies. The VFA Act, the MDIA Act, and the ITAS Act are the first of their kind in the world to regulate virtual assets. Together they create a regulatory regime that aims to provide legal certainty for individuals and entities wishing to develop these assets from in, or within, Malta; maintain market integrity and transparency; and provide clarity for those wishing to invest in them.[64]

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[63] GANDO ADVOCATES, *supra* note 61.

[64] VIRTUAL FINANCIAL ASSETS FRAMEWORK: FREQUENTLY ASKED QUESTIONS, *supra* note 5, FAQs 1-6 and 4-6.

Mauritius

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SUMMARY On March 1, 2019, the Financial Services (Custodian Services (Digital Asset)) Rules, issued by the Mauritius Financial Services Commission (FSC) to regulate the licensing and operations of custodian services, took effect. The Rules treat custodians as financial institutions and subject them to the requirements under the money laundering and counter-terrorism laws. The Rules also impose various conditions on custodians that appear to have been designed to protect customers, ranging from capital reserve requirements to infrastructure security for on-site storage of digital assets.

While the regulatory system related to investment in cryptoassets appears to be in its infancy, Mauritius recently recognized digital assets as a possible asset-class for investment by sophisticated investors, expert investors, expert funds, sophisticated collective investment schemes, and professional collective investment schemes.

I. Approach to Assets Created Through Blockchain

Based on the authority accorded to it in 2018 through amendments to the Financial Services Act of 2007, the Mauritius Financial Services Commission (FSC) issued the Financial Services (Custodian Services (Digital Asset)) Rules 2019 (the Rules) and the Financial Services (Consolidated Licensing and Fees) (Amendment) Rules 2019, both of which took effect on March 1, 2019.[1]

The Rules regulate digital asset custodians in the digital assets market; other activities appear to remain unregulated. The only recent source dealing with the regulation of investment in digital assets appears to be guidance issued by the FSC in 2018 recognizing digital assets as an asset-class and allowing certain investors to invest in them (see part IV, below).

One of the principal developments with the issuance of the Rules is the adoption a broad definition of the term "digital assets" that appears to include different versions of blockchain-based products. The Rules state as follows:

[1] Financial Services (Custodian Services (Digital Asset)) Rules 2019, GOVERNMENT NOTICE (GN) No. 44 (Feb. 28, 2019), https://www.fscmauritius.org/media/70809/44_fs-_custodian-service.pdf, *archived at* https://perma.cc/S7LS-CKPD; Financial Services (Consolidated Licensing and Fees)(Amendment) Rules 2019, GN No. 43 (Feb. 28, 2019), https://www.fscmauritius.org/media/70807/43_fs_-consolidated-licensing-and-fees-amd-rules-2019.pdf, *archived at* https://perma.cc/9ZT3-UK48; Press Release, Financial Services Commission, FSC Issues the Financial Services (Custodian (Digital Asset)) Rules 2019 (Mar. 6, 2019), https://www.fscmauritius.org/en/others/news/2019/fsc-issues-the-financial-services-custodian-services-digital-asset-rules-2019, *archived at* https://perma.cc/8LAA-D39R; FINANCIAL SERVICES COMMISSION, REGULATORY FRAMEWORK FOR THE CUSTODIAN SERVICES (DIGITAL ASSET) LICENSE: CONSULTATION PAPER 6 (Nov. 5, 2018), https://www.fscmauritius.org/media/67493/consultation-paper-custody-of-digital-assets_final.pdf, *archived at* https://perma.cc/45JH-FMC2.

(a) . . . any token, in electronic or binary form, which is representative of either the holder's access rights to a service or ownership of an asset;
(b) includes a digital representation of value which –
  (i) is used as a medium of exchange, unit of account, or store of value but which is not a legal tender, even if it is denominated in legal tender;
  (ii) represents assets such as debt or equity; or
  (iii) provides access to a blockchain-based application, service or product;

(c) excludes –
  (i) any transaction in which a business, as part of an affinity or reward programme, grants value which cannot be exchanged for legal tender, bank credit or any digital asset; or
  (ii) a digital representation of value issued for use within an online gaming platform.[2]

A. Financial Regulation and Consumer Protection

Many of the provisions under the Rules could be read as protections afforded to customers of custodian service providers (see part II, below). The Rules impose specific directives regarding how custodians must treat customers and protect their assets. For instance the "Communications with Clients" clause of the Rules states as follows:

1) A custodian shall have in place such procedures as may be required to ensure that –
  (a) each client is provided with an original of the signed agreement regarding the custody of digital asset within 30 days from the date on which the agreement is signed; and
  (b) each client is promptly informed of any action which is likely to impact on any provisions of the agreement and on digital asset being held in custody.
2) In the event that such disclosures are being made to a client through an internet-based service, a custodian shall have in place a multi-factor authentication system in line with best industry practices.[3]

The Rules also impose various restrictions regarding key and seed generation and storage as well as access of staff of a licensed custodian to keys, seeds, and other relevant information.[4] A key is "cryptographic key which is used by cryptographic algorithm to transfer plain text into encrypted form or vice versa."[5] A seed is "an alphanumeric phrase generated through the process of entropy."[6] Entropy is "unpredictability or randomness within the source code which is used to generate a cryptographic seed which ensures that a seed cannot be simply recreated."[7]

Significantly, the Rules include provisions on uninterrupted access for clients in certain circumstances and the segregation of client assets:

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[2] Financial Services (Custodian Services (Digital Asset)) Rules 2019, § 2.

[3] *Id.* § 18.

[4] *Id.* §§ 19-21.

[5] *Id.* § 2.

[6] *Id.*

[7] *Id.*

23. Uninterrupted Access

A custodian shall, subject to the custody agreement, provide its clients with uninterrupted access to their respective digital asset under its custody if –

(a) it is no longer able to abide by the custody agreement; or
(b) it ceases to operate; or
(c) it is requested to transfer the digital asset in accordance with the instructions of the client or such other mutually agreeable arrangements.

24. Segregation of client assets

(1) A custodian shall have adequate procedures to ensure that digital asset belonging to different clients are not pooled or not kept together at a single address or in a common wallet.
(2) A custodian shall ensure that an address or wallet is assigned to a single client and that the digital asset belonging to that client is kept in the assigned address or wallet.[8]

B. Anti-Money Laundering Law

It appears that the country's Financial Intelligence and Anti-Money Laundering Act and the Prevention of the Terrorism Act apply to custodians, which are considered financial institutions. In a 2018 consultation paper the FSC noted that,

10.1 [a]s part of its application document pack, the applicant will be required to submit a detailed report containing an in-depth assessment of the potential money laundering and terrorist financing ("ML/TF") risks posed by its operations as well as the measures, systems, controls and protocols which will be established in relation to those ML/TF risks. Once licensed, prior to starting its operations, the licensee will be required to have those ML/TF systems and controls in place.

10.2. For the sake of clarity, the FSC wishes to point out that the Custodian Services (Digital Asset) Licence will be issued under section 14 of the [Financial Services Act] and as such the holder of this licence, while being a licensee of the FSC, will simultaneously be considered as a "financial institution" under the [Financial Terrorism and Antti-Money Laundering Act].

10.3 Consequently, the holder of the Custodian Services (Digital Asset) Licence will be required to ensure strict adherence to the appropriate laws regulations and codes relating to [Anti-Money Laundering and Counter-Terrorist Financing] in Mauritius including the FSC Code on the Prevention of Money Laundering and Terrorist Financing, the FIAMLA and regulations made thereunder.

10.4. As part of its systems and controls to prevent ML/TF, the applicant must have in place procedures to conduct CDD and KYC as well as to ascertain the source of funds/wealth of potential clients prior to on-boarding.[9]

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[8] *Id*.

[9] FINANCIAL SERVICES COMMISSION, *supra* note 1, at 10; Financial Intelligence and Anti-Money Laundering Act 6 of 2002 (June 10, 2002), available on the Bank of Mauritius website, *at* https://www.bom.mu/sites/default/files/the_financial_intelligence_and_anti-money_laundering_act_2002.pdf, *archived at* https://perma.cc/9PDD-FVQU; Prevention of Terrorism Act 2 of 2002 (Feb. 2, 2002), available on the Financial Services Commission website, *at* https://www.fscmauritius.org/media/1106/the-prevention-of-terrorism-act-2002.pdf, *archived at* https://perma.cc/RBV2-RAG2.

The Financial Services Act requires that a licensee "keep and maintain internal records of the identity of each of his customers."[10] The Act also notes that "guidelines issued by the Commission under any relevant Act or under section 18(1) of the Financial Intelligence and Anti-Money Laundering Act 2002 may specify the nature of customer identification documentation to be kept and maintained."[11] It further requires that the records kept "shall include account files and business correspondence" and shall be kept for at least seven years.[12]

The FSC 2012 guidance, the Code on the Prevention of Money Laundering and Terrorist Financing, provides more detailed requirements on the prevention of money laundering and terrorism financing.[13]

C. Taxation

No information was located regarding the taxation of digital assets in Mauritius.

II. Custodianship of Cryptocurrencies by Financial Institutions

The Rules primarily deal with custodianship. Under the Rules, custody means "the safekeeping of digital assets being held or transacted" and a custodian is "an entity entrusted with the custody of digital asset."[14]

Opening a custody service requires the acquisition of a license under the Financial Services Act.[15] Anyone who operates a custodial service without a license commits a crime, on conviction, punishable by a fine of up to MUR1 million (about US$28,816) or custodial sentence not exceeding eight years.[16] Among others, the Act requires that applicants for license provide

> (a) a business plan or feasibility study outlining the proposed business activity of the applicant;
> (b) particulars and information relating to customer due diligence verification of promoters, beneficial owners, controllers and proposed directors in such form as may be specified in FSC Rules . . .[17]

The Rules require that the "objects of a custodian . . . shall be limited to the safekeeping of digital assets and operations arising directly from it."[18]

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[10] Financial Services Act of 14 of 2007, § 29 (as at Oct. 1, 2018), https://www.fscmauritius.org/media/70726/financial-services-act-2007-nov-2018.pdf, *archived at* https://perma.cc/HU4P-WE3S.

[11] *Id*.

[12] *Id.*

[13] FINANCIAL SERVICES COMMISSION, CODE ON THE PREVENTION OF MONEY LAUNDERING AND TERRORIST FINANCING (Mar. 2012; updated May 25, 2017), https://www.fscmauritius.org/media/1157/fsc-aml-cft-code-31-may-17.pdf, *archived at* https://perma.cc/5HJW-A3RR.

[14] Financial Services (Custodian Services (Digital Asset)) Rules 2019, § 2.

[15] *Id*. § 5.

[16] Financial Services Act 2007, § 14.

[17] *Id*. § 16.

[18] Financial Services (Custodian Services (Digital Asset)) Rules 2019, § 4.

The Rules also require that a custodian (an entity entrusted with the custody of digital assets) "shall at all times, have . . . an office in Mauritius from which it shall perform its core functions."[19] These are "functions relating to operational and governance protocols, safekeeping of digital assets and transaction management."[20] Operational and governance protocols include "fraud prevention in relation to the custody of digital assets."[21] Additional rules include a

- requirement to maintain a sound governance structure with sufficient oversight and internal controls;
- requirement to properly vet staff involved in the performance of core functions;
- requirement to prepare for disaster recovery and put in place a system for continuity of operations;
- requirement that a custodian maintain a capital reserve equal to 35 million Mauritius Rupees (MUR) (about US1.01 Million) or an amount representing six months' operational expense, whichever is higher;
- requirement that a custodian develop and maintain a risk management program, including strategies for assessing and mitigating operational risks;
- requirement that a custodian shall not outsource any of its core functions without prior approval of the FSC;
- requirement on security infrastructure for on-site storage of digital assets;
- requirement for developing storage strategy for digital assets;
- requirement regarding procedures for security breaches;
- requirement that custodians adopt multi-signature authorization so that "no single person is able to initiate and complete" a digital asset transaction; and
- requirement for putting in place systems and procedures for detecting and reviewing suspicious or fraudulent transactions.[22]

III. Regulation of Cryptocurrencies as Financial Securities

It does not appear that digital assets are categorized as financial securities in Mauritius.[23]

IV. Treatment of Cryptoassets Not Considered Securities

Other than the warnings and guidance that the government has issued, it does not appear digital assets are currently regulated. In 2017, the Bank of Mauritius issued a notice warning

[19] *Id.* §§ 2 & 6.

[20] *Id.* § 2.

[21] *Id.*

[22] *Id.* §§ 7-16, 25-27, 30 & 33.

[23] FINANCIAL SERVICES COMMISSION, *supra* note 1, at 5; Securities Act 22 of 2005, § 2 (updated through 2018), *available at* https://www.fscmauritius.org/media/67412/securities-act-2005.pdf, *archived at* https://perma.cc/FK5G-PMXS.

the public about the risks of investing in "'OneCoin', a purported cryptocurrency."[24] In addition, in September 2018, the FSC issued a guidance note with the following three main points:

- Cryptocurrencies are not legal tender in Mauritius;
- Investments in digital assets and cryptocurrencies are unprotected by "any statutory compensation arrangements"; and
- Mauritius "recognises that Digital Assets including Cryptocurrencies may constitute an asset-class for investment" by "sophisticated investors"[25], "expert investors"[26], "expert funds"[27], "specialized collective investment schemes"[28] and "professional collective investment schemes."[29]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

The Rules do not appear to make distinctions between different forms of cryptocurrencies. This is evident in the seemingly sweeping definition of the term "digital assets" that the Rules have adopted (see part I, above). In addition, the Rules require that custodians adopt "digital asset agnostic systems and procedure," stating that

> [t[he systems and procedures of a custodian shall be digital asset-agnostic and shall ensure the same level of regulatory compliance relating to the safekeeping, transaction management and custody operations of every digital asset type, irrespective of wallet functionality protocol.[30]

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[24] *Public Notice*, BANK OF MAURITIUS (Aug. 9, 2017), https://www.bom.mu/sites/default/files/public_notice_cryptocurrencies_09.08.2017.pdf, *archived at* https://perma.cc/6V38-YCDB.

[25] A sophisticated investor is "(a) the Government of Mauritius; (b) a statutory authority or an agency established by an enactment for a public purpose; (c) a company, all the shares in which are owned by the Government of Mauritius or a body specified in paragraph (b); (d) the government of a foreign country, or an agency of such government; (e) a bank; (f) a CIS manager; (g) an insurer; (h) an investment adviser; (i) an investment dealer; or (j) a person declared by the Commission to be a sophisticated investor." Securities Act 2005, § 2.

[26] An expert investor is "an investor who makes an initial investment, for his own account, of no less than US$ 100 000 … a sophisticated investor as defined in the [Securities] Act or any similarly defined investor in any other securities legislation." Securities (Collective Investment Scheme and Closed-End Funds) Regulations 2008, § 78(a) (as at Oct. 5, 2013), https://www.fscmauritius.org/media/2169/securities__collective_investment_schemes_and_closed-end_funds__regulations_2008.pdf, *archived at* https://perma.cc/PQF4-47QU.

[27] This means "a fund which is only available to expert investors." *Id*. § 2.

[28] This is "one that invests in real estate, derivatives, commodities or any other product authorised by the Commission." *Id*. § 77.

[29] *Fintech Series Guidance Note, Recognition of Digital Assets as an Asset-class for Investment by Sophisticated and Expert Investors*, FINANCIAL SERVICES COMMISSION (Sept. 17, 2018), https://www.fscmauritius.org/media/55003/guidance-note-on-the-recognition-of-digital-assets.pdf, *archived at* https://perma.cc/C44W-BBUM; Professional Collective Investment Schemes are those "offering their shares …solely to sophisticated investors … as private placements." Securities (Collective Investment Scheme and Closed-End Funds) Regulations 2008, § 75.

[30] Financial Services (Custodian Services (Digital Asset)) Rules 2019, § 29.

The term digital asset agnostic is defined as "the ability of the system and procedures of the custodian to operate properly irrespective of the type of digital assets kept in custody."[31]

[31] *Id.* § 2.

Mexico

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SUMMARY Mexican law defines virtual assets as representations of value electronically registered and utilized by the public as a means of payment for all types of legal transactions, which may only be transferred electronically. Virtual assets may not, under any circumstance, be considered Mexico's legal currency. Financial companies that carry out transactions with virtual assets must disclose to their clients the risks applicable to these assets. Financial technology institutions are prohibited from selling, ceding, transferring, loaning, using as collateral, or otherwise affecting the use or enjoyment of virtual assets under their custody and control without a pertinent order from the respective client. Services involving virtual assets is an activity classified as vulnerable to money laundering. Thus, providers of such services must report to the Mexican government relevant transactions that reach or exceed a specific threshold.

I. Approach to Assets Created through Blockchain

Mexico's Law to Regulate Financial Technology Institutions (Fintech Law) includes a chapter on operations with "virtual assets."[1] This chapter defines virtual assets as representations of value electronically registered and utilized by the public as a means of payment for all types of legal transactions, which may only be transferred electronically.[2] It also provides that virtual assets may not, under any circumstance, be considered to be Mexico's legal currency.[3]

A. Financial Regulation

Mexico's central bank, Banco de México (Banxico), has broad powers under the Fintech Law to regulate virtual assets, including

- specifying virtual assets that financial companies are allowed to operate with in the country, defining their particular characteristics, and establishing the conditions and restrictions applicable to transactions with such assets;
- authorizing financial companies to perform transactions with virtual assets; and
- imposing fines due to unauthorized transactions using virtual assets.[4]

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[1] Ley para Regular las Instituciones de Tecnología Financiera [Law to Regulate Financial Technology Companies] arts. 30–34, DIARIO OFICIAL DE LA FEDERACIÓN [D.O.F.], Mar. 9, 2018, available as originally enacted on the website of Mexico's House of Representatives *at* http://www.diputados.gob.mx/LeyesBiblio/pdf/LRITF_090318.pdf, *archived at* https://perma.cc/SB6N-RQY7.

[2] *Id.* art. 30.

[3] *Id.*

[4] *Id.* arts. 30–32, 88, 104(I).

B. Consumer Protection

Financial companies that carry out transactions with virtual assets must disclose to their clients the risks applicable to these assets.[5] At a minimum, these companies must inform their clients, in a clear and accessible manner on their respective websites or through the means that they utilize to provide services, that

- a virtual asset is not a legal currency and is not backed by the federal government or Mexico's central bank;
- once executed, transactions with virtual assets may be irreversible;
- the value of virtual assets is volatile; and
- technological, cybernetic, and fraud risks are inherent in virtual assets.[6]

C. Anti-Money Laundering Law

Providing services involving virtual assets is an activity classified as vulnerable to money laundering.[7] Thus, providers of such services must report to the Mexican government relevant transactions that reach or exceed a particular amount (equivalent to approximately US$2,849 as of March 2019).[8] Furthermore, providers of such services have a number of pertinent duties, including

- identifying their clients and verifying their identity through official identification documents, a copy of which must be kept by the provider;
- asking the client for information on his/her occupation if a business relationship is established; and
- keeping records pertaining to transactions and clients.[9]

D. Taxation

The chapter of the Fintech Law that governs virtual assets does not include rules on the taxation of these assets.[10] Pertinent rules as provided by other relevant statutes could not be located. Legal

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[5] *Id*. art. 34.

[6] *Id*.

[7] Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita [Federal Law for the Prevention and Identification of Transactions with Resources of Illicit Origin] art. 17(XVI), Nota de vigencia, D.O.F., Oct. 17, 2012, *available as amended at* http://www.diputados.gob.mx/LeyesBiblio/pdf/LFPIORPI_090318.pdf, *archived at* https://perma.cc/4UVN-GM98.

[8] *Id*.

[9] *Id*. arts. 17, 18.

[10] Ley para Regular las Instituciones de Tecnología Financiera arts. 30-34.

experts have pointed out that the Mexican government has not yet enacted taxation rules for virtual assets.[11]

II. Custodianship of Cryptocurrencies by Financial Institutions

The chapter of the Fintech Law that governs virtual assets defines "custody and control" of such assets as the possession of signatures, passwords, or authorizations necessary to execute transactions with them.[12] This chapter does not appear to include a rule indicating a specific type of cryptocurrency subject to custody by financial technology institutions.[13] Notably, these entities are prohibited from selling, ceding, transferring, loaning, using as collateral, or otherwise affecting the use or enjoyment of virtual assets that they have under their custody and control without a pertinent order from a respective client.[14]

III. Regulation of Cryptocurrencies as Financial Securities

The chapter of the Fintech Law that governs operations with virtual assets does not include a rule subjecting specific types of cryptocurrency to the national regulatory regime for financial securities.[15]

IV. Treatment of Cryptoassets Not Considered Securities

As noted above, Mexico's Fintech Law provides that virtual assets are representations of value electronically registered and utilized by the public as a means of payment for all types of legal transactions, which may only be transferred electronically and may not, under any circumstance, be considered to be Mexico's legal currency. (See discussion, Part I, above.)

V. Distinctions in Legal Treatment of Different Categories of Cryptocurrencies

The Fintech Law does not appear to distinguish between different categories of cryptocurrencies.[16] In March 2019, Banxico issued a regulation providing guidelines on virtual assets, including requirements applicable to relevant operations and authorizations to perform

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[11] Juan Carlos Tejado & Miguel Guerra, *Mexico*, *Taxation*, *in* BLOCKCHAIN AND CRYPTOCURRENCY REGULATION 2019 (Global Legal Insights, Jan. 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/mexico, *archived at* https://perma.cc/4YG6-9X24.

[12] Ley para Regular las Instituciones de Tecnología Financiera art. 32.

[13] *Id.* arts. 30-34.

[14] *Id.* art. 33.

[15] *Id.* arts. 30-34.

[16] *Id.*

transactions with such assets.[17] This regulation does not include rules on specific types of cryptocurrencies.[18] Instead, it provides rules applicable to virtual assets in general.[19]

[17] Circular 4/2019 dirigida a las Instituciones de Crédito e Instituciones de Tecnología Financiera relativa a las Disposiciones de carácter general aplicables a las Instituciones de Crédito e Instituciones de Tecnología Financiera en las Operaciones que realicen con Activos Virtuales [Regulation 4/2019 pertaining to Operations with Virtual Assets Performed by Financial Institutions], D.O.F., Mar. 8, 2019, available on the website of Mexico's Federal Official Gazette, *at* https://dof.gob.mx/nota_detalle.php?codigo=5552303&fecha=08/03/2019, *archived at* https://perma.cc/7AW7-9K64.

[18] *Id*.

[19] *Id*.

New Zealand

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SUMMARY New Zealand currently does not have specific legislation related to cryptocurrencies. Guidance provided by the Financial Markets Authority states that various activities related to cryptocurrencies could be considered financial services, which are subject to the "fair dealing" requirements in the Financial Markets Conduct Act 2013. Other laws may also be applicable if the entity involved is based in New Zealand and services are offered to retail clients. In addition, if the tokens offered to retail investors in New Zealand are considered financial products under the Act (including securities, derivatives, or interests in managed investment schemes), further licensing, governance, and disclosure requirements would apply. Whether a token is a particular type of financial product will depend on its individual characteristics.

Where no financial product or financial service is involved, communications related to offers of cryptocurrencies are subject to the fair dealing requirements in the Fair Trading Act 1986.

Cryptocurrency exchanges appear to be considered "money changers" that are subject to the Anti-Money Laundering and Counter-Terrorism Financing Act 2009.

Cryptocurrency is treated as property for purposes of income tax legislation. Where a person acquires cryptocurrency for the purpose of disposal, the proceeds from selling it are taxable.

I. Approach to Assets Created Through Blockchain

A report on the regulation of cryptocurrencies in New Zealand, published in September 2018 with the support of the New Zealand Law Foundation, stated that

> New Zealand has not, at the time of writing, passed specific legislation regulating cryptocurrencies. The lack of specific regulation, however, does not mean that cryptocurrencies are not subject to regulation. Regulators have applied existing laws to cryptocurrencies, albeit the lateness of official guidance about how the regulators would view them within existing legal frameworks has caused some confusion and uncertainty.[1]

Relevant laws that may be applied to activities involving cryptoassets include the Financial Markets Conduct Act 2013[2] and other laws related to financial regulation and investor protection

[1] ALEXANDRA SIMS ET AL., REGULATING CRYPTOCURRENCIES IN NEW ZEALAND 79 (Sept. 2018), *available at* https://www.interest.co.nz/sites/default/files/embedded_images/Sims et al ILAPP Cryptocurrencies Findings Final Report Sep2018.pdf, *archived at* https://perma.cc/KA8H-7JRZ.

[2] Financial Markets Conduct Act 2013, http://legislation.govt.nz/act/public/2013/0069/latest/whole.html, *archived at* https://perma.cc/9ZN6-83FX.

(including the Financial Service Providers (Registration and Dispute Resolution) Act 2008,[3] Financial Markets Supervisors Act 2011,[4] Financial Advisors Act 2008,[5] and Financial Markets Authority Act 2011[6]); the Fair Trading Act 1986, which contains consumer protection provisions in relation to nonfinancial products and services;[7] the Anti-Money Laundering and Counter-Terrorism Financing Act 2009;[8] and the Income Tax Act 2007.[9]

A. Financial Regulation and Consumer Protection

The FMA published online guidance on cryptocurrencies and initial coin offerings (ICOs) in October 2017. On announcing the guidance, the FMA stated that it "wants to facilitate responsible innovation, and ensure that the regulatory regime remains relevant and agile. This is supported by the Financial Markets Conduct Act 2013, as one of its purposes is 'to promote innovation and flexibility in financial markets'."[10]

The FMA guidance states that if an entity provides a "financial service" related to cryptocurrencies, it must comply with the "fair dealing" requirements in the Financial Markets Conduct Act 2013 (FMC Act).[11] In addition, if the entity is based in New Zealand it must be registered on the Financial Service Providers Register and, if services are offered to retail clients, it is also required to comply with the Financial Service Providers (Registration and Dispute Resolution) Act 2008.[12]

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[3] Financial Service Providers (Registration and Dispute Resolution) Act 2008, http://legislation.govt.nz/act/public/2008/0097/latest/whole.html, *archived at* https://perma.cc/SD3S-NZEQ.

[4] Financial Markets Supervisors Act 2011, http://www.legislation.govt.nz/act/public/2011/0010/latest/whole.html, *archived at* https://perma.cc/S3US-YH78.

[5] Financial Advisors Act 2008, http://www.legislation.govt.nz/act/public/2008/0091/latest/whole.html, *archived at* https://perma.cc/VHW2-LLGM.

[6] Financial Markets Authority Act 2011, http://www.legislation.govt.nz/act/public/2011/0005/latest/whole.html, *archived at* https://perma.cc/3UGC-RG4D.

[7] Fair Trading Act 1986, http://www.legislation.govt.nz/act/public/1986/0121/latest/whole.html, *archived at* https://perma.cc/9GCD-S2DZ.

[8] Anti-Money Laundering and Counter-Terrorism Financing Act 2009, http://www.legislation.govt.nz/act/public/2009/0035/latest/whole.html, *archived at* https://perma.cc/3W3F-W53X.

[9] Income Tax Act 2007, http://www.legislation.govt.nz/act/public/2007/0097/457.0/whole.html, *archived at* https://perma.cc/9PYX-VQAD.

[10] Press Release, FMA, FMA Commentary on ICOs and Cryptocurrencies (Oct. 25, 2017), https://www.fma.govt.nz/news-and-resources/media-releases/fma-commentary-on-icos-and-cryptocurrencies/, *archived at* https://perma.cc/54DR-VNAN.

[11] *Cryptocurrency Services*, FMA, https://www.fma.govt.nz/compliance/cryptocurrencies/cryptocurrency-services/ (last updated Feb. 5, 2019), *archived at* https://perma.cc/Y3RM-ZRDN.

[12] *Id*.

Key activities considered financial services under the legislation include "exchanges, wallets, deposits, broking and ICOs."[13] The guidance provides as follows:

- "Exchanges issuing their own cryptocurrency to facilitate trading fall within the financial service category of 'issuing and managing means of payment'."
- "Exchanges allowing cryptocurrency trading fall within the financial service category of 'operating a value transfer service'."
- If the trading involves cryptocurrencies or tokens that are "financial products" under the FMC Act, the exchange may be operating a financial product market, and such markets are required to be licensed unless an exemption applies.[14]
- Where a wallet provider stores cryptocurrency on behalf of others and facilitates exchanges between cryptocurrencies or between money and cryptocurrencies, the services fall within the category of "operating a value transfer service."
- If a wallet holds money for depositors, it may be offering debt securities, which are financial products under the FMC Act.
- A broker that arranges cryptocurrency transactions is also operating a value transfer service. If the cryptocurrencies or tokens involved in the transactions are financial products, a broker may have obligations under the Financial Advisors Act 2008.[15]

In terms of ICOs, the guidance states that,

> [w]hile each ICO must be looked at on an individual basis, most ICOs involve the financial service of 'operating a value transfer service'. ICOs may also involve the financial service of 'issuing and managing a means of payment' – where the tokens can be used to obtain products or services that are otherwise acquired using legal tender (such as NZ dollars), for example. Often this applies when the ICO offers a 'utility' or 'application' token.

Additional guidance is provided on ICOs, including whether a token could be considered a debt security, equity security, interest in a "managed investment scheme," or derivative, all of which are financial products under the FMC Act.[16] The FMA states that "[w]hen a financial product is offered to retail investors in New Zealand this is called a 'regulated offer' and attracts more substantial compliance obligations (compared to other types of offers)."[17] The obligations include licensing, governance, and disclosure requirements. Where tokens are offered to wholesale

[13] *Id*.

[14] *See generally Market Operators*, FMA, https://www.fma.govt.nz/compliance/role/market-operators/ (last visited Mar. 18, 2019), *archived at* https://perma.cc/CZ32-K8ZZ.

[15] *Cryptocurrency Services*, *supra* note 11.

[16] *Initial Coin Offers*, FMA, https://www.fma.govt.nz/compliance/cryptocurrencies/initial-coin-offers/ (last updated Feb. 11, 2019), *archived at* https://perma.cc/88U5-J2ZY.

[17] *Id*.

investors, or investors based outside New Zealand, this would not be a "regulated offer," but the fair -dealing provisions in the FMC Act would still apply.[18]

The guidance further states that,

> [e]ven if you are not providing a financial service or financial product, 'fair dealing' requirements still apply to white papers and other communications about your ICO under the Fair Trading Act 1986.[19]

The FMA provides additional guidance on fair dealing and ICOs on its website.[20] The Commerce Commission is responsible for enforcing the Fair Trading Act 1986. General consumer protection laws also apply, "including laws preventing fraudulent and other criminal conduct—like obtaining money by deception."[21]

In addition, the FMA "can designate tokens issued as part of an ICO to be a particular financial product if, based on their economic substance, this is necessary to promote fair and efficient financial markets in New Zealand or any of the other purposes of the FMC Act."[22] Such designations are "only made after consultation with industry and do not apply retrospectively."[23]

In its 2017–18 Annual Report, the FMA stated as follows:

> We also consider sales and advice practices in the context of technology and its associated risks. As awareness of cryptocurrencies and initial coin offerings entered the mainstream late in 2017, we published commentary for industry about our view and expectations. We expect potential cryptocurrency issuers to consider whether their currency or token may be a financial product under New Zealand law, and the legal obligations associated with that. They should also be aware of their obligations as a provider of financial services. Our main message is to approach us early for guidance, as we are always seeking opportunities to promote innovation and flexibility in our financial markets.[24]

The FMA's guidance to consumers regarding ways to invest warns of the various risks associated with cryptocurrencies.[25]

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[18] *Id*.

[19] *Id*.

[20] *Fair Dealing and Initial Coin Offers*, FMA, https://www.fma.govt.nz/compliance/cryptocurrencies/fair-dealing-and-initial-coin-offers/ (last updated Feb. 11, 2019), *archived at* https://perma.cc/R4XD-6RJL.

[21] *Id*.

[22] *Initial Coin Offers*, *supra* note 16.

[23] *Id*.

[24] FMA, ANNUAL REPORT 2017/18, at 21–22 (Sept. 2018), https://www.fma.govt.nz/assets/Uploads/181025-FMA-Annual-Report-2017-18-full.pdf, *archived at* https://perma.cc/C8TL-X83Q.

[25] *Cryptocurrencies*, FMA, https://www.fma.govt.nz/investors/ways-to-invest/cryptocurrencies/ (last updated Mar. 14, 2019), *archived at* https://perma.cc/5R5G-DJ7K.

B. Anti-Money Laundering Law

The FMA guidance on the regulation of cryptocurrencies and ICOs states generally that "[a]nti-money laundering obligations may also apply."[26] Neither the legislation nor guidance from the FMA and other government agencies on New Zealand's anti-money laundering and counter-financing of terrorism (AML/CFT) laws refer specifically to cryptocurrency exchanges.[27] However, several exchanges are listed as being Department of Internal Affairs (DIA) AML/CFT reporting entities.[28]

The DIA supervises several types of reporting entities, including casinos, non-deposit-taking lenders, money changers, and entities not supervised by other agencies. The FMA supervises, for example, issuers of securities, derivatives issuers and dealers, fund managers, and brokers and custodians. The Reserve Bank supervises banks, life insurers, and non-bank deposit takers.[29]

The DIA appears to consider cryptocurrency exchanges to be money changers under the AML/DFT system.[30]

The report referred to above recommends that

> New Zealand-based cryptocurrency exchanges should be encouraged, and clear and detailed guidance provided as to their anti-money laundering/counter-the funding of terrorism (AML/CFT) obligations by both the Department of Internal Affairs (DIA) and the Financial Markets Authority (FMA). That is, follow Australia's example.[31]

C. Taxation

The Inland Revenue Department (IRD) states that "[c]ryptocurrency is treated as property for tax purposes. There are no special tax rules for cryptocurrencies—ordinary tax rules apply."[32] Further guidance on the tax treatment of cryptocurrency includes the following:

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[26] *Cryptocurrency Services*, *supra* note 11; *Initial Coin Offers*, *supra* note 16.

[27] *See AML/CFT*, FMA, https://www.fma.govt.nz/compliance/amlcft/ (last updated Feb. 22, 2019), *archived at* https://perma.cc/4AKR-55VP; *Anti-Money Laundering and Countering Financing of Terrorism*, DEPARTMENT OF INTERNAL AFFAIRS (DIA), https://www.dia.govt.nz/Services-Anti-Money-Laundering-Index (last visited Mar. 18, 2019), *archived at* https://perma.cc/E7LN-8KJC.

[28] DIA, DIA AML/CFT Phase 1 Reporting Entities as at 30 November 2018, https://www.dia.govt.nz/diawebsite.nsf/Files/AMLCFT_Reporting-Entities_30-November-2018/$file/AMLCFT_Reporting-Entities_30-November-2018-Updated.pdf, *archived at* https://perma.cc/PTK3-7SA7.

[29] *AML/CFT: Who Needs to Comply*, FMA, https://www.fma.govt.nz/compliance/amlcft/who-needs-to-comply/ (last updated Feb. 26, 2019), *archived at* https://perma.cc/FNE4-MFDW.

[30] *See* SIMS ET AL., *supra* note 1, at 81.

[31] *Id.* at 6 & 127.

[32] *Cryptocurrency and Tax*, INLAND REVENUE DEPARTMENT (IRD), https://www.ird.govt.nz/campaigns/2018/cryptocurrency-tax.html (last visited Mar. 18, 2019), *archived at* https://perma.cc/CNE5-XXUR.

- Businesses that accept cryptocurrency as payment for goods and services must pay income tax based on the value of the cryptocurrency in New Zealand dollars at the time it is received, with the transaction treated as a barter transaction.[33]
- Where a person acquires cryptocurrency for the purpose of disposal, the proceeds from selling it are taxable. Any disposal that creates a realized gain or loss needs to be recorded at the time it occurs.
- The tax implications of an ICO "will depend on the unique features of the cryptocurrency being issued and how it's distributed." People can seek binding tax rulings to gain certainty about tax requirements.
- Cryptocurrency mining is considered to be an activity aimed at making a profit, and tax is payable on receipts from mining.[34]

II. Custodianship of Cryptocurrencies by Financial Institutions

No specific provisions or guidance exist requiring the custodianship of cryptocurrencies by financial institutions. It appears that storage providers that facilitate exchanges between cryptocurrencies and money are considered to be providing a financial service that is regulated under the FMC Act. These are also regulated under the AML/CFT system.

III. Regulation of Cryptocurrencies as Financial Securities

A. Debt Securities

The FMA guidance on ICOs states that

> [a] token is a debt security if investors have a right to be repaid money or paid interest on money lent to, deposited with, or owed by a person, company, or unincorporated entity making a token offer. For example, a token linked to the value of a dollar or commodity could be a debt security if:
>
> - investors can purchase a token with money;
> - investors holding the token have the right to redeem that token for money; and
> - an investor holding the token is not the beneficial owner of funds from which redemption proceeds are paid.[35]

In order to make a regulated offer of a debt security, an ICO issuer must register a product disclosure statement, appoint a licensed supervisor, meet fair dealing requirements, and meet financial reporting obligations.

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[33] *Questions & Answers: Cryptocurrency and Tax*, IRD, https://www.ird.govt.nz/income-tax-individual/cryptocurrency-qa.html (last visited Mar. 18, 2019), *archived at* https://perma.cc/N442-TWYV.

[34] *Id.*

[35] *Initial Coin Offers*, *supra* note 16.

The guidance further examines whether an asset-backed token could be a debt security, stating that,

> [w]hile each ICO must be looked at on an individual basis, asset backed tokens that give investors a right to redeem the token in exchange for the asset are not considered debt securities (unless the asset is cash). This is because the token does not give an investor the right to be repaid 'money'.[36]

An offer of such a token would still constitute a financial service, and as such the fair dealing provisions in the FMC Act would apply.[37]

B. Equity Securities

The FMA states that

> [a] token is an equity security if investors buy, or have the option to buy, for example, a share in a New Zealand incorporated company or any body corporate incorporated outside New Zealand. A token that provides an option to buy a share is an offer of both the token and the equity share.[38]

Issuance of such a token by an ICO would be considered a regulated offer under the FMC Act.

C. Managed Investment Products

The FMA guidance states as follows:

> A token is a managed investment product (an interest in a 'managed investment scheme') if investors:
>
> - contribute money or cryptocurrency to receive interests (tokens) in a scheme (a structure or project that allows investors to pool their money)
> - have a 'right to receive a financial benefit' (as defined in the FMC Act) from the scheme—such as money, rights to a share in profits, cryptocurrency, additional tokens, or changes in the tokens' value and these benefits are principally produced by someone else, and
> - do not have day-to-day control over the project or business (even if they have the right to be consulted or to give directions).[39]

In order to make a regulated offer of managed investment products, the manager of a managed investment scheme must be licensed, and the relevant entity must also register a product disclosure statement, appoint a licensed supervisor, have a trust deed that sets out investor rights

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[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

and the supervisor's role, meet fair dealing requirements, and meet financial reporting obligations.[40]

The guidance further examines the question of whether utility tokens are managed investment products, stating that,

> [w]hile each ICO must be looked at on an individual basis, utility tokens are not considered managed investment products simply because they can be traded on a cryptocurrency exchange or other secondary market. This is because any profits an investor receives by trading those utility tokens on a cryptocurrency exchange are not 'rights to receive a financial benefit' under a managed investment scheme.[41]

Similar to asset-backed tokens, where an ICO offers utility tokens this would typically be considered to constitute a financial service.

D. Derivatives

The FMA states that "[a] token may be a derivative if, under the terms of the token, the issuer or holder may be required to pay an amount or provide something else in the future, and the amount to be paid or the value of the token is derived from the value or amount of something else, such as a commodity or asset."[42] The issuer of such a token must be licensed, and the entity must register a product disclosure statement, meet fair dealing requirements, and meet financial reporting obligations.

IV. Treatment of Cryptoassets Not Considered Securities

The FMA guidance states that

> [w]hile each ICO must be looked at on an individual basis, most ICOs involve the financial service of 'operating a value transfer service'.
>
> ICOs may also involve the financial service of 'issuing and managing a means of payment' – where the tokens can be used to obtain products or services that are otherwise acquired using legal tender (such as NZ dollars), for example.
>
> Often this applies when the ICO offers a 'utility' or 'application' token.
>
> If your ICO provides financial services you must:
>
> - comply with the fair dealing provisions in Part 2 of the FMC Act. These prohibit you from engaging in misleading conduct or making false, deceptive or unsubstantiated statements.

[40] *Id.*

[41] *Id.*

[42] *Id.*

> In addition, if you are based in New Zealand, you must be registered on the Financial Service Providers Register (FSPR), and pay the applicable fees and levies, for each category of financial service you are in the business of providing. You must also belong to a dispute resolution scheme if you offer financial services to retail clients.
>
> Anti-money laundering obligations may also apply.[43]

As noted above, where an ICO does not involve a financial product or a financial service, "'fair dealing' requirements still apply to white papers and other communications about [the] ICO under the Fair Trading Act 1986."[44]

As also stated above, tokens can be designated to be a particular financial product under the FMC Act where this is, for example, "necessary to promote fair and efficient markets in New Zealand."[45]

The FMA guidance on the fair dealing requirements applicable to ICOs states as follows:

> [i]f your ICO is providing a financial product or financial service, all promotional material – including your white paper, website and on social media posts – must comply with the fair dealing provisions in Part 2 of the FMC Act. The provisions prohibit you from engaging in misleading conduct and making false, deceptive or unsubstantiated statements about the financial product or service, irrespective of the type of investor you are offering to, or where they are located.
>
> . . .
>
> Even if your ICO is not providing a financial service or financial product, 'fair dealing' requirements still apply to white papers and other communications about your ICO under the Fair Trading Act 1986. This prohibits misleading and deceptive conduct, and applies to the trading of assets, commodities and other goods and services.[46]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As indicated above, the categorization of a particular token will be based on an assessment of its characteristics. Utility tokens and asset-backed tokens may not be considered financial products, but an offer of such tokens could still be a regulated financial service. There do not appear to be any specific restrictions on the sale of, or investments in, a particular type of cryptocurrency.

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Fair Dealing and Initial Coin Offers*, *supra* note 20.

Norway

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SUMMARY Norway requires everyone who offers a marketplace for cryptocurrencies or a wallet to register with the Norwegian Financial Supervisory Authority. It has implemented the European Union's Fifth Anti-Money Laundering Directive, and in its implementing legislation specifically provides that anti-money laundering requirements also apply in relation to cryptocurrency transactions.

Norway taxes cryptoassets depending on their nature either as capital property income, other income (mined income), or business income (mined income on a larger scale). The sale of cryptocurrencies is not subject to value-added tax.

I. Approach to Assets Created through Blockchain

A. Duty to Register and Applicability of Anti-Money Laundering Law

The Norwegian Financial Supervisory Authority has issued guidance on the regulation of digital currency services, including cryptocurrencies and cryptowallets.[1] The guidance pertains specifically to the registration requirements associated with the amended Money Laundering Act.

As the result of a 2018 amendment to the Money Laundering Act, the use and issuance of cryptocurrencies are now subject to the Act.[2] The Act also gave the Norwegian Finance Department the authority to issue regulations pertaining to money laundering and virtual currencies.[3] In 2018, the Department issued the Regulation on Money Laundering where cryptocurrencies (defined as virtual currencies) are specifically mentioned.[4] The Regulation states that

> (1) Providers of exchange services between virtual currencies and official currencies have a duty to report in accordance with the Money Laundering Act. The same applies also to storage services for virtual currencies.

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[1] *Virtuelle valutatjenester*, FINANSTILSYNET (Jan. 31, 2019), https://www.finanstilsynet.no/konsesjon/virtuelle-valutatjenester/, *archived at* https://perma.cc/R4EA-EXP2 (all translations by the author).

[2] LOV OM TILTAK MOT HVITVASKING OG TERRORFINANSIERING (HVITVASKINGSLOVEN) [ACT ON MEASURES AGAINST MONEY LAUNDERING AND FINANCING OF TERRORISM] (LOV-2018-06-01-23), https://lovdata.no/dokument/NL/lov/2018-06-01-23, *archived at* https://perma.cc/QK4N-CS77.

[3] Kap. 1 § 4 (5) HVITVASKINGSLOVEN.

[4] § 1-3 Forskrift om tiltak mot hvitvasking og terrorfinansiering (hvitvaskingsforskriften) [Regulation on Measures on Money Laundering and Financing of Terrorism (Money Laundering Regulation)], https://lovdata.no/dokument/SF/forskrift/2018-09-14-1324, *archived at* https://perma.cc/8EJA-FZ22.

(2) A virtual currency is the digital expression of a value that is not issued by a central bank or a public agency, is not necessarily connected to an official currency, and does not have legal status as currency or money, but which is accepted as a means of payment and can be transferred, stored, or traded electronically.

(3) A storage service for virtual currencies is the storage of private cryptographic keys on behalf of customers, used to transfer, store, or trade in virtual currencies.

(4) The Financial Supervisory Authority enforces the requirement that the exchange and storage services mentioned in the first paragraph are done in accordance with the Money Laundering Act. Exchange providers and storage services as mentioned in the first paragraph must be registered with the Financial Supervisory Authority. The following information on the providers must be registered:

a) Name
b) Organization form [i.e. LLC etc.] and organization number
c) Business address
d) Information on services provided
e) Name, address and birth number or D-number for:
   1. The day-to-day leader or persons of equivalent position
   2. Board members or persons of equivalent position
   3. Other contact persons[5]

Also, prior to the amendment taking effect it had been determined by the courts that cryptocurrencies were subject to money laundering provisions.[6] In an Oslo District Court case from 2017, a Norwegian bank terminated a relationship with a customer who solely used his account to buy and sell bitcoins.[7] The Bank argued that it was required to terminate the relationship under the money laundering and terrorism financing rules because of the many cryptocurrency transactions, out of fear that he was laundering money.[8] The court found that, indeed, the Money Laundering Act required this action and that the bank had therefore acted properly when it terminated the relationship with the customer.[9]

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[5] *Id*.

[6] Oslo Tingsret [Oslo District Court], Case No. 17-173396TVI-OTIR/01 (Dec. 5, 2017), https://bitmynt.no/20171205%20rettens%20kjennelse.pdf, *archived at* https://perma.cc/R648-PRTE.

[7] *Id*.

[8] *Id*.

[9] *Id*.; § 10 LOV OM TILTAK MOT HVITVASKING OG TERRORFINANSIERING MV (HVITVASKLOVEN) [ACT ON MEASURES AGAINST MONEY LAUNDERING AND TERROR FINANCING (MONEY LAUNDERING ACT)] (LOV-2009-03-06-11), as in force 2017, https://lovdata.no/pro/#document/NLO/lov/2009-03-06-11 (subscription required).

B. Taxation

1. *Capital Property Income*

The Norwegian Tax Authority has issued a statement that income derived from the sale of cryptocurrencies such as bitcoins will be treated as capital property, at least for tax purposes.[10] Capital property legislation allows deductions for losses and taxes gains.[11] Although travel currencies are exempted from the capital gains tax, cryptocurrencies such as bitcoins are not, because cryptocurrencies are not recognized as travel currencies.[12]

All Norwegian residents are required to report taxable income (including from capital gains such as those from cryptocurrencies) in accordance with the Norwegian Income Tax Act.[13] Such income derived from cryptocurrencies should be filed as "other income."[14]

2. *Income from Mining*

Income from actively mining cryptocurrencies by the owner him or herself is likely to be considered other income.[15] The mining of cryptocurrencies on a larger scale, on the other hand, may be considered business income.[16]

3. *Value-Added Tax*

Sales of cryptocurrencies are exempt from Norwegian value-added tax (VAT). In a 2013 statement the Norwegian Tax Authority determined that the sale of bitcoins by a commercial actor was subject to a 25% VAT as the trade in bitcoins on a website is an electronic service subject to VAT

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[10] *Bruk av bitcoins – skatte- og avgiftsmessige konsekvenser* [*Use of Bitcoins – Tax Effects*], SKATTEETATEN (Nov. 11, 2013), https://www.skatteetaten.no/rettskilder/type/uttalelser/prinsipputtalelser/bruk-av-bitcoins--skatte--og-avgiftsmessige-konsekvenser/, *archived at* https://perma.cc/5223-NKR4; *see also* Elin Hofverberg, *Norway: Bitcoins Are Capital Property, Not Currency, Says Norwegian Tax Authority*, GLOBAL LEGAL MONITOR (Dec. 11, 2013), http://www.loc.gov/law/foreign-news/article/norway-bitcoins-are-capital-*property*-not-currency-says-norwegian-tax-authority/, *archived at* https://perma.cc/QVF6-BBFQ.

[11] §§ 5-1, 5-20, 6-1 LOV OM SKATT AV FORMUE OG INNTEKT (SKATTELOVEN) [ACT ON TAXATION OF INCOME (TAX ACT)] (LOV-1999-03-26-14), https://lovdata.no/dokument/NL/lov/1999-03-26-14, *archived at* https://perma.cc/S8Y6-8RPR.

[12] SKATTEETATEN, *supra* note 10.

[13] § 2-1 SKATTELOVEN.

[14] As per income tax guidelines at *3.1.12 Annen inntekt* [*Other Income*], SKATTEETATEN, https://www.skatteetaten.no/person/skatt/skattemelding/finn-post/3/1/12/ (last visited Apr. 6, 2018), *archived at* https://perma.cc/96P3-QXNK.

[15] *Mining av virtuell valuta*, SKATTEETATEN, https://www.skatteetaten.no/person/skatt/hjelp-til-riktig-skatt/aksjer-og-verdipapirer/om/virtuell-valuta/mining/ (last visited Apr. 16, 2019), *archived at* https://perma.cc/S54D-FUNA.

[16] *Id.* For guidance on what qualifies as *naeringsdrivande* (business income) see *Er jeg næringsdrivende?*, SKATTEETATEN, https://www.skatteetaten.no/bedrift-og-organisasjon/starte-og-drive/er-jeg-narings drivende/ (last visited Apr. 16, 2019), *archived at* https://perma.cc/8H4M-PP7U.

and not a VAT-exempt financial service.[17] However, in 2015 the Court of Justice of the European Union ruled that cryptocurrencies are exempt from VAT.[18] This caused Norway to start a process whereby the Finance Department was asked to determine how bitcoins and other cryptocurrencies should be treated in relation to VAT.[19] Final guidance was issued in 2017, establishing that the sale of cryptocurrencies is exempt from VAT.[20]

II. Custodianship of Cryptocurrencies by Financial Institutions

Norway requires that any organization that offers storage of cryptocurrencies, such as cryptowallets, first register with the Norwegian Financial Supervisory Authority.[21] It is also subject to the money laundering provision, and thus must keep a record of its sales.[22] No other specific legislation has been enacted surrounding these products.

III. Regulation of Cryptocurrencies as Financial Securities

The first Norwegian company to make an initial coin offering (ICO) reportedly did so in 2017.[23] The Financial Supervisory Authority has not commented on this ICO.

IV. Treatment of Cryptoassets Not Considered Securities

The Financial Supervisory Authority has made no statements on what laws may apply to cryptoassets that are not considered securities.

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As seen above, different laws and regulations will apply to different types of cryptoassets, based on their use.

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[17] SKATTEETATEN, *supra* note 10; *see also* Hofverberg, *supra* note 10.

[18] Case C□264/14, Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718, http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=EN, *archived at* https://perma.cc/LU2G-U6VD.

[19] Skriftlig spørsmål fra Sveinung Rotevatn (V) til finansministeren [Written Question from Sveinung Rotevatn (V) to the Minister of Finance], Dokument nr. 15:1436 (2015-2016) (Aug. 10, 2016), https://www.stortinget.no/no/Saker-og-publikasjoner/Sporsmal/Skriftlige-sporsmal-og-svar/Skriftlig-sporsmal/?qid=66127, *archived at* https://perma.cc/SBC3-9M7Q.

[20] Letter from the Finance Department to the Norwegian Tax Authority, Merverdiavgift – unntaket for finansielle tjenester [VAT Fees – Exemption for Financial Services] (Feb. 6, 2017), https://www.regjeringen.no/no/dokumenter/merverdiavgift---unntaket-for-finansielle-tjenester/id2538129/, *archived at* https://perma.cc/8GV3-TU4Q.

[21] FINANSTILSYNET, *supra* note 1.

[22] § 1-3 Forskrift om tiltak mot hvitvasking og terrorfinansiering (hvitvaskingsforskriften)

[23] Ashour Iesho, *Norwegian Company Launches First ICO for Asset-Backed Token*, BITCOINIST (2017), https://bitcoinist.com/norwegian-company-launches-first-ico-for-asset-backed-token/, *archived at* https://perma.cc/BK63-7WU9.

Philippines

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I. Approach to Assets Created Through Blockchain

A. Financial Regulation

Bangko Sentral ng Pilipinas (BSP, the Philippines Central Bank) has issued guidelines concerning virtual currencies (VCs).[1] Specifically, the BSP Guidelines provide that because VCs are not backed by a central bank or a particular commodity and are not guaranteed by any country, they are not legal tender.[2] However, because they are used as a conduit to provide certain financial services, such as remittances and payment transactions, entities that provide such services using VCs must register with the BSP and adopt adequate measures to mitigate and manage risks associated with such currencies.[3] VCs are defined by the BSP Guidelines as "any type of digital unit that is used as a medium of exchange or a form of digitally stored value created by agreement within the community of VC users."[4]

B. Management of Technology Risk

The BSP Guidelines indicate that the following cybersecurity measures must be taken by virtual currency exchanges:

> Depending on the complexity of VC operations and business models adopted, a VC exchange shall put in place adequate risk management and security control mechanisms to address, manage and mitigate technology risks associated with VCs. For VC exchanges providing wallet services for holding, storing and transferring VCs, an effective cybersecurity program encompassing storage and transaction security requirements as well as sound key management practices must be established to ensure the integrity and security of VC transactions and wallets. For those with simple VC operations, installation of up-to-date anti-malware solutions, conduct of periodic back-ups and constant awareness of the emerging risks and other cyberattacks involving VCs may suffice.[5]

C. Anti-Money Laundering Law

The BSP Guidelines provide that virtual currency exchanges are considered similar to transfer and remittance exchanges and thus are covered by pertinent anti-money laundering (AML) legal

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[1] Bangko Sentral ng Pilipinas, Guidelines for Virtual Currency (VC) Exchanges, Circular No. 944 (Feb. 6, 2017), http://www.bsp.gov.ph/downloads/regulations/attachments/2017/c944.pdf, *archived at* https://perma.cc/Z9ZR-BYZV.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

and regulatory rules.[6] Accordingly, a Philippine AML regulation provides that, in order to mitigate and manage risks, entities that provide services with virtual assets must register with Philippine authorities, obtain from them appropriate licenses, and have systems aimed at "monitoring and ensuring compliance with the relevant preventive measures."[7]

D. Taxation

Legislation specifically addressing the taxation of virtual currencies could not be located.

II. Custodianship of Cryptocurrencies by Financial Institutions

Detailed rules addressing the custodianship of cryptocurrencies by financial institutions could not be located. However, a Philippine AML regulation provides that "safekeeping and/or administration of virtual assets or instruments enabling control over virtual assets" is an activity that may be performed by providers of services related to virtual assets.[8]

III. Regulation of Cryptocurrencies as Financial Securities

The Philippine Securities and Exchange Commission is developing rules pertaining to the registration of initial coin offerings,[9] which will include pertinent rules on the topic of the regulation of cryptocurrencies as financial securities.

IV. Treatment of Cryptoassets Not Considered Securities

As noted above, the BSP Guidelines indicate that entities that provide certain financial services using virtual currencies must register with the BSP and adopt adequate measures to mitigate and manage risks associated with such currencies.

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

The BSP Guidelines on virtual currencies provide that no particular cryptocurrency is to be endorsed by the Philippine Central Bank.[10]

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[6] *Id.*

[7] Anti-Money Laundering Council, 2018 Implementing Rules and Regulations of Republic Act No. 9160, *as amended*, Rule 19-5.2, http://www.amlc.gov.ph/images/PDFs/FINAL%202018%20IRRv1.pdf, *archived at* https://perma.cc/SH7Y-A93F.

[8] *Id.* Rule 2-1(jjjjj).

[9] Press Release, Philippines SEC, SEC Releases Proposed Rules on Initial Coin Offerings (Aug. 2, 2018), http://www.sec.gov.ph/wp-content/uploads/2015/10/2018PressRelease_Draft-ICO-Rules-August-02-2018-1.pdf, *archived at* https://perma.cc/A3BQ-SZ8H.

[10] Bangko Sentral ng Pilipinas, Guidelines for Virtual Currency (VC) Exchanges, Circular No. 944 (Feb. 6, 2017), http://www.bsp.gov.ph/downloads/regulations/attachments/2017/c944.pdf, *archived at* https://perma.cc/Z9ZR-BYZV.

Singapore

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SUMMARY The Monetary Authority of Singapore (MAS) clarified in 2017 that the offer or issue of digital tokens in Singapore would be regulated by the MAS if the digital tokens fall within the definition of "securities." The offer of digital tokens that constitute securities must comply with the requirements under the securities laws, including that the offer must be made in or accompanied by a prospectus. The relevant MAS Notice on Prevention of Money Laundering and Countering the Financing of Terrorism (AML/CFT) is applicable if a person is deemed an intermediary conducting regulated activities in relation to digital tokens that constitute securities.

The Payment Services Act, which was passed on January 14, 2019, expands the MAS's regulatory scope to include digital payment token services. Any service dealing in or facilitating the exchange of digital payment tokens falls within the ambit of providing a digital payment token service. To be entitled to carry on a digital payment token service, the service provider must hold a standard payment institution license or a major payment institution license. The appropriate AML/CFT requirements will be imposed on relevant licensees through notices issued by the MAS.

I. Approach to Assets Created Through Blockchain

A. Digital Token Offerings

In the wake of an increase in the number of initial coin offerings (ICOs) in Singapore as a means of raising funds, the Monetary Authority of Singapore (MAS), the city state's central bank and financial regulator, issued a statement clarifying its regulatory position on digital tokens on August 1, 2017. According to the statement, the offer or issue of digital tokens in Singapore will be regulated by the MAS if the digital tokens fall within the definition of "securities" regulated under the securities laws.[1]

The MAS provides guidance on the application of the securities laws administered by the MAS in relation to offers or issues of digital tokens in a document titled *A Guide to Digital Token Offerings*, which was last updated on November 30, 2018 (MAS Guide).[2]

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[1] Press Release, Monetary Authority of Singapore (MAS), MAS Clarifies Regulatory Position on the Offer of Digital Tokens in Singapore (Aug. 1, 2017), http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/MAS-clarifies-regulatory-position-on-the-offer-of-digital-tokens-in-Singapore.aspx, *archived at* https://perma.cc/D8V5-3NST.

[2] MAS, A GUIDE TO DIGITAL TOKEN OFFERINGS (MAS Guide) (updated Nov. 30, 2018), http://www.mas.gov.sg/~/media/MAS/Regulations and Financial Stability/Regulations Guidance and Licensing/Securities Futures and Fund Management/Regulations Guidance and Licensing/Guidelines/A Guide to Digital Token Offerings last updated on 30 Nov 2018.pdf, *archived at* https://perma.cc/9KGD-JUG7.

B. Payment Services Act

The MAS has recognized that technology, in particular FinTech, or Financial Technology, is transforming the world of payments, while new payment methods also give rise to new risks. It therefore reviewed its regulatory framework applicable to payment systems and payment service providers, and proposed a new regulatory framework, the Payment Services Bill.[3]

On November 21, 2017, the MAS issued a consultation paper on the proposed Payment Services Bill.[4] On January 14, 2019, the Bill had its second reading in Parliament and was passed into law.[5] The Payment Services Act and its subsidiary legislation, which would contain substantive license application forms, processes, and procedures, are expected to take effect in the later part of 2019.[6]

Under the new regulatory framework, "digital payment token services" would come under the supervision of the MAS. According to a speech made by the Minister for Education on behalf of the Minister in charge of the MAS during the second reading of the Bill, "digital payment token services" are "commonly understood as cryptocurrency dealing or exchange services."[7] The Minister stated that the MAS would become one of the first few financial services regulators in the world to introduce a regulatory framework for digital payment token services.[8]

C. Anti-Money Laundering Law

According to the MAS Guide, the relevant MAS Notice on Prevention of Money Laundering and Countering the Financing of Terrorism (AML/CFT) is applicable if a person is deemed an intermediary conducting regulated activities in relation to digital tokens that constitute securities.[9]

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[3] MAS, "Payment Services Bill" - Second Reading Speech by Mr Ong Ye Kung, Minister For Education, On Behalf of Mr Tharman Shanmugaratnam, Deputy Prime Minister and Minister-In-Charge of The Monetary Authority of Singapore (Jan. 14, 2019) (Second Reading Speech), http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-Policy-Statements/Speeches/2019/Payment-Services-Bill.aspx, *archived at* https://perma.cc/9B25-U4H4.

[4] Press Release, MAS, MAS Launches Second Consultation on New Regulatory Framework for Payments (Nov. 21, 2017), http://www.mas.gov.sg/News-and-Publications/Media-Releases/2017/MAS-Launches-Second-Consultation-on-New-Regulatory-Framework-for-Payments.aspx, *archived at* https://perma.cc/W5RF-D5GP.

[5] Payment Services Act 2019, No. 2 of 2019 (Jan. 14, 2019, assented to by the President Feb. 11, 2019), https://sso.agc.gov.sg/Acts-Supp/2-2019/Published/20190220?DocDate=20190220&ViewType=Pdf&_=20190221030955, *archived at* https://perma.cc/PLP4-WCZ7.

[6] Li Chuan Hsu et al., *The Payment Services Act and How it Affects FinTech in Singapore*, JDSUPRA (Mar. 26, 2019), https://www.jdsupra.com/legalnews/the-payment-services-act-and-how-it-71949/, *archived at* https://perma.cc/VJY8-KQDB.

[7] Second Reading Speech, *supra* note 3.

[8] *Id.*

[9] MAS Guide, *supra* note 2, para. 3.1.

The MAS Guide sets out the following AML/CFT requirements applicable to such persons broadly, who must:

> 3.2.1 take appropriate steps to identify, assess and understand their money laundering and terrorism financing (ML/TF) risks;
>
> 3.2.2 develop and implement policies, procedures and controls – including those in relation to the conduct of customer due diligence and transaction monitoring, screening, reporting suspicious transactions and record keeping – in accordance with the relevant MAS Notices, to enable them to effectively manage and mitigate the risks that have been identified;
>
> 3.2.3 perform enhanced measures where higher ML/TF risks are identified, to effectively manage and mitigate those higher risks; and
>
> 3.2.4 monitor the implementation of those policies, procedures and controls, and enhance them if necessary.[10]

In respect of payment services regulation, the MAS has recognized that digital payment token services "carry significant money laundering and terrorism financing risks or ML/TF risks due to the anonymous and borderless nature of the transactions they enable."[11] When the new Payment Services Act takes effect, all providers of digital payment token dealing or exchange services in Singapore must meet AML/CFT requirements. According to the MAS, the appropriate AML/CFT requirements will be imposed on relevant licensees through notices issued under the MAS Act. The MAS will also provide guidance to the industry.[12]

II. Regulation of Cryptocurrencies as Financial Securities

A. Digital Tokens Considered Securities

According to the MAS Guide, offers or issues of digital tokens must comply with the Securities and Futures Act (Cap. 289) (SFA) and the Financial Advisers Act (Cap. 110) (FAA),[13] if the digital tokens are capital markets products under the SFA.[14]

Capital markets products include not only securities, but also units in a collective investment scheme (CIS), derivatives contracts, and spot foreign exchange contracts for purposes of leveraged foreign exchange trading.[15] To determine whether a digital token constitutes a type of capital markets product under the SFA, the MAS will examine the structure and characteristics of the digital token, including the rights attached to it.[16]

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[10] *Id.* para. 3.2.

[11] Second Reading Speech, *supra* note 3.

[12] *Id.*

[13] MAS Guide, *supra* note 2, para. 1.3.

[14] *Id.* para. 2.1.

[15] *Id.*

[16] *Id.* para. 2.2.

The offer of digital tokens that constitute securities, securities-based derivatives contracts, or units in a CIS must comply with the requirements under the SFA. Such requirements include that the offer must be made in or accompanied by a prospectus that is prepared in accordance with the SFA and is registered with the MAS.[17] In the case where an offer is made in relation to units in a CIS, the CIS is also subject to authorization or recognition requirements.[18]

B. Intermediaries

The MAS identifies the following three types of intermediaries facilitating offers or issues of digital tokens, who may be subject to MAS supervision unless otherwise exempted:

- Operators of platforms that make primary offers or issues of digital tokens that constitute capital markets products must hold a capital markets services license;
- Financial advisors providing advice in Singapore in respect of any digital token that is an investment product must be authorized to do so in respect of that type of financial advisory service by a financial advisor's license;
- Persons establishing or operating trading platforms in relation to digital tokens that constitute securities, derivatives contracts, or units in a CIS may need to be approved by the MAS as an approved exchange or recognized by the MAS as a market operator under the SFA.[19]

III. Treatment of Cryptoassets Not Considered Securities

A. Definition of Digital Payment Tokens

"Digital payment tokens" under the Payment Services Act appears to be a broad category of digital representation of value, whether or not created through blockchain. According to the Act, a "digital payment token" means

> any digital representation of value (other than an excluded digital representation of value) that —
>
> (a) is expressed as a unit;
>
> (b) is not denominated in any currency, and is not pegged by its issuer to any currency;
>
> (c) is, or is intended to be, a medium of exchange accepted by the public, or a section of the public, as payment for goods or services or for the discharge of a debt;
>
> (d) can be transferred, stored or traded electronically; and
>
> (e) satisfies such other characteristics as the Authority may prescribe[20]

[17] *Id.* para. 2.5.

[18] *Id.* para. 2.6.

[19] *Id.* paras. 2.8–2.11.

[20] Payment Services Act s 2.

B. Payment Services and Licenses

Under the Payment Services Act, any entity that provides any type of payment service will need a license that entitles the entity to carry on a business of providing that type of payment service, unless otherwise exempted.[21] The Payment Services Act regulates the following seven types of payment services:

(a) an account issuance service;

(b) a domestic money transfer service;

(c) a cross-border money transfer service;

(d) a merchant acquisition service;

(e) an e-money issuance service;

(f) a digital payment token service;

(g) a money-changing service.[22]

The Payment Services Act prescribed three classes of licenses:

- a money-changing license;
- a standard payment institution license; and
- a major payment institution license.[23]

For each class of license, the MAS will impose different regulatory requirements according to the risks posed by the scope and scale of services provided by the licensee. Money-changing licensees can provide only money-changing services. Standard payment institutions may provide any combination of payment services, including the digital payment token service, but below specified transaction flow or e-money float thresholds. According to the MAS, standard payment institutions will be regulated lightly, "and the regime mimics a 'permanent sandbox' environment to encourage innovation and enterprise." Major payment institutions can go above the specified thresholds, which will be subject to more regulation because the scale of their operations would pose more risk.[24]

C. Digital Payment Token Services

Any service that involves dealing in or facilitating the exchange of digital payment tokens falls within the ambit of providing a "digital payment token service."[25]

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[21] *Id.* s 5(1).

[22] *Id.* First Schedule, Part 1.

[23] *Id.* s 6(2).

[24] Second Reading Speech, *supra* note 3.

[25] Payment Services Act, First Schedule, Part 3.

Under the Payment Services Act, to be entitled to carry on a digital payment token service, the service provider must hold a standard payment institution license or a major payment institution license.[26] A licensee providing digital payment token services must have a major payment institution license if

> the average, over a calendar year, of the total value of all payment transactions that are accepted, processed or executed by the licensee in one month exceeds —
>
> (A) $3 million (or its equivalent in a foreign currency), for any one of those payment services; or
>
> (B) $6 million (or its equivalent in a foreign currency), for 2 or more of those payment services.[27]

In addition, as indicated above, all providers of digital payment token dealing or exchange services will have to meet appropriate AML/CFT requirements that are imposed by the MAS on relevant licensees.

IV. Custodianship of Cryptocurrencies by Financial Institutions

Custodianship of cryptocurrencies does not appear to be specifically regulated. Under the Payment Services Act, major payment institutions must safeguard money received from customers in the following manners:

> (a) by an undertaking, from a safeguarding institution, to be fully liable to the customer for the relevant money;
>
> (b) by a guarantee given by a safeguarding institution for the amount of the relevant money;
>
> (c) by depositing the relevant money in a trust account maintained with a safeguarding institution;
>
> (d) in such other manner as may be prescribed.[28]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

It appears that service providers that only provide or exchange Limited Purpose Digital Payment Tokens or Central Bank Digital Payment Tokens are exempt from the license requirement under the Payment Services Act. The Act sets out services that are not payment services for the purpose of the Act, which include:

> (k) any service of dealing in, or facilitating the exchange of, any central bank digital payment token, carried out by a central bank or financial institution;

[26] *Id.* s 6(4).

[27] *Id.* s 6(5).

[28] *Id.* s 23.

> (l) any service of dealing in, or facilitating the exchange of, any limited purpose digital payment token.[29]

In terms of the rational of the exclusion of the above two categories of digital payment tokens, a commentary pointed out that

> [t]he "Limited Purpose Digital Payment Token" exclusion refers to payment services, which involve non-monetary consumer loyalty or reward points or in-game assets or similar digital representations of value, which cannot be returned to the issuer or sold, transferred or exchanged for money. On the other hand, the "Central Bank Digital Payment Token" exception is one where a central bank or financial institution provides services for dealing in or facilitating the exchange of central bank digital payment tokens. In the former, Parliament has considered such activities to not pose sufficient risk to warrant regulation under the licensing regime. In respect of the latter, the rationale was that such institutions would have already been sufficiently regulated.[30]

[29] *Id.* First Schedule, Part 2.

[30] Hsu et al., *supra* note 6.

South Africa

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SUMMARY Cryptoassets remain largely unregulated in South Africa. This will change soon, at least with regard to taxation, if proposed legislation before the country's Parliament, the Taxation Law Amendment Bill, is enacted. The Bill would categorize cryptoassets as financial instruments under the 1962 Income Tax Act and subject transactions and investments involving them under the Act's "ring-fencing of asset losses clause." It would also categorize the issuance, acquisition, collection, buying or selling, or transfer of ownership of any cryptoasset as a financial service under the 1991 Value-Added Tax Act, thereby making it exempt from the application of this Act.

In addition, a consultation paper by the Crypto Assets Regulatory Working Group has proposed the registration and regulation of entities performing various cryptoasset activities, including wallet providers and custodial service providers.

I. Approach to Assets Created Through Blockchain

South Africa's initial statement regarding cryptoassets came in 2014. The National Treasury (along with the South African Reserve Bank, the Financial Services Board, the South African Revenue Service, and the Financial Intelligence Centre) issued a statement warning the public about the risks of transactions and investments in cryptoassets, at the time referred to as virtual currency (VC).[1] Among other things, the statement noted that

> [c]urrently in South Africa there are no specific laws or regulations that address the use of virtual currencies. Consequently, no legal protection or recourse is afforded to users of virtual currencies.
>
> Due to their unregulated status, virtual currencies cannot be classified as legal tender as any merchant may refuse them as a payment instrument without being in breach of the law. In addition, virtual currencies cannot be regarded as a means of payment as they are not issued on receipt of funds. The use of virtual currencies therefore depends on the other participant's willingness to accept them.
>
> While virtual currencies can be bought and sold on various platforms, they are not defined as securities in terms of the Financial Markets Act, 2012 (Act No. 19 of 2012). The regulatory standards that apply to the trading of securities therefore do not apply to virtual currencies.[2]

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[1] Press Release, National Treasury, User Alert: Monitoring of Virtual Currencies (Sept. 18, 2014), http://www.treasury.gov.za/comm_media/press/2014/2014091801 - User Alert Virtual currencies.pdf, *archived at* https://perma.cc/B3D8-NPYS.

[2] *Id.*

In December 2014, the South African Reserve Bank (SARB), the central banking institution whose responsibilities include formulating and implementing monetary policy, ensuring the effective functioning of the national payment system and issuing banknotes and coins in the country, published a position paper highlighting various risks associated with virtual currencies, including issues relating to payment systems and payment service providers, price stability, money-laundering and terrorism financing, consumer risk, circumvention of exchange control regulations, and financial stability.[3] The SARB maintains that its 2014 paper remains "current and relevant."[4]

In 2016, South Africa established an intergovernmental Fintech Working Group (IFWG) consisting of representatives from the National Treasury, the SARB, the Financial Sector Conduct Authority (previously known as the Financial Services Board), and the Financial Intelligence Centre.[5] The purpose of the Working Group is "to develop a common understanding among regulators and policymakers of financial technology (fintech) developments as well as policy and regulatory implications for the financial sector and economy."[6]

In 2018, a joint working group, the Crypto Assets Regulatory Working Group, consisting of the members of the IFWG and the South African Revenue Service (SARS) was established for the specific purpose of reviewing "the [country's] position on crypto assets."[7] In January 2019, this group published a consultation paper for public discussion.[8] While it identified multiple uses of cryptoassets, the Group focused on "the purchasing and selling of crypto assets . . . and . . . paying for goods and services using crypto assets (payments)."[9] The Group's work included unifying the various terms used to refer to virtual currencies around the term "crypto assets" and proposing the following definition for the term:

> Crypto assets are digital representations or tokens that are accessed, verified, transacted, and traded electronically by a community of users. Crypto assets are issued electronically by decentralised entities and have no legal tender status, and consequently are not considered as electronic money either. It therefore does not have statutory compensation

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[3] SOUTH AFRICAN RESERVE BANK (SARB), POSITION PAPER ON VIRTUAL CURRENCIES 4.3 (Dec. 3, 2014), https://www.golegal.co.za/wp-content/uploads/ 2018/01/Virtual-Currencies-Position-Paper-Final_02of2014.pdf, *archived at* https://perma.cc/A8L2-4MK6; *About Us*, SARB, https://www.resbank.co.za/AboutUs/Pages/About%20Us-Home.aspx (last visited Mar. 20, 2018), *archived at* https://perma.cc/TS79-2VFE.

[4] *Virtual Currencies/Crypto-Currencies*, SARB, https://www.resbank.co.za/RegulationAndSupervision/FinancialSurveillanceAndExchangeControl/FAQs/Pages/VirtualCurrenciesCryptocurrencies.aspx (last visited Mar. 21, 2019), *archived at* https://perma.cc/96CS-UTYD.

[5] CRYPTO ASSETS REGULATORY WORKING GROUP, CONSULTATION PAPER ON POLICY PROPOSALS FOR CRYPTO ASSETS 5 (Jan. 2019), http://www.treasury.gov.za/comm_media/press/2019/CAR WG Consultation paper on crypto assets_final.pdf, *archived at* https://perma.cc/E2M9-BRLB.

[6] *Id*.

[7] *Id*.

[8] *Id*.

[9] *Id* at 7-8.

> arrangements. Crypto assets have the ability to be used for payments (exchange of such value) and for investment purposes by crypto asset users. Crypto assets have the ability to function as a medium of exchange, and/or unit of account and/or store of value within a community of crypto asset users.[10]

In 2018, the SARS issued a clarification on the tax status of virtual currencies.[11]

A. Financial Regulation and Consumer Protection

It appears that cryptoassets remain unregulated. According to the SARB, "there are currently no specific laws or regulations that govern the use of VCs in [the country]. It follows, therefore, that currently no compliance requirements exist for local trading of VCs."[12]

However, there may be restrictions with regard to the cross border or foreign exchange transfers for the purpose of buying crypto assets. According to the SARB,

> [n]either the Currency and Exchanges Manual for Authorised Dealers nor the Currency and Exchanges Manual for Authorised Dealers in foreign exchange with limited authority (manuals) allow for cross-border/foreign exchange transfers for the explicit purpose of purchasing VCs… The Financial Surveillance Department is, from an exchange control point of view, unable to approve any transactions of this nature.
>
> Currently, the only permissible avenue for purchasing VCs from abroad is through the utilisation of an individual's single discretionary allowance (R1 million) and/or individual foreign capital allowance (R10 million with a Tax Clearance Certificate), per calendar year, … which a local Authorised Dealer in foreign exchange (local commercial bank) will be able to assist individuals with.[13]

It appears that South Africa also imposes a restriction on repatriation of funds by non-residents who sell virtual currencies in South Africa. According to the SARB,

> non-residents who have introduced VCs to [South Africa] for sale locally and who want to transfer the sale proceeds abroad will be unable to do so in terms of exchange control policy due to the fact that there is no proof that foreign currency or Rand from a Non-resident Rand account has been introduced into [South Africa].[14]

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[10] *Id.* at 9.

[11] Press Release, South Africa Revenue Services, SARS's Stance on the Tax Treatment of Cryptocurrencies (Apr. 6, 2018), http://www.sars.gov.za/Media/MediaReleases/Pages/6-April-2018---SARS-stance-on-the-tax-treatment-of-cryptocurrencies-.aspx, *archived at* https://perma.cc/2ET9-V3KX; *South Africa*, *in* Law LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD 92 (June 2018), https://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf, *archived at* https://perma.cc/8Q6M-TPYW.

[12] *Virtual Currencies/Crypto-Currencies*, *supra* note 4.

[13] *Id.*

[14] *Id.*

B. Anti-Money Laundering Law

It does not appear that South Africa's anti-money laundering laws are currently applicable to cryptoassets.[15]

C. Taxation

In addition to the above-noted statement issued by the SARS, in October 24, 2018, the South African Minister of Finance introduced a bill before Parliament, the Taxation Law Amendment Bill, which if enacted in its current form, will have taxation implications for cryptoassets.[16] The Bill seeks to amend the 1962 Income Tax Act so that the definition of the term "financial instruments" would include "any cryptocurrency" for tax purposes.[17]

In addition, it would amend the Income Tax Act to have the "the acquisition or disposal of any cryptocurrency" covered under the "Ring-Fencing of Assessed Losses of Certain Trades" clause of the Act.[18] Although, in determining taxable income of a person, the Income Tax Act permits the offsetting of any balance of assessed loss against income derived by the person, this is not available to persons engaged in trades listed under the "Ring-Fencing of Assessed Losses of Certain Trades" clause of the Act unless covered by a specific exception.[19] What this would mean for a person who invests in cryptocurrencies is that "any assessed loss incurred during that [tax assessment] year in carrying on [cryptocurrency] trade may not be set off against any income of that person derived during that year otherwise than from carrying on that [cryptocurrency] trade."[20]

The Bill also seeks to amend the Value-Added Tax Act of 1991 so that "the issue, acquisition, collection, buying or selling or transfer of ownership of any cryptocurrency" would constitute a financial service unless "the consideration payable in respect thereof is any fee, commission,

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[15] CRYPTO ASSETS REGULATORY WORKING GROUP, *supra* note 5, at 23.

[16] *Bill History: Taxation Laws Amendment Bill (B38-2018)*, PARLIAMENTARY MONITORING GROUP, https://pmg.org.za/bill/840/ (last visited Mar. 21, 2019), *archived at* https://perma.cc/UR95-6ACP.

[17] Taxation Laws Amendment Bill § 1 [B 38–2018], https://www.gov.za/sites/default/files/gcis_document/201810/taxation-laws-amendment-bill-b38-2018.pdf, *archived at* https://perma.cc/6PU5-CXVL.

[18] *Id.* § 37.

[19] Income Tax Act No. 58 of 1962, 16 STATUTES OF THE REPUBLIC OF SOUTH AFRICA §§ 20 & 20A (updated through 2018), https://www.gov.za/documents/income-tax-act-29-may-1962-0000, *archived at* https://perma.cc/EQ7C-YM6D.

[20] *Id.* § 20A.

merchant's discount or similar charge, excluding any discount cost".[21] As a result, such activities involving cryptocurrency would be exempt from value-added tax.[22]

II. Custodianship of Cryptocurrencies by Financial Institutions

While South Africa does not currently appear to have any laws regulating custodianship of cryptocurrencies, the Crypto Assets Regulatory Working Group, in its recently released Consultation Paper, proposed regulatory action that would encompass this area of activity. As a first phase of building the appropriate regulatory scheme, the Group proposed the registration of entities performing various activities including "[c]rypto asset digital wallet providers (custodial wallets) and a [c]rypto asset safe custody service providers (custodial services)."[23]

[21] Taxation Laws Amendment Bill § 90; Value-Added Tax Act No. 89 of 1991, 30 STATUTES OF THE REPUBLIC OF SOUTH AFRICA § 2 (updated through 2018), a version updated through 2005 is available on the Global Industry News and Insight website, *at* https://www.golegal.co.za/wp-content/uploads/2016/12/Value-Added-Tax-Act-89-of-1991.pdf, *archived at* https://perma.cc/9AFJ-K62Q.

[22] Value-Added Tax Act § 12; Angela Itzikowitz et al., *South Africa, in* BLOCKCHAIN & CRYPTOCURRENCY REGULATION (Global Legal Insights, 2019), https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/south-africa, *archived at* https://perma.cc/8HDW-VZ5U

[23] CRYPTO ASSETS REGULATORY WORKING GROUP, *supra* note 5, at 27 & 28. Cryptoasset digital wallet providers are "[e]ntit[ies] offering a software program with the ability to store private and public keys that are used to interact with various digital protocols that enable the user to send and receive crypto assets with the ability to monitor balances." *Id*. A custodial service involves "[s]afeguarding, storing, holding or maintaining custody of crypto assets belonging to another party." *Id.*

Spain

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I. Financial Regulation and Consumer Protection

Spain's Comisión Nacional de Valores (National Securities Commission) and the Banco de España (Bank of Spain) issued a joint statement regarding the use of cryptocurrencies in February 2018, noting that cryptocurrencies are not issued, registered, authorized, or verified by any regulatory agency in Spain.[1] Therefore, cryptocurrencies purchased or held in Spain are not backed by any of the guarantees or safeguards provided by regulations applicable to banking or investment products.[2] The statement aimed to alert investors to the inherent risk of loss or fraud associated with these types of transactions.[3]

Notwithstanding this warning, it has been reported that the government is considering the adoption of legislation friendly towards cryptocurrencies, which would include possible tax breaks to attract companies in the blockchain technology sector.[4]

II. Anti-Money Laundering Laws

The 2019 Tax and Customs Control Plan, issued by the Agencia Estatal de Administración Tributaria (AEAT) (State Tax Administration Agency) on January, 11, 2019, adopts measures aimed at reinforcing the control of the use of cryptocurrencies, considering its use by organized crime in the deep internet and the trafficking and trade in illegal goods.[5] In order to confront these challenges the plan states that there is a need for relevant authorities to adapt to the new methods used by criminal organizations, for international exchange of information and cooperation, as well as to provide adequate training of personnel.[6] In addition, those who intervene as

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[1] Comunicado Conjunto de la Comisión Nacional del Mercado de Valores (CNMV) y Banco de España [Joint Press Statement by CNMV and Banco de España on "Cryptocurrencies" and "Initial Coin Offerings" (ICOs)] (Feb. 8, 2018), https://www.cnmv.es/loultimo/NOTACONJUNTAriptoES%20final.pdf, *archived at* https://perma.cc/K5J4-WJM4.

[2] *Id.*

[3] *Id.*

[4] *España Busca Aprobar una Legislación Amistosa para las Criptomoneda* [*Spain Seeks to Approve Friendly Legislation Towards Cryptocurrencies*], HARWAREATE (Feb. 18, 2018), https://hardwareate.com/espana-busca-aprobar-una-legislacion-amistosas-las-criptomonedas, *archived at* https://perma.cc/6VTJ-NRRV.

[5] Resolución de 11 de enero de 2019, Dirección General de la Agencia Estatal de Administración Tributaria, por la que se Aprueban las Directrices Generales del Plan Anual de Control Tributario y Aduanero de 2019 [General Directorate of the State Tax Administration Agency, which Approves the General Guidelines on the Annual Tax and Customs Control Plan 2019], § II.4(g), BOE No. 15, Jan. 17, 2018, https://www.boe.es/boe/dias/2019/01/17/pdfs/BOE-A-2019-507.pdf, *archived at* https://perma.cc/2ZS2-AM3J .

[6] *Id.*

intermediaries in transactions with cryptocurrencies and its holders will have to provide information on those transactions.[7]

III. Taxation

Profits derived from transactions with cryptocurrencies are taxable under the Law on Income Tax of Individuals.[8] However, the Dirección General de Tributos (DGT) (General Directorate of Taxation) has established that transactions with bitcoins are exempt from value added tax.[9]

[7] *Id.* § II.2.D.

[8] José Trecet, *Declaración de Impuesto a la Renta: Cómo Tributan los Bitcoins en la Renta* [*Income Tax Reporting: How Are Bitcoins Taxed*], BOLSAMANÍA (Mar. 1, 2018), http://www.bolsamania.com/declaracion-impuestos-renta/como-tributan-los-bitcoins-en-la-renta/, *archived at* https://perma.cc/G4Y7-A59M.

[9] *Id.*

Sweden

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SUMMARY Sweden has not adopted legislation that specifically addresses cryptoassets. However, the European Union's Fifth Anti-Money Laundering Directive, which Sweden must implement before January 10, 2020, includes provisions on cryptocurrencies.

The applicability of Swedish rules and legislation on cryptoassets depends on the use of the asset. Sweden regulates financial services, money laundering, and taxation. Cryptoassets may be subject to any of these provisions.

The sale of virtual currencies is exempt from value-added tax. Purchases of virtual currencies as an investment are subject to capital gains tax—i.e., profits are taxable and losses deductible.

I. Approach to Assets Created Through Blockchain

Sweden does not currently regulate cryptocurrencies or cryptoassets specifically. However, a number of rules and regulations may still be applicable. For instance, if the cryptoasset activity qualifies as an activity that must be reported to the Finance Authority (Finansinspektionen) it is also subject to the law on money laundering.[1] Moreover, as discussed below, the European Union's (EU's) Fifth Anti-Money Laundering Directive needs to be implemented in Sweden by January 10, 2020, and that Directive includes provisions on virtual currencies.[2] Thus, although no legislation pertaining to the Fifth Anti-Money Laundering Directive is currently pending in Parliament, Sweden will have to adopt legislation that specifically addresses cryptoassets in the near future.

A. Currency

The Swedish Central Bank has unequivocally stated that "[b]itcoins are not money."[3] The announcement explained that cryptocurrencies are not seen as currencies, referencing a new

[1] 1 kap. 2 § 4p. LAG OM ÅTGÄRDER MOT PENNINGTVÄTT OCH FINANSIERING AV TERRORISM [ACT ON MEASURES AGAINST MONEY LAUNDERING AND TERRORISM] (Svensk Författningssamling [SFS] 2017:630), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2017630-om-atgarder-mot-penningtvatt-och_sfs-2017-630, *archived at* https://perma.cc/7TLY-DTA7.

[2] 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 (5th AMLD), 2018 O.J. (L 156) 43, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843, *archived at* https://perma.cc/JJ8H-NG29.

[3] Press Release, Sveriges Riksbank, Bitcoin är inte pengar [Bitcoins Are Not Money] (Mar. 14, 2018), https://www.riksbank.se/sv/press-och-publicerat/nyheter-och-pressmeddelanden/nyheter/2018/bitcoin-ar-inte-pengar/, *archived at* https://perma.cc/KXK7-PPW8.

financial report on cryptocurrencies written by the Central Bank of Sweden staff.[4] Nevertheless cryptocurrencies are de facto used as means of payments.

B. Financial Service

The Swedish Financial Supervisory Authority (Finansinspektionen) has made the determination that cryptocurrencies and digital currencies are subject to its authority, as trade in these items (i.e., offering a site where cryptocurrencies can be bought and sold similar to an exchange) is a financial service (*annan finansiell verksamhet*) and is thus subject to mandatory reporting requirements.[5]

In 2017, the Authority issued a report titled *The Authority's Role in Innovation*, which among other things described its role in relation to novel concepts such as cryptocurrencies.[6] The report described ICOs as investment products and a means of securing capital.[7] The Authority has issued warnings against the use of ICOs, noting that they are unregulated and not subject to its review.[8] It also referred to the European Supervisory Authority for its interpretation that ICOs may be regulated by the Prospectus Directive, the Markets in Financial Instruments Directive (MiFID), the Alternative Investment Fund Managers Directive (AIFMD), and the Fourth Anti-Money Laundering Directive.[9] The Authority's 2017 report stated that it is unaware of any Swedish corporation that secures funding through ICOs.[10]

C. Capital Asset

The Swedish Supreme Administrative Court in December of 2018 determined that for tax purposes, bitcoins are capital investments, affirming a prior preliminary judgement from the

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[4] Gabriel Söderberg, *Ekonomiska kommentarer, Är Bitcoin och andra kryptotillgångar pengar*? [*Financial Commentary: Are Bitcoin and Other Cryptocurrencies Money*?], SVERIGES RIKSBANK (Mar. 14, 2018), https://www.riksbank.se/globalassets/media/rapporter/ekonomiska-kommentarer/svenska/2018/ar-bitcoin-och-andra-kryptotillgangar-pengar, *archived at* https://perma.cc/PDP4-X2HU.

[5] Press Release, Finansinspektionen, Valutaväxlare och annan finansiell verksamhet [Currency Exchanges and Other Financial Activity] (updated Jan. 24, 2017), https://www.fi.se/sv/bank/sok-tillstand/valutavaxlare-och-annan-finansiell-verksamhet/, *archived at* https://perma.cc/K7DH-T2NN. 1 § LAG OM VALUTAVÄXLING OCH ANNAN FINANSIELL VERKSAMHET [ACT ON CURRENCY EXCHANGE AND OTHER FINANCIAL ACTIVITY] (SFS 1996:1006), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-19961006-om-valutavaxling-och-annan_sfs-1996-1006, *archived at* https://perma.cc/XZJ7-MJNY.

[6] FINANSINSPEKTIONEN, MYNDIGHETENS ROLL KRING INNOVATIONER [THE AUTHORITY'S ROLE REGARDING INNOVATION] 12 (Dec. 1, 2018), https://www.finansinspektionen.se/contentassets/d3cd30fe473d4a7995f0c38209ddb7f1/myndighetens-roll-kring-innovationer.pdf, *archived at* https://perma.cc/Y229-M3A7.

[7] *Id.*

[8] Press Release, Finansinspektionen, Varning för risker med Initial Coin Offerings (ICO) [Warning of Risks Associated with Initial Coin Offerings] (Nov. 7, 2017), http://www.fi.se/sv/publicerat/nyheter/2017/varning-for-risker-med-initial-coin-offerings/, *archived at* https://perma.cc/D9BS-K8C6.

[9] *Id.*; *see also* Press Release, European Securities and Market Authority, ESMA Highlights ICO Risks for Investors and Firms (Nov. 13, 2017), https://www.esma.europa.eu/press-news/esma-news/esma-highlights-ico-risks-investors-and-firms, *archived at* https://perma.cc/XGT3-T3QW.

[10] FINANSINSPEKTIONEN, *supra* note 6, at 12.

Swedish Tax Council, noting that bitcoins are not shares, foreign currency, or personal property.[11] It determined that it is not the opinion of the owner but the actual use of the bitcoin that determines whether it is a personal item or a utility coin, or whether it is a capital investment.[12] The court further noted that personal items may have investment properties (i.e., increase in value) but this aspect of the good must not dominate.[13]

The Swedish Enforcement Authority also treats bitcoins as capital assets. In 2014, its representatives announced to Swedish media outlets that it would start to investigate and seize bitcoin holdings as part of collecting funds from indebted individuals.[14] The first seized bitcoins were auctioned off online in 2017.[15]

D. Financial Legislation and Consumer Protection

1. Financial Services Law

As mentioned above, when the sale of cryptoassets is deemed to be a financial service the operator must register with the Financial Authority, provide the Financial Authority with pertinent information, and keep a record of its transactions.[16] It must also take measures to prevent money laundering.[17] If the activity is not registered in accordance with the law the Finance Authority may, under penalty, require that such a registration be completed; if it is not completed the Finance Authority may order that the activity be stopped.[18]

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[11] Högsta Förvaltningsdomstolen [Supreme Administrative Court] (HFD) 2018 ref 72, http://www.hogstaforvaltningsdomstolen.se/Domstolar/regeringsratten/Rättsfall/HFD 2018 ref. 72.pdf, *archived at* https://perma.cc/GS2N-CJPB.

[12] *Id.*

[13] *Id.*

[14] *Kronofogden ska leta Bitcoins hos skuldsatta* [*Swedish Enforcement Authority to Look for Bitcoins from Indebted Individuals*], SVERIGES RADIO (Oct. 6, 2014), http://sverigesradio.se/sida/artikel.aspx?programid=1646&artikel=5983956, *archived at* https://perma.cc/AR5S-V7G2; *see also* Elin Hofverberg, *Sweden: Enforcement Authority to Collect Bitcoins*, GLOBAL LEGAL MONITOR (Oct. 23, 2014), http://www.loc.gov/law/foreign-news/article/sweden-enforcement-authority-to-collect-bitcoins/, *archived at* https://perma.cc/6YVP-CLNX.

[15] Press Release, Kronofogden, Nu kan du köpa bitcoin hos Kronofogden [Now You Can Purchase Bitcoins from the Swedish Enforcement Authority] (Oct. 12, 2017), https://www.kronofogden.se/66713.html, *archived at* https://perma.cc/ZT5P-VWDS; *see also* Elin Hofverberg, *Sweden: Bitcoins Seized During Asset Seizure*, GLOBAL LEGAL MONITOR (Nov. 7, 2017), http://www.loc.gov/law/foreign-news/article/sweden-bitcoins-seized-during-asset-seizure/, *archived at* https://perma.cc/8QBR-V887.

[16] 2 §§ LAG OM VALUTAVÄXLING OCH ANNAN FINANSIELL VERKSAMHET; Press Release, Finansinspektionen, *supra* note 5.

[17] *Id.* 4 §.

[18] *Id.* 8 §.

2. Securities Law

Swedish securities law is found in the Act on Trade with Financial Instruments[19] and the Act on Securities Exchange.[20]

Both bitcoins and ether (generated by the Ethereum platform) are traded as exchange traded notes (ETNs) on the Swedish Stockholm Nasdaq Exchange (Nasdaq OMX Nordic Stockholm).[21] Thus, the Nasdaq OMX Nordic Stockholm exchange allows for speculation in the cryptocurrencies in the same way as speculations in gold or oil.[22] While an ETN is clearly a securities instrument, the law is less clear on whether cryptocurrencies themselves are financial instruments. The bitcoin and ether ETNs are subject to Swedish securities legislation.

In 2017, the Nasdaq Stockholm Disciplinary Committee rendered a decision that ordered the bitcoin company XBT Provider AB to pay a fine of SEK 1,000,000 (approximately US$120,000) for failing to publish annual reports and make its prospectus available online.[23]

3. General Consumer Protection Law

A statement by Minister for Financial Markets Per Bolund indicates an interpretation that general consumer protection laws would not apply when the good or service has been purchased with the use of bitcoins or another cryptocurrency.[24] He further advised caution in the use of

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[19] LAGEN OM HANDEL MED FINANSIELLA INSTRUMENT [ACT ON TRADE IN FINANCIAL INSTRUMENTS] (SFS 1991:980), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-1991980-om-handel-med-finansiella_sfs-1991-980, *archived at* https://perma.cc/UY4S-KETC.

[20] LAGEN OM VÄRDEPAPPARSMARKNADEN [ACT ON SECURITIES EXCHANGE] (SFS 2007:528), http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2007528-om-vardepappersmarknaden_sfs-2007-528, *archived at* https://perma.cc/M3JD-VCHL.

[21] *Bitcoin XBT, BitcoinTracker One XBT Provider (SE0007126024)*, NASDAQ OMX NORDIC, http://www.nasdaqomxnordic.com/etp/tracker-certificates/info?Instrument=SSE109538&name=Bitcoin Tracker One XBT Provider (last visited Apr. 10, 2018), *archived at* https://perma.cc/54JU-GZVB; *Ethereum XBT, Ether Tracker One XBT Provider, (SE0010296574)*, NASDAQ OMX NORDIC, http://www.nasdaqomxnordic.com/etp/tracker-certificates/info?Instrument=SSE144580&name=Ether Tracker One XBT PROVIDER (last visited Apr. 10, 2018), https://perma.cc/B8QZ-UJ6Q; Darryn Pollock, *Ether Follows Bitcoin onto Nasdaq Stockholm*, COINTELEGRAPH (Oct. 12, 2017), https://cointelegraph.com/news/ether-follows-bitcoin-onto-nasdaq-stockholm, *archived at* https://perma.cc/38X9-C8DC.

[22] *Handla Bitcoins på Stockholmsbörsen med Din aktiedepå*, AXIER.SE (May 18, 2017), https://www.axier.se/bors-marknad/Handla-Bitcoins-pa-Stockholmsborsen-med-Din-aktiedepa, *archived at* https://perma.cc/K66B-5CHV.

[23] Nasdaq Stockholm Disciplinary Committee, Decision 2017:07 (July 23, 2017), http://www.nasdaqomx.com/digitalAssets/106/106081_decision.pdf, *archived at* https://perma.cc/B3U3-PS6R.

[24] Statsrådet Per Bolund (MP), Kryptovalutor på svenska marknaden, Svar på skriftlig fråga 2017/18:484 [Cryptocurrencies on the Swedish Market, Answer to Written Question 2017/18:484] (Jan. 10, 2018), http://www.riksdagen.se/sv/dokument-lagar/dokument/svar-pa-skriftlig-fraga/kryptovalutor-pa-svenska-marknaden_H512484, *archived at* https://perma.cc/959K-AWSY.

cryptocurrencies by citizens, as they are largely unregulated and carry risk.[25] Also, the Financial Authority has indicated that consumer protections would not apply to ICOs.[26]

E. Anti-Money Laundering Law

If subject to the Financial Authority, providers of cryptoassets will also be subject to the Swedish Money Laundering Act.[27] The Swedish Money Laundering Act implemented the EU's Fourth Anti-Money Laundering Directive.[28] Sweden has yet to implement the Fifth Anti-Money Laundering Directive. That Directive specifically mentions virtual currencies and will require that EU Member States implement its provisions by January 10, 2020.[29]

F. Taxation

1. Mined Bitcoins

In 2015 the Swedish Tax Authority published a guideline on how it would view and tax *mined* bitcoins and other virtual currencies for the 2014 tax year.[30] Unless specific conditions are met the digital currency mined is considered income from a hobby, and generally tax exempt.[31]

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[25] *Id.*

[26] *Varning för risker med Initial Coin Offerings (ICO)*, FINANSINSPEKTIONEN (Nov. 7, 2017), https://www.fi.se/sv/publicerat/nyheter/2017/varning-for-risker-med-initial-coin-offerings/, *archived at* https://perma.cc/F2U7-ERFR.

[27] LAG OM ÅTGÄRDER MOT PENNINGTVÄTT OCH FINANSIERING AV TERRORISM (SFS 2017:630), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2017630-om-atgarder-mot-penningtvatt-och_sfs-2017-630, *archived at* https://perma.cc/GAK5-83YU.

[28] Prop. 2016/17:173 Ytterligare åtgärder mot penningtvätt och finansiering av terrorism [Additional Measures against Money Laundering and Financing of Terrorism], https://data.riksdagen.se/fil/AE6CB234-AD4B-47DB-97D9-D2EF187C3AC0, *archived at* https://perma.cc/NMX6-BQ63.

[29]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 (5th AMLD), art. 4, 2018 O.J. (L 156) 43 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018L0843, *archived at* https://perma.cc/JJ8H-NG29. For more information see the EU survey in this report . For an example of a country that has implemented/transposed the Fifth Anti-Money Laundering Directive see the Norway survey in this report.

[30] Guidelines available at Skatteverket Dnr: 131 191846-15/111 Beskattning vid mining av bitcoin och andra virtuella valutor m.m. [Guidelines on the Taxation of Mining of Bitcoins and Other Virtual Currencies] (Apr. 24, 2015), https://www4.skatteverket.se/rattsligvagledning/338713.html?q=131+191846-15%2F111, *archived at* https://perma.cc/QVH3-H8AL; *see also* Elin Hofverberg, *Sweden: Tax Authority Publishes Guidelines for Income Tax on Bitcoin Mining, Suggests Prohibition of Bitcoin Use in Waste and Scrap Metal Transactions*, GLOBAL LEGAL MONITOR (May 20, 2015) http://www.loc.gov/law/foreign-news/article/sweden-tax-authority-publishes-guidelines-for-income-tax-on-bitcoin-mining-suggests-prohibition-of-bitcoin-use-in-waste-and-scrap-metal-transactions/, *archived at* https://perma.cc/ZR8B-UP8X.

[31] *Id.*

2. *Capital Property*

As mentioned above, cryptoassets that are purchased as investments are treated as capital property—i.e., any gain or loss upon realization of the asset is either taxable or deductible.[32]

3. *Value-Added Tax*

The sale of cryptocurrencies is not subject to value-added tax (VAT). In 2016, the Swedish Supreme Administrative Court declared that sale of bitcoins on an exchange was not subject to VAT in accordance with EU law, as it was considered *omsättning av tjänster* (supply of services for consideration).[33] This confirms a previous Tax Authority preliminary judgment.[34] The Swedish Skatterättsnämnd (Swedish Tax Board) issued a preliminary ruling in 2013 on VAT and cryptocurrencies, stating that trade in cryptocurrencies is not subject to Swedish VAT, but is instead subject to Financial Supervisory Authority regulations and treated as a currency. The decision was appealed by the Swedish Tax Authority.[35] The Swedish Administrative Supreme Court ruled that bitcoins and similar cryptocurrencies are not subject to VAT.[36] That decision was rendered following a preliminary judgment from the Court of Justice of the European Union holding that cryptocurrencies are exempt from VAT.[37]

II. Custodianship of Cryptocurrencies by Financial Institutions

No specific legislative provisions governing custodianship of cryptocurrencies or other cryptoassets exist under Swedish law.

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[32] HFD 2018 ref 72, http://www.hogstaforvaltningsdomstolen.se/Domstolar/regeringsratten/Rättsfall/HFD 2018 ref. 72.pdf, *archived at* https://perma.cc/947H-LZEQ; Avyttring av bitcoin, Skatterättsnämnden Diarie No. 78-17/D (2018-04-18), https://skatterattsnamnden.se/publiceradeforhandsbesked/2018/avyttringavbitcoin.5.14dfc9b0163796ee3e77480d.html, *archived at* https://perma.cc/XJA7-SVNN.

[33] HFD 2016 ref. 6, http://www.hogstaforvaltningsdomstolen.se/Domstolar/regeringsratten/Rättsfall/HFD 2016 ref. 6.pdf, *archived at* https://perma.cc/34Y4-QVRG.

[34] Skatterättsnämnden, Förhandsbesked [Preliminary Ruling], Mervärdesskatt: Handel med bitcoins [VAT: Trade with Bitcoins] (Oct. 14, 2013), http://skatterattsnamnden.se/skatterattsnamnden/forhandsbesked/2013/forhands besked2013/mervardesskatthandelmedbitcoins.5.46ae6b26141980f1e2d29d9.html, *archived at* https://perma.cc/AET4-3T4N.

[35] *Id*.

[36] Högsta förvaltningsdomstolens dom [Supreme Administrative Court's Judgment] (SAC Judgment), Nr. 7101-13 (Feb. 2, 2016), http://www.hogstaforvaltningsdomstolen.se/Domstolar/regeringsratten/Avg%C3%B6randen/2016/Februari/7101-13.pdf, *archived at* https://perma.cc/JU5G-KLWE; *see also* Elin Hofverberg, *Sweden: Supreme Administrative Court Rules Trade in Bitcoins Not Subject to VAT*, GLOBAL LEGAL MONITOR (Feb. 4, 2016), http://www.loc.gov/law/foreign-news/article/sweden-supreme-administrative-court-rules-trade-in-bitcoins-not-subject-to-vat/, *archived at* https://perma.cc/82P2-CBBA.

[37] Case C□264/14. Skatteverket v. David Hedqvist, 2015 CURIA EUROPA, ECLI:EU:C:2015:718 (Oct. 22, 2015), http://curia.europa.eu/juris/document/document.jsf?docid=170305&doclang=EN, *archived at* https://perma.cc/LU2G-U6VD.

III. Regulation of Cryptocurrencies as Financial Securities

Cryptoassets that would qualify as financial securities (compare Part I(A), above) are subject to the financial securities legislation.[38] Specifically, the corporation issuing an ICO would be required to register offerings and disclose information about the corporation.[39] The Financial Authority must also approve the corporation's bylaws.[40] According to a study by the Swedish Police, none of these types of filings and records are typically performed or kept.[41]

IV. Treatment of Cryptoassets Not Considered Securities

As mentioned above, cryptocurrencies or crypto-tokens for personal use are typically not considered securities but investment capital, and thus subject to investment capital gains tax (with the ability to deduct losses) upon sale.[42] Because they are generally treated as capital assets this also means that they are subject to enforcement measures and can be seized in bankruptcy or in connection with illegal activity.[43]

Stealing cryptoassets would also be subject to criminal law. Using cryptoassets or ICOs to defraud someone is also subject to criminal sanctions for fraud, but is not a crime on its own, and because of the anonymous nature surrounding the ownership of cryptocurrencies generally cannot be successfully investigated by police.[44]

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[38] LAG OM VÄRDEPAPPERSMARKNADEN [ACT ON SECURITIES MARKET] (SFS 2007:528), http://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/lag-2007528-om-vardepappersmarknaden_sfs-2007-528, *archived at* https://perma.cc/45AH-3S3Y.

[39] Press Release, Finansinspektionen, *supra* note 5.

[40] *Id*. 3 kap. 3 §.

[41] Press Release, Polisen, Finanspolisen informerar (Sept. 2017), https://polisen.se/contentassets/0808e4fd9d0545ad9a9f22f638bfebbb/virtuella-valutor-i-penningtvattsrapporter, *archived at* https://perma.cc/PZ55-HAEV.

[42] See Part I(C), above.

[43] Press Release, Kronofogden, Nu kan du köpa bitcoin hos Kronofogden [Now You Can Purchase Bitcoins from the Swedish Enforcement Authority] (Oct. 12, 2017), https://www.kronofogden.se/66713.html, *archived at* https://perma.cc/ZT5P-VWDS; *see also* Elin Hofverberg, *Sweden: Bitcoins Seized During Asset Seizure*, GLOBAL LEGAL MONITOR (Nov. 7, 2017), http://www.loc.gov/law/foreign-news/article/sweden-bitcoins-seized-during-asset-seizure/, *archived at* https://perma.cc/8QBR-V887; *Kronofogden ska leta Bitcoins hos skuldsatta* [*Swedish Enforcement Authority to Look for Bitcoins from Indebted Individuals*], SVERIGES RADIO (Oct. 6, 2014), http://sverigesradio.se/sida/artikel.aspx?programid=1646&artikel=5983956, *archived at* https://perma.cc/AR5S-V7G2; Elin Hofverberg, *Sweden: Enforcement Authority to Collect Bitcoins*, GLOBAL LEGAL MONITOR (Oct. 23, 2014), http://www.loc.gov/law/foreign-news/article/sweden-enforcement-authority-to-collect-bitcoins/, *archived at* https://perma.cc/6YVP-CLNX.

[44] *See* BROTTSBALK [CRIMINAL CODE] (BRB) (SFS 1962:700), https://www.riksdagen.se/sv/dokument-lagar/dokument/svensk-forfattningssamling/brottsbalk-1962700_sfs-1962-700, *archived at* https://perma.cc/5XKB-36RY; Press Release, Polisen, *supra* note 41.

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As Swedish law does not specifically mention cryptoassets it also does not prohibit a certain form of cryptoassets. As seen above, different laws and regulations will apply to different types of cryptoassets, based on their use.

Switzerland

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SUMMARY On December 14, 2018, the Swiss Federal Council, the Swiss government, published a comprehensive report titled the *Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland*. It addresses the legal treatment of cryptocurrencies, blockchain, distributed ledger technologies, and fintech under the current legal framework and highlights areas that require amendments in order to provide market participants with legal certainty. It focuses on civil law, insolvency law, financial market law, banking law, and combatting money laundering and terrorist financing. The report acknowledges that there is a selective need for new regulation to cover open questions, for example the treatment of cryptocurrencies. The Federal Council has tasked the Federal Department of Finance and the Federal Department of Justice and Police to draw up a consultation draft in the first quarter of 2019 to address these open questions.

I. Approach to Assets Created Through Blockchain

On December 14, 2018, the Swiss Federal Council, the Swiss government, published a comprehensive report titled the *Legal Framework for Distributed Ledger Technology and Blockchain in Switzerland*.[1] The report is based on the work of the blockchain/ICO working group that was set up by the Swiss State Secretariat for International Finance (Staatssekretariat für internationale Finanzfragen, SIF) in January 2018.[2] The report also took into account the evaluation of a consultation carried out with the fintech and financial industry as well as the recommendations of the Blockchain Taskforce, a private industry initiative.[3]

The Federal Council report addresses the legal treatment of cryptocurrencies, blockchain, distributed ledger technologies (DLT), and fintech under the current legal framework and highlights areas that require amendments in order to provide market participants with legal certainty. It focuses on civil law, insolvency law, financial market law, banking law, and

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[1] FEDERAL COUNCIL, LEGAL FRAMEWORK FOR DISTRIBUTED LEDGER TECHNOLOGY AND BLOCKCHAIN IN SWITZERLAND – AN OVERVIEW WITH A FOCUS ON THE FINANCIAL SECTOR (Dec. 14, 2018) (Federal Council Report 2018), https://www.newsd.admin.ch/newsd/message/ attachments/55153.pdf, *archived at* http://perma.cc/Z4X7-7J82.

[2] *Id.* at 14; Press Release, Federal Council, Blockchain/ICO Working Group Established (Jan. 18, 2018), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-69539.html, *archived at* http://perma.cc/YD27-TR3Q.

[3] Federal Council Report 2018, *supra* note 1, at 14; WORKING GROUP BLOCKCHAIN/ICO, CONSULTATION ON THE WORK OF THE WORKING GROUP BLOCKCHAIN/ICO (Aug. 31, 2018), https://www.newsd.admin.ch/newsd/message/attachments/53506.pdf, *archived at* http://perma.cc/36MV-VUGS; BLOCKCHAIN TASKFORCE, STRENGTHENING THE BLOCKCHAIN IN SWITZERLAND: THE WHITE PAPER OF THE BLOCKCHAIN TASKFORCE (Apr. 2018), https://blockchainfederation.ch/wp-content/ uploads/2018/10/Blockchain-Taskforce-White-Paper_English-Version1.pdf, *archived at* http://perma.cc/3JG2-EXSW.

combatting money laundering and terrorist financing.[4] The report acknowledges that there is a selective need for new regulation to cover open questions, for example the treatment of cryptocurrencies.[5] The Federal Council has tasked the Federal Department of Finance (FDF) and the Federal Department of Justice and Police (FDJP) to draw up a consultation draft in the first quarter of 2019 to address these open questions.[6]

Laws that can potentially apply to cryptoassets are anti-money laundering legislation, tax laws, financial market laws, civil law, bankruptcy law, and banking law.

A. Anti-Money Laundering Law

The Anti-Money Laundering Act (AMLA) generally applies to "financial intermediaries," who are defined as natural and legal persons who accept or hold deposit assets for third parties or who assist in the investment or transfer of such assets on a professional basis.[7] The Federal Council reiterates that cryptocurrencies are classified as virtual currencies, which are considered assets with regard to their tradability.[8] AMLA is technology-neutral and therefore also applicable to cryptoassets.[9] However, the Federal Council proposes to take the following steps to make the application of anti-money laundering legislation more explicit:

- It will set out in further detail and explicitly adopt into law the current FINMA [Financial Market Supervisory Authority] practice whereby decentralised trading platforms with the power to dispose of third-party assets are subject to AMLA;
- It will set out in further detail and explicitly adopt into law the applicability of Article 2 paragraph 3 letter b AMLA to the issue of crypto-based means of payment;
- Switzerland will in future continue its efforts in international committees to actively promote an internationally coordinated and effective defence mechanism to combat the risks of money laundering and terrorist financing by means of international standards.[10]

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[4] Federal Council Report 2018, *supra* note 1, at 14.

[5] *Id*. at 45.

[6] Press Release, Federal Council, Federal Council Wants to Further Improve Framework Conditions for Blockchain/DLT (Dec. 14, 2018), https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-73398.html, *archived at* http://perma.cc/57PW-M5V8.

[7] Geldwäschereigesetz [GwG] [Anti-Money Laundering Act] [AMLA], Oct. 10, 1997, SYSTEMATISCHE RECHTSSAMMLUNG [SR] [SYSTEMATIC COLLECTION OF LAWS] 955.0, art. 2, para. 1, let. a, art. 2, para. 3, https://www.admin.ch/opc/de/classified-compilation/19970427/201601010000/955.0.pdf, *archived at* http://perma.cc/E9UX-3EBW, unofficial English translation *available at* https://www.admin.ch/opc/en/classified-compilation/19970427/201601010000/955.0.pdf, *archived at* http://perma.cc/M4M6-UW5U.

[8] Federal Council Report 2018, *supra* note 1, at 131.

[9] *Id*. at 140.

[10] *Id*. at 142.

B. Taxation

Cryptocurrencies may also be subject to wealth, income, and capital gains tax, as outlined in the Law Library's June 2018 report entitled *Regulation of Cryptocurrency in Selected Jurisdictions*.[11]

II. Custodianship of Cryptocurrencies by Financial Institutions

Custody services for cryptocurrencies in Switzerland are provided both by specialized companies offering custody services as a core activity (crypto custodians) and by other blockchain service providers as an ancillary service, for example crypto trading platforms and brokers.[12] If the tokens are functionally comparable to money, these services may be offered without bank authorization, provided that a Swiss bank provides a guarantee in case of default.[13]

Furthermore, custody services might be subject to the Financial Services Act (FinSA).[14] If the service is restricted exclusively to custody, FinSA will not apply.[15] However, if the sale of tokens that are classified as financial instruments is only possible via an account with the provider of custody services, FinSA will apply. Such providers must comply with the conduct rules in articles 7-20 of FinSA.[16]

III. Regulation of Cryptocurrencies as Financial Securities

There are currently no regulations specific to initial coin offerings (ICOs), but depending on how the ICO is designed, financial market laws may be applicable. This is assessed on a case-by-case basis by the Swiss Financial Market Supervisory Authority (Eidgenössische Finanzmarktaufsicht, FINMA).[17] FINMA differentiates between payment tokens (cryptocurrencies), utility tokens, and asset tokens. Payment tokens (cryptocurrencies) are defined as tokens that are used as a means of payment or as a means of money or value transfer. Utility tokens are those that provide digital access to an application or service by means of a blockchain-based infrastructure. Asset tokens

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[11] *Switzerland, in* LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY IN SELECTED JURISDICTIONS 70 (June 2018), https://www.loc.gov/law/help/cryptocurrency/regulation-of-cryptocurrency.pdf, *archived at* http://perma.cc/8SYU-82AT.

[12] Federal Council Report 2018, *supra* note 1, at 27.

[13] *Id*. at 88.

[14] Bundesgesetz über die Finanzdienstleistungen [Finanzdienstleistungsgesetz] [FIDLEG] [Financial Services Act] [FinSA], June 15, 2018, SR 950.1, https://www.admin.ch/opc/de/federal-gazette/2018/3615.pdf, *archived at* http://perma.cc/YM7A-E839. FinSA will enter into force on 1 January 1, 2020, see Federal Council Report, *supra* note 1, at 112.

[15] Federal Council Report 2018, *supra* note 1, at 118.

[16] *Id*.

[17] FINMA, Guidelines for Enquiries Regarding the Regulatory Framework for Initial Coin Offerings (FINMA ICO Guidelines) 2, no. 3 (Feb. 16, 2018), https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/ myfinma/ 1bewilligung/fintech/wegleitung-ico.pdf?la=en, *archived at* http://perma.cc/PV9L-5AEK.

represent assets such as a debt or an equity claim against the issuer. According to FINMA, asset tokens are analogous to equities, bonds, and derivatives.[18]

Operators of financial market infrastructures are subject to authorization by FINMA.[19] If the tokens received in an ICO qualify as securities, trading will require authorization. "Securities" are defined as "standardised certificated or uncertificated securities, derivatives and intermediated securities which are suitable for mass standardised trading,"[20] meaning they are "publicly offered for sale in the same structure and denomination or are placed with more than 20 clients, insofar as they have not been created especially for individual counterparties."[21] FINMA treats utility tokens that have an additional investment purpose or a sole investment purpose at the time of issue, as well as asset tokens that are standardized and suitable for mass standardized trading as securities.[22]

The Federal Council in its report endorses FINMA's classification of tokens issued in ICOs as asset, utility, or payment tokens.[23] It also points out that the existing definitions for securities and derivatives will not be changed for blockchain- and token-based applications.[24]

However, for financial market infrastructures, the Federal Council proposes an amendment to the Financial Market Infrastructure Act (FMIA) and the Financial Market Infrastructure Ordinance (FMIO), so that exceptions for blockchain and DLT may be granted in justified cases.[25] With regard to crypto-trading platforms, the report states that only decentralized trading platforms for tokens that qualify as securities require authorization from FINMA as a financial market infrastructure, whereas exchange platforms and distributed peer-to-peer platforms do not.[26] However, the operation of a financial market infrastructure is currently limited to certain financial market institutions.[27] The Federal Council therefore proposes the creation of a new

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[18] *Id*. at 3, no. 3.1.

[19] Finanzmarktinfrastrukturgesetz [FinfraG] [Financial Market Infrastructure Act] [FMIA], June 19, 2015, SR 958.1, art. 4, https://www.admin.ch/opc/de/classified-compilation/20141779/201708010000/958.1.pdf, *archived at* http://perma.cc/5F64-2WFF, unofficial English translation *available at* https://www.admin.ch/opc/en/classified-compilation/20141779/201708010000/958.1.pdf, *archived at* http://perma.cc/WT73-EMWN.

[20] *Id.* art. 2, let. b.

[21] Finanzmarktinfrastrukturverordnung [FinfraV] [Financial Market Infrastructure Ordinance] [FMIO], Nov. 25, 2015, SR 958.11, art. 2, para. 1, https://www.admin.ch/opc/de/classified-compilation/20152105/2017 08010000/958.11.pdf, *archived at* http://perma.cc/NW3S-JAGZ, unofficial English translation *available at* https://www.admin.ch/opc/en/classified-compilation/20152105/201708010000/958.11.pdf, *archived at* http://perma.cc/2423-R4HG.

[22] FINMA ICO Guidelines, *supra* note 17, at 4, nos. 3.2.1–3.2.3.

[23] Federal Council Report 2018, *supra* note 1, at 83.

[24] *Id*. at 96.

[25] *Id*. at 97.

[26] *Id*. at 99.

[27] *Id*. at 101.

authorization category for the operation of a financial market infrastructure involving crypto-based assets by amending FMIA and FMIO.[28]

Furthermore, the Federal Council proposes with respect to crypto funds to amend the Swiss Collective Investment Schemes Act (CISA)[29] to permit a new fund category called "limited qualified investment funds" (L-QIF). The L-QIFs will require no authorization from FINMA, which means that they can be placed on the market faster.[30] In September 2018, the FDF was instructed to draw up a consultation paper in that regard.[31]

IV. Treatment of Cryptoassets Not Considered Securities

A. Civil Law

The Federal Council's report reiterates that tokens in the form of cryptocurrencies are classified as intangible assets under Swiss civil law.[32] Civil law differentiates between tokens that represent a value such as cryptocurrencies and tokens that represent a right outside of the blockchain.[33] The report concludes that as they are neither absolute nor relative rights, the law does not provide any specific requirements for their transfer and there is therefore no need to amend the civil law provisions.[34] However, the Federal Council has tasked the FDF and the FDJP to include a proposal for the transfer of rights by means of digital registers in their consultation draft to improve legal certainty.[35]

B. Insolvency and Bankruptcy Law

As cryptocurrencies are considered assets, they could potentially be seized in insolvency proceedings by the creditor of the person entitled to them, and subsequently be realized. Likewise, in bankruptcy proceedings, when assets are collected, realized, and distributed to the creditors, a realization of cryptoassets is generally possible.[36] Most of the time, cryptoassets are held by third-party wallet providers. If the wallet provider declares bankruptcy, it must be determined whether cryptoassets are included in the estate or whether they can be segregated. The report points out that there are currently no special provisions for the treatment of

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[28] *Id*. at 108.

[29] Kollektivanlagengesetz [KAG] [Collective Investment Schemes Act] [CISA], June 23, 2006, SR 951.31, https://www.admin.ch/opc/de/classified-compilation/ 20052154/201607010000/951.31.pdf, *archived at* http://perma.cc/9HHP-QTY6, unofficial English translation *available at* https://www.admin.ch/opc/en/classified-compilation/20052154/201607010000/951.31.pdf, *archived at* http://perma.cc/8NAX-442E.

[30] Federal Council Report 2018, *supra* note 1, at 129.

[31] *Id*.

[32] *Id*. at 63.

[33] *Id*. at 64.

[34] *Id*.

[35] Press Release, Federal Council Wants to Further Improve Framework Conditions for Blockchain/DLT, *supra* note 6.

[36] Federal Council Report 2018, *supra* note 1, at 65.

cryptocurrencies in bankruptcy proceedings, so that the general provisions of the Federal Act on Debt Enforcement and Bankruptcy Act (DEBA) apply.[37] The Swiss Federal Supreme Court has held that segregation is only necessary when the bankruptcy estate has custody over the assets, meaning "exclusive actual power of disposal."[38] In addition, article 242, para. 3 of DEBA provides that that there is no actual power of disposal in cases of shared custody. The report differentiates between the following cases for cryptoassets:

- Third-party custody: Custodian has exclusive actual power of disposal over the crypto assets.
- No third-party custody: The private key to access the crypto assets is exclusively known to the client or known both to the client and the custodian, so that the client retains actual power of disposal.
- Multi-signature address: Access to the crypto assets requires several keys, so that the power of disposal is shared between the custodian and the client.[39]

The report concludes that cryptoassets are only included in the bankruptcy estate and must be separated if the client has no access to the private key and therefore no custody.[40] However, it is unclear whether they can be separated on the basis of article 242 DEBA as they are not physical "objects" as the text of article 242 explicitly provides. In order to achieve legal certainty, the Federal Council therefore suggests amending the relevant legal provisions to be able to segregate cryptoassets.[41] For that purpose, it is important how cryptoassets are allocated by the third-party wallet provider to determine if they are more akin to a property law claim or a contractual claim due to "mixing." If the client's credit balance is assigned to a specific blockchain and registered directly on the blockchain, there will be no problem in assigning the crypto assets to an individual client. The report compares this to a deposit in a safe deposit box or securities account with a bank.[42] If, on the other hand, the credit balances are no longer assigned to an individual blockchain, the clients only have a credit balance vis-à-vis the custodian. The individual balances are only recorded on the custodian's ledger. The report compares this situation to a traditional bank that does not keep the money that it receives from its clients separate.[43]

In addition to clarifying how cryptoassets may be separated in bankruptcy proceedings, the report also proposes to determine whether the object of separation will be the cryptoasset itself or the access key. However, the report states that this question might be left unanswered if "an

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[37] *Id.* at 66; Bundesgesetz über Schuldbetreibung und Konkurs [SchKG] [Federal Act on Debt Enforcement and Bankruptcy] [DEBA], SR 281.1, https://www.admin.ch/opc/de/classified-compilation/18890002/201901010000/281.1.pdf, *archived at* http://perma.cc/RX3E-7JPD.

[38] BUNDESGERICHT [BGER] [FEDERAL SUPREME COURT], June 1, 1984, 110 ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS [BGE] [DECISIONS OF THE SWISS FEDERAL SUPREME COURT] III 87, 90, https://www.bger.ch/ext/eurospider/live/de/php/clir/http/index.php?highlight_docid=atf:://110-III-87:de&lang=de&zoom=&type=show_document, *archived at* http://perma.cc/D4CV-GDW2.

[39] Federal Council Report 2018, *supra* note 1, at 66.

[40] *Id.* at 67.

[41] *Id.* at 68, 69.

[42] *Id.* at 69.

[43] *Id.*

additional legal provision were introduced to provide for the segregation of data to which the beneficiary is able to demonstrate a special entitlement."[44] A parliamentary initiative to amend article 242 of DEBA to include the surrender of non-physical assets was endorsed by the Legal Affairs Committee of the Swiss National Council on May 3, 2018.[45] The Federal Council would extend this claim to include all data and not just assets. In conclusion, the Federal Council will "propose a provision setting out a right to the surrender of data in the event of insolvency, including a claim to the transfer of crypto assets."[46]

C. Banking Law

In addition to exempting fintech firms that accept public funds up to a total value of CHF1 million (approximately US$995,000) from the requirement to have a banking license (regulatory sandbox), since January 2019, a new fintech authorization category with simplified requirements has been included in the Banking Act.[47] However, even though the new category is commonly referred to as "fintech license," it is also available to non-fintech companies that meet the authorization requirements.[48]

Companies that are granted the new fintech license may accept public funds of up to CHF 100 million (about US$95.5 million) on a professional basis, but may not invest or pay interest on these funds.[49] This includes traditional currencies as well as cryptocurrencies.[50] Companies with that special license are subject to less restrictive requirements than banks—for example, they are not obligated to participate in the deposit protection regime, but must inform their clients accordingly.[51] Furthermore, unlike banks that have minimum capital requirements of CHF 10 million (about US$9.9 million), companies with the new fintech license must only hold 3% of the public funds received as capital, however, or at least CHF300,000 (about US$ 298,500).[52] The

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[44] *Id*. at 69.

[45] *Id*. at 70; Parliamentary Initiative 17.410. Daten sind das höchste Gut privater Unternehmen. Datenherausgabe beim Konkurs von Providern regeln [Data are the Greatest Good of Private Companies. Regulating the Surrender of Data in the Event of Bankruptcy of Providers], https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20170410, *archived at* http://perma.cc/V62J-FZ5Y.

[46] Federal Council Report 2018, *supra* note 1, at 70.

[47] *Id*. at 89; Press Release, Federal Council, Federal Council Adopts Implementing Provisions for Fintech Authorization (Nov. 30, 2018), https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-73186.html, *archived at* http://perma.cc/72FW-A3GW; Bankengesetz [BankG] [Banking Act] [BankA], Nov. 8, 1934, SR 952.0, art. 1b, https:// www.admin.ch/opc/de/classified-compilation/19340083/201901010000/952.0.pdf, *archived at* http://perma.cc/XE8G-XARQ.) The Banking Ordinance was amended accordingly. (Bankenverordnung [BankV] [Banking Ordinance] [BankO], Apr. 30, 2014, SR 952.02, https://www.admin.ch/opc/de/classified-compilation/20131795/201901010000/952.02.pdf, *archived at* http://perma.cc/BZP5-696P.

[48] Federal Council Report 2018, *supra* note 1, at 89, n.472.

[49] BankA, art. 1b.

[50] Federal Council Report 2018, *supra* note 1, at 89.

[51] BankO, art. 7a, para. 1(b).

[52] BankO, art. 15, para. 1 & art. 17a, para. 1.

report points out that if cryptocurrencies are held in custody for clients on the blockchain and can be attributed to individual clients at all times, they are not considered deposits within the meaning of the Banking Act and no banking or fintech license is required.[53]

Furthermore, in light of the proposed amendment to the general insolvency law provisions, the Federal Council will look into a corresponding amendment of bank insolvency law provisions for the treatment of tokens and similar assets.[54]

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

As discussed above, the treatment of different types of cryptocurrencies depends on their nature.

[53] Federal Council Report 2018, *supra* note 1, at 89; FINMA, FACT SHEET: VIRTUAL CURRENCIES 2 (Jan. 1, 2019), https://www.finma.ch/en/~/media/finma/dokumente/dokumentencenter/myfinma/faktenblaetter/faktenblatt-virtuelle-waehrungen.pdf?la=en, *archived at* http://perma.cc/M9QR-S9AC.

[54] Federal Council Report 2018, *supra* note 1, at 90.

Taiwan

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SUMMARY In Taiwan, virtual currencies are not considered legal tender, but are virtual commodities. The anti-money laundering law was revised in November 2018 to bring virtual currency platforms within its regulatory scope. In addition, Financial Supervisory Commission guidance states that whether tokens involved in ICOs are securities will be examined on a case-by-case basis, and illegal fundraising will be sanctioned in accordance with financial laws.

I. Approach to Assets Created Through Blockchain

A. Financial Regulation

Financial regulators in Taiwan have issued statements warning the general public about the risks of investing in virtual currencies such as Bitcoin. According to a 2013 statement jointly issued by Taiwan's Central Bank and the Financial Supervisory Commission (FSC), Bitcoin is not a real currency, but a "highly speculative virtual commodity."[1] The general public was warned about the specific risks associated with accepting, trading, or holding Bitcoin.[2] In 2014, the FSC issued a notice prohibiting banks and financial institutions in Taiwan from accepting or exchanging Bitcoin or providing Bitcoin-related services at bank ATMs.[3]

B. Anti-Money Laundering Law

Recently, Taiwan revised its anti-money laundering law to bring virtual currency platforms within the scope of the law. On November 7, 2018, the Money Laundering Control Act was revised.[4] According to the revised article 5, provisions regulating financial institutions under the Act also apply to virtual currency platforms and trading businesses.[5]

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[1] Press Release, Central Bank & Financial Supervisory Commission (FSC), Bitcoin Is Not Real Currency; Accepters Please Look to the Risks (Dec. 30, 2013), http://www.cbc.gov.tw/ct.asp?xItem=43531& ctNode=302 (in Chinese), *archived at* https://perma.cc/4N82-R6GS.

[2] *Id.*

[3] Press Release, FSC, Financial Institutions Must Not Provide Bitcoin-Related Services at ATMs (Jan. 6, 2014), https://www.fsc.gov.tw/ch/home.jsp?id=96&parentpath=0,2&mcustomize=news_view.jsp&dataserno=201401060003&toolsflag=Y&dtable=News (in Chinese), *archived at* https://perma.cc/P7FK-YGVD.

[4] Money Laundering Control Act (enacted Oct. 23, 1996, *last amended* Nov. 7, 2018), https://law.moj.gov.tw/LawClass/LawAll.aspx?pcode=G0380131 (in Chinese), *archived at* https://perma.cc/P364-LRHZ; English translation *available at* https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=G0380131, *archived at* https://perma.cc/F6SH-BWGZ.

[5] *Id.* art. 5.

The Money Laundering Control Act requires financial institutions to establish their own internal-control and audit systems to combat money laundering and the financing of terrorism in accordance with the money-laundering and terrorism-financing risk levels those institutions face. Financial institutions must prepare and periodically update their risk assessment reports on anti-money laundering and combating the financing of terrorism.[6] A financial institution that fails to establish the internal-control and audit system or breaches the relevant rules is punishable by a fine of NT$500,000 to ten million (approx. US$16,180 to $323,600).[7]

II. Regulation of Cryptocurrencies as Financial Securities

In 2017, the FSC issued a new press release warning the general public about the risks of investing in virtual commodities such as Bitcoin. The FSC reiterated that in Taiwan, virtual currencies such as Bitcoin are considered highly speculative virtual commodities. The FSC further indicated that initial coin offerings (ICOs) involving raising and issuing securities are subject to relevant provisions in the Securities and Exchange Act. Whether tokens involved in ICOs are securities will be examined on a case-by-case basis, and illegal fundraising will be sanctioned in accordance with financial laws.[8]

[6] *Id.* art. 6.

[7] *Id.*

[8] Press Release, FSC, Financial Supervisory Commission Warns General Public Once Again about Risks of Investing in Virtual Commodities Such as Bitcoin (Dec. 19, 2017), https://www.fsc.gov.tw/ch/home.jsp?id=96&parent path=0,2&mcustomize=news_view.jsp&dataserno=201712190002&aplistdn=ou=news,ou=multisite,ou=chinese,ou=ap_root,o=fsc,c=tw&dtable=News (in Chinese), *archived at* https://perma.cc/R56Q-Z2KM.

Ukraine

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SUMMARY Although there is robust trade in virtual currencies in Ukraine, the government has not yet put in place legislation regarding cryptoassets. In 2018, the Ministry of Economic Development published its "Concept of State Policy in the Field of Virtual Assets" with the aim of developing a legal and policy framework for cryptocurrencies. If adopted, the Concept will be implemented in two stages.

I. Approach to Assets Created Through Blockchain

Despite relatively robust virtual currency turnover in the country, Ukraine does not yet have legislation regulating cryptoassets. According to the Ministry of Economic Development, in 2017, Ukraine was among the top ten countries in the number of users of virtual currencies with the volume of transactions involving cryptographic goods reaching US$100 million dollars a year.[1] Since 2017, the Ukrainian government has been trying to establish a legal framework for cryptocurrencies and to manage associated risks.[2]

In the fall of 2018, the Ministry of Economic Development published its *Concept of State Policy in the Field of Virtual Assets* with the aim of developing a legal and policy framework for cryptocurrencies.[3] According to a press release, the government aims to legally define key terms relating to virtual assets such as "virtual currency" ("crypto currency"), "virtual assets," initial coin offering and initial token offering ("ICO / ITO"), "mining," "smart contract," and "token." The government is also planning to amend its taxation and financial sector legislation to address issues related to cryptocurrency circulation and trading.

The government plans to implement the Concept in two stages:

- First Stage (2018-2019). The government plans to define the legal status of cryptocurrencies. In order to improve the regulatory framework, the government intends to conduct monitoring of entities engaged in cryptocurrency trade as well as trends in the development of the market for virtual assets and virtual currencies.

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[1] Press Release, Ministry of Economic Development, The Ministry of Economic Development Initiates Legalization of Cryptology in Ukraine, (Oct. 10, 2018), http://www.me.gov.ua/News/Detail?id=2cc04fa0-3577-49c7-a465-bd0fc3f61bed (in Ukrainian), *archived at* https://perma.cc/8V6R-QANW

[2] *See Ukraine, in* LAW LIBRARY OF CONGRESS, REGULATION OF CRYPTOCURRENCY AROUND THE WORLD (June 2018), https://www.loc.gov/law/help/cryptocurrency/world-survey.php#ukraine, *archived at* https://perma.cc/XED2-9AT3

[3] Press Release, Ministry of Economic Development, *supra* note 1.

- Second stage (2020-2021). The Concept envisages legal recognition of virtual currency custodians (persons providing services to protect private cryptographic keys on behalf of their clients for the storage and transfer of virtual currencies) by entities involved in financial sector monitoring. The second stage will also involve the development of a legal and regulatory framework for the use of virtual assets, smart contracts, and tokens, and for the holding of an ICO or ITO.[4]

The implementation of the Concept is in its initial stages, with the Ministry of Economic Development currently in the process of gathering comments and feedback.[5]

II. Taxation

In 2017, a draft law containing amendments to the Tax Code of Ukraine regarding the taxation of transactions with virtual assets in the country was introduced.[6] The bill defines cryptocurrency as a digital asset.[7] The bill proposes establishing an income tax break until December 31, 2029, for the income of physical and legal persons earned from transactions involving virtual assets. The bill also envisages a value-added tax break for the import of equipment associated with cryptocurrencies.[8]

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[4] *Id.*

[5] *Id.*

[6] On Amendments to the Tax Code of Ukraine Regarding the Taxation of Transactions with Virtual Assets in Ukraine, Draft Law of Ukraine of Sept. 27, 2017, No. 9083-1, http://search.ligazakon.ua/l_doc2.nsf/link1/JH70B1AA.html (in Ukrainian), *archived at* https://perma.cc/37WB-ABXA.

[7] *Id*. art. 14.1.1.

[8] *Id*. art. 8.

United Arab Emirates

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SUMMARY The Financial Services Regulatory Authority of the Abu Dhabi Global Market considers that where cryptoassets have characteristics of shares, debentures, or units in collective investment funds, they are to be treated as securities. The Authority considers "utility tokens" and "non-fiat" cryptocurrencies to be commodities, and offers of such cryptocurrencies are not regulated by the market regulations. Documents produced by the Authority related to the regulation of cryptoasset activities describe requirements related to risk disclosure and for the protection of clients' transactions and information.

Law No. 20 of 2018 on Money Laundering defines laundered funds to be assets in whatever form, including digital currencies.

I. Treatment of Assets Created Through Blockchain

A. Financial Regulation and Consumer Protection

1. Abu Dhabi Global Market Legal Framework

The Abu Dhabi Global Market (ADGM) was established pursuant to Abu Dhabi Law No. 4 of 2013 as a financial free zone in the Emirate of Abu Dhabi (one of the nine emirates of the United Arab Emirates). The legislative and regulatory framework of the ADGM includes the following: federal legislation; Law No. 4 of 2013 issued by the Emirate of Abu Dhabi; and ADGM special financial regulations. The federal legislation encompasses the following legal instruments: Federal Law No. 8 of 2004 regulating financial activities in the United Arab Emirates; Federal Decree No. 15 of 2013 on the establishment of the Mariyah Island free trade zone; and Cabinet Resolution No. 28 of 2007 regulating fees related to financial transactions in the free trade zones.

At the local level, Abu Dhabi Law No. 4 of 2013 regulates the administrative structure of the ADGM, such as the functions of the market's board of directors. Finally, the framework includes the ADGM court's regulations and procedures, arbitral and commercial regulations, and the Financial Services and Markets Regulations.[1]

2. Financial Services and Markets Regulations 2015

The Financial Services and Markets Regulations 2015 were issued by the Board of Directors of the ADGM on October 4, 2015, and have been amended a number of times. The instrument regulates financial services in the ADGM and contains various provisions related to "accepted"

[1] *See ADGM Legal Framework*, ABU DHABI GLOBAL MARKET (ADGM), https://www.adgm.com/doing-business/adgm-legal-framework/ (last visited Mar. 26, 2019), *archived at* https://perma.cc/8MMF-W8YX.

cryptoassets and the operation of cryptoasset businesses, including exchanges and providing custodian services, in the ADGM.

Article 258 of the 2015 regulations, which was amended on June 25, 2018, defines "crypto asset" as a "digital representation of value that can be digitally traded and functions as (1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but does not have legal tender status in any jurisdiction."[2] Cryptoassets are also distinguished from "fiat currency," which is a government-issued currency that is designated as legal tender in its country of issuance through a government decree.[3]

The Financial Services Regulatory Authority (FSRA) of the ADGM has produced the following documents that include information on the regulation of cryptoassets:

- The *Conduct of Business Rulebook*;[4]
- A guidance document on the regulation of cryptoasset activities in the ADGM (Cryptoasset Guidance);[5] and
- A guidance document on the regulation of initial coin/token offerings under the Financial Services and Markets Regulations 2015 (ICO Guidance).[6]

3. Consumer Protection

The FSRA must grant a license to market intermediaries and operators who deal or manage investments in security tokens. Cryptoasset custodians are required to carry out reconciliations of clients' money every week. They also must send out monthly statement of a client's cryptoasset holdings.[7]

The Conduct of Business Rulebook states that, "[p]rior to entering into an initial Transaction for, on behalf of, or with a Client, an Authorised Person Operating a Crypto Asset Business shall disclose in a clear, fair and not misleading manner all material risks associated with (i) its

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[2] Financial Services and Markets Regulations 2015, art. 258 (at p. 169), http://adgm.complinet.com/net_file_store/new_rulebooks/f/i/Financial_Services_and_Markets_Regulations_FSMR_2015_Consolidated_March_11_2019.pdf, *archived at* https://perma.cc/32DP-FKEC.

[3] *Id.*; FINANCIAL SERVICES REGULATORY AUTHORITY (FSRA), ADGM, GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM 4 (June 25, 2018), https://www.adgm.com/media/304701/guidance-regulation-of-crypto-asset-activities-in-adgm-25th-june-2018-2.pdf, *archived at* https://perma.cc/MU4D-QDBX.

[4] FSRA, ADGM, CONDUCT OF BUSINESS RULEBOOK, (COBS VER06.110319, Mar. 11, 2019), http://adgm.complinet.com/net_file_store/new_rulebooks/c/o/COBS_VER06.110319.pdf, *archived at* https://perma.cc/KGE4-WSLU;

[5] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3.

[6] FSRA, ADGM, GUIDANCE – REGULATION OF INITIAL COIN/TOKEN OFFERINGS AND CRYPTO ASSETS UNDER THE FINANCIAL SERVICES AND MARKETS REGULATIONS (June 25, 2018), https://www.adgm.com/media/304700/guidance-icos-and-crypto-assets_20180625_v11.pdf, *archived at* https://perma.cc/JH8L-ZTRJ.

[7] CONDUCT OF BUSINESS RULEBOOK, *supra* note 4, para. 17.8.3(a). *See also* GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 31.

products, services and activities (ii) Crypto Assets generally and (iii) the Accepted Crypto Asset that is the subject of the Transaction."[8]

It is mandatory for cryptoasset businesses to use blockchain technology to store all information related to transactions done by their clients. Furthermore, they must provide such information to the FSRA at any time if requested.[9]

To protect clients' personal information and transactions, cryptoasset businesses must take appropriate technical measures to secure their clients' data. The Conduct Business Rulebook indicates the following:

> An Authorised Person Operating a Crypto Asset Business must, as a minimum, have in place systems and controls with respect to the following:
> . . .
> (d) A security plan describing the security arrangements relating to:
> (i) the privacy of sensitive data;
> (ii) networks and systems;
> (iii) cloud based services;
> (iv) physical facilities; and
> (v) documents, and document storage.[10]

Cryptoasset businesses must also have a plan articulating the process of protecting client information and transaction data in the event of an unplanned system outage. In the event of a planned outage, clients must be informed ahead of time. [11]

B. Taxation

Article 3 of Law No. 8 of 2017 on value added tax imposes a 5% tax on imported and exported commodities.[12] This tax may apply to "utility tokens" since the FSRA considers them to be commodities, as discussed below.[13]

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[8] CONDUCT OF BUSINESS RULEBOOK, *supra* note 4, para. 17.6.1. *See also* GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 24.

[9] CONDUCT OF BUSINESS RULEBOOK, *supra* note 4, para. 18.7. *See also* GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 17.

[10] CONDUCT OF BUSINESS RULEBOOK, *supra* note 4, para. 17.5(d). *See also* GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 20.

[11] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 23.

[12] Law No. 8 of 2017, issued on August 23, 2017, https://www.mof.gov.ae/ar/lawsAndPolitics/govLaws/Documents/ نسخة النشر 1مرسوم بقانون ضريبة القيمة المضافة 23 أغسطس 2017.pdf (in Arabic), *archived at* https://perma.cc/3MLL-AHHC.

[13] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 5.

According to the Conduct of Business Rulebook, cryptoasset businesses have an obligation to declare international income for tax purposes as set out in the guidance notes on the requirements of the Intergovernmental Agreement between the United Arab Emirates and the United States.[14]

C. Anti-Money Laundering Law

Article 1 of Law No. 20 of 2018 on Money Laundering defines laundered funds as assets in whatever form, whether tangible or intangible, movable or immovable, including national currency, foreign currencies, documents or notes evidencing the ownership of those assets or associated rights in any form including electronic or digital forms or any interests, profits or income originating or earned from those assets.[15]

According to the Cryptoasset Guidance, cryptoasset exchanges must report any suspicious activities or transactions to the official authorities.[16] Cryptoasset businesses are required to establish sophisticated transaction monitoring systems to detect possible money laundering activity. Cryptoasset businesses must adopt systems that identify any attempt to breach money-laundering regulations. Such systems may rely on new technological solutions, including monitoring algorithms or artificial intelligence.[17]

Cryptoasset businesses must submit to regular reviews from the FSRA. The FSRA will monitor the cryptoaasset wallets, as well as the origin and destination of cryptoasset funds. The Conduct of Business Rulebook states that

> [a]n authorised person Operating a Crypto Asset Business must, as a minimum, have in place systems and controls with respect to the following:
>
> . . .
>
> (c) systems and controls to mitigate the risk of misuse of Crypto Assets, setting out how –
>
> (i) the origin of Crypto Assets is determined, in case of an incoming transaction; and
> (ii) the destination of Crypto Assets is determined, in case of an outgoing transaction.[18]

Cryptoasset businesses must perform due diligence on their clients before opening an account. Accordingly, any cryptoasset wallet would be identified and linked to a specific user. If a transaction is detected that originates from or is sent to a "tainted" wallet, the user must be

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[14] CONDUCT OF BUSINESS RULEBOOK, *supra* note 4, PARA. 17.4.1 ("International Tax Reporting Obligations").

[15] Law No. 20 of 2018, issued on September 23, 2018, https://www.mof.gov.ae/ar/lawsAndPolitics/govLaws/Documents/ مرسوم بقانون اتحادي رقم 20 لسنة 2018 في شأن مواجهة جرائم غسل الأموال ومكافحة تمويل الإرهاب وتمويل التنظيمات غير المشروعة.pdf (in Arabic), *archived at* https://perma.cc/LV5C-EZXR.

[16] Financial Services and Markets Regulations 2015, art. 149(2) ("Obligation to Report Transactions").

[17] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 17.

[18] CONDUCT OF BUSINESS RULEOOK, *supra* note 4, para. 17.5(c) ("Origin and Destination of Crypto Asset Funds"). *See also* GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 18.

reported. Cryptoasset businesses must maintain a list of tainted wallet addresses and consider the use of third party services to help identify such addresses.[19]

II. Custodianship of Cryptocurrencies by Financial Institutions

According to article 73(B)(5)(a) of the Financial Services Market Regulations 2015,"operating as a Crypto Asset Custodian involves – (a) safeguarding, storing, holding or maintaining custody of Accepted Crypto Asset belonging to another person."[20]

If a cryptoasset business will not hold the cryptoassets of clients in their custody, this must be fully disclosed to clients upfront. Clients must be informed that the cryptoasset business is not responsible for the custody and protection of clients' cryptoassets. Where a cryptoasset business will be responsible for the custody of a client's cryptoassets, the business may provide this service "in-house" through its own cryptoasset wallet solution. Alternatively, they may outsource this service to a third party.[21]

III. Regulation of Cryptoassets as Financial Securities

A. Cryptoassets as Security Tokens

The FSRA considers cryptoassets that have the characteristics of shares, debentures, or units in collective investment funds to be securities. All financial activities related to those securities, such as operating primary or secondary markets, dealing, trading, managing investments in or advising on security tokens, are subject to the regulatory requirements issued by the FSRA.[22]

B. Operating a Cryptoasset Business

Chapter 17B of the Financial Services and Markets Regulations 2015 regulates the activity of operating a cryptoasset business.[23] Article 73B(1) states that "Operating a Crypto Asset Business is a specified kind of activity."[24] Article 73B(2) stipulates that operating a cryptoasset business involves undertaking one or more cryptoasset activities in or from the ADGM.[25]

Article 73B(3) discusses cryptoasset activities. It states that cryptoasset activities may include the following:

> (a) Buying, Selling or exercising any right in Accepted Crypto Asset (whether as principal or agent);

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[19] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 22.

[20] Financial Services and Markets Regulations 2015, art. 73B(5)(a).

[21] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 7.

[22] *Id.* at 5.

[23] Financial Services and Markets Regulations 2015, ch. 17B (Operating a Cryptoasset Business).

[24] *Id.* art. 73B(1).

[25] *Id.* art. 73B(2).

> (b) managing Accepted Crypto Asset belonging to another person;
> (c) making arrangements with a view to another person (whether as principal or agent) Buying, Selling or providing custody of Accepted Crypto Asset;
> (d) marketing of Accepted Crypto Assets;
> (e) advising on the merits of Buying or Selling of Accepted Crypto Assets or any rights conferred by such Buying or Selling; or
> (f) operating –
> (i) a Crypto Asset Exchange; or
> (ii) as a Crypto Asset Custodian[26]

Article 73(B)(4) provides that "operating a Crypto Asset Exchange means the trading, conversion or exchange of - (a) Fiat Currency or other value into Accepted Crypto Assets; (b) Accepted Crypto Asset into Fiat Currency or other value; or (c) one Accepted Crypto Asset into another Accepted Crypto Asset."[27]

Finally, article 73C cites activities that do not constitute "Operating a Crypto Asset Business." Those activities include the following:

> (1) the creation or administration of Crypto Asset that are not Accepted Crypto Asset;
> (2) the development, dissemination or use of software for the purpose of creating or mining a Crypto Asset;
> (3) the transmission of Crypto Asset;
> (4) a loyalty points scheme denominated in Crypto Asset; or
> (5) any other activity or arrangement that is deemed by the Regulator to not constitute Operating a Crypto Asset Business, where necessary and appropriate in order for the Regulator to pursue its objectives."[28]

Article 73D states "[a] person does not operate a Crypto Asset Exchange if it operates a facility which is merely an order routing system where Buying and Selling interests in, or orders for, Accepted Crypto Asset are merely transmitted but do not interact."[29]

C. Regulation of Initial Coin/Token Offerings

The ICO Guidance states that ICOs can take many forms. However, all of those forms utilize Distributed Ledger Technology (DLT). It states that "[i]nvestors will typically give a Crypto Asset to an ICO issuer in exchange for a proprietary digital medium of exchange on the DLT platform, being termed a "coin" or "token" (where the latter term will be used hereafter)."[30]

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[26] *Id*. art. 73B(3).

[27] *Id*. art 73B(4).

[28] *Id*. art. 73C.

[29] *Id*. art. 73D.

[30] GUIDANCE – REGULATION OF INITIAL COIN/TOKEN OFFERINGS AND CRYPTO ASSETS, *supra* note 6, para. 3.1.

The ICO Guidance further states that an emerging method of fundraising uses DLT with the tokens representing a "traditional" regulated issuance, such as shares, debentures, or units in a collective investment fund.[31]

According to the Guidance, whether an ICO is to be regulated under the Financial Services and Markets Regulations 2015 will be assessed by the FSRA on a case-by-case basis. It further states that "[i]f the tokens in an ICO are assessed to exhibit the characteristics of a Security, FSRA may deem the tokens as a Security pursuant to Section 58(2)(b)2of FSMR, hereinafter referred to as "Security Tokens.""[32]

With respect to issuances of securities, the ICO Guidance states as follows: "issuances of Securities (as defined in Section 258 of FSMR), whether through a DLT platform or other means, will see no difference in their treatment under our regulatory framework. Those issuers/market actors who seek to raise funds in a regulated, robust and transparent manner using new business models or technologies such as DLT are encouraged to engage with us as early as possible in the fund-raising process."[33]

In terms of offers of securities, the ICO Guidance states that

> [a] Person may make an Offer of Securities to the Public without a Prospectus where any one of the following is met:
> (i) an Offer is directed at Professional Clients other than natural Persons;
> (ii) fewer than 50 Persons in any 12 month period, excluding Professional Clients who are not natural persons; or
> (iii) where the consideration to be paid by a Person to acquire Securities is at least USD100,000.[34]

D. Derivatives

The ICO Guidance states that "derivatives of Crypto Assets are regulated as Commodity Derivatives and hence, a type of Specified Investment under the FSMR [Financial Services and Markets Regulations 2015]. Consequently, any market operators or market intermediaries dealing or managing investments in Derivatives of Crypto Assets will be subject to the appropriate regulations and rules applicable under FSMR."[35]

IV. Treatment of Cryptoassets Not Considered Securities

According to the Cryptoasset Guidance, cryptoassets such as non-fiat cryptocurrencies are not considered securities and are treated as commodities. Utility tokens are also treated as commodities. The FSRA states that "non-fiat currency" and "utility tokens" do not exhibit the

[31] *Id*. para. 3.2.

[32] *Id*. para. 3.3.

[33] *Id*. para. 3.4.

[34] *Id*. para. 3.6.

[35] *Id*. para. 4.5.

features and characteristics of a regulated investment. Spot trading and transactions in utility tokens are not regulated by the market regulations.[36]

The ICO Guidance also addresses tokens that are not deemed to be securities. It states that, "[w]here tokens do not have the features and characteristics of Securities such as Shares, Debentures or Units in a Fund, the offer of such tokens is unlikely to be an Offer of Securities, nor is the trading of such tokens likely to constitute a Regulated Activity under FSMR."[37]

The Guidance further states that

> [i]n unregulated ICOs, investors do not benefit from any of the safeguards that accompany a regulated Offer of Securities. Reliable information regarding the issuer, and what it plans to do with the funds raised may be lacking. The risk of fraud and loss of capital is therefore significantly higher. This is particularly likely to be the case where a token issuer promises extremely high investment returns that are disproportionately high relative to those generally available in the market. We advise potential investors in unregulated ICOs to exercise extreme caution before committing any funds.[38]

[36] GUIDANCE – REGULATION OF CRYPTO ASSET ACTIVITIES IN ADGM, *supra* note 3, at 5.

[37] GUIDANCE – REGULATION OF INITIAL COIN/TOKEN OFFERINGS AND CRYPTO ASSETS, *supra* note 6, para. 3.10.

[38] *Id.* para. 3.11.

United Kingdom

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SUMMARY The United Kingdom has yet to introduce legislation to regulate the use of cryptocurrencies, choosing to adopt a wait-and-see approach. The UK's financial regulators have cautioned individuals about the risks posed by purchasing cryptocurrencies and assets, and has proposed consulting on legislation to prohibit the purchase of such assets by individuals. A cryptoasset taskforce has been appointed, and issued its first report in late 2018. The report provided some clarity over the treatment of cryptoassets, and this was followed up by an advisory from HM Revenue & Customs over the tax treatment of cryptoassets for individuals. In January 2019 the Financial Conduct Authority (FCA) also issued guidance over the regulatory regime of cryptoassets and announced that HM Treasury is planning to issue a consultation on legislation that would expand its regulatory authority to cover cryptoassets.

I. Introduction

The United Kingdom (UK) has yet to introduce legislation to regulate the use of cryptocurrency and has adopted a cautious wait-and-see approach. The Bank of England stated it does not consider cryptocurrencies to be money as they are "too volatile to be a good store of value, they are not widely-accepted as means of exchange, and they are not used as a unit of account."[1] It has further stated that it believes the current generation of cryptoassets show little evidence of delivering any kind of benefits to the financial services and other sectors, but given the rapidly developing market this may change in the future.[2]

II. Consumer Protection

Financials services are regulated in the UK by the Financial Conduct Authority (FCA), whose regulations aim to "protect consumers from harm, protect and enhance the integrity of the UK's financial services sector, and promote effective competition in the interest of consumers."[3] The FCA is currently consulting on "[g]uidance for cryptoassets in order to provide regulatory clarity for market participants carrying on activities in this space"[4] to help firms determine whether or not a digital asset falls within the existing regulatory framework. In the consultation paper, the

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[1] HM TREASURY ET AL., CRYPTOASSETS TASKFORCE: FINAL REPORT (Oct. 2018), ¶ 2.13, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/752070/cryptoassets_taskforce_final_report_final_web.pdf, *archived at* https://perma.cc/LE5W-5MZS.

[2] *Id*. at 2.

[3] *Id*. ¶ 2.23.

[4] FINANCIAL CONDUCT AUTHORITY, GUIDANCE ON CRYPTOASSETS, CONSULTATION PAPER, CP19/3 (Jan. 2019), ¶ 1.8, https://www.fca.org.uk/publication/consultation/cp19-03.pdf, *archived at* https://perma.cc/E8UM-WAUB.

FCA noted that HM Treasury will also conduct a consultation process later in 2019 to consider bringing legislative changes to extend the FCA's authority to cover cryptoassets.[5]

The Bank of England is responsible for ensuring "the safety and soundness of firms (through the PRA [Prudential Regulation Authority]) and to remove or reduce systemic risks that could pose a threat to financial stability (through the Financial Policy Committee and the Bank's supervision of Financial Market Infrastructures)."[6]

III. Regulation of Cryptoassets

Whether existing financial regulations apply to cryptocurrencies is dependent upon what the cryptocurrency is being used for, and must be determined on a case-by-case basis. Given the complexity and uncertainty surrounding these determinations, a cryptoasset taskforce was established in March 2018 to "consider[] the policy and regulatory implications of distributed ledger technology (DLT), and cryptoassets."[7]

The cryptoasset taskforce set out a table with common uses of cryptocurrency and whether or not the use falls within what is known as the current "regulatory perimeter." The taskforce identified three different types of cryptocurrencies—exchange tokens, utility tokens, and security tokens—and considered that cryptoassets are used in three different ways:

1. As a means of exchange, functioning as a decentralised tool to enable the buying and selling of goods and services, or to facilitate regulated payment services.
2. For investment, with firms and consumers gaining direct exposure by holding and trading cryptoassets, or indirect exposure by holding and trading financial instruments that reference cryptoassets.
3. To support capital raising and/or the creation of decentralised networks through Initial Coin Offerings (ICOs).

These purposes are not mutually independent, and the cryptocurrency may change during the course of its life.[8]

The cryptoasset taskforce determined that cryptocurrencies used as a means of exchange may fall within the regulatory perimeter under the Payment Services Regulations 2017 (PSR)[9] if the cryptocurrency is considered a fiat fund, or falls within the definition of e-money as, for example, when it is structured in a way that the asset is "centrally issued, and accepted by third parties as

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[5] *Id.* ¶ 1.27.

[6] HM TREASURY ET AL., *supra* note 1, ¶ 2.23.

[7] *Cryptoasset Taskforce Publishes Report on UK Approach to Cryptoassets*, FINANCIAL CONDUCT AUTHORITY (Oct. 29, 2018), https://www.fca.org.uk/news/news-stories/cryptoasset-taskforce-publishes-report-uk-approach-cryptoassets, *archived at* https://perma.cc/E8LH-AUV7.

[8] HM TREASURY ET AL., *supra* note 1 ¶ 2.15.

[9] Payment Services Regulations 2017, SI 2017/752, http://www.legislation.gov.uk/uksi/2017/752/pdfs/uksi_20170752_en.pdf, *archived at* https://perma.cc/6WCR-T68E.

a means of exchange."[10] According to the report from the taskforce, the use of cryptocurrencies to facilitate regulated payment services, such as an intermediary in a cross-border transaction, and indirect investment from financial instruments that reference cryptoassets, would be regulated as a money remittances under the PSR.[11] Investments directly into cryptoassets only fall within the regulatory perimeter if the asset is a security token or the investment is made by a regulated investment vehicle. Capital-raising tools that include cryptoassets fall within the perimeter if the asset is a security token.[12]

The policy paper notes that exchange tokens are intended to be used as a form of payment, and include bitcoins. Exchange tokens use DLT and the value exists based on the use of it as a type of exchange or investment; utility tokens are tokens that can be redeemed for access to a specified product or service; and security tokens are those that are considered to be a "specified investment'" in the Financial Services and Markets Act (2000) (Regulated Activities) Order.[13] These tokens provide certain rights, including ownership, repayment of a specified amount of money, or a share in future profits.[14]

IV. Taxation

HM Revenue & Customs recently issued its first policy paper detailing the tax treatment of cryptoassets acquired, held, and sold by individuals, focusing on ensuring the tax treatment of the profits and losses of transactions involving these types of assets are clear.[15] HM Revenue & Customs noted that the tax treatment of these tokens are dependent upon how they are used, rather than on the definition of the token.[16] The taskforce developed a framework to take into account three potentially different uses for cryptoasset:

1. As a means of exchange, functioning as a decentralised tool to enable the buying and selling of goods and services, or to facilitate regulated payment services.
2. For investment, with firms and consumers gaining direct exposure by holding and trading cryptoassets, or indirect exposure by holding and trading financial instruments that reference cryptoassets.
3. To support capital raising and/or the creation of decentralised networks through Initial Coin Offerings (ICOs).[17]

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[10] HM TREASURY ET AL., *supra* note 1, Table 2.A.

[11] *Id*.

[12] *Id*.

[13] Financial Services and Markets Act 2000 (Regulated Activities) Order 2001, SI 2001/544, http://www.legislation.gov.uk/uksi/2001/544/made, *archived at* https://perma.cc/QU4R-53DF.

[14] HM TREASURY ET AL., *supra* note 1, ¶ 2.11.

[15] HM REVENUE & CUSTOMS, CRYPTOASSETS FOR INDIVIDUALS, POLICY PAPER (Dec. 19, 2018), *available at* https://www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals, *archived at* https://perma.cc/KJ8N-T26S.

[16] *Id*.

[17] HM TREASURY ET AL., *supra* note 1, ¶ 2.11.

HM Customs & Revenue does not consider that cryptoassets are currency or money. Instead, it defines cryptoassets as

> cryptographically secured digital representations of value or contractual rights that can be:
> - transferred
> - stored
> - traded electronically[.]
>
> While all cryptoassets use some form of Distributed Ledger Technology (DLT) not all applications of DLT involve cryptoassets.[18]

HM Revenue & Customs has yet to issue information or guidance about the taxation of cryptocurrency for businesses.

V. Anti-Money Laundering

The government is currently consulting on how it will bring cryptocurrencies within its anti-money laundering framework in accordance with the EU Fifth Anti-Money Laundering Directive,[19] and is

> developing a robust regulatory response which will address these risks by going significantly beyond the requirements set out in the EU Fifth Anti-Money Laundering Directive (5MLD), providing one of the most comprehensive responses globally to the use of cryptoassets for illicit activity.[20]

It has requested the FCA to be responsible for ensuring anti-money laundering obligations are fulfilled by companies, and the FCA has taken a progressive approach, issuing appropriate practices for dealing with cryptoassets and the measures banks should take to address the risk of financial crime using these assets.[21] The FCA recommended banks take a risk-based approach to mitigate financial crime by

> - developing staff knowledge and expertise on cryptoassets to help them identify the clients or activities which pose a high risk of financial crime[;]

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[18] HM REVENUE & CUSTOMS, *supra* note 15.

[19] Directive (EU) 2018/843 of the European Parliament and of the Council of 30 May 2018 Amending Directive (EU) 2015/849 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, and Amending Directives 2009/138/EC and 2013/36/EU (5th AMLD), 2018 O.J. (L 156) 43, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN, *archived at* http://perma.cc/JV7W-64Y5; Consolidated Version of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Anti-Money Laundering Directive, AMLD), 2015 O.J. (L 141) 73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015L0849-20180709&qid=1552510550346&from=EN, *archived at* http://perma.cc/W7KN-PCPM.

[20] HM TREASURY ET AL., *supra* note 1, ¶ 5.6.

[21] *Id.* ¶ 5.9.

- ensuring that existing financial crime frameworks adequately reflect the crypto related activities which the firm is involved in, and that they are capable of keeping pace with fast-moving developments[;]
- engaging with clients to understand the nature of their businesses and the risks they pose[;]
- carrying out due diligence on key individuals in the client business including consideration of any adverse intelligence[;]
- in relation to clients offering forms of crypto-exchange services, assessing the adequacy of those clients' own due diligence arrangements; [and],
- for clients which are involved in ICOs, considering the issuance's investor-base, organisers, the functionality of tokens (including intended use) and the jurisdiction.[22]

The government has stated that it will take a broader approach to money laundering and introduce legislation that surpasses the requirements of the Fifth Anti-Money Laundering Directive, including covering

- exchange services between different cryptoassets, to prevent anonymous 'layering' of funds to mask their origin
- platforms that facilitate peer-to-peer exchange of cryptoassets, which could enable anonymous transfers of funds between individuals
- cryptoasset ATMs, which could be used anonymously to purchase cryptoassets
- non-custodian wallet providers that function similarly to custodian wallet providers, which may otherwise facilitate the anonymous storage and transfer of cryptoassets. Consultation on this area will include considering issues of technological feasibility.[23]

VI. Future of Cryptocurrency Regulation

As noted above, a cryptoasset taskforce was formed in March 2018 and issued a report in October 2018 on its findings.[24] The taskforce took a particular interest in the future use and development of DLT technology. It stated that DLT "has the potential to deliver significant benefits in financial services and other sectors in the future"[25] and that development of this technology will be supported by the UK financial authorities. The taskforce also stated that

> the most immediate priorities for the authorities are to mitigate the risks to consumers and market integrity, and prevent the use of cryptoassets for illicit activity. The authorities will also guard against threats to financial stability that could emerge in the future, and encourage responsible development of legitimate DLT and cryptoasset-related activity in the UK.[26]

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[22] Letter from FCA to CEOs on Cryptoassets and Financial Crime (June 11, 2018), https://www.fca.org.uk/publication/correspondence/dear-ceo-letter-cryptoassets-financial-crime.pdf, *archived at* https://perma.cc/7FLZ-VEM5.

[23] HM TREASURY ET AL., *supra* note 1, ¶ 5.7.

[24] *Id.*

[25] *Id.* at 2.

[26] *Id.* at 3.

The approach that the taskforce has taken

- maintains the UK's international reputation as a safe and transparent place to do business in financial services[;]
- ensures high regulatory standards in financial markets[;]
- protects consumers[;]
- guards against threats to financial stability that could emerge in the future[; and]
- allows those innovators in the financial sector that play by the rules to thrive[.][27]

The cryptoasset taskforce proposed that it would consult further on introduction of a prohibition on selling "all derivatives referencing exchange tokens such as Bitcoin, including CFDs, futures, options and transferable securities"[28] to retail consumers due to the concerns of consumer protection and market integrity.

VII. Conclusion

The government has taken a number of steps[29] to encourage the development of financial technology, including

- launching a Digital Strategy[30] and the cryptoasset taskforce;
- creating an Innovation Hub and Regulatory Sandbox to encourage and support innovation by the FCA and enable developers to test products and services in a real market environment;[31]
- investing £10 million (approximately US$13.2 million) in DLT projects;
- calling for information and publishing reports on cryptocurrency[32] and DLT technology;[33]

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[27] *Id.* ¶ 1.6.

[28] *Id.* ¶ 5.17.

[29] For a list of ongoing activities taken by the government, *see id.* Table 5.A.

[30] Department for Media, Culture and Sport, *Policy Paper: UK Digital Strategy* (Mar. 1, 2017), https://www.gov.uk/government/publications/uk-digital-strategy/uk-digital-strategy, *archived at* https://perma.cc/XSX2-CPW8.

[31] HM TREASURY ET AL., *supra* note 1, at 4.

[32] HM TREASURY, 'DIGITAL CURRENCIES: RESPONSE TO THE CALL FOR INFORMATION' (Mar. 2015), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/414040/digital_currencies_response_to_call_for_information_final_changes.pdf, *archived at* https://perma.cc/G5DK-5K3N; HOUSE OF COMMONS TREASURY COMMITTEE, CRYPTO-ASSETS: TWENTY-SECOND REPORT OF SESSION 2017-19, HC 910 (2018), https://publications.parliament.uk/pa/cm201719/cmselect/cmtreasy/910/910.pdf, *archived at* https://perma.cc/5UFD-UKP3.

[33] GOVERNMENT OFFICE FOR SCIENCE, DISTRIBUTED LEDGER TECHNOLOGY: BEYOND BLOCK CHAIN (2016), *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf, *archived at* https://perma.cc/6Z8W-PB5N.

- considering the use of DLT for the FCA's supervisory duties;[34] and
- establishing a FinTech hub to consider the policy implications of financial technology.

The recent reports and consultation papers demonstrates the UK's intention to provide a regulatory environment to protect consumers and the UK's reputation as a financial center, and to ensure that robust measures are in place against money laundering.

[34] HM TREASURY ET AL., *supra* note 1, at 4.

Uzbekistan

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SUMMARY A July 2018 presidential resolution on measures for the development of the digital economy legalized the utilization of cryptoassets and blockchain technologies in Uzbekistan. The National Agency for Project Management was authorized to implement the introduction of cryptocurrencies and blockchain technologies, as well as to further develop national legislation.

A subsequent decree on the creation of crypto exchanges provides the legal framework for the licensing and certification of exchange operators.

I. Approach to Assets Created Through Blockchain

The Resolution of the President on Measures for the Development of the Digital Economy (Digital Economy Resolution), made in July 2018, legalized the utilization of cryptoassets and blockchain technologies in Uzbekistan.[1] One of the priority measures in the Resolution was the introduction and development of activities in the area of cryptoassets, including the issuance, trade, and exchange in cryptoassets. The Resolution assigned the National Agency for Project Management as the responsible body for the implementation of the introduction of cryptocurrencies, development of legislation, and coordination between various government bodies.

The Resolution provided for the introduction of blockchain technologies in, *inter alia*, clearing operations, letters of credit, and project finance, as well as in corporate governance beginning from January 1, 2021.[2] A subsequent Presidential Resolution on the Creation of Crypto Exchanges (Crypto Exchanges Resolution), promulgated in September 2018, defined cryptoasset as "a set of entries in the blockchain, which has a value and an owner."[3] A crypto exchange is defined as an organization that provides a platform for trading and exchanging of cryptoassets.[4]

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[1] Postanovleniye Presidenta Respubliki Uzbekistan o Merakh Po Razvitiyu Tsifrovoi Ekonomiki v Respublike Uzbekistan [Resolution of the President of Uzbekistan on Measures for the Development of the Digital Economy] (Digital Economy Resolution), July 3, 2018, http://www.lex.uz/ru/pdfs/3806048 (in Russian), *archived at* https://perma.cc/6UWZ-39XG.

[2] *Id.* § 3.

[3] Postanovleniye Presidenta o Merax po Organizatsii Kripto-Birzh V Respublike Uzbekistan [Resolution of the President of Uzbekistan on Measures for Creation of Crypto Exchanges in the Republic of Uzbekistan] (Crypto Exchanges Resolution), Sept. 2 2018, http://lex.uz/ru/docs/3891610 (in Russian), *archived at* https://perma.cc/H84M-A2XS.

[4] *Id.* § 2.

The Digital Economy Resolution tasked the National Agency for Project Management with developing supplemental legislation in the area of cryptoassets and blockchain technologies.[5]

II. Financial Regulation and Consumer Protection

According to the Digital Economy Resolution, foreign exchange regulations do not apply to foreign exchange transactions that involve licensed operations in cryptoassets.[6] The Resolution provides for the licensing of activities related to cryptoassets beginning from October 1, 2018. The National Agency for Project Management is the body authorized to license operators of cryptoasset businesses.[7] Foreign legal entities can only obtain a license to operate cryptoasset exchanges if they open subsidiaries or other enterprises in the territory of the Republic of Uzbekistan.[8]

The Crypto Exchanges Resolution contains the following requirements for licensing cryptoasset operations:

a) availability as of the date of application of a statutory authorized fund in the amount of at least thirty thousand minimum monthly wages [approx. US$390,000] in cash, of which twenty thousand [approx. US$260,000] is reserved in a separate account in a commercial bank of the Republic of Uzbekistan;

b) the presence of a functioning electronic system of crypto-exchange trading, hosted on servers located in the territory of the Republic of Uzbekistan, and complying with the requirements stipulated in the Regulations on the procedure for licensing activities of crypto-exchanges;

c) availability of the rules of crypto-exchange trade, which must include:
   - the procedure for admission of participants to the crypto-exchange trading;
   - measures aimed at ensuring compliance with the anti-money laundering and terrorism financing legislation;
   - procedures for admission to circulation and removal from circulation of crypto assets;
   - the procedure for the implementation and registration of operations with crypto assets;
   - the order of mutual settlements of participants of crypto-exchange trade at the conclusion of transactions;
   - the amount of payment for using the services of the crypto-exchange and the procedure for determining it;
   - measures to prevent the manipulation of prices on a crypto exchange and the misuse of confidential information;
   - ban on the use of crypto assets for illegal purposes.

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[5] Digital Economy Resolution, § 7.

[6] *Id*. § 2.

[7] *Id. § 4.*

[8] Crypto Exchanges Resolution, § 2.

d) implementation of quotations for crypto assets based on the ratio of supply and demand for them;
e) storage for five years of information on operations with crypto-assets of clients as well as information concerning their identification data and materials on customer relations, including business correspondence.[9]

According to the Crypto Exchanges Resolution, crypto exchanges have the right to

- receive and set the value of payments (including in crypto-assets) for rendered services;
- organize exchange transactions with residents and non-residents of the Republic of Uzbekistan aimed at the acquisition and (or) alienation of crypto assets for national and foreign currency, as well as the exchange of crypto-assets for other crypto-assets.[10]

The Crypto Exchanges Resolution states that legislation on securities, stock exchanges, and exchange activities does not apply to cryptoassets and crypto exchanges.[11]

III. Anti-Money Laundering Law

The Cryptoasset Exchanges Resolution states that the National Agency for Project Management as well as the head of President's Administration will assume surveillance functions to make sure that the activities of cryptoasset exchanges are in compliance with anti-money laundering and terrorism finance prevention legislation.[12] In addition, the Resolution states that the availability of safeguards related to compliance with such legislation is one of the preconditions for the licensing of cryptoasset exchanges.[13]

IV. Taxation

According to the Digital Economy Resolution, the transactions of both physical and legal persons involving cryptoassets are not subject to taxation.[14]

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[9] *Id.* § 3.

[10] *Id.* § 4.

[11] *Id.* § 2.

[12] *Id.* § 7.

[13] *Id.* § 3.

[14] Digital Economy Resolution, § 2.

Venezuela

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I. Approach to Assets Created through Blockchain

A. Regulation

The Decreto Constituyente sobre Cripotactivos y la Criptomoneda Soberana Petro (DCCCSP) (Constitutional Decree on Cryptoassets and the Sovereign Cryptocurrency Petro) issued on April 9, 2018, establishes the legal base for the creation, circulation, use, and exchange of cryptoassets in Venezuela by both individuals and legal entities, public and private, including both Venezuelan residents and nonresidents.[1]

Additionally, the DCCCSP creates the petro, the Venezuelan sovereign cryptocurrency, developed and issued by the Bolivarian Republic of Venezuela and backed by several commodities, such as minerals and hydrocarbon reserves.[2] The petro, created as an alternative to the traditional financial system, is a novel financial mechanism that operates through blockchain transactions.[3]

On January 30, 2019, the Decreto Constituyente sobre el Sistema Integral de Cripotactivos (DCSIC) (Constitutional Decree on the Integral System of Cryptoassets) enacted a comprehensive cryptoasset structure, establishing a legal framework for all cryptocurrencies in Venezuela.[4] It provides that the Superintendencia Nacional de Criptoactivos y Actividades Conexas (SUNACRIP) (National Superintendency of Cryptoactivities and Related Activities) will be the authority in charge of regulating the creation, issuance, organization, operation, and use of cryptoassets.[5] SUNACRIPT will also regulate the operation of cryptoasset exchange agencies.[6]

The DCSIC applies to goods, services, assets, or activities related to the creation, issuance, organization, operation, and use of the national cryptoasset (petro) and other cryptoassets within the national territory, as well as the purchase, sale, use, distribution, and exchange of any product

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[1] Decreto Constituyente sobre Criptoactivos y la Criptomoneda Soberana Petro [DCCCSP] [Constitutional Decree on Cryptocurrency and the Sovereign Cryptocurrency Petro] art. 1, GACETA OFICIAL DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA] [G.O.], Apr. 9, 2018, http://www.badellgrau.com/upl/go_extraordinaria_6370_(2).pdf, *archived at* https://perma.cc/T4JK-NPKP.

[2] *Id.* art. 5.

[3] *Id.*

[4] Decreto Constituyente sobre el Sistema Integral de Cripotactivos [Constitutional Decree on the Integral System of Cryptoassets] art. 8, G.O., Jan. 30, 2019, https://www.sunacrip.gob.ve/files/gaceta-oficial-41.575.pdf , *archived at* https://perma.cc/M3A9-E6PE

[5] *Id.* arts. 7-8.

[6] *Id.* art. 8.

or service derived from them and other related activities.[7] It includes rules for the purchase, sale, use, distribution, and exchange of cryptocurrencies and related products.[8] It also mandates a registration system and detailed audit and inspection procedures for those operating with cryptoassets.[9] Penalties for noncompliance with the law potentially include confiscation of mining equipment, suspension of licenses and permits, fines, or prison sentences.[10] It also establishes an administrative procedure to determine violations of the law.[11]

B. Consumer Protection

Those who transact with/in cryptoassets with falsified data resulting in damages to its users and clients are punishable by imprisonment for three to five years and a fine.[12]

C. Anti-Money Laundering Law

No specific money laundering regulations have been issued. However, the DCSIC penalizes those who use or provide equipment or programs related to the Integral Cryptoassets System in order to perpetrate acts of terrorism or money laundering, among other offenses.[13]

D. Taxation

No specific rules on the taxation of cryptocurrencies have been issued.[14]

II. Custodianship of Cryptocurrencies

The DCCCSP created the Tesorería de Criptoactivos (Crypto Assets Treasury), which is in charge of the custody, collection, and distribution of cryptoassets according to the instructions issued by the President of Venezuela.[15]

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[7] *Id*. art. 3.

[8] *Id*.

[9] *Id*. arts. 29-33.

[10] *Id*. arts. 37, 42-51.

[11] *Id*. arts. 42-63.

[12] *Id*. art. 50.

[13] *Id*. art. 46.

[14] GLOBAL LEGAL INSIGHTS, BLOCK CHAIN AND CRYPTOCURRENCY REGULATION 2019: VENEZUELA, sec. 6, "Taxation," https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/venezuela, *archived at* https://perma.cc/Y95A-K9BC.

[15] DCCCSP art. 7.

European Union

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SUMMARY The European Union (EU) is currently reviewing existing EU financial legislation, how those rules apply to cryptoassets and initial coin offerings (ICOs), and whether EU-level action is necessary. The European Banking Authority (EBA) and the European Securities and Markets Authority (ESMA) issued their respective reports on the suitability of the EU regulatory framework in January 2019. ESMA supported the introduction of EU-wide rules for cryptoassets to ensure investor protection and have a level playing field, as most cryptoassets do not qualify as financial instruments under EU financial law. EBA concluded that most cryptoasset-related activities are not covered by EU financial services regulation and that Member States apply divergent approaches, which poses risks to consumers. It therefore recommended to the European Commission the performance of a comprehensive cost-benefit analysis to determine what, if any, action is required at the EU level at this stage.

With regard to anti-money laundering legislation, the EU amended its Anti-Money Laundering Directive (AMLD) in July 2018 and brought custodian wallet providers and virtual-currency exchange platforms within the scope of the AMLD. In their reports EBA and ESMA recommended also bringing crypto-to-crypto exchanges and providers of financial services for ICOs within the scope of the AMLD, taking into account the recommendations of the Financial Action Task Force (FATF).

I. Approach to Assets Created through Blockchain

The European Union (EU) is currently reviewing existing EU financial legislation and how those rules apply to cryptoassets and initial coin offerings (ICOs). The European Commission is carrying out this work together with the European Supervisory Authorities (ESAs), meaning the European Banking Authority (EBA), the European Securities and Markets Authority (ESMA), and the European Insurance and Occupational Pensions Authority (EIOPA). In its 2018 FinTech Action Plan, it tasked the ESAs to assess the suitability of the EU regulatory framework with regard to ICOs and cryptoassets.[1] EBA and ESMA issued their respective reports in January 2019.[2] The Commission is also monitoring developments together with international partners such as

[1] *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions. FinTech Action Plan: For a More Competitive and Innovative European Financial Sector*, COM (2018) 109 final (Mar. 8, 2018), at 7, https://eur-lex.europa.eu/resource.html?uri=cellar:6793c578-22e6-11e8-ac73-01aa75ed71a1.0001.02/DOC_1&format=PDF, *archived at* https://perma.cc/F7NP-YPCP.

[2] EBA, REPORT WITH ADVICE FOR THE EUROPEAN COMMISSION ON CRYPTO-ASSETS (Jan. 9, 2019) (EBA REPORT), https://eba.europa.eu/documents/10180/2545547/EBA+Report+on+crypto+assets.pdf, *archived at* http://perma.cc/8NRJ-ANXR; ESMA, ADVICE. INITIAL COIN OFFERINGS AND CRYPTO-ASSETS (Jan. 9, 2019) (ESMA REPORT), https://www.esma.europa.eu/file/49978/download?token=56LqdNMN, *archived at* http://perma.cc/2GRY-J8BG.

the Financial Stability Board (FSB) and G20 as well as the European Central Bank (ECB) to determine if regulatory action at the EU level is necessary.[3]

Several laws are relevant to the regulatory treatment of cryptoassets and other assets created through blockchain, in particular the Market in Financial Instruments Directive (MiFID 2),[4] the Second Electronic Money Directive (EMD2),[5] the Second Payment Services Directive (PSD2),[6] and the EU Anti-Money Laundering Directive (AMLD).[7]

A. Financial Regulation and Consumer Protection

ESMA's mission is to enhance investor protection and promote stable and effective financial markets.[8] It is authorized to provide opinions to the Union institutions on all issues related to its area of competence.[9]

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[3] *Cryptocurrencies*, EUROPEAN COMMISSION, BANKING AND FINANCE NEWSLETTER (Apr. 27, 2018), https://ec.europa.eu/newsroom/fisma/item-detail.cfm?item_id=624021&utm_source=fisma_newsroom&utm_medium=Website&utm_campaign=fisma&utm_content=Cryptocurrencies&lang=en, *archived at* http://perma.cc/W8RW-ERWV.

[4] Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (recast) (MiFID 2), art. 4, para. 1, no. (15), 2014 O.J. (L 173) 349, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0065&from=EN, *archived at* http://perma.cc/8QGS-X6SM.

[5] Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the Taking Up, Pursuit and Prudential Supervision of the Business of Electronic Money Institutions Amending Directives 2005/60/EC and 2006/48/EC and Repealing Directive 2000/46/EC (Second Electronic Money Directive, EMD2), 2009 O.J. (L 267) 7, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0110&from=EN, *archived at* http://perma.cc/5Z9Q-RZTK.

[6] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on Payment Services in the Internal Market, Amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and Repealing Directive 2007/64/EC (Second Payment Services Directive, PSD2), 2015 O.J. (L 337) 35, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L2366&from=EN, *archived at* http://perma.cc/K52R-KG4C.

[7] Consolidated Version of the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the Prevention of the Use of the Financial System for the Purposes of Money Laundering or Terrorist Financing, Amending Regulation (EU) No. 648/2012 of the European Parliament and of the Council, and Repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC (Anti-Money Laundering Directive, AMLD), 2015 O.J. (L 141) 73, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02015L0849-20180709&qid=1552510550346&from=EN, *archived at* http://perma.cc/W7KN-PCPM.

[8] Consolidated Version of Regulation (EU) No. 1095/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), Amending Decision No. 716/2009/EC and Repealing Commission Decision 2009/77/EC (ESMA Regulation), art. 1, para. 5, art. 8, 2010 O.J. (L 331) 84, https://www.esma.europa.eu/sites/default/files/library/2015/11/1095-2010_esma_regulation_amended.pdf, *archived at* http://perma.cc/2GFP-ZCMF.

[9] ESMA Regulation, *supra* note 8, art. 34.

It achieves these objectives through four activities:

- assessing risks to investors, markets and financial stability;
- completing a single rulebook for EU financial markets;
- promoting supervisory convergence; and
- directly supervising specific financial entities.[10]

ESMA in its report reviewed the applicability of EU financial securities laws to cryptoassets, in particular whether they qualify as financial instruments under MiFID 2.[11] It supports the introduction of EU-wide rules for cryptoassets to ensure investor protection and have a level playing field. ESMA's Chair, Steven Maijoor, summarized the findings of ESMA's report as follows:

> Our survey of NCAs [National Competent Authorities] highlighted that some crypto-assets may qualify as MiFID financial instruments, in which case the full set of EU financial rules would apply. However, because the existing rules were not designed with these instruments in mind, NCAs face challenges in interpreting the existing requirements and certain requirements are not adapted to the specific characteristics of crypto-assets.
>
> Meanwhile, a number of crypto-assets fall outside the current financial regulatory framework. This poses substantial risks to investors who have limited or no protection when investing in those crypto-assets.
>
> In order to have a level playing field and to ensure adequate investor protection across the EU, we consider that the gaps and issues identified would best be addressed at the European level.[12]

EBA "works to ensure effective and consistent prudential regulation and supervision across the European banking sector. Its overall objectives are to maintain financial stability in the EU and to safeguard the integrity, efficiency and orderly functioning of the banking sector."[13] In addition, it is tasked with consumer protection in relation to financial products and services offered by

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[10] *Id*. art. 8; Press Release, ESMA, Crypto-Assets Need Common EU-Wide Approach to Ensure Investor Protection (Jan. 9, 2019), at 2, https://www.esma.europa.eu/file/49980/download?token=_GEsHR5L, *archived at* http://perma.cc/648L-6FB6.

[11] ESMA REPORT, *supra* note 2, at 18, nos. 76, 77.

[12] *Crypto-Assets Need Common EU-Wide Approach to Ensure Investor Protection*, ESMA (Jan. 9, 2019), https://www.esma.europa.eu/press-news/esma-news/crypto-assets-need-common-eu-wide-approach-ensure-investor-protection, *archived at* http://perma.cc/SYW5-BVT7.

[13] *About Us*, EBA, https://eba.europa.eu/about-us;jsessionid=75D0A8C75C63907C8EFC856A802664C1 (last visited Apr. 2, 2019), *archived at* http://perma.cc/M37G-RSVU; Consolidated Version of Regulation (EU) No. 1093/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Banking Authority), Amending Decision No. 716/2009/EC and Repealing Commission Decision 2009/78/EC (EBA Regulation), 2010 O.J. (L 331) 12, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R1093-20160112&qid=1552588821407&from=EN, *archived at* http://perma.cc/3U3S-ESRS.

payment institutions, e-money issuers, and mortgage credit providers.[14] Like ESMA, it is authorized to provide opinions to the Union institutions in its area of competence.[15]

The EBA opinion reviewed the applicability of financial services regulation to cryptoassets, in particular the applicability of the Second Electronic Money Directive (EMD2)[16] and the Second Payment Services Directive (PSD2),[17] and issues arising in relation to cryptoasset custodian wallet provision; the risks of money laundering and terrorism financing arising from virtual assets; and the extent to which institutions engage in activities involving cryptoassets.[18] It concluded that current cryptoasset-related activity in the EU in this area is relatively limited and therefore not a threat to financial stability.[19] However, as most cryptoasset-related activities are not covered by EU legislation in this area and Member States apply divergent approaches, risks exist for consumers. It therefore recommended to the European Commission the performance of

> a comprehensive cost/benefit analysis to determine what, if any, action is required at the EU level at this stage to address these issues, specifically with regard to the opportunities and risks presented by crypto-asset activities and new technologies that may entail the use of crypto-assets. The EBA also advises the European Commission to have regard to the latest recommendations and any further standards or guidance issued by the Financial Action Task Force (FATF) and to take steps where possible to promote consistency in the accounting treatment of crypto-assets.[20]

B. Anti-Money Laundering Law

On July 9, 2018, the amendment of the EU Anti-Money Laundering Directive (5th AMLD) entered into force.[21] Member States must transpose the new rules into national law by January 10, 2020.[22] The AMLD obligates credit institutions, financial institutions, and certain other entities to fulfill customer due diligence requirements when they conduct business transactions and have in place

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[14] EBA, THE EUROPEAN BANKING AUTHORITY AT A GLANCE 3 (2016), https://eba.europa.eu/documents/10180/1401372/EBA+AT+A+GLANCE.pdf/e8686db2-6390-4c52-ad06-bc8d24b7aeb5, *archived at* http://perma.cc/D8HE-GUDH.

[15] EBA Regulation, *supra* note 13, art. 34.

[16] EMD2, *supra* note 5.

[17] PSD2, *supra* note 6.

[18] EBA, *supra* note 2, at 6, no. 4.

[19] *Id*. at 4.

[20] *Id*. The FATF is an inter-governmental body that "set[s] standards and promote[s] effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats to the integrity of the international financial system." FATF, WHO WE ARE, http://www.fatf-gafi.org/about/whoweare/ (last visited Apr. 15, 2019), *archived at* https://perma.cc/3EJ6-RC4C.

[21] 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 (5th AMLD), 2018 O.J. (L 156) 43, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L0843&from=EN, *archived at* http://perma.cc/JV7W-64Y5; Consolidated Version of the AMLD, *supra* note 7.

[22] 5th AMLD, art. 4, para. 1.

policies and procedures to detect, prevent, and report money laundering and terrorist financing.[23] The amendment, among other things, extended the customer due diligence requirements to custodian wallet providers and virtual-currency exchange platforms that exchange virtual currencies for fiat currencies and vice versa.[24]

The amendment defines "virtual currencies" as "a digital representation of value that is not issued or guaranteed by a central bank or a public authority, is not necessarily attached to a legally established currency and does not possess a legal status of currency or money, but is accepted by natural or legal persons as a means of exchange and which can be transferred, stored and traded electronically."[25] A "custodian wallet provider" is defined as "an entity that provides services to safeguard private cryptographic keys on behalf of its customers, to hold, store and transfer virtual currencies."[26]

Both EBA and ESMA support bringing crypto-to-crypto exchanges and providers of financial services for ICOs within the scope of the AMLD, taking into account the recommendations of the Financial Action Task Force (FATF).[27]

C. Taxation

In general, collecting taxes falls within the competences of the individual EU Member States. However, the EU has some limited competences to harmonize Member States' rules if harmonization is necessary to ensure the establishment and the functioning of the internal market and to avoid distortion of competition. An example would be the harmonization of Member States' rules in the area of indirect taxation,[28] such as value-added tax (VAT).[29] On October 22, 2015, the European Court of Justice (ECJ) held in its *Hedqvist* decision that transactions to exchange a traditional currency for bitcoin or other virtual currencies and vice versa constitute the supply of services for consideration, which are generally subject to VAT, but fall under the

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[23] AMLD, arts. 2, 8.

[24] *Id*. art. 2, para. 1(3)(g), art. 2, para. 1(3)(h). For an overview of the other amendments, see Jenny Gesley, *European Union: 5th Anti-Money Laundering Directive Enters into Force*, GLOBAL LEGAL MONITOR (July 16, 2018), http://www.loc.gov/law/foreign-news/article/european-union-5th-anti-money-laundering-directive-enters-into-force/, *archived at* http://perma.cc/98W8-TJQV.

[25] AMLD, art. 3, para. 18.

[26] *Id*. art. 3, para. 19.

[27] ESMA REPORT, *supra* note 2, at 36, no. 169; EBA, *supra* note 2, at 21, nos. 48 & 49.

[28] Consolidated Version of the Treaty on the Functioning of the European Union (TFEU), art. 113, 2016 O.J. (C 202) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12016E/TXT&from=EN, *archived at* http://perma.cc/7755-NL2S.

[29] Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, 2006 O.J. (L 347) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0112&from=EN, *archived at* http://perma.cc/8UU8-VFYM.

exemption from VAT.[30] Buying or selling bitcoin is therefore exempt from VAT in all EU Member States.

II. Custodianship of Cryptocurrencies by Financial Institutions

EU financial law does not contain a definition of safekeeping and record keeping of ownership of securities.[31] There are many different entities involved. The rules at the issuer level are regulated in the corporate laws of the EU Member States, whereas the investor-level rules vary depending on which type of EU financial legislation applies.[32] With regard to cryptoassets, ESMA in its report defines safekeeping services as "having control of private keys on behalf of clients."[33] These custodians would then have to ensure the safekeeping and segregation of client assets. However, ESMA points out that this requires "further consideration" as there might be other relevant factors, and the safekeeping of cryptoassets may take different forms.[34] In addition, it suggests that regulators look into the issue of multiwallet providers.[35]

III. Regulation of Cryptocurrencies as Financial Securities

ESMA in its report reviewed whether cryptoassets qualify as financial instruments under MiFID 2. It defined "cryptoassets" as "a type of private asset that depends primarily on cryptography and Distributed Ledger Technology as part of their perceived or inherent value" and that is "neither issued nor guaranteed by a central bank."[36] ESMA uses the term to refer to both virtual currencies and digital tokens issued through ICOs.[37] It notes that there is currently no legal definition of cryptoassets in EU financial securities laws.[38]

MiFID II defines "financial instruments" as "those instruments specified in Section C of Annex I."[39] Among others, these instrument include "transferable securities," defined as "those classes of securities which are negotiable on the capital market, with the exception of instruments of payment."[40] In order to review whether cryptoassets qualify as financial instruments, in particular as transferable securities, ESMA surveyed the National Competent Authorities (NCAs) of the Member States, gave them a sample set of six cryptoassets issued in an ICO, and asked

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[30] *Id.* arts. 2, 24, 135; Case C-264/14, Skatteverket v. David Hedqvist, ECLI:EU:C:2015:718, paras. 30, 53, http://curia.europa.eu/juris/celex.jsf?celex=62014CJ0264&lang1=en&type=TXT&ancre, *archived at* https://perma.cc/7Q6Q-MM9V.

[31] ESMA REPORT, *supra* note 2, at 34, no. 162.

[32] *Id.*

[33] *Id.* at 35, no. 164.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 7, no. 17.

[37] *Id.*

[38] *Id.* at 18, no. 77.

[39] MiFID II, *supra* note 4, art. 4, para. 1(15).

[40] *Id.* art. 4, para. 1(44).

them whether they would qualify as financial instruments under national law.[41] It pointed out that the classification of a cryptoasset as a financial instrument falls within the competence of the respective NCA and varies depending on the national implementation of MiFID 2.[42] A majority of NCAs determined that cryptoassets with attached profit rights qualify as transferable securities.[43] No NCA labelled the sample case of a pure utility-type cryptoasset as a financial instrument.[44] For hybrid cryptoassets, the financial instrument features mostly prevailed.[45] Member States that defined the categories for financial instruments broader than in MiFID 2 and included instruments with an investment purpose or expectation of returns were able to capture more of the sample cryptoassets than the other NCAs.[46] The NCAs agreed that cryptoassets should be subject to some type of regulation; however, at a minimum cryptoasset-related activities must be subject to anti-money laundering laws.[47]

If a cryptoasset is qualified as a financial instrument, several legal provisions will potentially apply to them, among them the Prospectus Directive (PD),[48] the Transparency Directive (TD),[49] the Market in Financial Instruments Directive framework (MiFID II),[50] the Market Abuse

[41] ESMA REPORT, *supra* note 2, at 19, no. 80.

[42] *Id.* at 19, no. 81.

[43] *Id.* at 20, no. 85.

[44] *Id.* at 20, no. 86.

[45] *Id.* at 20, no. 85.

[46] *Id.* at 20, no. 87.

[47] *Id.* at 21, no. 49.

[48] Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to be Published when Securities are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC (Prospectus Directive), 2003 O.J. (L 345) 64, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003L0071&from=EN, *archived at* http://perma.cc/H3PZ-7PSD.

[49] Consolidated Version of Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the Harmonisation of Transparency Requirements in Relation to Information About Issuers Whose securities are Admitted to Trading on a Regulated Market and Amending Directive 2001/34/EC (Transparency Directive, TD), 2004 O.J. (L 390) 38, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02004L0109-20131126&qid=1553004898571&from=EN, *archived at* http://perma.cc/D7GC-WVG9.

[50] The MiFID II framework consists of MiFID 2, *supra* note 4; the Regulation (EU) No. 600/2014 of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Regulation (EU) No 648/2012 (MiFIR), 2014 O.J. (L 173) 84, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0600&from=EN, *archived at* http://perma.cc/6VEV-C4X5; and their implementing acts. For more information on the MiFID II framework, see Catharina Schmidt, *European Union: New EU Legislative Framework to Regulate Financial Markets Enters into Force*, GLOBAL LEGAL MONITOR (Feb. 27, 2018), http://www.loc.gov/law/foreign-news/article/european-union-new-eu-legislative-framework-to-regulate-financial-markets-enters-into-force/, *archived at* http://perma.cc/UYB8-WN4R.

Regulation (MAR),[51] the Settlement Finality Directive (SFD),[52] the Central Securities Depositories Regulation (CSDR),[53] the Alternative Investment Fund Managers Directive (AIFMD),[54] the Directive on Investor-Compensation Schemes,[55] and the 5th AMLD.[56]

A. Prospectus Directive

The Prospectus Directive (PD), which will be repealed and replaced by the Prospectus Regulation (PR)[57] in July 2019, requires that a prospectus must be published before transferable securities are offered to the public or before such securities are admitted to trading on a regulated market in the EU. Some provisions of the PR already came into force in July 2018.[58] The requirement to publish a prospectus for cryptoassets offered to the public in an ICO therefore only applies if they are qualified as transferable securities.[59] Depending on the size of the offer, some cryptoassets might be exempt from the obligation to publish a prospectus (the threshold for which is €1 million (about US$1.12 million)) and only be subject to disclosure requirements.[60] When a prospectus has

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[51] Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC (Market Abuse Regulation, MAR), 2014 O.J. (L 173) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN, *archived at* http://perma.cc/GAJ8-3GB7.

[52] Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 Amending Directive 98/26/EC on Settlement Finality in Payment and Securities Settlement Systems and Directive 2002/47/EC on Financial Collateral Arrangements as Regards Linked Systems and Credit Claims (SFD), 2009 O.J. (L 146) 37, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009L0044&from=EN, *archived at* http://perma.cc/2AA2-3JQY.

[53] Regulation (EU) No. 909/2014 of the European Parliament and of the Council of 23 July 2014 on Improving Securities Settlement in the European Union and on Central Securities Depositories and Amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No. 236/2012 (CSDR), 2014 O.J. (L 257) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0909&from=EN, *archived at* http://perma.cc/YSG2-MS2C.

[54] Consolidated Version of Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and Amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No. 1060/2009 and (EU) No. 1095/2010 (AIFMD), 2011 O.J. (L 174) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02011L0061-20190113&qid=1553025823876& from=EN, *archived at* http://perma.cc/DN4V-WPLT.

[55] Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on Investor-Compensation Schemes, 1997 O.J. (L 84) 22, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997L0009&from=EN, *archived at* http://perma.cc/UAA8-YKMG.

[56] 5th AMLD, *supra* note 21.

[57] Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the Prospectus to be Published When Securities are Offered to the Public or Admitted to Trading on a Regulated Market, and Repealing Directive 2003/71/EC (Prospectus Regulation, PR), 2017 O.J. (L 168) 12, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1129&from=EN, *archived at* http://perma.cc/56QM-TCA9.

[58] *Id.* art. 49, para. 2.

[59] ESMA REPORT, *supra* note 2, at 23, no. 96.

[60] *Id.* at 23, no. 97; PR, art. 1, para. 3.

to be published, it must contain the necessary information to enable an investor to make an informed decision about the financial condition of the issuer, meaning in the case of cryptoassets "detailed information on the issuer's venture, the features and rights attached to the crypto-assets being issued, the terms and conditions and expected timetable of the offer, the use of the proceeds of the offer and the specific risks related to the underlying technology."[61] However, there are no specific schedules for ICOs unlike for IPOs, so that existing schedules must be adapted to the ones that they mostly resemble.[62]

B. Transparency Directive

The Transparency Directive (TD) objective is to improve information supplied to investors about issuers of securities admitted to trading on a regulated market in the EU. It therefore requires the disclosure of periodic and ongoing information about issuers—for example, annual financial reports.[63] Like MiFID 2, it only applies to transferable securities, meaning that issuers of cryptoassets that are qualified as transferable securities must comply with these disclosure obligations.[64]

C. Markets in Financial Instruments Directive Framework

The MiFID II framework obligates companies that provide investment services or activities in relation to financial instruments to register as an investment firm and comply with the legal requirements set out in MiFID II.[65] According to the ESMA report, the following cryptoasset-related activities will most likely qualify as investment services: "placing, dealing on own account, operating an MTF [Multilateral Trading Facility] or OTF [Organized Trading Facility] or providing investment advice."[66] The report focuses on the applicability of MiFID II to cryptoasset trading platforms as the most common type of intermediaries. These platforms are generally divided into three categories:

- those that have a central order book and/or match orders under other trading models;
- those whose activities are similar to those of brokers/dealers; and
- those that are used to advertise buying and selling interests.[67]

Category 1 platforms are qualified as multilateral systems and should therefore either operate as Regulated Markets (RMs) or as MTFs or OTFs.[68] Category 2 platforms must adhere to the requirements set out in Title II of MiFID 2 for broker/dealers, whereas the third category of

[61] ESMA Report, *supra* note 2, at 23, no. 98.

[62] *Id*. at 23, no. 99.

[63] TD, *supra* note 49, art. 1, para. 1.

[64] *Id*. art. 2, para. 1(a); ESMA REPORT, *supra* note 2, at 24, no. 102.

[65] MiFID 2, *supra* note 4, arts. 1, 5.

[66] ESMA REPORT, *supra* note 2, at 24, no. 103.

[67] *Id.* at 24, no. 105.

[68] *Id*. at 25, no. 106.

platforms falls outside of the scope of MiFID II.[69] Cryptoasset trading platforms that are covered by the MiFID II framework must comply with several requirements—for example, minimum capital requirements, organizational requirements, investor protection provisions, rules for transparent and nondiscriminatory access to MTFs, OTFs, and RMS, pre- and post-trade transparency rules, and transaction reporting and obligations to maintain records, among others.[70]

The ESMA report identified the following gaps and issues that arise from the application of the MiFID II framework to cryptoassets:

- Disintermediated access to cryptoasset trading platforms: Checks on the reputation, sufficient level of trading ability, competence, experience, adequate organizational arrangements, and resources of members or participants "may be time and resource intensive for the platforms in the case of individual investors, because of their large number, and many individual investors may not pass those tests."
- Pre- and post-trade transparency provisions: These rules are designed for equity and nonequity instruments and not all Member States will qualify cryptoassets as such, which would result in divergent transparency rules across Member States.
- Transaction reporting and obligations to maintain records: The rules were designed to capture traditional instruments, and standards must be adapted to cryptoassets.
- Platforms with decentralized business models: The lack of a clearly identified operator and the reliance on self-executing pieces of code raise specific issues.
- Hybrid platforms: There is a need to clarify the types of investment services they can provide.[71]

D. The Market Abuse and Short-Selling Regulation

The Market Abuse Regulation (MAR) prohibits insider dealing and the disclosure of inside information and market manipulation (market abuse) with regard to financial instruments that are traded or admitted to trading on a trading venue, MTF, or OTF.[72] The MAR would apply to such cryptoassets, which means that several arrangements, systems, and procedures to prevent, detect, and report market abuse have to be put in place.[73] ESMA recommends that for the next revision of the MAR, the EU should look into whether the price of a financial instrument could be influenced through manipulative trading activity in cryptoassets that do not qualify as financial instruments.[74] Furthermore, it warns that "new actors may hold new forms of inside

[69] *Id.* at 25, no. 107; MiFIR, *supra* note 50, recital 8.

[70] ESMA REPORT, *supra* note 2, at 25-28.

[71] *Id.* at 28, nos. 127-131.

[72] MAR, *supra* note 51, arts. 1, 2.

[73] ESMA REPORT, *supra* note 2, at 29, no. 133.

[74] *Id.* at 29, no. 134.

information, such as miners and wallet providers, which could potentially be used to manipulate the trading and settlement of crypto-assets."[75]

Where a position in a cryptoasset that qualifies as a financial instrument confers a financial advantage in the event of a decrease in the price or value of a share or sovereign debt, the Short Selling Regulation applies.[76] However, the determination of net short positions is dependent on the list of financial instruments included in Annex I of the Commission Delegated Regulation (EU) 918/2012.[77] ESMA proposes to explicitly include cryptoassets in that list.[78]

E. Settlement Finality Directive and Central Securities Depositories Regulation

The Settlement Finality Directive (SFD) and the Central Securities Depositories Regulation (CSDR) apply to settlement activities.[79] The objective of the SFD is to reduce systemic risk in payment, clearing, and securities settlement systems, in particular with regard to insolvency.[80] The CSDR aims to "harmonize certain aspects of the settlement cycle, [implement] settlement discipline and provide a set of common requirements for CSDs [central securities depositories] operating securities settlement systems in order to enhance cross border settlement in the EU."[81] The ESMA report points out various issues when the trading platform or the DLT network for cryptoassets qualifies as a securities settlement system, among them

- whether a market operator can be identified in the case of decentralized business models;
- the role of miners under the CSDR;
- that participants to a securities settlement system cannot be individuals as is the case for most cryptoasset trading platforms and DLT networks;

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[75] *Id*. at 29, no. 135.

[76] *Id*. at 30, no. 138; Regulation (EU) No. 236/2012 of the European Parliament and of the Council of 14 March 2012 on Short Selling and Certain Aspects of Credit Default Swaps (Short Selling Regulation), 2012 O.J. (L 86) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0236&from=EN, *archived at* http://perma.cc/2R73-PNFZ.

[77] Commission Delegated Regulation (EU) No 918/2012 of 5 July 2012 Supplementing Regulation (EU) No. 236/2012 of the European Parliament and of the Council on Short selling and Certain Aspects of Credit Default Swaps with Regard to Definitions, the Calculation of Net Short Positions, Covered Sovereign Credit Default Swaps, Notification Thresholds, Liquidity Thresholds for Suspending Restrictions, Significant Falls in the Value of Financial Instruments and Adverse Events, 2012 O.J. (L 274) 1, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012R0918&from=EN, *archived at* http://perma.cc/NJ4X-76KF.

[78] ESMA REPORT, *supra* note 2, at 30, no. 139.

[79] *Id*. at 30, no. 141.

[80] *Id*.; SFD, *supra* note 52.

[81] ESMA REPORT, *supra* note 2, at 30, no. 142; CSDR, *supra* note 53.

- potential issues in relation to settlement finality and Delivery versus Payment (DvP) in a DLT environment; and
- timeline requirements set by CSDR.[82]

F. Alternative Investment Fund Managers Directive

The Alternative Investment Fund Managers Directive (AIFMD) "lays down the rules for the authorisation, ongoing operation and transparency of the managers of alternative investment funds (AIFMs) which manage and/or market alternative investment funds (AIFs) in the Union."[83] Several NCAs told ESMA that some of the sample cryptoassets would qualify as collective investment undertakings, most likely AIFs under national law.[84] However, ESMA states that further research needs to be conducted to determine whether the AIFMD applies to these cases.[85]

G. Directive on Investor-Compensation Schemes

If an investment firm is no longer financially able to meet its obligations, investors will receive compensation under the Directive on Investor-Compensation Schemes.[86] The Directive applies to all MiFID firms that deal with MiFID financial instruments.

IV. Treatment of Cryptoassets Not Considered Securities

EBA in its report reviewed whether EU financial services law applies to cryptoassets, in particular whether they qualify as "electronic money" within the Second Electronic Money Directive (EMD2) or as "funds" within the Second Payment Services Directive (PSD2).[87] It emphasized that the report did not focus solely on cryptoassets that are used as a means of exchange as earlier reports did.[88] For purposes of the report, it defined the term "cryptoasset" as

> an asset that depends primarily on cryptography and distributed ledger technology (DLT) or similar technology as part of its perceived or inherent value, is neither issued nor guaranteed by a central bank or public authority, and can be used as a means of exchange and/or for investment purposes and/or to access a good or service.[89]

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[82] ESMA REPORT, supra note 2, at 31, nos. 147-150.

[83] AIFMD, *supra* note 54, art. 1.

[84] ESMA REPORT, *supra* note 2, at 35, no. 166.

[85] *Id*.

[86] Directive on Investor-Compensation Schemes, *supra* note 55, art. 2.

[87] EBA REPORT, *supra* note 2, at 6, nos. 3, 4; EMD2, *supra* note 5; PSD2, *supra* note 6.

[88] EBA REPORT, *supra* note 2, at 11, no. 16.

[89] *Id*. at 10, no. 15.

A. Second Electronic Money Directive

The Second Electronic Money Directive (EMD2) defines "electronic money" as

> electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC [PSD2], and which is accepted by a natural or legal person other than the electronic money issuer.[90]

The EBA report found that, depending on their characteristics, certain cryptoassets will qualify as electronic money under the EMD2. The issuers of these cryptoassets would require an authorization as an electronic money institution, unless a limited network exception applies.[91] The following was provided as an example of a proposed business model involving a cryptoasset that was qualified as electronic money by one or more NCAs:

> Company A wishes to create a Blockchain-based payment network. The network is open meaning that both merchants and consumers can participate. Company A explains that it intends to issue a token which is intended to be the means of payment in the network. The token is issued on the receipt of fiat currency and is pegged to the given currency (e.g. EUR 1 to 1 token). The token can be redeemed at any time. The actual payment on this network is the underlying claim against Company A or the right to get the claim redeemed.[92]

B. Second Payment Services Directive

The Second Payment Services Directive (PSD2) puts in place rules for different categories of payment service providers.[93] It defines "funds" as "banknotes and coins, scriptural money or electronic money as defined in point (2) of Article 2 of Directive 2009/110/EC [EMD2]." The EBA report states that if cryptoassets are categorized as electronic money and are used to provide a payment service, PSD2 would apply.[94]

C. Recommendations

EBA advises the European Commission to carry out a cost-benefit analysis and, if necessary, to develop proposals for EU-level action.[95] It recommends taking a holistic and balanced approach as well as an activities-based approach, focusing on the interconnectedness of cryptoasset activities with the traditional financial system and with consumers, and trying to achieve a coordinated international response.[96]

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[90] EMD2, *supra* note 5, art. 2, no. 2.

[91] *Id*. art. 3, para. 1, art. 9; EBA REPORT, *supra* note 2, at 14, no. 24.

[92] EBA REPORT, *supra* note 2, at 13.

[93] PSD2, *supra* note 6, art. 1, para. 1.

[94] *Id*. art. 4, no. 25, Annex I; EBA REPORT, supra note 2, at 14, nos. 25, 26.

[95] EBA REPORT, *supra* note 2, at 18, no. 40.

[96] *Id*.

V. Distinctions in Treatment of Different Categories of Cryptocurrencies

ESMA pointed out that most cryptoassets will not qualify as financial instruments or be covered by EU financial services rules, and investors will therefore not benefit from investor protection rules.[97] However, most investors will not be aware that most cryptoassets are not subject to these rules, especially when they are traded on the same venues. Instead of national regimes for cryptoassets, ESMA suggests a bespoke regime on an EU level for cryptoassets that do not qualify as financial instruments, as well as for pure utility-type cryptoassets and certain payment-type cryptoassets.[98] In addition, there is a consensus among ESMA, EBA, and the NCAs that all activities involving cryptoassets should be subject to the AMLD.[99] ESMA "advises to focus the regime for crypto-assets that are not financial instruments on warning buyers about the risks of those crypto-assets, instead of a more elaborate regime that could legitimise crypto-assets and bring them into a similar regulatory remit as the one for crypto-assets that are financial instruments."[100]

EBA's report states that "it appears that a significant portion of activities involving crypto-assets do not fall within the scope of current EU financial services law (but may fall within the scope of national laws)."[101] Like ESMA, it therefore sees potential issues regarding consumer protection, a level playing field, and divergent national approaches.[102]

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[97] ESMA REPORT, *supra* note 2, at 39, no. 179.

[98] *Id*. at 40, no. 182.

[99] *Id*. at 40, no. 183.

[100] *Id.* at 40, no. 185.

[101] EBA REPORT, *supra* note 2, at 15, no. 28.

[102] *Id.*